Cases and Materials on

# Sentencing in Queensland

J. E. Newton

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# Foreword

The difficulty of ensuring that the law is enforced and that at the same time justice is done in each individual case makes sentencing one of the most difficult tasks of any judicial officer. Except in the very few cases where the legislature has seen fit to lay down a mandatory sentence the court is left with a tremendously wide discretion which leads to apparent wide disparity of sentences by different courts for what appear to be very similar offences. That disparity is not always as real as it appears since in the ultimate, taking into account all of the matters that the court may properly consider in passing sentence, there can rarely be two really identical situations.

However, in our multiplicity of courts, there is no doubt that courts are often badly in need of guidelines and particularly of information as to sentences passed by other courts in similar cases.

For the first time, so far as I know, a comprehensive study has been made of the sentencing process and of the principles of punishment as seen by the Queensland Court of Criminal Appeal and this work should prove of great value both to the bench and to the profession generally.

John Newton has undertaken quite a formidable task, as a large number of the cases to which he refers are unreported. A considerable amount of his material must have been unearthed by him only after most diligent and conscientious inquiry. He is to be commended on the work he has done and the Australian Institute of Criminology merits the appreciation of the legal profession for undertaking this project.

THOMAS PARSLOW, E.D., Q.C., LL.B.
Brigadier (R.L.)
Solicitor-General for Queensland

# The Author

John Newton B.A., LL.B.(Qld), Barrister of the Supreme Court of Queensland and of the High Court and Federal Court of Australia.

Mr Newton is a Lecturer in Criminology and Criminal Law at the School of Law, Queensland Institute of Technology. He was formerly a Senior Legal Research Officer at the Australian Institute of Criminology and before that a Crown Prosecutor in Queensland.

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Of course, responsibility for any errors or omissions in this work rests solely with me.

J.E.N.

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# Introduction

Despite the existence of a number of text books and case and resource materials on the criminal law of Queensland, there has never been available a collection of materials on the practice of sentencing in that State. This work attempts to provide such a resource. It represents a collation of those legislative provisions relating directly to the sentencing process as well as a collection of cases from the Queensland Court of Criminal Appeal concerning sentencing decisions.

As with most case books there is little attempt to offer any critical evaluation of the material reproduced. However, in a number of areas some suggestions have been made as to possible areas of legislative reform. In particular the provisions of the Queensland Criminal Code relating to habitual offenders have been singled out for attention in this regard.

This work is primarily concerned with identifying those parts of the Criminal Code and other pieces of legislation, notably the Health Acts and the Traffic Acts, which deal specifically with the sentencing of offenders convicted of indictable offences. The various kinds of punishment that may be inflicted under the Criminal Code of Queensland are listed in section 18 of that Code: 1. Imprisonment with hard labour. 2. Imprisonment without hard labour. 3. Detention in a reformatory prison. 4. Detention in an industrial or reformatory school. 5. Detention for such period as may be specified by the court in such place and on such conditions as the Minister may direct pursuant to the provisions of the Children's Services Act 1965. 6. Solitary confinement. 7. Whipping. 8. Fine. 9. Finding security to keep the peace and be of good behaviour.

The death penalty in Queensland was abolished in 1922 by section 2 of the Criminal Code Amendment Act, 2. Hard labour is defined by section 30 of the Prisons Act 1958 as follows:

> Hard Labour for the purposes of this Act shall mean any manual, industrial or trade labour of the type performed in the community and as may from time to time be determined by the Comptroller-General [of prisons]. Adequate means for enforcement of hard labour shall be provided in every prison.

The provisions relating to the punishment of whipping have apparently fallen into complete disuse, but in any case requirements do exist regulating the number of strokes, types of instrument to be used and the time in which the punishment must be inflicted. These provisions are contained in section 655 of the Criminal Code.

Further sentencing options which have been made available to the courts by legislation have not been incorporated in the Code. These include probation, week-end detention, custody of juvenile offenders, and the detention of drug offenders for treatment. Community service orders are likely to be added to this list in the near future. In addition, various restitution and compensation orders which may be imposed in conjunction with one or more of the other alternatives, are provided for by the Code.

One of the anticipated uses of this book will be to enable practitioners to be aware of all the sentencing options which are available in any given set of circumstances. For example, in the case of *Williams* (C.A. 138–157 of 1974), the defendant was convicted of a number of offences of burglary and stealing. The trial judge imposed sentences in respect of various charges ranging from 12 to 15 months imprisonment with a recommendation that the defendant be considered for parole after serving six months. On other charges the trial judge made probation orders. The Court of Criminal Appeal in Queensland varied these orders because there was no power for a judge to make a probation order for some offences combined with a sentence of imprisonment for others with which he is dealing simultaneously.

Multiplication of sentencing alternatives does not necessarily mean that the interests of the offender are better safeguarded or that the task of the sentencer is made easier. It has been argued that it is far too easy for the search for sentencing alternatives to degenerate into a chase after gimmicks which may well result in confusing both sentencer and sentenced.

The situation in England demonstrates the dangers of enacting an excessive number of sentencing alternatives which differ only in their legal forms. In that country until 1967 the courts were provided with two basic non-custodial measures – probation and the conditional discharge. Legislation enacted in 1967 and 1972 added a confusing and unnecessary variety of alternatives dealing with the case where the court wishes to release the offender while retaining some measure of control over his conduct with the possible enforcement of a sanction against him at some future date. In this regard Thomas has commented that:

> The sentencer in such a case must choose between probation, conditional discharge, suspended sentence, suspended sentence with supervision, and binding over, and may be forgiven if he decides to exercise his new and wholly

> unnecessary power to defer sentence while he tries to work out the difference between them . . . the proposal of the Adivsory Council on the Penal System to add another version, the Supervision and Control Order, will only aggravate the situation. (Thomas, D.A., 'Developments in Sentencing 1964–1973'. (1974) *Criminal Law Review* 685.)

Although the Queensland Court of Criminal Appeal has yet to comment on the growing problem of over-diversification of sentencing options, it has recognised the problem of gross disparity in sentences of co-defendants. In this respect the Court of Criminal Appeal has recognised the existence of the principle, based on public interest, that sentences imposed on co-defendants should, generally, compare favourably with one another. (See *Williams and White* (C.A. 172 of 1974; C.A. 5 of 1975; C.A. 6 of 1975).

This desire for uniformity was subsequently restated by the Court in *Howard* (C.A. 130 of 1975) where the two offenders had been convicted of a drug offence and had been sentenced, one to a term of imprisonment and the other to a period of probation. In quashing the order of imprisonment and substituting for it a probation order, the Court stated that:

> There is a disparity in the sentences which the circumstances do not seem to justify. It is highly desirable in a case like this that there be uniformity. Where there is disparity it must lead to resentment against the system on the part of the joint offender receiving the heavier sentence. It may be thought that [the co-defendant] was treated too leniently; but that is beside the point. Both are young apprentices with similar backgrounds, and no distinction was or could be drawn between them on account of their antecedents.

In common with other jurisdictions, certain problems have arisen in Queensland with respect to the making of probation orders. The use of probation orders had the obvious benefit to an offender that he is able to receive guidance and counselling which may be the two benefits that have been lacking in his upbringing. As may be expected, probation orders are usually made in cases where the offenders are relatively young and where their previous criminal histories do not indicate a hardened attitude towards crime. Under Queensland law a court makes a probation order instead of actually proceeding to sentence an offender, and is empowered to make such an order when it is expedient to do so having regard to the nature of the offence and to the character and personal history of the offender.

From this it can be appreciated that the dispositional or sentencing stage of the criminal trial, like the adjudicatory stage involves the finding of facts by the court. However, whereas the determination of guilt is controlled by elaborate procedural and evidentiary rules which narrowly confine the trial to evidence that is strictly relevant to the issue properly before the court,

no such restrictions apply at the dispositional stage. Section 650 of the Criminal Code provides that: 'The court may, before passing sentence, receive such evidence as it deems fit in order to inform itself as to the sentence proper to be passed'.

There is no provision of the Queensland Criminal Code or other legislation in force in that State which, in relation to the compiling of a pre-sentence report by a probation officer, confers upon the subject of such a report the right to an open hearing, confrontation by and cross-examination of witnesses, exclusion of hearsay, or the right to the benefit of any reasonable doubt in the case of the prosecution. It has been pointed out that the exercise of sentencing discretion (apart from legislative restrictions on choice of sanction) is, in the end, based on both facts relating to the offence of which the accused has been convicted, and facts regarding the offender himself. These include: his previous convictions; allegations of other instances of offences; his social history; and medical and psychiatric assessments.

In addition to information concerning these matters, the court may receive information related to: the prevalence of the type of offence of which the accused has been convicted; the policy of the relevant government departments responsible for implementing sentences; and the availability of treatment services to which an accused may be referred or committed. (Fox, R.G. and O'Brien, B.M., 'Fact-Finding for Sentencers', (1975) 10 *Melbourne University Law Review*, 163–206.)

Clearly, the information received by the court with respect to such matters and the uses to which such information is put may significantly affect the final decision as to the type and severity of the sentence imposed. In the absence of legislative provisions relating to procedural rules at the dispositional stage of the trial, it has largely been left to the courts themselves to decide upon the proper relationship between the rules relating to the receiving of evidence at adjudication and those at sentencing. As may well be expected, the result has been a rather disjointed and fragmented number of decisions designed to fill the gap left by the silence of the Code. In this instance, furthermore, recourse to the general principles of the common law is of little assistance as it is only now that judges in other Australian jurisdictions are themselves turning their attention to this matter.

In the absence of satisfactory legislative provision in this regard the Queensland Court of Criminal Appeal has recently commented on the desirability for both the Crown and the defendant to have access to accurate documentation of the defendant's criminal history. In *Munro* (C.A. 110 of 1972) it was of particular importance for the Crown to clarify matters expressly raised by the defendant in respect of his criminal history between

certain periods. The defendant contended before both the trial judge and the Court of Criminal Appeal that certain convictions in 1966, 1970 and 1971 were the result of 'hounding' by the police and related to events which occurred some 10 years previously. The Crown was not able to either verify or dispute these assertions. The Court of Criminal Appeal accordingly considered itself bound to regard the defendant as a man who for approximately five years had attempted without success to rid himself of his criminal inclination.

Was the interest of justice served in this situation? Perhaps not, but the need for a trial judge to be precluded from taking a disputed fact into account without satisfactory proof of its accuracy by the prosecution was rightly accorded pre-eminence. Williams J., sitting as a member of the appellate tribunal stated that:

> In my experience the practice in this State has always proceeded upon the basis that it is not necessary for the accused to admit the truth of every fact stated by the prosecution before the Judge may act upon it. Rather, those facts not disputed by or on behalf of the accused are taken as admitted. If any doubt is raised as to the truth of any of those facts then if the Crown does not see fit to clarify the matter it seems to me that the Court must disregard such facts or else form a view upon them consistent with what the accused is prepared to concede to be.

Queensland law does not require that pre-sentence reports be made available to both the prosecution and the defence. It is only in the exercise of the court's discretion that copies of such reports are made available. (See Regulation 6 of the Offenders Probation and Parole Regulations of 1959). Yet in the absence of the exercise of the court's discretion in this regard the defendant's capacity to challenge the veracity of adverse statements contained in a pre-sentence report may be severely restricted. It should be remembered that at least a portion of the contents of a pre-sentence report is based on interviews with such persons as employers and teachers, and that such evidence would, if not admitted by the defendant, be normally excluded as hearsay.

Two commentators in this field have argued that:

> The compelling conclusion, when viewed from a civil liberties perspective, is that the right of the defendant to contest the truth of the contents of a report which is adverse to him and likely to be used in determining the quantum of punishment, overrides the value of protecting the anonymity of informants, the need to avoid the risk of traumatising the defendant by exposing him to unpleasant facts, or the need to preserve a therapeutic relationship. If, because of youth or unusual disability, the defendant needs to be protected from his vulnerability, a case may be made for legal representation and disclosure only

> to counsel, but total non-disclosure is unacceptable. Were it not for the fact that the information is contained in a formal pre-sentence report called for by the court itself, there would be no difficulty in arguing that as a concomitant of the adversary system (even at the sentencing stage) the defendant should be given an opportunity to dispute facts prejudicial to his interests and that the judge, in determining where the truth lies, should apply the same formalities in testing the weight, relevance and cogency of the evidence on the challenge sentencing issue as he would have applied earlier in the trial. (Fox, R.G. and O'Brien, B.M., 'Fact-Finding for Sentencers', (1975) 10 *Melbourne University Law Review*, 163–206 at p. 163.)

Where a pre-sentence report contains a psychological or psychiatric report that is adverse to a defendant, it becomes even more difficult for the defendant to contest the statements contained in it, even assuming that full disclosure has been made. Pursuant to section 8(4) of the Offenders Probation and Parole Act 1959–1974, a probation order may require a probationer to submit to such medical or psychiatric treatment as the court considers necessary for securing the good conduct of the offender or for preventing the offender from committing further offences.

The danger of a court acting upon the uncontested diagnosis of a psychiatrist is immediately apparent – not only to an unrepresented, or even a represented, defendant, but also to the court faced with the responsibility of directing the type and extent of any treatment that may have been recommended in a report. Under Queensland law there is no limit to the type of case in which a court may require a pre-sentence and psychiatric report. Thus, in theory, any convicted person may be confronted with the prospect of contesting medical and psychiatric evidence where a court requests a pre-sentence report.

The attitude of the Queensland Court of Criminal Appeal towards psychiatric evidence generally, has been stated fairly recently in *Brown* (C.A. 109 of 1972). The defendant in this case had pleaded guilty to a charge of manslaughter with diminished responsibility and had been released on probation for a period of two years. The trial judge made it a special condition of the probation order that the defendant submit to treatment by a psychiatrist and by any other medical practitioner advised by that psychiatrist during the probation period so long as the psychiatrist considered it necessary, and also that the defendant underwent such therapy and treatment as the psychiatrist advised during that period.

In upholding an appeal by the Attorney-General on the ground that the sentence imposed was inadequate, the Court of Criminal Appeal took the opportunity to consider at some length its attitude to the reliability of opinions of qualified psychiatrists as to the future behaviour of an individual

patient. In his judgment the then Chief Justice of Queensland referred to psychiatric text books about the difficulties of making psychiatric diagnoses, prescribing treatment and evaluating results:

> For instance, I find in the Handbook of Psychiatry, 1969 Ed., the following passages. The authors, after referring to certain problems of diagnosis say at pp. 50–51: 'Many of these problems of diagnostic reliability are serious enough to call into question the value of psychiatric diagnosis as it is presently accomplished. Even greater doubts are raised when one considers the unproved validity of psychiatric diagnosis (the fact that diagnostic statements often prove to be of limited value even when they are rigorously attained) . . . Traditionally, the medical clinician has assumed that a diagnostic formulation based on knowledge of the origin, signs of, and symptoms of an illness ultimately permits its successful treatment. Since the origin and course of most functional illnesses are not known, and diagnosis of these illnesses from signs and symptoms is both largely unreliable and unproved validity, many investigors now propose radical changes in the manner of approaching diagnosis . . . '

The problems of psychiatric diagnosis and prognosis were seen by the then Chief Justice as follows: 1. How does the psychiatrist know his patient is cured? 2. For how long will the cure be effective? 3. How does the psychiatrist reach his prognosis? 4. Is not the psychiatrist very dependent in reaching his conclusion upon what the patient tells him?

Prompting these questions was psychiatric evidence asserting that the defendant, who had without justification killed a person, should be allowed back into the community. The following passage from the judgment of W.B. Campbell J. in *Brown (supra)* typifies the reluctance of the Court to act upon psychiatric evidence:

> I have asked myself many times – to what extent should I rely on the opinion evidence of psychiatrists? Psychiatry is an inexact science; no one can be certain that the respondent, if placed under stress, will not react in a fashion similar to that when he displayed such abnormal behaviour (at the time of the offence); he has been out of confinement a mere two months. How far is a court justified in exposing the community to risk by allowing the respondent to live freely within it in order that he may the more readily be restored to health? It is a question of the balancing of one interest against the other.

Mr Justice W.B. Campbell could well have also referred to the question of fairness to the defendant in prematurely releasing him in circumstances where he may have re-offended. The principle to be extracted from *Brown* is that the court will not lightly abdicate its responsibility to the opinion of an expert witness in assessing the appropriate sentence in any particular case. It is the court which carries the final responsibility for releasing a potentially dangerous person, dangerous both to himself and to others, into the community.

To obviate the necessity of the court's determination and application of restrictions applying to receiving evidence at the dispositional stage of the criminal trial, it is submitted that the Criminal Code should be amended to contain procedural requirements along the lines suggested by the United States National Advisory Commission on Criminal Justice Standards and Goals in 1973.

Broadly speaking, these recommendations are as follows. Sentencing courts should conduct the hearing prior to imposing sentence and incorporate in the hearing these guidelines:

1. At the hearing the defendant should be entitled to: (a) Be represented by counsel. (b) Present evidence on his own behalf. (c) Subpoena witnesses. (d) Call or cross-examine the person who prepared the pre-sentence report and any contributor thereto whose statements may be adverse to the defendant; and (e) Present arguments as to sentencing alternatives.
2. If the exclusionary rules of evidence applicable to the adjudicatory stage of a criminal trial are not to apply to the sentencing hearing, evidentiary requirements should stipulate that irrelevant, immaterial or unduly repetitious evidence will be inadmissible. Sentencing decisions should be based on competent and reliable evidence. Where a person providing evidence of factual information is reasonably available, he should be required to testify orally and thus enable cross-examination of his testimony.
3. If the court finds, after considering the pre-sentence report and whatever information is presented at the sentence hearing, that there is a need for further study and observation of the defendant before he is sentenced, it should be able to remand the defendant for up to 30 days in order to permit a more complete investigation of the defendant's background and social history.

There are problems associated with the habitual offender legislation in Queensland. The instances where a judge may declare a convicted person to be an habitual criminal under Queensland law are contained in complex provisions of the Criminal Code. Once the declaration has been made, section 659 D of the Code requires that every habitual criminal shall at the expiration of his sentence be detained during Her Majesty's pleasure.

The very existence of such legislation has been strongly criticised on a number of grounds. These include that for many offenders anti-social patterns of behaviour are firmly established by the time the first sentence is imposed; that in Queensland there is a scarcity of reformatory prisons despite legislative references to such institutions; that where an element of indeter-

minacy in a sentence is present offenders serving such sentences tend to lose contact with their families more readily than those serving fixed sentences; that the administrative powers concomitant with indeterminate sentences are susceptible to abuse; that there is apparently no consistent policy on the part of the courts in imposing indeterminate sentences; and, finally, that the way in which an offender perceives the indeterminate sentence depends upon his individual psychopathology.

But perhaps the most obvious reason for criticism of the Queensland habitual offender legislation is that the provisions have fallen into obsolesence and disuse and thereby have failed to act as a deterrent to offenders with serious criminal records. Furthermore, to resort to the use of such drastic legislation in an inconsistent and infrequent manner would be grossly unjust During the period from 1964 to 1969 only two persons were declared habitual criminals in Queensland. In February, 1968 four habitual criminals were still incarcerated. From 1971 to 1976 no person was declared an habitual criminal by the courts in Queensland. From 1971 to 1976 some habitual criminals have served prison sentences but those who have were declared habitual criminals prior to 1971. As at 21 May 1976 there were no habitual criminals serving a sentence in any Queensland prison.

The question may legitimately be asked whether, in view of the infrequent and inconsistent application of the habitual offender legislation, there remains any purpose in allowing the provisions to remain within the Criminal Code.

The victim of criminal activity is protected by the Queensland Criminal Code in a number of ways, not all of which are entirely satisfactory. All the measures are basically designed to restore the victim as nearly as possible to the position he was in prior to the commission of the offence which had adversely affected him. The provisions relate solely to cases where the victim has suffered personal injury. An order by way of compensation for injuries suffered by a person aggrieved by an offence may be made by the court pursuant to section 663 B (1) of the Code:

(a) Where a person is convicted on indictment.
(b) Of any indictable offence relating to the person of any person; and
(c) On the application by or on behalf of the person aggrieved by the offence.

This criminal compensation scheme is not designed to add to the burden of punishment of the offender, but rather to avoid the necessity of a separate civil action by the victim, although the right to further civil proceedings is not barred by the making of an order for criminal compensation. An assessment of compensation does not include any amount for loss of wages and is

based solely upon on the extent of injuries and mental and nervous shock apparent from the evidence at the criminal trial.

Perhaps the most serious defect in this scheme is that the victim is entitled, at present, to be awarded a maximum of only $5,000. The majority of awards are for amounts considerably less than the permissible maximum and cannot be considered adequate compensation in many instances. This scheme involves an *ex gratia* payment by the Governor-in-Council upon application by the person in whose favour the court order has been made, and it may be expected that the maximum amount payable will progressively increase with the passing of time.

The Code preserves the rights of the victim with regard to his property by providing for the making of an order for the restitution of property in respect of which an offence has been committed. Such an order may be made whether or not the court imposes any punishment. If the property is not at once restored, the court may order the offender to pay the amount of its value, as assessed by the court, to the owner. Payment may be ordered to be in one sum or by such instalments as the court thinks fit. (See section 443 of the Criminal Code.)

This scheme operates in cases where a person is charged with an indictable offence which may be dealt with summarily and again the design of the legislation is to prevent the necessity for the victim to institute civil proceedings for the recovery of, or restitution for, his property. Further provisions of the Code relate to orders of restitution generally, and relate to all classes of offences involving property. (See, for example, section 685 A (2) of the Criminal Code.)

It is not uncommon for judges, either when imposing sentence or deciding an appeal against sentence, to use the phrase 'the interest of the community'. The frequency with which this and similar phrases are used suggests that the interest of the community may be a tangible and readily ascertainable concept. This, however, is not the case and there is accordingly a possibility of judicial misuse of the concept of community interest as a relevant factor in assessing penalty.

When reference is made by a sentencing court to the necessity of protecting the interest of the community, it may generally be accepted that this indicates a lessening in the consideration of the aspect of rehabilitation of the defendant. Although the rehabilitation of an offender may not be entirely excluded by emphasis on the protection of the community interest, prominence must be given to three other important aspects of sentencing policy.

A lengthy term of imprisonment may be deemed appropriate by the

sentencing tribunal as a **preventive** measure designed to ensure the protection of the community during the incarceration of the offender. Similarly, the **retributive** aspect of punishment, although considered by many to be irrelevant in the modern sentencing system, may receive recognition through the invoking of the need to protect the community interest. Also the **deterrent** aspect of punishment may be seen by the court as being in the interest of the community where a particular offence is of significant prevalence in that community.

When considering the type of case in which community interest is recognised as a major or predominant factor in sentencing policy, it is possible to discern several classes of offences that are more likely than others to call for such an approach. However, it must be recognised that where an offender's pattern of behaviour can be categorised as anti-social, then regardless of the particular offence or type of offence of which he has been convicted, the protection of the community interest becomes an appropriate consideration in assessing penalty.

Drug offences may frequently call for recognition of the community interest as opposed to the reformation and rehabilitation of an offender. This is particularly so in cases where more than mere possession of cannabis is concerned and where there is evidence of the supplying of a dangerous drug to other persons. Even although the offender may be considered to be an addict, the interest of the community may require emphasis to be placed upon the preventive and deterrent aspects of punishment.

Sex offences also, particularly where the victim is extremely young or where elements of violence are present, have frequently been recognised as comprising a class of offence which requires the community's interest to be recognised as the primary aim of sentencing. In these cases the treatment and rehabilitation of an offender may be even more difficult and complex than in cases involving drug offences, and certainly treatment may be severely restricted in a prison environment. However the deterrent and preventive aspects again are of such importance that the offender's rehabilitation is often given only limited consideration.

Driving offences form another class of case where the deterrent aspect is utilised to protect the interest of the community in preference to a sentence which stresses the reformation of the offender. With such offences it is particularly common to invoke the interest of the community as a factor influencing the sentencing decision because of the extent to which members of the community are prone to be affected by driving offences. As with some drug offences, there are some driving offences in which the interest of the community and the interest of the offender may be served simultaneously by

a reformative approach to sentencing.

I have selected a number of cases to illustrate the courts' attitude to sentencing in cases where the community's interest is perceived as being a dominant factor. These cases are dealt with in more detail in the main body of this book in their appropriate classifications.

In *Starr and Kiriazis* [1973] Qd. R. 472, evidence established that the defendants were addicted to a soft drug and were in a favourable state of mind to respond to treatment. It was urged on behalf of the defendants that they had peddled drugs to get money to buy the drug to which they were addicted and that they had made little profit from the peddling in which they had been engaged. The then Chief Justice recognised that it was in the interest of the offenders that they be cured of their addiction and he further recognised that it was also in the interest of the community that this cure be effected. It was also acknowledged by the then Chief Justice that the cure from drug addiction could not be achieved if the offenders were sent to prison. However, his Honour then said that the penalties imposed for drug offences quickly become known among the drug-taking members of the community. Therefore the deterrent aspect of the sentence of imprisonment imposed by the Court of Criminal Appeal could effectively take precedence over the interest of the offenders.

*Howarth* [1973] Qd. R. 431, provides a further example of the need to give recognition to and protect the community interest in cases involving the supply of dangerous drugs to others, and particularly to young persons. In that case the defendant imported into Australia approximately 10½ pounds of cannabis sativa in three boxes specially constructed with hollow sides for the importation of the drug.

Stable J., considered that this showed calculated cunning in the concealed importing of the drug for sale in pound lots at enormous profit. His judgment, with which the then Chief Justice concurred, continued:

> I think apposite to bear in mind the common knowledge that in recent years the Australian community, particularly in the capital cities, have become alarmed at the growing and dangerous use of narcotic drugs, particularly by young people. The great bulk of the community has become resentful of the peddling and trafficking in these drugs by those who seek large profit by supplying them and encouraging the demand for them. I consider, with the New South Wales Court [of Criminal Appeal], that responsible members of the Australian community want offenders detected, and the trafficking suppressed by adequate deterrence. The sentence for the pusher must be one which, having regard to the circumstances, takes into account the general moral sense of the community and the pressing need to deter the offender and others.

In *Schloss* (C.A. 64 of 1974), the interest of the community was clearly a most relevant factor in assessing penalty. There the defendant pleaded guilty to a charge of rape committed upon a six and a half year old girl and was ordered by the trial judge to be imprisoned for five years with a recommendation that he be considered for parole after two years. In upholding an appeal by the Attorney-General against the sentence on the ground that it was manifestly inadequate, the Court dismissed the medical, psychiatric and probation reports as being concerned only with the interests of the offender. The Court of Criminal Appeal, in substituting a sentence of imprisonment with hard labour for eight years for that imposed by the trial judge, recognised that its duty required it to consider not only the interests of the offender but also the interest of the community at large, and of those persons in the community who were potential offenders of the same kind.

Similarly, in *Rielly* [1963] Q.W.N. 6, where the defendant pleaded guilty to a charge of having had unlawful carnal knowledge of girl aged two years and four months, the interests of society were seen as requiring that the offender be confined in an institution. In this case reports by medical practitioners placed before the trial judge indicated that the offender suffered from a personality disorder that rendered him incapable of exercising proper control over his sexual instincts. One psychiatrist had expressed the view that it might take at least 10 years for his condition to improve. In these circumstances it was ordered that the defendant be detained for a period of 15 years in such place and under such conditions as the Minister might direct in terms of section 25A of the State Children Acts. (This legislation has now been repealed and replaced by the Children's Services Act.)

Personality disorders influenced the behaviour of the defendant in *Gascoigne* [1964] Qd. R. 539, where the offender was convicted of unlawful wounding with intent to do grievous bodily harm. The victim of the attack, who was not known to the defendant, was looking in a shop window in a city street one evening when the offender approached her from behind, caught her by the shoulder and stabbed her in the back with a knife before hurrying off down the street. According to the defendant, he mistook the victim for another girl. He was mentally examined after conviction and three doctors, two of them psychiatrists, gave evidence before the trial judge that the defendant should be kept under strict control two saying that a minimum of five years was necessary.

In *Byrne* (C.A. 128–129 of 1974), however, reformation of the offender was seen as coinciding with the public interest. A sentence of probation for 18 months with a special condition that the defendant undergo psychiatric or psychological treatment as recommended by his probation officer was

upheld on an appeal by the Attorney-General by the Court of Criminal Appeal.

The defendant had pleaded guilty to unlawfully and indecently dealing with a girl under the age of 12 years. Hoare J., commented that:

> However, so far as this offender is concerned it seems to me that the imposition of any prison sentence is unnecessary for his reformation and indeed could even be harmful. From this point of view of the public interest it seems to me that far more is likely to be served by ensuring (as far as it can be done) that the offender should be encouraged and assisted to be a responsible member of society rather than that he be sent to prison.

It is important to note that in *Byrne*, the psychiatric evidence suggested that the offender was unlikely to offend again. It was apparently accepted by the Court that he was not dangerous to the community and was unlikely to be guilty of similar acts in the future.

In motoring offences, such as those involving charges alleging dangerous driving, either simpliciter or with the added element of causing grievous bodily harm or death, the balancing of the interest of the public against that of the offender can become a problem. A balance must be struck between the social evil of this type of offence combined with the toll of human life and injury together with the costs of repairing the damage caused by motor accidents, and the jailing of persons who have previously exhibited good character.

This particular problem faced the Court of Criminal Appeal in *McIntosh* [1968] Qd. R. 570, where the defendant was convicted of dangerous driving in circumstances where the defendant's vehicle mounted the footpath and came to rest against an electric lightpole, narrowly missing an elderly pedestrian who was crossing the road in the vicinity of the accident. Three police officers who were sitting in a patrol car near the scene of the incident estimated the speed of the defendant's vehicle at approximately 60 m.p.h. The Court upheld a sentence of a fine of $150 and a good behaviour bond for a period of 18 months together with a period of disqualification from holding or obtaining a driver's licence of 18 months.

Because of the prevalence of offences involving breaking, entering and stealing from houses, the Court has perceived the retributive aspect of punishment as satisfying, at least partially, the protection of the public interest where offenders of this type are convicted.

In *Clavarino* (C.A. 28 of 1972), the accused pleaded guilty to three separate charges of housebreaking and one of receiving proceeds of another housebreaking. All offences were committed in flats or houses in Brisbane. The homes were ransacked and looted and a substantial amount of valuable

property was stolen. Some of it was disposed of and about $860 worth of property was never recovered.

Wanstall S.P.J., as he then was, with whose judgment the other members of the Court agreed, stated that:

> Housebreaking is extremely prevalent in our community. It is notoriously difficult of detection and in my view the learned judge of District Courts is to be commended for taking a strong stand as a deterrent against this troublesome and prevalent offence. Although the accused was a person with no previous convictions and was a young man, I am reminded of the adoption by this Court in an appeal by the Honourable the Attorney-General in *Williams*, of the remarks which fell from the Court of Criminal Appeal in New South Wales in the case of *Aitkin*. In that case there was an application for leave to appeal against the sentence of 18 months' hard labour for his first offence, one for larceny of a motor car, and he was a young man of good character. He had been in regular employment and came from a good home and the Court said that after giving every consideration to the extenuating circumstances they had been compelled to conclude that the application must be dismissed; and they did say with regret because they did not overlook that the applicant was being sent to prison for the first time and for his first offence, but they added, 'The Court is bound to consider not only the interests of the applicant himself and his family, but the community. The retributive aspect of punishment must be given full weight. Perhaps this would be met in this case by the exposure of the crime, the arrest of the applicant, the disgrace with which it is accompanied and the disruption of his life of previous good character'. They added that they did not think that he was likely to fall again into a crime of dishonesty and they went on, 'There remains the question of the deterrent aspect. A sentence such as this is imposed to deter others as much as to deter or punish the individual. For many years judges have taken a serious view of car stealing owing to its prevalence and the serious loss of property involved and have frequently imposed sentences of two or three years' imprisonment on young offenders and this Court has consistently supported them'. In my view every word of that extract is applicable to the present case particularly as it is one of housebreaking, the prevalence of which in our community needs no emphasis. I therefore think that far from the sentence being manifestly excessive it is a just one.

Again, it is emphasised that the expression 'the interest of the community' is a particularly vague term, difficult to assess accurately, and should therefore be used most cautiously by a sentencing tribunal in assessing an appropriate sentence. There is however, little or no evidence to suggest that in Queensland, as yet, this concept is being improperly emphasised, or for that matter improperly underestimated, in assessing sentence.

It can be expected that the interest of the community will continue to be considered as a relevant factor affecting the severity of sentence in cases involving drug offences, sex offences and motoring offences. But as other classes of offences become more prevalent and of greater consequence to the

community at large, it could also be expected that, in these cases too, the interest of the community as a sentencing concept will be increasingly invoked in assessing appropriate penalties.

# PART I

# Legislative Provisions

# Chapter 1

# Non-Custodial Sentences

Several sentencing options which do not involve the imprisonment of an offender are available to Queensland courts. Such alternatives to imprisonment are known as non-custodial sentences and in the case of an absolute discharge the order of the court may not strictly be considered as a sentence at all because no conviction is recorded in some cases. In this respect an absolute discharge differs from a discharge under s. 657 of the Criminal Code where the order follows the recording of a conviction.

## Discharges in cases involving summary conviction where offence relates to property

**CRIMINAL CODE s. 657**

**Conviction Recorded:** Note that the discharge order is made pursuant to a conviction.

**Summary Offences Relating to Property:**

**CRIMINAL CODE s. 443**

A discharge order under s. 657 may be made where the offender has been convicted of any of the following offences:

1. Stealing under circumstances rendering offender liable to up to three years imprisonment. (s. 443(a))
2. Killing an animal with intent to steal skin or carcass under circumstances rendering offender liable to up to three years imprisonment. (s. 443(b))
3. Stealing from the person of another. (s. 443(c))
4. Stealing of government property by a public servant. (s. 443(ca))
5. Stealing of employer's property by a clerk or servant. (s. 443(d))
6. Making anything moveable with intent to steal it, without circumstances of aggravation. (s. 443(e))
7. Bringing stolen goods into Queensland. See s. 406 (s. 443(ea))

8. Any offence defined in ss. 419, 420, 421 and 422 where
   . The indictable offence is stealing.
   . The offender was unarmed, not equipped with an instrument of safebreaking, nor in company.
   . The value of property stolen does not exceed five hundred dollars. (s. 443(eb))
9. Being found armed, etc., with intent to commit a crime. See s. 425 (s. 443(ec))
10. Obtaining delivery of objects, etc., by false pretences or fraud. (s. 443(f))
11. Obtaining chattel, money or valuable security by cheque not paid on presentation. (s. 443(fa))
12. Obtaining by fraudulent trick or device anything capable of being stolen. (s. 443(g))
13. Attempting to commit any of the above. (s. 443(h))
14. Receiving anything obtained by crime or misdemeanour where offender who committed such crime or misdemeanour might be summarily convicted under s. 443 (s. 443(i))
15. Counselling or procuring the commission of any of the above. (s. 443(j))

**Age of the Offender**: Note that the offender must be aged at the time of the commission of the offence between 12 and 17 years.

**CRIMINAL CODE s. 443(2)**

**Limitation on Value of Property**: The value of the property in question must not exceed five hundred dollars.

**CRIMINAL CODE s. 443(1)**

**Admission of Guilt by Offender**: The accused must admit that he is guilty of the offence.

**CRIMINAL CODE s. 443(3)**

**Discharge Conditional on Restitution**: A discharge under s. 657 is conditional upon the convicted person making satisfaction to the person aggrieved for damages.

**Bar to Civil Proceedings**: When the convicted person has made satisfaction, he is not liable to civil proceedings for the same cause at the suit of the person aggrieved.

**CRIMINAL CODE s. 657**

## Discharges where power is granted to permit the release of certain persons pursuant to the Criminal Code s. 657A

Note that no age limit applies in respect of discharges under this section and that the provisions have general application in that there are no prescribed offences required to have been committed before an order can be made discharging the offender. The discharge may be absolute or conditional.

**Absolute Discharge**: The court may discharge the offender absolutely.

**CRIMINAL CODE s. 657A(e)**

**Conditional Discharge**: The court may discharge the offender conditionally upon his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence during such period not exceeding three years as is specified in the order.

**CRIMINAL CODE s. 657A(f)**

**No Conviction Recorded**: The court does not proceed to record a conviction unless the offender is called up during the term of a recognisance.

**Considerations**: In making a discharge order under this section the court is required to consider the following matters:

- The offender's character, antecedents, age, health and mental condition. (s. 657(a))
- The trivial nature of the offence. (s. 657A(b))
- Any extenuating circumstances. (s. 657A(c))
- Any other matter that the court deems proper to consider. (s. 657A(d))

**Additional Orders**: The court is empowered to make further orders to that discharging an offender but may not impose a penalty that is normally made following conviction.

Where an offender is conditionally discharged upon his entering into a recognisance, such recognisance may contain such conditions and terms that the court thinks fit in any particular case. (s. 657A(2))

Where an order is made discharging the offender either absolutely or conditionally upon recognisance, the court may make any other order that does not impose a penalty that the court could lawfully make had the offender been convicted. (s. 657A(3))

**Rights of Appeal**: Although an order for discharge under this section is not made pursuant to a conviction being recorded, the right to appeal against conviction is preserved.

Where an offender is discharged absolutely or conditionally upon recognisance he has the same right of appeal on the ground that he was not guilty of the offence charged as he would have had if he had been convicted of the offence. (s. 657A(4) (a))

The Attorney-General, or complainant, has the same right of appeal as would have existed if the offender had been convicted and the order made in respect of him had been a sentence. (s. 657A(4) (b))

**Breach of Condition of Recognisance:** If the court is satisfied that the offender has breached any condition of his recognisance, it may forfeit the recognisance, enter a conviction and sentence the offender for the offence with which he was originally charged. (s. 657A(5))

## Fines

The fine represents an important component of the court's sentencing options. Because it may be used in conjunction with other forms of punishment, the range of cases in which the fine may be used is considerable. Unfortunately a monetary penalty imposed on other than a summary conviction cannot be paid to the person aggrieved by the offence.

**Statutory Basis:** A fine is one of the forms of punishments which may be inflicted under the Criminal Code pursuant to the provisions of s. 18 of the Code.

**Statutory Construction:** Two points of construction concerning fines should be noted:

1. A fine (not exceeding $2,000) may be imposed in addition to or instead of a sentence of imprisonment.
   **CRIMINAL CODE s. 19(3)**
2. A person liable to a fine of any amount may be sentenced to pay a fine of a lesser amount.
   **CRIMINAL CODE s. 19(4)**

**Appropriation of Fines:** On a summary conviction where a penalty is imposed upon the basis of the value of the property taken, killed, destroyed, or damaged, the amount recovered is to be paid to the person aggrieved.

**CRIMINAL CODE s. 658**

It is recommended that similar provision should exist for use in the case of conviction upon indictment. Such an amendment could become part of the law relating to restitution.

**Power to Withhold Fines Payable to Informers:** A magistrates' court may withhold all or part of a penalty from an informer, not being a party aggrieved, unless by the Act on which the conviction is founded, it is otherwise expressly directed.

**THE JUSTICES ACTS 1886–1974 s. 178**

**Appropriation of Penalties when Act Silent:** When a penalty or forfeiture is imposed under any Act, such Act, unless otherwise expressly provided, is

deemed to provide that of the amount recovered one moiety is to be paid into the Consolidated Revenue Fund, and the other moiety to the informer or prosecutor, unless ordered otherwise when the whole of the amount recovered is to be paid into the Consolidated Revenue Fund.

**ACTS INTERPRETATION ACTS 1954– s. 43**

**Fine on Child:** The power to impose a fine upon a child should be used with great caution as such penalty may fall on others, thus relieving the offender of the burden of punishment. A court may impose a fine upon a child who has pleaded or been found guilty of an offence as provided for in the Act under which the child has been charged.

**CHILDREN'S SERVICES ACT 1965–1974 s. 62(e)**

## Probation

This order is made instead of sentencing an offender and so may not be used in conjunction with imprisonment or the fine. The requirements of a probation order must be strictly fulfilled by the court making such an order.

**Power to Make Probation Orders:** A probation order may be made in respect of a person convicted by the Supreme Court, a district court, or a magistrates' court of an offence punishable by a term of imprisonment (otherwise than in default of payment of a fine).

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(1)**

**When a Probation Order May be Made:** A probation order may be made when the court is of the opinion that it is expedient to do so having regard to the circumstances including:

- The nature of the offence.
- The offender's character.
- The offender's personal history (including home surroundings and other environment).

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(1)**

**Order in Lieu of Sentence:** A court makes a probation order instead of sentencing an offender.

**Limits on Duration of a Probation Order:** A probation order may require an offender to be under the supervision of a probation officer for a period of not less than six months and not more than three years.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(1)**

**Restriction on Making Order:** A probation order may not be made in respect of any offence the punishment for which cannot be mitigated or varied under s. 19 of the Criminal Code.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(1)**

Thus, a probation order may not be made in respect of treason, attempted piracy with personal violence or murder.

**Requirements of Probation Order**: A probation order is required to contain certain details relating to the supervising court and the need for the probationer to report after his release on probation.

1. Requirement to appoint supervising court.
   Every probation order must appoint a magistrates' court to be the supervising court in respect of the order.
   The supervising court must be that which is the nearest to where the probationer intends to reside, or that which the court making the order deems most convenient in the circumstances.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(2)**
2. Requirement of probationer to report.
   Every probation order must require the probationer to report in person to the place directed in the order within 24 hours after his release on probation.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(3)**
3. Requirement of medical and psychiatric treatment.
   A probation order may require a probationer to submit to such medical or psychiatric treatment as the court considers necessary for securing the good conduct of the offender or for preventing the offender from committing further offences.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(4)**
   This requirement is often expressed in terms of the probationer submitting to such medical or psychiatric treatment as is deemed necessary by a particular medical practitioner.
4. Order may include provisions for compensation or restitution.
   A probation order made in respect of an offence against the person may require the offender to pay compensation for injury occasioned to any person by the commission of the offence.
   A probation order made in respect of a property offence may require the offender to make restitution of the property involved or to pay compensation for the loss or destruction of the property.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(4A)**
5. Requirements as to residence of offender.
   A probation order may include requirements relating to the residence of the offender whether in Queensland or in another State or a Territory. But note that:
   - The court must consider the home surroundings of the offender.
   - If the offender is required to reside in an institution, the name of that

institution and the period for which he is so required to reside must be specified in the order.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(5)**

Unless a probationer is permitted to reside outside Queensland, the probation order must contain a requirement that the probationer shall not leave the State except in compliance with the terms and conditions of a permit issued pursuant to A. 8 (5B) of the Act.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(5A)**

6. Requirement of explanation of terms of order.

Before a probation order is made, the court is required to explain to the offender the effect of the order and that failure to comply with the requirements of the order render the offender liable to be sentenced for the original offence.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(6)**

7. Offender must express willingness to comply with order.

A court is not empowered to make a probation order unless the offender expresses his willingness to comply with the requirements thereof.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(6)**

In practice, willingness to comply with a probation order is expressed orally at this stage rather than in writing.

8. Procedural requirements after making of order.

A copy of the probation order must be given or sent to:

- The offender.
- The Chief Probation Officer.
- The person in charge of any institution in which the probationer is required to reside.
- The clerk of the supervising court.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(7)**

- Where a probationer is to reside in another State or a Territory, the Chief Probation Officer is required to cause to be sent to his counterpart in that State or Territory a copy of the probation order.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 8(7A)**

**Prohibited Order for First Offender:** It is envisaged by the legislation that the benefits of probation should be available to a first offender in as many appropriate cases as possible.

An order made pursuant to the provisions of s. 19(9) or s. 656(2) of the Criminal Code shall not be made if in the opinion of the court the offender could properly and conveniently be released on probation.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 9(1)**

**Discharge of Probation Order:** If a probation order has been made by the

Supreme Court then only that court may discharge the order. Similarly, probation orders made by a district or magistrates' court may be discharged only in the court in which the order was made.

A probation order may be discharged:

- By the court which made the order.
- Upon application of the probation officer or of the probationer.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 1(1)**

Where the probationer is residing outside Queensland under the terms of the order and a court of that State or Territory, having jurisdiction similar to that of the court by which the probation order was made, upon application of a probation officer of that State or Territory makes an order for the discharge of the probation order, the probation order shall be deemed to be discharged accordingly.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 11(1A)**

Upon the expiration of the probation period a probation order shall *ipso facto* be discharged without further action by any court provided that:

- The probationer has complied with all requirements of the order.
- The probationer has not committed any offence in Queensland or elsewhere.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 11(2)**

**Effect of Discharge of Probation Order:** This section refers only to the release from any criminal liability in respect of a probation order. As will be seen from the next succeeding section, civil liability is unaffected.

Upon the discharge of a probation order, a probationer is thereby released from any further obligation or liability in respect of the order and of the offence in respect of which it was made.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 11(3)**

**Civil Liability of Offender Released on Probation:** Any civil liability incurred by any person in respect of any act or omission which constitutes an offence is not prejudiced or affected in any way by the Offenders Probation And Parole Act.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 11(5)**

**Amendment of Probation Order:** The power to amend a probation order is vested in both the court which made the order and the supervising court.

However, two important restrictions on the power to amend should be noted.

The supervising court or the court by which the order was made may, at any time upon application by the probation officer or by the probationer himself, by order amend the probation order by:

- Cancelling any of the requirements thereof; or

. Inserting in the order (either in addition to or in substitution for any such requirement) any requirement which could be included in the order if it were then being made.

But note the following restrictions on the power to amend:

. The supervising court or the court by which the order was made may not reduce the probation period or extend the probation period beyond the end of three years from the date of the original order.
. The supervising court or the court by which the order was made may not, except with the consent of the probationer, amend the order so that the probationer is thereby required to reside in any institution.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 13(1)**

**Probationer's Assent to Amendment:** The requirement that the court making a probation order must first obtain the consent of the person in respect of whom the order is to be made, is repeated where the order is to be amended.

The probationer's assent to an amendment of his probation order must be obtained except where:

. A requirement of the probation order is cancelled; or
. The period of any requirement is reduced; or
. Another supervising court is substituted.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 14**

**Breach of Probation Order Otherwise than by Conviction:** Basically, there are two ways in which a probation order may be breached. These are by failing to observe all the conditions of a probation order, or by being convicted of an offence during the term of a probation order.

Failure to comply with any requirement (whether expressed or implied) of a probation order is an offence against the Act.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(1)**

A probationer may be ordered to appear by summons:

. At the magistrates' court where the order was made, or at the supervising court.
. At the supervising court if the order was made by a court other than a magistrates' court.

A probationer may be brought before a magistrates' court on a warrant for his arrest as soon as practicable after his arrest if the complaint of failure to comply with the order is made in writing and on oath.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(2)**

**Power of Magistrates' Courts on Breach Otherwise than by Conviction:** The powers of a magistrates' court to deal with a breach of a probation order other than by conviction are limited if the order was made by a court other than a magistrates' court.

If a probationer is convicted by a magistrates' court of failing to comply with a requirement of a probation order the court may:

1. Without prejudice to the continuation of the probation order, impose a fine not exceeding $100 and order, in addition to or without imposing a fine, any sum outstanding that was required to be paid as restitution or compensation under s. 8(4A) of the Act.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(3)(a)**
2. If the probation order was made by a magistrates' court, deal with the probationer for the offence in respect of which the probation order was made in any manner in which the court could deal with him if it had just convicted him of that offence.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(3)(b)**
3. If the probation order was made by a court other than a magistrates' court, commit the probationer to custody or release him on bail (with or without sureties) to be brought before or to appear before the court which made the order.
   **OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(3)(c)**

**Powers of Supreme Court and District Court on Breach Otherwise than by Conviction:** Where the probationer appears before the Supreme Court or a district court and it is proved to the satisfaction of the judge that the probationer has failed to comply with all or any of the requirements of the probation order, he may be dealt with for the offence in respect of which the probation order was made in any manner in which he could have been dealt with if he had just been convicted before that court of that offence.
**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(5)**

**Restrictions on Powers of Court to Deal with Breach of Order Otherwise than by Conviction:** A probationer who is convicted of an offence (other than an offence against s. 15) committed during the probation period is not on that account liable to be dealt with under s. 15 for failing to comply with all or any requirements of the probation order.
**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(6)**

A probationer who has already been dealt with under the provisions of a law of another State or a Territory, corresponding to sections 36G and 36H of the Act, for failing to comply with all or any of the requirements of the probation order, cannot be delt with under s. 15 for the act or omission which constituted the failing to comply for which he was so dealt with.
**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 15(7)**

**Breach of Order by Conviction:** Breach of order by conviction represents the second way in which a probation order may be breached and the probationer is proceeded against by way of summons.

If it is made to appear on complaint to a justice that a person in whose case a probation order has been made has been convicted in Queensland or elsewhere of an offence committed during the probation period and has been dealt with in respect of that offence, the justice may issue a summons requiring that person to appear at the time and place specified therein. Where the complaint is in writing and on oath, the justice may issue a warrant for the person's arrest.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 16(1)**

A summons or warrant issued under s. 16 must direct the person so convicted to appear before the court by which the probation order was made provided that:

- If that court is a magistrates' court, the summons or warrant may direct him to appear before the supervising court.
- If the warrant is issued requiring him to be brought before the Supreme Court or a district court and that court is not then sitting, the warrant shall have effect as if it directed him to be brought before a magistrates' court and that court shall commit him to custody or release him on bail, with or without sureties, to be brought or to appear before the Supreme Court or district court (as the case requires).

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 16(2)**

**Power of Court on Conviction of Person During Probation:** It should be noted that these alternatives may be exercised in respect of an offence other than an offence against s. 15 of the Act or against a law of another State or Territory corresponding to section 36G of the Act. This means that the following alternatives are not to be exercised in respect of breach by way of non-compliance of a probation order.

1. The court or supervising court may, without prejudice to the continuation of the probation order, fine the probationer an amount not exceeding $100 in respect of the breach of the probation order by the conviction. In addition, or without imposing a fine, the court may make an order for the payment of any sum outstanding under an order made under s. 8 (4A); or
2. The court or supervising court may deal with the probationer for the offence for which the order was made as if he had just been convicted by that court of that offence.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 16(5)**

3. If a probationer whose probation order was made by a magistrates' court

is convicted before the Supreme Court or a district court of an offence committed during the probation period, the Supreme Court or district court may deal with him for the offence in respect of which the order was made in any manner in which the magistrates' court could deal with him if it had just convicted him of that offence.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 16(6)**

It should be noted that under the above provision any sentence imposed is regarded as the sentence of the magistrates' court except for the purposes of appeal when it is regarded as a sentence imposed on conviction on indictment.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 16(6)**

4. If a probationer whose probation order was made by a district court is convicted before the Supreme Court for an offence committed during the probation period, the Supreme Court may deal with him for the offence for which the probation order was made in any manner in which the district court could deal with him if it had just convicted him before that court of that offence.

   It should be noted that any sentence thus imposed by the Supreme Court is regarded as the sentence of the district court imposed on a conviction on indictment.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 16(7)**

**Conviction to be Disregarded for Certain Purposes where a Probation Order is Made**: A conviction for an offence in respect of which a probation order is made is deemed not to be a conviction for any purpose except in relation to:

- The making of the order.
- Any subsequent proceedings which may be taken against the offender under the foregoing provisions of the Act.
- The remission or mitigation of sentences for good conduct and industry under the Prisons Act and regulations thereunder.
- Any proceedings against the offender for a subsequent offence.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 19(1)**

**Rights of Appeal Protected**: The above provisions of s. 19 do not affect the right of an offender to appeal against his conviction or to rely thereon in bar of any subsequent proceedings for the same offence or the revesting or restoration of any property in consequence of the conviction.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 19(3)**

Any person who feels himself aggrieved by a summary conviction of a magistrates' court in respect of which a probation order is made, may appeal

against that conviction notwithstanding that no fine, penalty of forfeiture is imposed thereby.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1974 s. 19(4)**

## Suspended Sentences

This type of sentence is included here although the making of a suspended sentence may result in term of imprisonment being served.

**Conditional Suspension of Punishment on First Conviction Pursuant to s. 656 of the Criminal Code**: When a person who has not been previously convicted in Queensland or elsewhere of an offence of such a nature that, upon conviction, a sentence may be imposed restricting the liberty of the offender for a period of six months or upwards is convicted of an offence whereby he may be sentenced upon conviction to imprisonment for a period not exceeding three years, if in the opinion of the court a sentence of imprisonment for a period not exceeding three years is an adequate punishment, then the court must pass sentence in the usual form. The court may, if it thinks fit, suspend the execution of the sentence, upon the offender entering into a recognisance for such an amount as the Court directs. Such recognisance would be conditioned that the offender be of good behaviour for a period from the date of the sentence equal to the term of the sentence, or if the term of the sentence is less than 12 months, then for the period of 12 months. The offender shall not during this period do or omit to do any act whereby the recognisance would become liable to be forfeited under the following conditions.

The offender is discharged from custody when the recognisance is entered into, but may be committed to prison to undergo his sentence if, during the period specified in the recognisance, any of the following conditions occur:

1. When an offender is so committed to prison, the term of the sentence begins to run from the commencement of his custody upon the commitment, but the term of the imprisonment does not extend beyond the period specified in the recognisance, and at the expiration of that period the offender is entitled to be discharged.
2. With respect to property offences or offences against the person, the court may, upon suspending the execution of the sentence, order restitution or compensation. It may assess the amount to be paid by the offender and may direct when and to whom and in what instalments the amount ordered to be paid is to be paid.

   Note that such an order may be enforced by a magistrates' court in the

same manner as orders made upon summary convictions.
Also note that the court may require the offender to give security for the performance of such an order.

3. An offender discharged under s. 656 must, at least once in every three months during the period specified in the recognisance, report his address and occupation to the officer in charge of police at the place he was convicted or at any other place that the commissioner of police may appoint. Note that the report may be made by the offender in person or by mail, unless personal reporting is required by the Minister.
4. If during the period specified in the recognisance:
   - It is proved that an offender so discharged has failed to report his address and occupation at the times and in the names prescribed; or
   - There are reasonable grounds for a court to believe that an offender is living by dishonest means; or
   - An offender refuses to give his name and address, or gives a false name or a false address, to a magistrates' court upon being charged with an offence punishable on indictment or summary conviction; or
   - An offender so discharged is convicted of any indictable offence, whether on indictment or summarily, or of any offence punishable on summary conviction and for which imprisonment for a period greater than one month may be imposed,

   then the court before whom the offender is charged or convicted may:
   - Forfeit the recognisance.
   - Commit the offender to prison to undergo his original sentence; and
   - Grant a warrant for his committal.

   **CRIMINAL CODE s. 656(7)**
5. If none of the above occurs:
   - The offender is discharged from the original sentence.
   - The conviction on which that sentence was imposed is not on any subsequent conviction deemed to be a previous conviction for the purposes of any law under which a greater punishment may be inflicted upon a person who has been previously convicted.

   **CRIMINAL CODE s. 656(7)**

# Chapter 2

# Custodial Sentences

In this chapter sentences involving custodial treatment are identified in terms of their legislative bases. The chapter includes custodial sentences in respect of both adults and children and the provisions relating to weekend detention have also been included here.

## Custodial Treatment of Adults

**Statutory Basis of Imprisonment**: The punishments which may be inflicted under the Criminal Code include:

- Imprisonment with hard labour.
- Imprisonment without hard labour.
- Detention in a reformatory prison.
- Detention in an industrial or reformatory school.
- Solitary confinement.

**CRIMINAL CODE** s. 18

**Construction of Provisions of Code**: In the construction of the Code it is to be taken that:

- A person liable to imprisonment, either with or without hard labour, for life or for any other period may be sentenced to similar imprisonment for any shorter term.

**CRIMINAL CODE** s. 19(1)

However this construction applies only in the absence of a contrary express provision. Such contrary express provisions are to be found in respect of the offences of treason (s. 37 of the Criminal Code), attempted piracy with personal violence (s. 82 of the Criminal Code), and murder (s. 305 of the Criminal Code).

- A person liable to imprisonment with hard labour may be sentenced to imprisonment without hard labour.

**CRIMINAL CODE** s. 19(2)

- A person liable to imprisonment, either with or without hard labour, may be sentenced to pay a fine not exceeding $2.000 in addition to, or instead of, such imprisonment.

**CRIMINAL CODE s. 19(3)**

- The punishment of solitary confinement cannot be inflicted upon a person who is sentenced to imprisonment, with or without hard labour, for a longer term than two years.

**CRIMINAL CODE s. 19(5)**

- A person sentenced on conviction upon indictment to pay a fine may be sentenced to be imprisoned until the fine is paid, in addition to any other punishment to which he is sentenced. However, the imprisonment for non-payment of the fine shall not extend for a term longer than two years, and shall not, together with the fixed term of imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned without fine.

**CRIMINAL CODE s. 19(6)**

- Provided that a person sentenced on conviction upon indictment to pay a fine may be sentenced, in lieu of being sentenced to be imprisoned until the fine is paid, to be imprisoned for a term (not exceeding that mentioned above) if the fine is not paid within a specified period which may be extended by the Court as it deems fit. In that event the sentence of imprisonment shall be suspended accordingly.

**CRIMINAL CODE s. 19(6)**

It should be noted that the court may give such directions as it thinks fit as to the enforcement of the sentence of imprisonment.

**Definition of Hard Labour**: Hard labour is defined for the purposes of the Prisons Act 1958–1964 by s. 30 of that Act which provides that hard labour in relation to imprisonment under any lawful conviction or order, shall mean any manual, industrial or trade labour of the type performed in the community and as may from time to time be determined by the Comptroller-General. Adequate means for enforcement of hard labour is required to be provided in every prison.

It should be noted that a prisoner must be capable of performing any work allotted by the Comptroller-General or Superintendent.

**Solitary Confinement**: When an offender is sentenced to solitary confinement, the court is required to give directions in the sentence as to the confinement, and may direct that the offender be kept in solitary confinement, but not in darkness, for any portion or portions of the term of his imprisonment, whether it is with or without hard labour.

It should be noted that solitary confinement may not exceed one month at any one time, and may not exceed three months in any one year.

**CRIMINAL CODE s. 654**

**Calculation of Term of Imprisonment – Cumulative Sentences:** When a person who is convicted of an offence is undergoing a sentence involving deprivation of liberty for another offence the punishment to be inflicted on him for the first-mentioned offence may be directed to take effect from the expiration of the deprivation of liberty for the last-mentioned offence.

**CRIMINAL CODE s. 20**

**Time when Sentence of Imprisonment Commences:** Except as already stated in the paragraph above, a sentence of imprisonment, with or without hard labour, upon a conviction on indictment, takes effect from the day the court passes sentence upon the offender. A sentence of imprisonment, with or without hard labour, upon a summary conviction takes effect from the commencement of the offender's custody under the sentence.

**CRIMINAL CODE s. 20**

**Escaped Prisoners:** A person who escapes from lawful custody while undergoing a sentence involving deprivation of liberty is liable upon recapture to undergo the punishment which he was undergoing at the time of his escape for a term equal to that during which he was absent from prison after the escape and before the expiration of the term of his original sentence.

It should be noted that this provision applies whether or not at the time of recapture the term of the sentence has expired.

**CRIMINAL CODE s. 20**

**Protection of Royal Prerogative:** No provision of the Code affects the Royal Prerogative of Mercy.

**CRIMINAL CODE s. 21**

## Weekend Detention

This form of custodial sentence was introduced in 1970 with the introduction of the Weekend Detention Act of that year. The aim of this legislation is to enable a court to punish an offender by depriving him of his liberty during periods when it would normally be expected that such deprivation of liberty would be unlikely to interfere with the livelihood of the offender.

**Power to Impose Weekend Detention:** The court may, in any case in which it is of the opinion that a sentence of weekend detention is an appropriate sentence in the circumstances of the case, impose a sentence of weekend

detention instead of a sentence of imprisonment for a period of two days or more.

**WEEKEND DETENTION ACT 1970 s. 4**

It should be noted that a sentence of weekend detention shall not be imposed for any number of weekends in excess of twenty-six.

**WEEKEND DETENTION ACT 1970 s. 12**

**Meaning of Weekend:** Weekend means a number of consecutive hours being not less than 44 hours and not more than 48 hours commencing at a time, specified in accordance with the Act, after noon on a Friday.

**WEEKEND DETENTION ACT 1970 s.3**

**Requirements of Order:** Just as a court is required to observe a number of formalities in the making of a probation order, so to, is it required to include in an order imposing weekend detention several specific directions.

The court is required to specify in an order for weekend detention:

- The number of consecutive weekends to be served.
- The number of consecutive hours to be served each weekend.
- The prison at which the weekend detention is to be served.
- The date of and time after noon on the Friday on which the sentence of weekend detention shall commence.
- The time after noon on each Friday during the currency of the sentence when the person so sentenced is to report to the person in charge of the prison.

**WEEKEND DETENTION ACT 1970 s.5**

It should be noted that the following are empowered to impose a sentence of weekend detention:

Any court of the State of Queensland, including any commission, tribunal, judge, magistrate or other person empowered under any State law to impose a sentence of imprisonment.

**WEEKEND DETENTION ACT 1970 s. 3**

**Power to Impose Weekend Detention upon Default in Payment of Fine, etc.:** The court may, where it thinks fit, impose a sentence of weekend detention instead of a sentence of imprisonment for a period of two days or more upon any default being made in the payment of a fine or sum of money, the doing of an act or the compliance with an order.

**WEEKEND DETENTION ACT 1970 s. 6**

It should be noted that a court order for weekend detention upon default is required to specify:

- The number of consecutive weekends to be served.
- The number of consecutive hours to be served each weekend.
- The prison at which the weekend detention is to be served.

- The time after noon on the Friday, on which the sentence of weekend detention shall commence.
- The time after noon on each Friday during the currency of the sentence when that person shall report to the person at the time in charge of the prison.

**WEEKEND DETENTION ACT 1970 s. 7**

**Commencement Date of Sentence of Weekend Detention:** The date of the Friday, as specified in a weekend detention order, on which a sentence of weekend detention shall commence may be that of a Friday other than the Friday immediately following the date of the imposition of the sentence of weekend detention or the time when default is made.

**WEEKEND DETENTION ACT 1970 s. 9**

**Weekend Detention in Relation to Other Sentences:** A sentence of weekend detention may be made cumulative on any other sentence of weekend detention. But it should be noted that the total number of weekends during which the person subject to the sentences will be required to be detained under the sentences after the date of the imposition of the further sentence must not exceed twenty-six.

**WEEKEND DETENTION ACT 1970 s. 13(1)**

Where a person sentenced to weekend detention is, during the currency of that sentence, sentenced to a term of imprisonment, he shall, in respect of any weekend when he would, but for the sentence of imprisonment, be detained in a prison pursuant to a court order, be deemed to serve the sentence of imprisonment concurrently with the sentence of weekend detention, so that, in respect of each weekend served by him during the term of his imprisonment, he shall be deemed to have been detained for that weekend under the court order.

**WEEKEND DETENTION ACT 1970 s. 13(2)**

**Variation of Terms of Order:** An order imposing a sentence of weekend detention may be varied by the court which imposed the sentence.

It should be noted that it is not necessary that the court varying the order be constituted by the same member or members who constituted it at the time the sentence was imposed.

**WEEKEND DETENTION ACT 1970 s. 14(1)**

Application for variation of the terms of an order may be made by:

- The person on whom the sentence was imposed.
- The Crown; or
- There may be no application but the order may be varied if it appears to the court that there is good reason so to do.

**WEEKEND DETENTION ACT 1970 s. 14(1)**

The court may direct that the following variations be made to an order for weekend detention:

- That the offender thereafter serve his detention at a prison other than the prison specified in the court order.
- That the offender report thereafter to the person at the time in charge of the prison at a time after noon on each Friday different from the time specified in the court order.
- That the offender report thereafter to the person at the time in charge of the prison on a Friday different from the Friday specified in the court order.
- That the court order imposing the sentence of weekend detention be varied in such other manner as the court thinks fit.

**WEEKEND DETENTION ACT 1970 s. 14(1)**

**Failure to Report, and Escape from Prison by Weekend Detainee:** A person sentenced to weekend detention who fails to report to the person at the time in charge of the prison specified in the court order made pursuant to the Act on the date of and at the time after noon on any Friday specified therein, shall be deemed thereupon to be a prisoner who escapes from that prison.

It should be noted that such a person is then deemed to be a person so escaped not withstanding the expiration of the period of weekend detention to be served on the weekend in question.

**WEEKEND DETENTION ACT 1970 s. 16(1)**

A person who escapes pursuant to the above provision shall, without any specific order or any authority other than the Act, serve, in lieu of the sentence or balance of the sentence of weekend detention imposed under the Act, a sentence of imprisonment equivalent to the weekend detention at that time to be served by him.

**WEEKEND DETENTION ACT 1970 s. 16(2)**

The provisions of s. 16 of the Act are in addition to and not in derogation of:

- Sections 33 and 34 of the Prisons Act.
- Section 30 of the Vagrants, Gaming, and Other Offences Acts.
- Section 143 of the Criminal Code; and
- Any other law of the State relating to persons escaping from a prison or from legal custody.

**WEEKEND DETENTION ACT 1970 s. 16(3)**

## Custodial Sentences in Respect of Young Offenders

A separate section of this chapter is devoted to custodial sentences in respect of young offenders because the provisions of the Children's Services Act 1965–1973 must be considered in this context.

**Establishment of Children's Court**: The Children's Services Act 1965–1973 s. 18 establishes a Children's Court, which is a court of record and which has a seal which requires judicial notice.

**Constitution of Children's Courts**: A Children's Court is constituted by a Magistrate of Children's Courts sitting alone, or if he is not then present, by a Stipendiary Magistrate or an Acting Stipendiary Magistrate sitting alone, or if neither of such magistrates are then present; by two or more justices.

**CHILDREN'S SERVICES ACT 1965–1973 s. 20**

It should be noted that for appointment of Magistrates of Children's Courts, the Children's Services Act 1965–1973 s. 19(1) should be seen and that a child is a person under or apparently under the age of 17 years.

**CHILDREN'S SERVICES ACT 1965–1973 s. 8**

**Child Charged with Simple Offence or Breach of Duty**: A child charged with a simple offence or breach of duty shall be brought or summoned to appear before a Children's Court. Subject to the Act, a magistrates' court shall not have jurisdiction in respect of a child charged with a simple offence or breach of duty.

**CHILDREN'S SERVICES ACT 1965–1973 s. 23**

A breach of duty is defined in the Justices Acts 1886–1975.

**Child Charged with Indictable Offence**: Where an examination of witnesses in relation to an indictable offence charged against a child is to be taken at a place where a Magistrate of Children's Courts is available, the child shall be brought or summoned to appear before that Magistrate sitting alone to take an examination of witnesses in relation to the indictable offence.

**CHILDREN'S SERVICES ACT 1965–1973 s. 24**

**Jurisdiction of Children's Court in Indictable Offence**: A Children's Court has jurisdiction to try or sentence or otherwise deal with, in accordance with the Act, a person who:

- Is a child charged with an indictable offence other than such an offence for which he would be liable, were he not a child, to imprisonment with hard labour for life.
- Was a child when there was commenced against him a proceeding whereby he stands before that Children's Court charged with an indictable offence other than such an offence for which he would be liable, were he not a

child, to imprisonment with hard labour for life.

**CHILDREN'S SERVICES ACT 1965–1973 s. 29(1)**

**Restrictions on Exercise of Jurisdiction by a Children's Court:** A Children's Court must refrain from exercising its jurisdiction unless it is satisfied that:

- The right of the defendant to be tried before a judge and jury has been explained to the defendant and to such parent or guardian of the defendant as is present before the Court.
- The defendant and such parent or guardian consent to the Children's Court exercising such jursidiction; and
- The circumstances of the case and of the defendant are such that the case may be adequately dealt with by a Children's Court.

**CHILDREN'S SERVICES ACT 1965–1973 s. 29(2)**

**Requirements on Exercise of Jurisdiction Re Trial:** When a magistrate is taking an examination of witnesses in relation to an indictable offence and is about to commit the defendant to be tried before a court of competent jurisdiction, and is satisfied that the circumstances of the case and of the defendant are such that the case may be adequately dealt with by a Children's Court, he is required to:

- Explain to the defendant and to any parent or guardian present that the defendant is entitled to be tried by a jury or by a Children's Court without a jury.
- Enquire of the defendant and any parent or guardian present whether each of them consents to the defendant's being tried by a Children's Court.
- Not commit the defendant to be tried by a Children's Court or proceed in accordance with subsection (4) of s. 29 unless the defendant and such parent or guardian consent.

**CHILDREN'S SERVICES ACT 1965–1973 s. 29(3)**

**Requirements on Exercise of Jurisdiction Re Trial and Sentence:** When taking an examination of witnesses in relation to an indictable offence charged against a child, a magistrate who is about to commit the defendant to be tried or for sentence before a court of competent jurisdiction, if he may lawfully constitute a Children's Court at the place where he is then sitting, may (but only with the consent of counsel or a solicitor appearing for the defendant) instead of so committing the defendant deal with the defendant according to law.

**CHILDREN'S SERVICES ACT 1965–1973 s. 29(4)**

**Provisions of the Criminal Code to Apply to Children's Courts:** The provisions of section 600 of the Code apply in relation to a defendant committed for sentence before a Children's Court as if he appeared before such court charged upon indictment.

**CHILDREN'S SERVICES ACT 1965–1973 s. 29(7) (b)**

The provisions of section 600 of the Code are as follows:

> When a person has been committed by a justice for sentence for an offence, he is to be called upon to plead to the indictment in the same manner as other persons, and may plead either that he is guilty of the offence charged in the indictment or, with the consent of the Crown, of any other offence of which he might be convicted upon the indictment.
>
> If he pleads that he is not guilty, the Court, upon being satisfied that he duly admitted before the justice that he was guilty of the offence charged in the indictment, is to direct a plea of guilty to be entered, nothwithstanding his plea of not guilty. A plea so entered has the same effect as if it had been actually pleaded.
>
> If the Court is not so satisfied, or if, notwithstanding that the accused person pleads that he is guilty, it appears to the Court upon examination of the depositions of the witnesses that he has not in fact committed the offence charged in the indictment or any other offence of which he might be convicted upon the indictment, the plea of not guilty is to be entered, and the trial is to proceed as in other cases when that plea is pleaded.
>
> A person who has been committed for sentence may plead any of the other pleas mentioned in section 598.

For the application of further provisions of the Code to Children's Courts, see the **CHILDREN'S SERVICES ACT 1965–1973 s. 29(7) (a)**

**Rights of Appeal from Children's Court**: A person convicted of an indictable offence before a Children's Court and the Attorney-General of the State have the same rights of appeal against conviction and against sentence as if the convicted person had been convicted on indictment.

It should be noted that the appeal procedure is in the manner provided for in Chapter LXVII of the Code and in the Criminal Practice Rules of 1900 as amended from time to time.

**CHILDREN'S SERVICES ACT 1965–1973 s. 29(7) (c)**

For the committal of a child in need of care and control see the provisions of the **CHILDREN'S SERVICES ACT 1965–1973 ss. 60 and 61.**

**Powers of Court and Range of Orders Re Children Guilty of Offences**: When a child has pleaded or been found guilty of an offence before a court of competent jurisdiction the court may:

(i) Order such investigations and medical examinations of the child as the court thinks necessary and may order that such reports be furnished to the court.

(ii) Remand the child in the custody of his parent or guardian, the Director of the Department of Children's Services or other person who can properly care for him. If the court is satisfied that the child is so unruly or that his character is otherwise such that he should be detained else-

where than in that custody, it may commit the child in such other custody as the court thinks fit pending completion of all investigations and examinations ordered by it.

(iii) Order the child or his parent or guardian (other than the Director), or any two or more of them, to pay compensation or make restitution in respect of damage or loss occasioned by the offence, or order the child to reinstate property damaged or defaced in the course of the offence.

(iv) Order the child or his parent or guardian (other than the Director), or any two or more of them to pay the costs of the proceedings before the court and of any investigation or examination made of the child pursuant to the court's order, save where the making of an order as to costs would, apart from this provision, be unlawful.

(v) Impose a fine upon the child as provided for or permitted in the Act under which he is charged.

(vi) Order a parent or guardian (other than the Director) of the child to enter into a recognisance in such amount as the court fixes without a surety or with such surety or sureties as the court orders, and for such period as the court orders, conditioned that such parent or guardian exercise proper care, control, protection and guardianship in respect of the child.

(vii) Order that the child be committed to the care and control of the Director for a period not exceeding two years.

(viii) Order that the Director exercise supervision over the child until he attains the age of 18 years or for a period not exceeding two years notwithstanding that within that period the child will have attained the age of 18 years.

(ix) Order the child to be imprisoned for a period not exceeding two years if the court is satisfied that the child is so unruly or his character is otherwise such that he should be detained in custody other than in a home or institution under the control of the Director.

(x) If the offence is of a sexual nature committed upon or in relation to a child, make such orders in relation to and deal with the child pursuant to the Criminal Law Amendment Act of 1945 as if he were not a child and, where the court is a Children's Court, as if the court were a magistrates' court.

(xi) Admonish and discharge the child, or order that the Director exercise supervision over the child for a period not exceeding two years, or order that the child be committed to the care and control of the Director for a period not exceeding two years.

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(1) (a)–(k)**

It should be noted that a court may exercise any one or more of the powers conferred on it by s. 62(1) (a)–(j) (i.e. (i)–(x) above) as it thinks appropriate; and that a court may not exercise more than one of the powers conferred on it by s. 62(1) (k) (i.e. (xi) above).

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(1)**

It should also be noted that a court may exercise a power conferred on it by s. 62(1) (a), s. 62(1) (b), s. 62(1) (c), s. 62(1) (d), or s. 62(1) (f) (i.e. (i) (ii) (iii) (iv) (vi) above, without formally convicting the defendant of the material offence and shall not formally convict the defendant of the material offence if it exercises a power conferred on it by s. 62(1) (k) (i.e. (xi) above). If, as a result, the defendant is not formally convicted of that offence a conviction shall not be recorded against the defendant in respect of that offence.

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(1)**

It should be noted that, save as provided by the Children's Services Act, a child who has been convicted of an offence shall not be sentenced to imprisonment.

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(1)**

It should be noted that an order to pay compensation, restitution or costs shall not be made against a parent or guardian of a child unless such parent or guardian has been given an opportunity of being heard on that matter.

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(2) (b)**

It should be noted that an order to pay compensation, restitution or costs may be made against a parent or guardian of a person dealt with by a court on the basis that he is a child notwithstanding that he is not under or apparently under the age of 17 years.

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(2) (c)**

It should be noted that a court may order that a child be committed to the care and control of the Director for any period permitted by s. 62(1) (g) or s. 62(1) (k) (i.e. (vii) and (xi) above), notwithstanding that before the expiration of such period such child shall have attained the age of 18 years. Such a child shall, subject to the Act, remain in the care and control of the Director until the expiration of the period for which he was ordered to be so committed.

**CHILDREN'S SERVICES ACT 1965–1973 s. 62(3)**

**Powers of Court Re Children Guilty of Serious Offences:** A court may, in its discretion order a child to be detained during Her Majesty's pleasure in such place and on such conditions as the Minister may from time to time direct when a child is convicted of an offence for which he would be liable, were he

not a child, to imprisonment with hard labour for life; or when a child is convicted of:

1. An offence of attempting to commit an offence defined in the following sections of the Code:
   Section 212 (defilement of girls under twelve).
   Section 317 (acts intended to cause grievous bodily harm or prevent apprehension).
   Section 319 (intentionally endangering safety of persons travelling by railway).
   Section 319A (endangering safety of persons travelling by aircraft).
   Section 467 (obstructing and injuring railways).
   Section 467A(1) (endangering safe use of an aircraft).
2. An offence of attempting to commit an offence defined in section 469 of the Code (that is, malicious injuries in general), when to establish the offence of which he is convicted, a circumstance of aggravation referred to in special case I or II under that section is relied upon.
3. An offence defined in the following sections of the Code:
   Section 214 (attempt to abuse a girl under ten).
   Section 321 (attempt to injure by explosive substances).
   Section 349 (attempt to commit rape).
   Section 412 (attempted robbery: accompanied by wounding or in company).
   Section 462 (attempt to commit arson).
   Section 470 (attempt to destroy property by explosives).

**CHILDREN'S SERVICES ACT 1965–1973 s. 63(1)**

It should be noted that a child so ordered to be detained shall continue to be detained in such place and on such conditions as the Minister from time to time directs notwithstanding that in the meantime the child has attained the age of 18 years.

**CHILDREN'S SERVICES ACT 1965–1973 s. 63(1)**

For prohibition and restriction of reports of proceedings concerning a child see the **CHILDREN'S SERVICES ACT 1965–1973 s. 138(1)**

For the power of a court to exclude a child from proceedings in certain circumstances see the **CHILDREN'S SERVICES ACT 1965–1973 s. 138(3).**

# Chapter 3

# Additional Orders

## Costs

The ordinary rule with respect to costs of a defendant is that the Crown is immune from liability for costs. The costs of the prosecution, however, may be awarded in certain circumstances.

**Costs of Prosecution**: The court may order an offender to pay to the person aggrieved his costs of prosecution as well as compensation for loss of time by reason of the offence of which the offender is convicted when the offender is convicted on indictment of any indictable offence relating to the person of any person on the application of the person aggrieved by the offence.

It should be noted that such an order for costs is in addition to any sentence which may be passed upon the offender.

**CRIMINAL CODE s. 660**

Enforcement. An order for the payment of such costs or compensation is enforceable in the same manner as a judgment of the court given in an action.

**CRIMINAL CODE s. 660**

Money found on the person of the offender on his arrest may be ordered by the court to be applied towards the payment of any money ordered to be paid by him.

**CRIMINAL CODE s. 660**

Civil liability. The civil liability of a defendant is extinguished by the making of an order under this provision.

When an order for the payment of compensation to an aggrieved person is made, the offender is not liable to any civil proceedings for the same cause at the suit of that person.

**CRIMINAL CODE s. 660**

**Revesting and Restitution of Property on Conviction**: To avoid the possibility of an aggrieved person being required to return compensation in the event of a successful appeal by an offender an order for restitution or compensation is

usually suspended pending appeal.

The operation of any order for the restitution of any property for the payment of compensation to an aggrieved person shall be suspended (unless the court directs to the contrary in any case in which in its opinion the title to the property is not in dispute) until the expiration of the time provided for appeal or until determination of the appeal or refusal of the application for leave to appeal.

**CRIMINAL CODE s. 670**

It should be noted that the Court of Criminal Appeal may annul or vary any such order, although the conviction is not quashed.

**CRIMINAL CODE s. 670**

**Temporary Suspension of Orders Made on Conviction as to Costs:** Normally a convicted person has 14 days to give notice of his appeal. (Criminal Code s. 671). However, this time may be extended. (Criminal Code s. 671L).

Where an order is made requiring a convicted person to pay the whole or any part of the costs and expenses of the prosecution, such order shall be suspended until the expiration of 14 days.

**CRIMINAL PRACTICE RULES ORDER IX r. 12**

**Taxation of Costs:** Costs of a prosecution or defence must be taxed by the proper officer of the court in which the indictment is presented.

**CRIMINAL CODE s. 662**

**Costs in Cases of Defamation:** In the case of a prosecution of any person on the complaint of a private prosecutor on a charge of the unlawful publication of defamatory matter, if the accused person is indicted and acquitted he is entitled to recover from the prosecutor his costs of defence, unless the court otherwise orders.

**CRIMINAL CODE s. 661(1)**

In similar circumstances, if the accused person pleads that the defamatory matter was true and that it was for the public benefit that the publication should be made, then, if that issue is found for the Crown, the prosecutor is entitled to recover from the accused person the costs sustained by him by reason of such plea, unless the court otherwise orders.

**CRIMINAL CODE s. 661(2)**

It should again be noted that the costs of a prosecutor must be taxed by a Taxing Officer of the Supreme Court.

## Compensation for Injury

**Court May Order Payment of Compensation for Personal Injury:** An order by way of compensation for injury suffered by a person aggrieved by an offence may be made by the court where a person is convicted on indictment of any indictable offence relating to the person of any person on the application by or on behalf of the person aggrieved by the offence.

**CRIMINAL CODE s. 663B(1)**

It should be noted that the order is in addition to any other sentence or order that court may make and that the sum which may be ordered must not exceed the prescribed amount. See next paragraph.

**CRIMINAL CODE s. 663B(1)**

**The Prescribed Amount:** Pursuant to s. 30 of the Criminal Code and the Justices Act Amendment Act 1975, s. 663A of the Criminal Code was amended by inserting the following definition:

'Prescribed amount' is:

- Where the offence in connection with which the case arises is committed before the commencement of the Criminal Code and the Justices Act Amendment Act 1975, $2,000.
- In all other cases, $5,000.

**Compensation Order Not Part of Sentence:** An order made under subsection (1) of s. 663B shall not, for any purpose, be taken to be part of a sentence.

**CRIMINAL CODE s. 663B(1)**

**Requirements of Court:** In determining whether or not to make an order and in determining the amount of any order, the court is to have regard to:

- Any behaviour of the person aggrieved which directly or indirectly contributed to the injury suffered by him.
- Such other circumstances as it considers relevant (including whether the person aggrieved is or was a relative of the convicted person or was at the time of the commission of the offence, living with the convicted person as his wife or her husband or as a member of the convicted person's household).

**CRIMINAL CODE s. 663B(2)**

**Application of Money Found on Person of Offender:** If any money was found on the person of the offender on his arrest, the court may, if it is satisfied that the money is the property of the offender, order it to be applied towards the payment of any sum ordered to be paid by him under s. 663B(1).

**CRIMINAL CODE s. 663B(3)**

**Enforcement of Order by Person Aggrieved:** The person aggrieved may enforce an order under s. 663B(1) against the offender as if the order were a

judgment of the court given in an action for the amount of the order less any moneys received by that person under an order made under s. 663B(3).

**CRIMINAL CODE s. 663B(4)**

**What Constitutes Injury:** 'Injury' means any degree of bodily harm and includes pregnancy, mental shock and nervous shock.

**CRIMINAL CODE s. 663A**

**Ex Gratia Payments by Governor in Council:** What the applicant is required to do follows. Where an order has been made under s. 663B(1) of the Code, the person in whose favour the order has been made may make application in writing to the Minister for Justice and Attorney-General for the approval of the Governor in Council for the payment to him from the Consolidated Revenue Fund of the sum ordered to be paid. Such application may only be made in respect of a sum in excess of one hundred dollars.

**CRIMINAL CODE s. 663C(1)**

What the Minister for Justice and Attorney-General is required to do follows. He is required to submit to the Governor in Council a report specifying:

- Particulars of the application.
- The order of the court and the circumstances of the offence.
- Any amounts which the applicant has, to the knowledge of the Minister, received or would receive if he had exhausted all relevant rights of action and other legal remedies available to him.
- Particulars of any medical examination of the applicant which may have been requested by the Minister.
- Such other matters as the Minister may think fit.

**CRIMINAL CODE s. 663C(2)**

What the Governor in Council is required to do follows. The Governor in Council may, upon examining the report of the Minister, if he considers that in the circumstances of the case the making of a payment to the applicant is justified, approve that the Treasurer pay to the applicant, in such manner and subject to such conditions as the Governor in Council thinks fit, an amount not exceeding the prescribed amount fixed by the Governor in Council having regard to the amount ordered by the court to be paid to the applicant and any amount the applicant has received or would receive if he had exhausted all relevant rights of action and other legal remedies available to him.

**CRIMINAL CODE s. 663C(4)**

**Ex Gratia Payments in Other Cases:** Apart from payment by way of compensation for personal injury suffered by a person aggrieved, provision exists for the payment of compensation to three further classes of victims. Any person who suffers injury may make application in writing to the Minister for

the approval of the Governor in Council for the payment to him from the Consolidated Revenue Fund of a sum not exceeding the prescribed amount by way of compensation for injury suffered in the following circumstances:

1. While assisting a police officer to arrest or attempt to arrest an offender or suspected offender or to prevent or attempt to prevent the commission of any offence.
2. By reason of any act or omission which would have rendered the person doing the act or making the omission liable, if he had been criminally responsible for that act or omission, to punishment as for an indictable offence relating to the person of the person who suffers injury.
3. By reason of the commission of an indictable offence relating to the person of that person and:
   - The offence has been reported to a police officer without delay and after due inquiry and search the offender cannot be found.
   - The offender has not been dealt with summarily nor has an indictment been presented in relation to that offence.
   - The offender has not been convicted on an indictment presented in relation to that offence.

**CRIMINAL CODE s. 663D(1)**

The Minister for Justice and Attorney-General is required to submit to the Governor in Council a report specifying:

1. Particulars of the application.
2. Circumstances of the offence and particulars of the injury suffered by the applicant.
3. Particulars of any relevant police report.
4. Particulars of any medical examination relating to the injury at or near the time the injury was suffered.
5. Any amounts which, to the knowledge of the Minister, the applicant would receive if he had exhausted all relevant rights of action and other legal remedies available to him.
6. Particulars of any medical examination of the applicant requested by the Minister.
7. Such other matters concerning the application as the Minister thinks fit.

**CRIMINAL CODE s. 663D(2)**

The Governor in Council may, if he considers that in the circumstances of the case the making of a payment to the applicant of a sum in excess of $100 is justified, approve that the Treasurer pay to the applicant, in such manner and subject to such conditions as the Governor in Council thinks fit, such amount not exceeding the prescribed amount as the Governor in Council thinks fit, having regard to the amounts which the applicant has received or

would receive if he had exhausted all relevant rights of action and other legal remedies available to him.

**CRIMINAL CODE s. 663D(4)**

There are no restrictions in certain cases. The monetary limitations referred to above do not apply in respect of a person who suffers injury while assisting a police officer to arrest or attempt to arrest an offender or suspected offender or to prevent or attempt to prevent the commission of any offence.

**CRIMINAL CODE s. 663D(5)**

## Orders for Restitution of Property

**On Summary Conviction for Stealing:** When a person is charged with an indictable offence which may be dealt with summarily pursuant to s. 443 of the Code, and the magistrates' court finds that the charge is proved, it may, whether it imposes any punishment or not, order the offender to make restitution of the property, if any, in respect of which the offence was committed, to the owner thereof. If the property is not at once restored the court may order the offender to pay the amount of its value, to be assessed by the court, to the owner.

Payment may be ordered to be in one sum or by such instalments and at such times as the court thinks fit.

**CRIMINAL CODE s. 443**

**Upon Summary Conviction for Offences Involving Shipwrecked Goods:** Upon summary conviction for unlawful possession of shipwrecked goods (see Criminal Code s. 451) or offering shipwrecked goods for sale (see Criminal Code s. 452), a magistrates' court is required to order the goods in question to be delivered up to the rightful owner.

**On Conditional Suspension of Punishment on First Conviction:** When a person who has not been previously convicted in Queensland or elsewhere of an offence of such a nature that, upon conviction, a sentence may be imposed restricting the liberty of the offender for a period of at least six months, is convicted of any offence of such a nature that he may be sentenced upon conviction to imprisonment for a period not exceeding three years, then, if in the opinion of the court a sentence of imprisonment for a period not exceeding three years is an adequate punishment, and if the offence has relation to property, or is an offence against the person, the court may, upon suspending the execution of the sentence, order the offender to make restitution of the property in respect of which the offence was committed.

The Court may assess the amount to be paid by the offender and direct when and to whom and in what instalments the amount ordered to be paid is to be paid.

**CRIMINAL CODE s. 656(5)**

**On Summary Conviction for a Property Offence:** When a person is summarily convicted of any offence relating to property, the magistrates' court may discharge the offender without inflicting any punishment upon his making such satisfaction to the person aggrieved for damages, with or without costs, as may be approved by the court.

**CRIMINAL CODE s. 657**

**Pursuant to Section 685 of the Code:** When a person is prosecuted, on the complaint of the owner of property or any person on whom the right to property has devolved by operation of law, on a charge of an indictable offence of which the unlawful acquisition of the property by him is an element and is convicted of the offence on indictment, the court may order the property to be restored to the owner.

**CRIMINAL CODE s. 685**

Such an order is binding only upon the offender and any person claiming through him.

The court may order that any personal property which is found in the offender's possession, and which appears to the court to have been derived from unlawful acquisition of property, shall be delivered to any person who appears to the court to be entitled to the property so unlawfully acquired.

These provisions do not apply to a valuable security, if it appears that the security has been paid or discharged in good faith by some person liable to the payment thereof.

These provisions do not apply to a negotiable instrument which has been taken or received by transfer or delivery in good faith by some person for a valuable consideration without any notice and without any reasonable cause to suspect that the instrument had been so unlawfully acquired.

**CRIMINAL CODE s. 685**

**Pursuant to Section 685A of the Code:** Upon the conviction on indictment or summarily of any person of an offence relating to property or against the person of another, the court may, in addition to any other penalty to which the offender is liable, order that the offender make restitution of property in relation to which the offence was committed.

**CRIMINAL CODE s. 685A(1) (a)**

It should be noted that such an order may stipulate:

- The amount to be paid by way of restitution.
- The person to whom the restitution is to be made.

. A time within which the restitution is to be made.
. The names in which the restitution is to be made.

**CRIMINAL CODE s. 685A(2)**

**Restitution of Stolen Cattle:** Restitution of stolen cattle may be awarded pursuant to s. 3 of the Cattle Stealing Prevention Act.

**Requirement to Hear Persons Affected by an Order of Restitution:** Persons affected by an order of restitution of property may, with the leave of the Court of Criminal Appeal, be heard by that Court before any order under s. 670 of the Code, annulling or varying such order of restitution is made.

**CRIMINAL PRACTICE RULES – ORDER IX r. 10**

## Disqualification from Driving

A most important feature of sentencing policy with regard to motoring offences is the use of the powers to disqualify an offender from holding or obtaining a driver's licence. The provisions relating to the disqualification of drivers of motor vehicles for certain offences received substantial amendment in the Traffic Act Amendment Act 1974. Section 12 of this Act repealed section 20 of the Principal Act and substituted extensive new provisions. Section 20 of the Traffic Act now provides for periods of disqualification of between one month and two years. Absolute disqualification or disqualification for such period as the court may specify is provided for in section 15, section 21, section 22 and section 54(1) of the Traffic Act and also by section 328C of the Criminal Code.

The explanatory notes that follow represent an attempt to simplify the complex statutory provisions relating to licence disqualification. The material has been arranged according to the period of disqualification that may be imposed in different circumstances (such as the relevant offence and prior convictions of an offender), and progresses from the shorter to the longer terms of disqualification. The legislative provisions imposing disqualification are also noted.

**Disqualification for a Period of Not Less Than One Month and Not More Than Nine Months:** An offender convicted under s. 16(2) can be disqualified for a period of not less than one month and not more than nine months if, during the period of five years prior to conviction, he has not been previously convicted:

. Under that subsection.
. Under subsection (1a) of that section as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

. Under subsection (1) of that section.
. Under subsection (1) of that section as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.
. Upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him; or
. Summarily of an offence against any provision of s. 328A of the Criminal Code.

It should be noted that s. 16(2) provides that any person who while the concentration of alcohol in his blood equals or exceeds 80 mg. of alcohol to 100 ml. of blood but is less than 150 mg. of alcohol to 100 ml. of blood:

. Drives a motor vehicle, tram, train or vessel.
. Attempts to put in motion a motor vehicle, tram, train or vessel; or
. Is in charge of a motor vehicle, tram, train or vessel,
. Is guilty of an offence and liable to a penalty not exceeding $400 or to imprisonment for a term not exceeding three months or to both such penalty and imprisonment.

It should also be noted that the period of disqualification is required to be determined by the court having regard to the concentration of alcohol in the blood of the defendant and the real or potential danger to the public in the circumstances of the case.

Note that s. 16(1a) immediately prior to the commencement of the Traffic Act Amendment Act 1974, provides that any person who, while the concentration of alcohol in his blood equals or exceeds 100 mg. alcohol to 100 ml. blood:

. Drives a motor vehicle, tram, train or vessel.
. Occupies the driving seat of a motor vehicle and attempts to put that motor vehicle in motion.
. Attempts to put in motion a tram, train or vessel.
. Is in charge of a motor vehicle,

shall be guilty of an offence and shall be liable to be convicted thereof in the circumstances prescribed by this subsection.

Note that s. 16(1) provides that any person who, while he is under the influence of liquor or a drug:

. Drives a motor vehicle, tram, train or vessel.
. Attempts to put in motion a motor vehicle, tram, train or vessel.
. Is in charge of a motor vehicle, tram, train or vessel,

is guilty of an offence and liable to a penalty not exceeding $800 or to imprisonment for a term not exceeding nine months or to both such penalty and imprisonment.

Note that s. 16(1) immediately prior to the commencement of the Traffic

Act Amendment Act 1974 provides that any person who, while he is under the influence of liquor or a drug:

- Drives a motor vehicle, tram, train or vessel.
- Occupies the driving seat of a motor vehicle and attempts to put that motor vehicle in motion.
- Attempts to put in motion a tram, train or vessel.
- Is in charge of a motor vehicle,

shall be guilty of an offence and shall be liable to the penalties there prescribed.

It should be noted that s. 328A of the Criminal Code provides that any person who drives a motor vehicle on a road or in a public place dangerously is guilty of a misdemeanour and is liable to a fine of $1000 or to imprisonment with hard labour for two years or to both such fine and imprisonment, or he may be summarily convicted before two justices in which case he is liable to a fine of $200 or to imprisonment with hard labour for six months or to both such fine and imprisonment. If the offender causes the death of or grievous bodily harm to another person he is liable upon conviction upon indictment to imprisonment with hard labour for five years.

**Disqualification for a Period of Not Less Than Three Months and Not More Than 18 Months:** An offender convicted under s. 16(2) can be disqualified for a period of not less than three months and not more than 18 months if, within the period of five years prior to such conviction, he has been previously convicted of an offence under that subsection (2) or under subsection (1a) of s. 16 as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

Again, the period of disqualification is required to be determined by the court having regard to the concentration of alcohol in the blood of the defendant and also the real or potential danger to the public in the circumstances of the case.

**Disqualification Without any Specific Order for a Period of Six Months:** The following classes of offender can be disqualified for a period of six months without any specific order:

An offender convicted under s. 16(1) provided he has not, during the period of five years prior to conviction, been previously convicted:

- Under that subsection.
- Under subsection (1) of s. 16 as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.
- Under subsection (2) of s. 16.
- Under subsection (1a) of s. 16 as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

. Upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him.
. Summarily of an offence against any provision of s. 328A of the Criminal Code.

An offender convicted under s. 16(2) if, within the period of five years prior to such conviction, he has been previously convicted:

. More than once of an offence against subsection (2).
. More than once of an offence under s. 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.
. Of an offence under s. 16(2) and of an offence under s. 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

An offender convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or an offender convicted summarily of an offence against any provision of s. 328A of the Criminal Code subject to the provisions of subsection 3 of section 20 of the Traffic Act.

Note that s. 20(3) of the Traffic Act provides that the normal period of disqualification under section 20(3) is a period of six months without the requirement of any specific order.

An offender convicted under s. 16A(22) (e) of the Traffic Act.

It should be noted that s. 16A(22) (e) of the Traffic Act provides that any person who, while his driver's licence is suspended pursuant to this subsection, drives a motor vehicle on a road or elsewhere is guilty of an offence and liable to a penalty not exceeding $400 or to imprisonment for a term not exceeding 12 months or to both such penalty and imprisonment.

**Disqualification Without Any Specific Order for a Period of Nine Months:** The following classes of offender can be disqualified for a period of nine months without any specific order:

An offender convicted under s. 16(1) if, within the period of five years prior to such conviction, he has been previously convicted of an offence under s. 16(2) or under s. 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

An offender convicted under s. 16(2) if, within the period of five years prior to such conviction, he has previously been convicted of an offence under s. 16(1) or:

. Under s. 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.
. Who has been convicted upon indictment of any offence in connection

with or arriving out of the driving of a motor vehicle by him.

. Who has been summarily convicted of an offence against any provision of s. 328A of the Criminal Code.

An offender convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or who has been summarily convicted of an offence against any provision of s. 328A of the Criminal Code if within the period of five years prior to such conviction he has been previously convicted:

. Under s. 16(2); or

. Under s. 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

**Disqualification Without Any Specific Order for a Period of 12 Months:** The following classes of offender can be disqualified for a period of 12 months without any specific order:

An offender convicted under section 16(1) if, within the period of five years prior to such conviction, he has been previously convicted of an offence under section 16(1), or under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

An offender convicted under section 16(1) if, within the period of five years prior to such conviction, he has been previously convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him, or who has been convicted summarily of an offence against any provision of section 328A of the Criminal Code.

An offender convicted under section 16(1) if, within the period of five years prior to such conviction, he has been previously convicted more than once of an offence under section 16(2) or:

. More than once of an offence under section 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

. Who has been previously convicted of an offence under section 16(2) and of an offence under section 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

An offender convicted under section 16(2) if, within the period of five years prior to such conviction, he has been previously convicted of an offence under section 16(2) or:

. Under section 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974 and has been previously convicted of an offence under section 16(1) or under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974; or

- Has been previously convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or summarily of an offence against any provision of section 328A of the Criminal Code.

An offender convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or who has been convicted summarily of an offence against any provision of section 328A of the Criminal Code if, within the period of five years prior to such conviction, he has been previously convicted:

- Of an offence (whether of the same or of a different kind) of either of the classes referred to above.
- Under section 16(1); or
- Under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

An offender convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or who has been convicted summarily of an offence against any provision of section 328A of the Criminal Code if, within the period of five years prior to such conviction, he has been previously convicted more than once of an offence under section 16(2) or:

- More than once of an offence under section 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.
- Who has been previously convicted of an offence under section 16(2) and an offence under section 16(1a) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

**Disqualification Without Specific Order for a Period of Two Years:** The following classes of offenders can be disqualified for a period of two years without specific order:

An offender convicted of an offence under section 16(1) if, within the period of five years prior to such conviction, he has been previously convicted more than once of an offence under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974 or who has been previously convicted of an offence under section 16(1) and an offence under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

An offender who is convicted of an offence under section 16(1) if, within the period of five years prior to such conviction, he has been previously convicted more than once upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or:

- More than once summarily of an offence against any provision of section 328A of the Criminal Code.
- Who has been previously convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him and summarily of an offence against any provision of section 328A of the Criminal Code.

An offender convicted under section 16(1) if, within the period of five years prior to such conviction, he has been previously convicted of an offence under section 16(1) or under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974 and has been previously convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or summarily of an offence against any provision of section 328A of the Criminal Code.

A person who is convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or summarily of an offence against any provision of section 328A of the Criminal Code if, within the period of five years prior to such conviction, he has been previously convicted more than once of an offence (whether of the same or of a different kind) of either of the classes referred to above or who has been previously convicted of an offence (whether of the same or of a different kind) of each of the classes referred to above.

A person who is convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or summarily of an offence against any provision of section 328A of the Criminal Code if, within the period of five years prior to such conviction, he has been previously convicted more than once of an offence under section 16(1) or:

- More than once of an offence under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.
- Who has been previously convicted of an offence under section 16(1) and an offence under section 16(1) as that section stood immediately prior to the commencement of the Traffic Act Amendment Act 1974.

A person who is convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him or summarily of an offence against any provision of section 328A of the Criminal Code if, within the period of five years prior to such conviction, he has been previously convicted of an offence (of the same or of a different kind) of either of the classes referred to above and has been previously convicted of an offence under section 16(1) or under section 16(1) as that section stood

immediately prior to the commencement of the Traffic Act Amendment Act 1974.

**Disqualification Absolutely or for Such Period as the Court May Specify:** Where a person is convicted upon indictment of any offence in connection with or arising out of the driving of a motor vehicle by him, the court, in addition to any sentence it may pass, may order and direct that the offender shall from the date of conviction be disqualified absolutely from holding or obtaining a driver's licence to operate a motor vehicle or be so disqualified for such period as the court shall specify in its order.

**CRIMINAL CODE s. 328C**

Where any person is convicted of an offence under the Traffic Act or is convicted upon indictment or summarily of an offence against any other Act or Law then, if the judge of the Supreme Court or District Court presiding at his trial upon indictment is, or the justices before whom he is summarily convicted are, satisfied upon the evidence:

- That any licence under the Traffic Act held by the offender enabled, aided or facilitated the commission of the offence by him; or
- That having regard to the nature of the offence or to the circumstances in which it was committed, or to both, the offender should, in the interest of the public, be prohibited from holding or obtaining any particular licence under the Traffic Act either absolutely or for a period, the judge or justices may order that the offender shall, from the date of the order, be disqualified absolutely from holding or obtaining such licence or all or any of such licences or to be so disqualified for such period as the judge or justices shall specify in the order.

**TRAFFIC ACT s. 54(1)**

It should be noted that s. 54(1) of the Traffic Act provides that at the trial of any person charged upon indictment with an offence in connection with or arising out of the driving of a motor vehicle by him, the judge presiding at his trial is satisfied that upon the evidence such person should, in the interest of the public, be prohibited from driving a motor vehicle either absolutely or for a period, the judge may, notwithstanding that such person is found not guilty by the jury, order that he shall from the date of the order be disqualified absolutely from holding or obtaining a driver's licence, or be so disqualified for such period as the judge shall specify in the order.

**TRAFFIC ACT s. 21**

It should also be noted that this provision confers upon a trial judge very wide powers as a disqualification order may be made in respect of a defendant even though that person has been acquitted by a jury of the offence charged.

Also note that s. 22 of the Traffic Act provides that similar provisions apply in the case of the hearing of a complaint by justices.
**TRAFFIC ACT s. 22**

## Adjournment of Sentence

When a person is convicted upon indictment or summarily of an offence relating to property, the court or justices may:

- Adjourn the matter of sentence to a place, date and time for up to 6 months after the date on which the offender is convicted; and
- Discharge the offender upon his entering his own recognisance, with or without sureties, in such sum as the court thinks or the justices think fit conditioned that he shall appear and receive sentence at the place, date and time to which the matter of sentence has been adjourned, or when called upon prior to that date.

This procedure has been enacted to enable the offender, during the adjournment of the matter of sentence, to take such steps as may be necessary to:

- Restore the property to which the offence relates to the person aggrieved by the offence.
- Reinstate that property to the satisfaction of the court or justices or the person aggrieved by the offence.
- Compensate the person aggrieved by the offence for the injury caused to his property.
- Comply in all respects with any order the court or justices may make.

**CRIMINAL CODE s. 19(9A)**

When the offender is before the court or justices to receive sentence, regard may be had to whether the offender has taken or caused to be taken the necessary steps referred to above.

If the offender fails to appear at the place, date and time to which the matter of sentence was adjourned the court or justices may forfeit the recognisance and issue a warrant for the arrest of the offender.
**CRIMINAL CODE s. 19(9A)**

# Chapter 4

# Matters Affecting the Determination of a Sentence

## Disparity of Sentences

Generally speaking where the Court of Criminal Appeal is asked to determine an appeal against sentence by one of two or more joint offenders the Court will consider the sentence on its merits in terms of the propriety of the order with respect to the individual offender. That is, the Court will look at the features of the relevant circumstances surrounding the commission of the crime, as well as those circumstances pertaining to the offender and his social background. This procedure can be expected to be adopted in cases where co-defendants have received substantially the same sentence for substantially similar parts played by each defendant in the commission of the particular offence.

Where one of two or more co-defendants appeals on the ground, *inter alia*, that he has received a disproportionately heavier sentence than his co-defendant and that correspondingly there is an absence of any circumstance to justify such disparity, the Court of Criminal Appeal has shown its willingness to reduce the sentence imposed upon the appellant.

However, this does not necessarily mean that if one of two or more co-defendants has been treated particularly leniently the Court of Criminal Appeal will reduce the sentence of his co-defendant or co-defendants so as to lessen the degree of disparity. To reduce the sentence on a defendant by upholding an appeal on the grounds that a co-defendant received a substantially more lenient sentence may be merely to impose a further incorrect sentence if it appears that the comparative sentence has been unduly lenient.

An interesting example of the way in which the Queensland Court of Criminal Appeal has recently dealt with the question of disparity of sentences is seen in the decision in *Williams and White* (C.A. 172 of 1974; C.A. 5 of 1975; C.A. 6 of 1975.) Both defendants were young males of Aboriginal descent. Williams had spent the greater part of his adult life in prison, while White was able to point to a satisfactory employment record. As far as

previous convictions were concerned, Williams had a very long criminal record and had been convicted on a number of charges of breaking and entering and of other offences of dishonesty. White had committed a series of comparatively minor offences some six years prior to the commission of the offence with which this appeal was concerned. Both defendants had been jointly indicted on a charge of murder and both had been convicted by jury of manslaughter.

The circumstances surrounding the crime involved a fracas outside a hotel resulting in the death of an innocent bystander who was beaten by fence palings, although it was not conclusively established that either of the defendants had actually struck the deceased. A third co-defendant subsequently disappeared from the scene of the crime and had not been located by the police at the time the sentences were imposed.

The trial judge imposed sentences of seven years imprisonment upon Williams and three years imprisonment upon White. The Minister for Justice appealed against both sentences as being insufficient and inadequate and Williams also appealed against his sentence as being manifestly excessive. W.B. Campbell J., having accepted the submissions on behalf of the Attorney-General that the trial judge placed too much importance on the subjective facts in White's case, made the following comments with regard to the disparity in the sentences:

> Having regard to my view that the sentence imposed upon Williams was by no means excessive, to the principle based upon the public interest that sentences upon co-defenders should, generally, compare favourably with one another, ... it is my opinion that the sentence imposed upon White is such as to warrant the interference of this court. I would allow the appeal against sentence, in the case of White by the Attorney-General, and order that a sentence of imprisonment with hard labour for five years be substituted for that of three years. I would dismiss the appeal by the Attorney-General against sentence in the case of Williams, and I would refuse leave to Williams to appeal against such sentence. The resultant differentiation in treatment between White and Williams, namely one of two years, is justified by a consideration of, and gives sufficient weight to, the matters to which His Honour referred, namely, the difference in their antecedents, the fact that Williams played a more dominant part in the attack, and the learned judge's view that White was a decent type of man.

In *Howard* (C.A. 130 of 1975) the Court of Criminal Appeal considered an appeal against a sentence of 16 months imprisonment with a recommendation that the defendant be considered for release on parole after serving six months, imposed upon conviction for an offence under s. 130 of the Health Act 1937–1973 of having possession, without authority or licence, of a prohibited plant, namely cannabis sativa, for a purpose specified in s. 130(2) (c) of the Health Act.

The co-defendant in the case had received a sentence of two years probation. There was no allegation that the offender had been more involved than his co-defendant in obtaining possession of the drug, it having been acquired by both defendants. The cost of $380 was also shared by both co-defendants. The only evidence against Howard was in admissions to the police; the cannabis being found in the possession of Howard's co-defendant. D.M. Campbell J., in commenting upon the disparity of the two sentences, stated that:

> There is a disparity in the sentences which the circumstances do not seem to justify. It is highly desirable in a case like this that there be uniformity. Where there is disparity it must lead to resentment against the system on the part of the joint offender receiving the heavier sentence. It may be thought that (the co-defendant) was treated too leniently; but that is beside the point. Both are young apprentices with similar backgrounds, and no distinction was or could be drawn between them on account of their antecedents. The appellant was sentenced on October 28, 1975; so he has been in prison since then. I think he should have been dealt with on the same footing as (the co-defendant). If he consents – as I assume he will – I will be disposed to set aside the sentence and admit him to probation for eighteen months on the terms upon which the order was made in (the co-defendant's case).

*Howard* is also important for the point that co-defendants or defendants in separate matters arising out of substantially the same fact situation should be sentenced by the same trial judge, or at least, the trial judge should be notified that another offence or other offences of one or more co-defendants arising out of the same facts has or have been dealt with. These remarks may apply equally to offences involving the same defendant which are dealt with on different occasions.

An example of this point is seen in *Timmermans* (C.A. 124 of 1973). There the defendant was charged with two counts of attempted incest involving two of his three daughters aged 12 and 10 respectively. For the offence in respect of which the appeal was brought, the defendant was sentenced on 25 September 1973, to four years imprisonment, and no recommendation concerning parole was made. This sentence may be compared to that imposed on 12 June 1973, in respect of one count of incest with a 16 year old daughter for which the defendant had received three years imprisonment with a recommendation that he be eligible for parole at the end of 12 months. Although the application for leave to appeal against sentence was refused, Andrews J. stated that:

> In my opinion regretably, regretably in the sense that we do not appear to be able to agree, the application should be refused. It seems quite likely to me that had

> all three matters been dealt with at the one time by the same judge and the facts in relation to the latter two offences made known at the time that they were being canvassed in respect of the first matter a heavier sentence would have been imposed in respect of the first offence, but for myself I cannot see that the learned trial judge has acted on any wrong principle, nor does it appear to me that any injustice has been done.

In circumstances where co-defendants are being sentenced in respect of the same offence and one defendant has elected to plead guilty to the charge and the other elects to stand trial, it is not necessarily the case that the defendant who pleads guilty to the offence can expect to receive a more lenient sentence than that imposed upon his co-defendant. Where, however, the defendant who pleads guilty indicates more than a mere confession of guilt to the extent that genuine remorse is shown, it may be possible for a sentencing court to take this into account.

In *Cox* [1972] Q.W.N. 54, the defendant was sentenced to imprisonment for seven years with hard labour after he had pleaded guilty to a charge of robbery in company while armed with an offensive weapon. Two other co-defendants also received seven years imprisonment. Before the Court of Criminal Appeal it was urged on behalf of the defendant that his record was not nearly as bad as that of the other two co-defendants and also that he had pleaded guilty. It was claimed that these circumstances called for a marked distinction in sentence being made in his case. After dealing with the appeals against convictions and sentences by the other two co-defendants, Hanger C.J. continued:

> As to the effect of a plea of guilty, I wish to make a comment. In *re Petty* [1969] Q.W.N. 17, W.B. Campbell J., in reasons with which the other members of this Court agreed, said:
>
> 'In addition to all the circumstances I have mentioned, I consider that regard should be had to the mitigating circumstances of the applicant's confession of guilt, and his co-operation with the investigating police officers – *R.* v. *De Hoan* [1967] 3 All E.R. 618'.
>
> The English decision referred to was given on October 9, 1967 and had been preceded by a decision in *R.* v. *Harper* given on October 6, 1967. The decision in *Harper* appears as a note to the reports of *De Hoan* in the All England Reports. Both cases are reported in the Queen's Bench Reports: [1968] 1 Q.B. 108. As appears from the note referred to of *R.* v. *Harper* in the All England Reports, the Court said:
>
> 'It is, however, proper to give an accused a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty'.
>
> In the Queen's Bench reports, the statement appears:
>
> 'It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things, by pleading guilty'.
>
> I think that it is the indication of genuine remorse which is the substance of the matter. This is not always necessarily shown by a plea of guilty.

Despite these examples of individual claims for mitigation, sentences on co-defendants will normally be considered by the Court of Criminal Appeal on the propriety of each sentence passed on an individual offender. The general principle of ensuring that sentences on co-defendants are not grossly disparate is subject in its implementation to considerations pertinent to a particular appellant or offender.

## Social Background of Defendant

Whether or not the social background or circumstances of a defendant should be considered in formulating a sentence depends upon both the antecedents of the defendant and the type of offence committed. Of course, in looking at the latter, attention will also be focused on the circumstances surrounding the commission of the offence. Thus, where a defendant resorts to the use of particularly grave acts of violence in the commission of an offence, the mitigating effect of that defendant's social background will be correspondingly lessened. Similarly, where the victim of a crime is abnormally vulnerable, such as where an aged victim is involved or where a victim is incapacitated physically or mentally, it is of little avail for a defendant to point to a history of social deprivation, in the hope of attracting a more lenient sentence. A long list of previous offences may also act to diminish leniency on the part of a court for a defendant who may have had an unfortunate background.

In *Williams* (C.A. 138–157 of 1974), the defendant, an 18 year old male, pleaded guilty to three charges of burglary, one charge of housebreaking, one of breaking, entering and stealing, two of stealing property of the value of $2,000, five of stealing and eight charges of unlawfully using a motor vehicle. The 20 offences may be subdivided into three distinct phases, commencing late in December 1973 and concluding about the middle of July 1974.

The trial judge, who requested and apparently relied upon a pre-sentence report, imposed sentences ranging from 15 months to 12 months imprisonment with a recommendation that the respondent be considered for parole after serving six months. On other charges he made probation orders.

The Attorney-General appealed on the grounds that the sentences were manifestly inadequate and that the trial judge had exercised his discretion improperly because of the decision in *Lihou* (C.A. 70–85 of 1974). In *Lihou* it was held that there was no power for a judge to make a probation order for some offences combined with a sentence of imprisonment for others with which he was dealing simultaneously.

In allowing the appeal, Wanstall S.P.J. acknowledged that although the respondent might have deserved the court's sympathy because of an unfortunate background, the long list of previous offences indicated that the interests of the public must be the paramount consideration. The respondent was the product of a broken home and also suffered through the early death of his mother. Largely because of these factors he had been denied many opportunities that others might have been able to accept. Hoare J. expressed the view that it was for these reasons that the trial judge had seen fit to extend leniency to the respondent.

In *Marsh and Marsh* (C.A. 80–81 of 1970), pre-sentence reports revealed that both appellants, aged 18 and 19 years respectively, were socially maladjusted with unfortunate histories of a disturbed home background; inadequate parental care, especially from their father; indifferent school achievement; and throughout adolescence an unstable, drifting pattern of behaviour.

In assessing penalties for offences of arson and stealing, the trial judge said that both defendants were quite incorrigible despite the hopes held out in the psychiatrists' reports. The trial court sentenced the older defendant to imprisonment for three years and the younger defendant to imprisonment for four years. Both appellants had previous convictions for stealing and the younger of the two had also been convicted of offences in relation to motor vehicles. However, it was significant that no sentencing court had deemed it appropriate to make a probation order in respect of either brother.

In upholding the appeals against sentence, on the ground that in each case the sentences were manifestly excessive, W.B. Campbell J. stated that:

> I do not think that it can fairly be said that these men are beyond reformation when they have not been subjected to the test of complying with the requirements of probation and I consider that, in the present cases, the reformative aspects of punishment so outweighed the deterrent factors as to justify an appellate court in holding that the terms of imprisonment imposed are sufficiently excessive to justify interference.

In *Williams* [1962] Q.W.N. 22, factors relating to the social background of an applicant were considered to be of sufficient relevance and weight for the Court of Criminal Appeal to reduce by 12 months a sentence of four years and nine months imposed on a conviction for unlawful carnal knowledge of a girl under 17 years.

The evidence showed that the victim was just over 15 years of age and was a virgin. There was no suggestion that she was in any way of loose character. While changing her shoes in a motor vehicle during a social function, which she was attending with her parents, the girl was threatened and had part of her clothing forcibly removed by the applicant. Later, at some little distance

from the vehicle, the act of intercourse took place. Although at this stage there was no use of threats or force, the victim claimed that she was in a state of fear. Applying for leave to appeal against sentence on the ground that the sentence was manifestly excessive, counsel for the applicant submitted that the trial judge had not given sufficient weight to the youth of the applicant, his previous good character and his somewhat unfortunate upbringing.

The importance of not destroying all degree of hope for a youthful offender from a deprived background has been acknowledged by the Court of Criminal Appeal. To impose a sentence of such length as to remove any chance of rehabilitation, even in the case of serious offences, may act only to create hopelessness or a desire to seek revenge on the part of a prisoner.

In *Scheutz and Young* (C.A. 68 and 69 of 1975), both applicants had been convicted of robbery in company, with personal violence and had been sentenced to six and 11 years imprisonment respectively. In the case of *Young,* two sentences of seven and four years hard labour had been made cumulative.

Douglas J., with whom Kneipp J. concurred, held that to make the second sentence cumulative with the first was, in turn, to make that sentence manifestly excessive:

> I agree with my brother presiding in respect of the application by Scheutz. I also agree in respect of the first sentence imposed on Young. So far as the second sentence is concerned, I unfortunately differ. No doubt these sentences, imposed as they were in respect of very serious crimes, were deserved and apposite to the crime committed. What troubles me is that Young at the time of the imposition of both sentences was aged some eighteen years. He came from a deprived background and, in effect, had not had much of a chance. There is no doubt that he must be punished, and punished severely, in the interest of the community. However, when one looks at the first sentence imposed objectively, seven years is a very long time for a young man aged eighteen years to serve. In itself, it would have the effect of being a deterrent, and a severe deterrent, to those who are inclined to perform in the same manner as he did. To impose the further four years, in my view, would have the effect of destroying hope so far as the applicant is concerned. If he served seven years there is some chance of his rehabilitation. If the further four years is to be served after the seven years I have no doubt that he would start off with an attitude of hopelessness.

Accordingly, the second application for leave to appeal against sentence by Young was allowed and the sentence varied by making it concurrent with the first sentence.

## The Effect of Section 16 of the Criminal Code

The legal maxim that no person should be punished twice for the one fault receives recognition in Queensland law through the provisions of section 16 of the Criminal Code. That section provides that:

> A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death notwithstanding that he has already been convicted of some other offeence constituted by the act or omission.

The Court of Criminal Appeal has recently had cause to consider the scope of and basis for this provision in *Gordon* [1975] Qd. R. 30. The facts of the case are set out in the judgment of Williams J.:

> On the 27th April, 1973 the accused drove from Toowoomba intending to proceed to Brisbane along the Cunningham Highway. At a point along the Highway some little distance on the Brisbane side of Ipswich, whilst driving his vehicle he came into collision with a motor cycle being ridden by [G] towards Ipswich in an opposite direction. One important factor that has not yet been stressed is that the accused and [G] were approaching one another upon a divided Highway but whilst [G] was on his correct side of a median strip the accused was on his incorrect side approaching [G] at a speed not less than 70 m.p.h. and on what was obviously a collision course. The scene of the accident was approximately 2.3 miles from a bridge which constitutes part of a by-pass road and under which the accused passed shortly prior to his apparently mistaking his correct side of the roadway, a mistake which led him to the wrong side of the median strip. That he proceeded along this median strip for some considerable distance at a speed of not less than 70 m.p.h. was well verified from an eye witness who drove his vehicle on the correct side of the median strip and endeavoured by flashing his lights and sounding his horn to warn the accused of his situation. The evidence would seem to indicate that the accused did not observe the warning. Certainly he took no steps to get back onto his correct side of the roadway. The witness' evidence indicated that the accused's vehicle was driven on a somewhat erratic course along the incorrect side of the median strip over an area that seems to have occupied at least two lanes for outbound traffic to Ipswich. The speed limit at the relevant point was 60 m.p.h.
>
> One relevant reason for the unusual conduct of the accused was that he was under the influence of alcohol. He admitted to the Acting Government Medical Officer who examined him on that evening that he had consumed alcohol and that he also had taken prescribed medication. The doctor said that when he examined the accused some time after the accident his speech was loud, his gait was normal but his reaction to a number of co-ordination tests was not within normal limits. The doctor described his behaviour during the interview was incongruous. He formed the opinion that at the relevant time namely about 11 p.m. on the 27rh

> April, 1973 the accused was under the influence of alcohol to such an extent that he was incapable of being in charge of or driving a motor vehicle.

The accused subsequently appeared before a stipendiary magistrate and pleaded guilty of being in charge of a motor vehicle while under the influence of liquor or a drug. He was fined $350 and disqualified from holding or obtaining a driving licence for a period of 18 months. Some four months after the proceedings in the magistrates' court with respect to the drink driving charge, an indictment charging the accused with dangerous driving causing grievous bodily harm was presented in the District Court before His Honour Judge B.M. McLoughlin to which the accused pleaded guilty.

It was argued on behalf of the accused that Section 16 precluded the punishment of the accused in respect of the indictment because he had previously been punished for the same 'act or omission' in the proceedings before the stipendiary magistrate. Judge B.M. McLoughlin elected to follow his own decision in *Millward's Case* and accordingly recorded a conviction against the accused for the offence of dangerous driving causing grievous bodily harm and imposed no penalty. He stated that:

> I have no doubt whatsoever that in imposing punishment upon the accused [the stipendiary magistrate] took into account as he was bound to do, the dangerous nature of the accused's driving and the injuries that he caused to the person [G] as well as the fact that he was under the influence of liquor at the time in question.

The Crown, in the role of appellant before the Court of Criminal Appeal, argued that on the charge of dangerous driving causing grievous bodily harm, the accused could and should have been punished in that he had not been punished previously on the charge of being in charge of a motor vehicle while under the influence of liquor or a drug for the same 'act or omission'.

To better explain the provisions of section 16 of the Criminal Code both the Chief Justice and Mr Justice Williams referred to section 17 of the Code, which relates to former conviction or acquittal and provides that:

> It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which he might have been convicted of the offence with which he is charged, or has already been acquitted upon indictment, or has already been convicted of an offence of which he might be convicted upon the indictment or complaint on which he is charged.

These provisions of section 17 are designed to ensure that an accused person who is charged and convicted or acquitted of an offence which may be constituted in one form or another by legislation but which consists of the

same act or omission, regardless of the offence alleged, is not exposed to the risk of being put in jeopardy twice in respect of the same offence.

Hanger C.J., referred to some examples in the Code where section 17 operates to prevent a double set of proceedings. For example, by section 212, it is an offence to have unlawful carnal knowledge of a girl under the age of 12 years; by section 215, it is an offence to have unlawful carnal knowledge of a girl under the age of 17 years; by section 216, it is an offence to deal unlawfully and indecently with a girl under the age of 17 years; and by section 350 it is an offence unlawfully and indecently to assault a woman or girl. By carrying out one act it is conceivable that a man could simultaneously commit all of these offences.

Pursuant to the provisions of section 578 of the Criminal Code on an indictment charging a person with the crime of having unlawful carnal knowledge of a girl under the age of 12 years, he may be convicted of any offence which is established by the evidence, or he may be convicted of unlawfully and indecently assaulting the girl or of unlawfully and indecently dealing with a girl under the age of 12 or 17 years. By virtue of the provisions of section 17, if a person had been charged with the crime of having unlawful carnal knowledge of a girl under the age of 12 years, he could not then be convicted of any of those offences referred to subsequently.

However, section 17 cannot be extended to apply to all situations where separate offences may be constituted by the same act or omission. Hanger C.J. cited as examples section 222, by which it is an offence for a man carnally to know a girl who is, to his knowledge, his daughter; and section 212 which renders the act of incest a separate crime if the girl is under 12 years. Proceedings consequent upon an indictment under section 212 would not act to bar later proceedings taken under section 222.

Furthermore, by section 210, it is an offence to unlawfully and indecently deal with a boy under the age of 14 years; and by section 211, it is an offence for a male person, in public or private, to commit an act of gross indecency with another male person. As pointed out by the Chief Justice, one and the same act is capable of constituting each of these separate offences and the provisions of section 17 of the Code do not operate to prevent successful prosecutions for each of the offences.

It is at this stage that section 16 comes into operation by prohibiting the punishment of a person for an offence where the 'same act or omission' is that which constitutes an offence for which that person has been previously punished. As Hanger G.J. noted:

> Section 16, in saying that a person cannot be twice punished for the same act or omission, must be referring to punishable acts or omissions; and the prohibition

> applies though the act or omission would constitute two different offences. It is to these cases that the section is directed.

The judgment of Williams J., also refers to the limited application of section 17 which is perceived as a defence, *inter alia*, to a charge for the same offence or for one on which the accused could have been convicted at a previous hearing. By comparison, leaving aside the proviso, section 16 is concerned with punishment for the same act or omission. Although Mr Justice Williams was aware of the problems associated with an attempt to state a general rule as to the application of Section 16, he did state that:

> In the final result it seems to me that the proper test in whether the same wrongful act or omission which previously resulted in conviction and punishment, is the central theme, the focal point or for want of a more apt choice of words and perhaps more appropriately, the basic act or omission in the later offence charged. If it is, then except in the case of resulting death in terms of the exception in Section 16, a person may not be twice punished for that same act or omission. In my view it would be dangerous to attempt to state the position more specifically in the hope of propounding a general rule. Each set of situations should be considered on their own particular 'acts or omissions'.

In *Gordon's Case*, [1975] Qd. R. 30, it will be recalled that the two offences charged were, first, driving a motor vehicle while under the influence of liquor or a drug and, second, driving dangerously causing grievous bodily harm. Clearly, the former offence can be established with either no evidence as to the manner of driving or with evidence establishing that the manner of driving was of a lawful nature. Williams J. noted that it was not incumbent on the prosecution to establish as an element of the drink driving charge the manner in which the vehicle had been driven. However, evidence of the fact that the accused drove in a dangerous manner was properly adduced before the magistrate in that this allowed the magistrate to form an opinion as to the appropriate penalty in view of the circumstances in which the alleged offence had been committed. Williams J. observed that:

> Had the man been driving carefully and had there been no accident it may well be that the Magistrate would and should have imposed a lesser fine.

By the same token, in respect of the indictment charging dangerous driving causing grievous bodily harm, it was a relevant consideration in assessing penalty that a fine of $350 had already been imposed by the magistrate in respect of the drink driving charge.

However, because one offence involved an act of driving in a particular condition and the other concerned an act of driving in a particular manner

causing a certain result, the same 'act or omission' was not involved and each offence was liable to attract a penalty.

Having determined that section 16 could not be invoked successfully by the respondent, and also that the order of the District Court following his conviction on his own confession was an order falling within the definition of 'sentence' in section 668 of the Code, and accordingly was appealable under section 669A, the Court of Criminal Appeal imposed sentence.

## Pre-sentence Reports

**Court's Power to Require Report:** The power of a court to require the submission of a psychiatric report derives from the provisions of the Offenders Probation and Parole Act 1959–1971 s. 6(1).

This section provides that the Chief Probation Officer shall, when so required by any court, cause to be prepared and submitted to that court such reports upon and information with respect to any convicted person as the Court requires.

Note that such reports may be required by a court and prepared by the Chief Probation Officer only with respect to persons who have been convicted of an offence.

**Contents of Report:** Pre-sentence reports can be expected to contain information pertaining to the character, personality and social and domestic background of the convicted person. Such background information would be expected to relate to his educational, training or employment record and to this extent information may properly be obtained from employers, teachers and the like in those cases where the probation officer considers that the attitudes and habits of the convicted person may be known to them.

Note that although probation officers who prepare pre-sentence reports may sometimes prefer that their informants should remain anonymous, a court is entitled to require the identity of such persons and a probation officer must in these circumstances reveal the informants' identities.

Note also that pre-sentence reports may properly express a view on the likely response of a convicted person to probation or, conversely, on the likely effects of some other form of treatment or punishment.

**Requirements as to Form:** Part 1 of the Offenders Probation and Parole Regulations of 1959 deals with pre-sentence reports, including psychiatric and medical reports.

Any court which wishes to receive a pre-sentence report on a convicted person may request such a report from the Chief Probation Officer in the

form or to the effect of Form A of the Schedule to the Regulations.

Form A of the Schedule to the Regulations is as follows:

The Offenders Probation and Parole Act 1959–1971
Chief Probation Officer,
Brisbane
At (name of Court) on , (name in full) (surname in block letters) who resides at (full address) was convicted of and remanded for sentence in custody (on bail) (strike out words not applicable at
He is to appear for sentence at on
Please submit a pre-sentence report to
Medical report required (not required) (strike out words not required).
Psychological report required (not required) (strike out words not required).

(Clerk or Officer of the Court)

Dated / /19 .

N.B. – This report is to be submitted in triplicate within 21 days after receipt of this request.

Note that a report is required to be furnished to the court within 21 days of the receipt of the request by the Chief Probation Officer.

**THE OFFENDERS PROBATION AND PAROLE REGULATIONS OF 1959 REGULATION 4**

A probation officer is assigned by the Chief Probation Officer to prepare an individual report.

When completed, the report must be submitted in triplicate to the court and at the discretion of the court copies may be made available to both the prosecution and the defence.

**THE OFFENDERS PROBATION AND PAROLE REGULATIONS OF 1959 REGULATION 6**

**What Type of Case Requires a Report?** There is no limit as to the type of case in which a court may require the submission to it of a pre-sentence and psychiatric report. Clearly, cases which reveal aberrant, depraved, and erratic behaviour will tend to attract requests for the submission of psychiatric reports. However it may also be expected that where criminal behaviour is of a type previously unencountered in a particular offender, a court may consider it appropriate to attempt to ascertain the underlying psychiatric reasons for this change of habit.

For example, in *Langford* [1974] Qd. R. 67, the defendant had a criminal record consisting largely of convictions for false pretences. In the 10 years

between 1961 and 1971 the defendant had been convicted of over 60 counts of false pretences or attempted false pretences. During the defendant's career of crime there had never been a suggestion of any predilection for crimes involving personal assaults of a sexual nature. Then, in 1973, the defendant was convicted of rape in circumstances which involved the threatened use of a pistol, the terrifying of the victim and other women concerned, and the subjection of the victim to gross indecencies. In this context the trial judge deemed it proper to obtain a pre-sentence and a psychiatric report before imposing sentence. The Court of Criminal Appeal refused an application for leave to appeal against a sentence of 12 years imprisonment.

The attitude of a convicted person during trial towards the proceedings may encourage the trial judge to request a psychiatric report. In *Hall* (C.A. 131 of 1974), the defendant was convicted of incest committed with his daughter who at the time was aged 10 years. The father initiated the girl into acts of sexual intercourse and other indecent acts and consequent upon that initiation she had had intercourse with another man of 29 years and with a great number of school boys.

These facts alone would probably have justified the court's requesting a psychiatric report. However the behaviour and attitude of the defendant during his trial no doubt indicated to the trial judge that the submission of such a report was absolutely necessary. The accused exhibited no contrition whatever and regarded his convictions as being a result of a conspiracy between the police officers and his wife who wanted to get rid of him. According to him, the conspiracy extended to his solicitor, his barrister, and the magistrates' court. In imposing a sentence of six years imprisonment, the trial judge commented that:

> The fact that you have no contrition and the fact that you maintain your innocence of this may well be due to a particular mental state which has developed in you.

The contents of the psychiatric report demonstrated that there was imposed on the court a clear duty to keep the defendant out of circulation in the community for a considerable time.

**Protection for the Community**: Where a psychiatric report indicates that a defendant should be under control for a lengthy or indefinite period, such control should not be implemented through a sentence for life imprisonment in cases where the making of such an order would impose a manifestly excessive sentence. The necessary protection for the community and degree of control required over the defendant may be obtained through a recommendation by the court that the Comptroller-General of Prisons favourably

consider taking action under the Prisons Acts 1958 to 1964 s. 16.

The Comptroller-General of Prisons is authorised to order the removal of any prisoner from any prison to any mental hospital where a medical officer has satisfied him that such removal is required for the medical treatment, observation or examination of the prisoner concerned.

**PRISONS ACT 1958 to 1964 s. 16(1) (ii)**

Such a prisoner shall be detained in such hospital until the responsible medical practitioner certifies that he has recovered or is not mentally ill.

In *Gascoigne* [1964] Qd. R. 539, the defendant, aged 28 years was convicted of the offence of unlawful wounding. The victim, who was not known to the defendant, was looking in a shop window in a main city street at about 9.45 pm when the defendant came up behind her, caught her by the shoulders, stabbed her in the back with a knife and hurried off down the street.

The defendant told a police officer that he came to Brisbane looking for 'his girl' whom he was going to stab to death. He said he had mistaken the victim for 'his girl', and ceased his attack when he discovered his mistake. He was mentally examined after conviction and three doctors, two of them psychiatrists, gave evidence before the trial judge pronounced sentence. All agreed that the defendant should be kept under strict control, two saying that a minimum period of five years was necessary.

The psychiatric report stated that the defendant was psychopathic, and suffered periods of depression and withdrawal, suggestive of a schizoid personality. He was addicted to alcohol and the effect of alcohol appeared to be to precipitate schizophrenic delusions resulting in irresponsible behaviour such as attempts at suicide and homicidal attacks such as the one with which he was charged. It was unlikely that his behaviour would alter materially in the foreseeable future, particularly should he be free to go on drinking sprees again.

The report stated that the defendant should be kept under control and surveillance for an indefinite period – certainly not less than five or even 10 years – in a suitable institution, and adequate safeguards should be provided for parole and surveillance when he was released.

In these circumstances the trial judge sentenced the defendant to life imprisonment. In upholding an appeal against the sentence, the Court of Criminal Appeal held that apart from any question of the mental condition of the appellant, the sentence of life imprisonment with hard labour was manifestly excessive. The court recommended that the Comptroller-General of Prisons should favourably consider taking action under section 16 of the Prisons Act of 1958. A sentence of imprisonment with hard labour for five

years was imposed by the Court of Criminal Appeal.

In *Murdock* (C.A. 82 and 158 of 1978) the Court of Criminal Appeal considered the effect of the decision in *Gascoigne* and stated that:

> The first case in which *R.* v *Gascoigne* was considered was *R.* v *Pedder* (No. 16 of 1964 – unreported), in which the judgment of the Court of Criminal Appeal was delivered on 19th May 1964, two months after the decision in *R.* v *Gascoigne* had been given. In that case the applicant had been charged with murder by shooting, but convicted of manslaughter on the ground of diminished responsibility. He was a man of 78 suffering from a senile delusional state, and the medical opinion was that it could not be said that incidents of violence would not recur. He was sentenced to life imprisonment, the learned judge remarking that the sentence was imposed with a view to protecting the community and the applicant himself, and not merely for the purpose of punishing the applicant. He applied for leave to appeal against his sentence, which was refused. The court consisted of Mansfield C.J. (who had written the leading judgment in *R.* v *Gascoigne*), Jeffriess J. and Gibbs J. The judgment was written by Gibbs J., the other members of the court agreeing. Gibbs J. after remarking that the court had been pressed with the decision in *R.* v *Gascoigne*, went on to say:
>
> 'R. v. *Gascoigne* is no doubt authority for the proposition that any sentence imposed must be in respect of and appropriate to the crime committed, but it does not in my opinion decide that the protection of the public is not a matter that should be considered in imposing sentence. Indeed the protection of the community is one of the most important results that the criminal law is designed to secure'.
>
> Later he said:
>
> 'There are cases in which the mental condition of the convicted person would make him a danger if he were at large and in some such cases sentences of life imprisonment may have to be imposed to ensure that society is protected. It is true that the proper place for many of such persons is a mental hospital rather than prison. But the court has no power (such as that conferred by section 60 of the Mental Health Act 1959 of the United Kingdom) to order that the offender be admitted to hospital and it cannot abdicate its duty to impose a proper sentence on the assumption that if the offender was sentenced to a short term of imprisonment he might be transferred to and kept in a security patient's hospital'.
>
> *R.* v *Pedder*, then, was a unanimous decision of the Court of Criminal Appeal to the effect that *R.* v *Gascoigne* did not decide that the protection of the community was not a matter for consideration in passing sentence.

The effect of *Gascoigne* was explained as follows:

1. The sentence imposed was much heavier than the circumstances of the offence warranted;
2. In imposing it, the learned trial judge gave more weight to the protection of the public than to the consideration of what was an appropriate sentence

having regard to the circumstances of the offence;

3. It would have been open to the judge to have had regard to the provisions of the Mental Health Act dealing with the disposition of mentally disturbed prisoners.

However, there are cases where the facts and the psychiatric evidence indicate the necessity of imposing a sentence which will leave the time at which the prisoner is to be released wholly within the discretion of the executive.

The only sentence which is capable of achieving that object under Queensland law is one of imprisonment for life. In *Church* (C.A. 39 of 1974), the defendant had pleaded guilty to a charge of attempted murder. The facts indicated that the defendant had abducted a girl who had hitched a ride with him and had kept her in captivity for a considerable period of time.

At no time after the girl became aware of the defendant's apparent intentions did she consent to anything he proposed or to her remaining in his company. Over a lengthy period of time the defendant subjected the victim to a number of serious threats and acts of violence and other indignities culminating in his raping her and then, with the intention of killing her, stabbing her many times. The defendant left the victim in the bush in the belief that he was leaving her for dead.

A psychiatric report described the defendant as having a schizoid personality, and as being a withdrawn, sensitive and an isolated loner. But, according to the report, factors other than the personality of the defendant played an important part in the motivation of the crime. These were the defendant's repressed anger towards his mother and what he misrepresented as provocative behaviour by the girl following her rejection of him.

In these circumstances the trial judge sentenced the defendant to imprisonment for 15 years with hard labour. The Attorney-General appealed against this sentence on the ground that it was insufficient and inadequate in the circumstances. The Court of Criminal Appeal upheld the Attorney's appeal and sentenced the defendant to imprisonment for life with hard labour. Mr Justice Kneipp commented that:

> Having regard to the nature of the crime and to the defects of the prisoner's personality, which, to my mind, raise for serious consideration the risk that the prisoner's misconduct, or misconduct of a similar nature, might be repeated, I think that the matter can be dealt with adequately only by the imposition of a sentence which will leave the time at which the prisoner is to be released if he should be released, wholly within the discretion of the Executive. This, I think is necessary in the interests both of the public and of the accused.

In such cases it is clear that the role of a psychiatric report is most important. The protection of the community, and also of the defendant, may sometimes be adequately protected only by the recognition by a psychiatrist of dangerous traits and defects in an offender's personality.

*Doe* (C.A. 27 of 1975), shows how the trial judge was able to assess the prisoner as a man who was potentially violent and distressed and to realise that the possibility of further homicidal behaviour existed if he were to become emotionally upset. Again, through the contents of the psychiatric report, the protection of the community was revealed as an absolute necessity.

**Court's Attitude to Expert Psychiatric Evidence:** The court will not invariably accept the expert opinion of a psychiatrist when assessing penalty. This is particularly so in cases where a psychiatric report stresses the importance of the rehabilitation aspect but the court sees its primary duty as being to give greater recognition to the preventive and deterrent aspects of punishment.

The position adopted by the Court of Criminal Appeal in *Brown* (C.A. 109 of 1972), although relating to the broader question of the evidence of psychiatrists generally, stresses that the court will not abdicate its responsibility to the opinion of an expert psychiatrist in assessing appropriate punishment in a particular case.

The defendant had pleaded guilty to a charge of manslaughter with diminished responsibility and had been released on probation for a period of two years. The trial judge made it a special condition of the probation order that the respondent submit to treatment by a psychiatrist, and by any other medical practitioner advised by that psychiatrist, during the probation period, and that the defendant undergo such therapy and treatment as the psychiatrist advised.

In upholding an appeal by the Attorney-General on the ground that the sentence imposed was inadequate, the Court of Criminal Appeal took the opportunity to consider at length its attitude to the reliability of opinions of qualified psychiatrists as to the future behaviour of an individual patient. In his judgment the Chief Justice referred to the writing of psychiatrists with respect to the difficulties of making psychiatric diagnoses, prescribing treatment and evaluating results:

> For instance, I find in the Handbook of Psychiatry, 1969 Ed., the following passages. The authors, after referring to certain problems of diagnosis say at pp. 50–51: 'Many of these problems of diagnostic reliability are serious enough to call into question the value of psychiatric diagnosis as it is presently accomplished. Even greater doubts are raised when one considers the unproved validity of psychiatric diagnosis (the fact that diagnostic statements often prove to be of limited value even when they are rigorously attained) . . .
>
> Traditionally, the medical clinician has assumed that a diagnostic formulation

> based on knowledge of the origin, signs and symptoms of an illness ultimately permits its successful treatment. Since the origin and course of most functional illnesses are not known, and diagnosis of these illnesses from signs and symptoms is both largely unreliable and of unproved validity, many investigators now propose radical changes in the manner of approaching diagnosis . . .
> In spite of these valid criticisms and the attractiveness of potentially useful new diagnostic techniques, not enough is known today to justify acceptance of any one of them or of traditional medical model views. For one thing, continuing efforts are being made to maximise the reliability of diagnosis from signs and symptoms based upon alternations of current procedures, to permit final definitive assessment of the validity of diagnosis.

The Chief Justice concluded that:

> It would, in any case, seem clear that the diagnosis of a patient who is mentally ill is fraught with extreme difficulty.

The difficulties of psychiatric diagnosis and prognosis were seen by the Chief Justice as follows:

- How does the psychiatrist know his patient is cured?
- For how long will the cure be effective?
- How does the psychiatrist reach his prognosis?
- Is the psychiatrist not very dependent in reaching his conclusion upon what the patient tells him?

The Chief Justice's doubts about the reliability of psychiatric diagnosis and prognosis were prompted by psychiatric evidence asserting that the defendant, who had without justification killed a person, should be allowed to go free in the community.

The evidence of two psychiatrists was to the effect that, although the defendant's capacity to control his actions at the time of the killing was substantially impaired, he was now quite safe to be freed in the community. The judgment of the Chief Justice continued:

> I have referred to these text books to check opinions I held as to the reliability of the opinions of psychiatrists in their particular specialty. In this case, the responsibility cast upon the Court is as grave as a responsibility can be. The shooting took place on 3 March of this year. The capacity of the respondent to control his actions is taken as less than that of a murderer who could not plead diminished responsibility. While it is the duty of our courts to give great importance to the rehabilitation of an offender in the determination of the appropriate sentence, the interest of the community remains a matter of serious importance. The preventive and deterrent aspects of a sentence have always been important.

Similar doubts about the reliability of psychiatric opinion were expressed in the judgment of W.B. Campbell J.

> I have asked myself many times – to what extent should I rely on the opinion evidence of psychiatrists? Psychiatry is an inexact science; no one can be certain that the respondent, if placed under stress, will not react in a fashion similar to that when he displayed such abnormal behaviour on March 3, 1972; he has been out of confinement a mere two months. How far is a court justified in exposing the community to risk by allowing the respondent to live freely within it in order that he may the more readily be restored to health? It is a question of the balancing of one interest against the other.

Thus, despite psychiatric evidence contained in a pre-sentence report or given in oral testimony as to the hopeful prognosis with respect to an offender, the court will nevertheless balance the interests of the offender against those of the community at large. It should be remembered that it is the court, not the psychiatrist, which carries the final responsibility for releasing a potentially dangerous person into the community.

**Conflict of Reports and Conflict of Interests:** There may be cases where a trial judge has requested a pre-sentence report, including a medical or psychiatric report, and where a conflict arises in the contents of the reports.

For example, in *Tacey* (C.A. 6 of 1973), the pre-sentence report of an officer of the Queensland Probation Service and the report of the State Psychiatry Clinic formed part of the court record. The defendant had pleaded guilty to a charge of assault occasioning bodily harm. The victim was a girl who had been keeping company with the defendant over some seven months in an emotional relationship in which it appears that the stronger feeling was on the side of the defendant. The judgment of Mr Justice Wanstall S.P.J., reveals the divergence in the contents of the two reports:

> [The trial judge] was profoundly influenced by the report of the probation officer, which he described as the most 'glowing' one he had seen on the bench. One sentence of it reads 'if ever there was a candidate for probation there is Tacey'. His decision to grant probation was made 'primarily because of the contents of the pre-sentence report and the recommendations contained in it'. He had been disturbed by the remark of the psychiatrist that Tacey 'feels very insecure in his relationships with women and feels untrusting and suspicious towards people', and his opinion that Tacey 'has a midly paranoid personality disorder with a high anxiety level and a tendency to impulsive behaviour'. Doubtless (the trial judge) felt that on this report there was a risk of repetition of violence, and so he sent for the probation officer and discussed it with him. He mentioned for the record that the probation officer did not find the psychiatrist's observations borne out by his own inquiries and investigations.

The Court of Criminal Appeal found nothing in the record to indicate that

the trial judge had erred in any particular and considered that the record did show that the trial judge had considered all the relevant factors. The Court refused the appeal by the Attorney-General against the sentence of two years probation imposed by the trial judge.

Where a pre-sentence report which contains also a psychiatric report has inherent inconsistencies such as those in *Tacey* (C.A. 6 of 1973), the trial judge may be required to make his own assessment of the validity of the conflicting aspects of the reports. *Tacey* (C.A. 6 of 1973), shows that it cannot be assumed that the report of a psychiatrist will be preferred to that of a probation officer where there are conflicting opinions.

Where a psychiatric report concerns itself exclusively with the interests of the subject and fails to take into consideration the interests of the community in general, it can be expected that such a report will receive proportionately less recognition from the court. Such was the case in *Schloss* (C.A. 64 of 1974), where the Court of Criminal Appeal commented that the medical, psychiatric and probation reports are:

> . . . concerned only with the interests of Schloss. We have also to think of the interest of the community at large regarded separately and of those persons in the community who are potential offenders of the samd kind.

## Record of Offender

**General Principle**: The general principle that a bad criminal record is not held to justify an increase in sentence beyond that appropriate to the particular facts of the case has been recognised by the Court of Criminal Appeal in *Stephens* (C.A. 104–107 of 1974), where Wanstall S.P.J. stated that it would be wrong to punish an offender because of his record as such.

The defendant had a particularly bad criminal record and had also enjoyed the benefit of probation orders on a number of occasions. In these circumstances a sentence of imprisonment for four years imposed for four offences of breaking, entering and stealing was increased by the Court of Criminal Appeal to a sentence of six years imprisonment for each offence, the sentences to be served concurrently. Although the court held that it was improper to increase the sentences on the basis merely of the defendant's bad record, the fact that the defendant was on probation at the time the offences were committed, and the fact that the offences were committed in succession for gain, were held to justify a longer sentence than that which had been imposed in the District Court.

When the Court of Criminal Appeal increases a sentence imposed on a

defendant with a bad criminal history, it does not do so on the principle that it is the prior record of the defendant which warrants the increased penalty, but rather on the principle that the trial judge may have given too much weight as a circumstance of mitigation to a criminal history that clearly does not warrant such treatment.

In *Coss* (C.A. 26 of 1975), the defendant's criminal record included 20 convictions for stealing, housebreaking, breaking, entering and stealing, breaking and entering with intent, unlawfully using motor vehicles, false pretences and receiving. All the offences were committed over the last 10 years.

In quashing a sentence of imprisonment for two years upon the appeal of the Attorney-General, and imposing a sentence of four years imprisonment, Wanstall S.P.J., with whom the other members of the Court agreed, stated that:

> Regarding the appeal of the Attorney-General against sentence, it is my opinion that the sentence is manifestly inadequate for a person with the sustained criminal record of Coss . . . He has been given at least four recognizances or other suspended sentences for parole with a view to encouraging his rehabilitation. I am satisfied that he is incorrigible and one of that type of persistent offender who must be incarcerated for the protection of the community.

Thus, the general principle governing the relevance of an offender's previous record should not be seen in terms of a longer sentence being imposed as a progressive aggravation of the basic penalty for an offender with a bad record. Instead, it should be seen in terms of the sentence being a progressive loss of credit for good character which diminishes in direct proportion to the offender's worsening record.

**Disputation of Facts at Sentencing**: If the accused wishes to dispute any fact stated by the prosecution and does so dispute, the trial judge is precluded from taking the disputed fact into account without satisfactory proof of its accuracy by the prosecution. In *Munro* (C.A. 110 of 1972), Williams J. stated that:

> In my experience the practice in this State has always proceeded upon the basis that it is not necessary for the accused to admit the truth of every fact stated by the prosecution before the judge may act upon it. Rather, those facts not disputed by or on behalf of the accused are taken as admitted. If any doubt is raised as to the truth of any of those facts then if the Crown does not see fit to clarify the matter it seems to me that the Court must disregard such facts or else form a view upon them consistent with what the accused is prepared to concede them to be.

In *Munro* it was of particular significance for the Crown to clarify matters expressly raised by the respondent in respect of his criminal history between certain periods.

Because the defendant contended, before both the trial judge and the Court of Criminal Appeal, that certain convictions in 1966, 1970 and in 1971 were the result of 'hounding' by the police relating to events which occurred some 10 years previously, and because the Crown was not in a position to either verify or dispute these assertions, the Court of Criminal Appeal accordingly considered itself bound to regard the defendant as a man who had for approximately five years attempted unsuccessfully to rid himself of his criminal inclinations. Williams J. considered that this situation:

> Indicates the need for some system whether by way of computerisation or otherwise to ensure the collation and ready availability of details of convictions recorded (including where possible the date of the alleged offence) at the least, throughout Australia. In my view on this appeal the accused must be given full credence in relation to what he says were the facts dealing with his criminal record during this period.

In *Gilder Rose* [1978] Qd. R. 61, the applicant pleaded guilty in the District Court to a charge of unlawfully and indecently dealing with a boy under the age of 17 years. The trial judge requested that a pre-sentence report, together with a psychiatric and psychological report, be furnished and he remanded the applicant for sentence at a later date. The pre-sentence report was found by the Court of Criminal Appeal to have:

> Been prepared by a probation officer, [and] included under the heading 'Previous Convictions' the observations that 'this conviction is the first registered conviction against the defendant. However, this offence was not the first time Rose has been the subject of extensive criminal investigations'. It then proceeded to discuss three occasions on which information obtained by the probation officer suggested that the applicant had been charged with criminal offences, and discharged without conviction; and another occasion on which an award of compensation was made to a woman on her claim against him under the *Criminal Injuries Compensation Act* in respect of an indecent assault.

The Court of Criminal Appeal stated that, having regard to the nature of the offence on which the report had been called for, the hearsay allegations were potentially highly prejudicial to the applicant. The court stated that:

> There are two aspects of this matter upon which this court must rule. The first is that no reference should be made in a pre-sentence report, or in any associated medical or psychological report, to any alleged conduct of a criminal nature attributed to the person the subject of the report, unless he had been convicted of an offence constituted by that conduct. It is improper to place before a court in

> any report of this nature material relating to allegations, investigations or charges which did not result in a conviction, and this should be made clear to those responsible for the preparation of these reports. Whilst the purpose of a pre-sentence report is to provide the court with all available information relating to a convicted person which may properly assist it in determining the appropriate sentence to impose the inclusion of prejudicial material of this nature tends to frustrate that purpose.
>
> The other ruling required is that if, despite this admonition, any material of the nature referred to is included in a pre-sentence report or any associated report and is read by the court which is to impose sentence, it would generally be prudent, and proper in the interests of justice, for the judge or magistrate concerned to order that the objectionable material be deleted from the report, and then to decline to proceed further, except to adjourn the matter so that it may be heard *de novo* before a court constituted by a different judge or magistrate.

## Mitigation and Aggravation

**Age of Offender and of Victim:** It is unusual to find cases where the Court of Criminal Appeal has considered the advanced age of an offender as a significant factor affecting sentencing decisions. It may be assumed that only rarely is this factor by itself accepted as representing a strong factor of mitigation. However, where other factors are combined with that of age, the approach of the Court is likely to differ.

For example, where a defendant of advanced age is shown to suffer from some debilitating mental condition largely due to his years, then it may be expected that the court will adopt a more lenient attitude. The advanced age of an offender, however, will not invariably be accepted as a mitigating plea.

In *Walton* (C.A. 59 of 1964) the defendant, who was 63 years of age, was convicted of dangerous driving. A bad criminal history, including two convictions for being under the influence of liquor while in charge of a motor vehicle, could have been expected to have negatived any mitigating effect that age may have had.

The Court of Criminal Appeal, in quashing the sentence of a fine of £100 imposed at the lower court, commented that the defendant's previous convictions did not impress as indicating the type of individual likely to be seriously deterred from further transgressions by such a fine. In lieu of the fine the Court ordered that the respondent be sentenced to imprisonment with hard labour for three months and that he be disqualified from holding or obtaining a driver's licence for 18 months. See also *Sweeney* (C.A. 106 of 1975).

Where, however, it appears that a defendant may be prevented from

repeating an offence by the imposition of a lesser sentence than might otherwise be called for, the court may be disposed to awarding the lesser punishment. In *Cheng Wah* [1972] Q.W.N. 45, a 69 year old Chinese seaman pleaded guilty to two charges under the Customs Act 1901–1971. The charges involved the importing into Australia and possession of prohibited imports in the form of heroin.

In quashing a sentence of imprisonment for five years and imposing one of imprisonment for three years, the Chief Justice, with whom Skerman J. agreed, stated that:

> When applying the usual test on an appeal against sentence, that is, considering the question as being whether the sentence is manifestly excessive or not, we have to make up our minds as to whether any less punishment would meet the situation which arises. We have the fact that the penalty prescribed as the maximum penalty by the legislature is large. It is clear that the offence is regarded by the legislature as a very serious one. Quite independently of that, of course, it is a matter of which we are all aware that the offence is a matter of great gravity and a matter of great consequence to people in Australia. As the age of the appellant at the time of the commission of offence was 69 years, it is quite probable that he would not be able to engage in smuggling drugs into Australia for much longer; from the point of view of deterring him or preventing him from repeating his offence it would seem to me that the punishment of considerably shorter time would have met the case.

Whether this extension of leniency on the part of the majority of the court was designed to attempt to prevent the possibility of the appellant dying in prison in a foreign land is open to conjecture. It would appear that a sentence of five years imprisonment would have been unlikely to have been viewed as manifestly excessive in circumstances involving a younger defendant. This matter was alluded to by the Chief Justice who stated:

> The other question of course is whether the deterrent effect of any punishment imposed upon this offender, upon other people likely to commit the offence, would be sufficient if any less punishment were imposed upon this particular appellant. This, of course, is a matter of which one can have no precise knowledge. Other penalties imposed by courts in other cases of offences against this section of the Commonwealth Legislation do not provide very great guidance as to what other courts would have done in a situation the same as the one which is before us. There have been cases in which substantial terms of imprisonment have been imposed but there are no cases quite like this one.

Although the age of the offender is unlikely to carry weight as a mitigating factor when it is in excess of 60 years, it seems beyond doubt that an offender convicted of a crime involving a victim of advanced years will receive an appropriately more severe sentence. This is particularly so if the offence involves violence.

In *Hopkins and Tolliday* (C.A. 71, 73 & 78 of 1973), the court upheld sentences of imprisonment with hard labour for robbery in company with violence where the offence consisted of a combined attack on an elderly man and the theft of his money. The age of the victim was a matter of comment on the part of the court in dismissing the application for leave to appeal against sentence.

In *Donohue* (C.A. 46 of 1975), a sentence of six years imprisonment imposed upon a young Aborigine aged 19 years for the offence of rape committed upon an elderly woman was seen by the Court of Criminal Appeal as somewhat low but not so inadequate as to warrant its interference.

In *Drummond* (C.A. 24 of 1972), an 88 year old widow was raped in her own bed by an offender who had illegally entered the woman's dwelling. A sentence of 10 years imprisonment was upheld by the Court of Criminal Appeal. The Court considered the offence to be of a particularly revolting nature in view of the advanced age of the victim.

A further offence of rape involving an elderly victim was seen in *Aidi* [1970] Q.W.N. 4, where a sentence of imprisonment with hard labour for life was overturned by the Court of Criminal Appeal and replaced by a sentence of imprisonment with hard labour for 16 years – which nevertheless is much longer than sentences usually imposed for rape.

The offence was committed upon a woman of 70 years of age and was vicious in the extreme. It was accompanied by threats to the victim's life, repeated assaults, blows to the head, and possibly by a pretended attempt to strangle the vicitm. The court of Criminal Appeal considered that, in short:

> It may perhaps be said that almost all, if not all, of those circumstances which aggravate the offence of rape and one or more of which are frequently found associated with the offence were present in this case.

Undoubtedly one of the circumstances which brought forth comment from the court was the age of the victim of the offence. No doubt the court concurred in the opinion of the lower court that there is a serious aberration present in a young man who forcibly has intercourse with a woman of advanced years.

In *Cooper* (C.A. 30 of 1975), the defendant was convicted of unlawful wounding with intent to disable in circumstances where the victim had invited the defendant to pass the night in his flat as the defendant had nowhere to go. Following some prior provocation, the defendant attacked his sleeping host with a bottle and continued to assault him, obtaining a fresh bottle as each one broke, ultimately breaking three bottles over his victim.

Quite substantial wounds were inflicted upon the victim who was a man of approximately 60 years. The Court of Criminal Appeal imposed a sentence of five years imprisonment with hard labour. This sentence was seen as being in line with sentences imposed for crimes of violence of this nature. Again, the advanced age of the victim was undoubtedly a relevant factor in the Court's assessment of the appropriate penalty.

However, in cases where the youth of the offender is in issue, it can be expected that the court will, wherever possible, impose an individualised sentence rather than one which has deterrence as its main element.

In *Price* [1978] Qd. R. 68, the Court of Criminal Appeal heard an application for leave to appeal against a sentence of three months imprisonment which had been imposed by a magistrate at Townsville on a charge of unlawfully using a motor vehicle. The applicant was a single man aged 18 years who was residing with his mother in Townsville and who was unemployed at the time of the offence. He had no previous convictions and was of good character. Wanstall, C.J. reiterated that he agreed with the views of the Chief Justice of Tasmania, Sir Stanley Burbury, in *Lahey and Sanderson* [1959] Tas. S.R. 17 where the Chief Justice stated:

> The courts have recognised that imprisonment is likely to expose a youth to currupting influences and to confirm him in criminal ways, thus defeating the very purpose of the punishment imposed. There has accordingly been a universal acceptance by the courts in England, Australia and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and in the ordinary run of crime the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord Goddard, the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. With that I respectfully agree.

Wanstall, C.J. stated that this was a correct principle to be applied, particularly as the applicant was young, had no previous convictions and that therefore his chances of reformation appeared favourable.

Even in cases where a young offender is sentenced to a term of imprisonment, it will normally be the case that older defendants would have received substantially increased sentences for similar crimes.

However this proposition may not have as strong an application in cases involving motoring offences or sexual offences as in other types or classes of offence. This is because it is predominantly young offenders who are responsible for the commission of a large proportion of motoring and sexual offences.

One difficulty in illustrating the effect on mitigation that the youth of the

offender may have is that discernible factors are rarely found in isolation. Usually a combination of both mitigating and aggravating factors are found in any particular fact situation and it is in these circumstances that difficulty arises in attempting to examine some of the more common factors and identify their particular relevance.

An example of the difficulty in assessing the relative weight to be given to competing factors relating to a particular defendant is shown in *Coe* (C.A. 5, 6 and 7 of 1975). The defendant pleaded guilty to unlawfully using a motor vehicle and also to discharging a loaded firearm with intent to alarm. The defendant's background was dealt with by a psychiatrist's report which stated that:

> Coe has not had much of a chance to make a go of his life. He was a neglected baby, cruelly treated as a boy and left to fend for himself from the age of fifteen without any training or direction. He could easily drift into a life of crime if not helped and I believe he is capable of being rehabilitated. In my opinion he should remain under adequate supervision until he is qualified in some trade.

However the defendant had a bad criminal history for one of his age. He was aged only 20 at the date of these offences, and had previous convictions relating to the unlawful use of a motor vehicle, stealing, false pretences and aggravated assault. In these circumstances the Court of Criminal Appeal overturned probation orders imposed by the lower court and substituted on the charge of unlawful use of a motor vehicle a sentence of imprisonment with hard labour for two years. On the other charge a sentence of imprisonment with hard labour for nine months was imposed and ordered to be served concurrently with the sentence to two years.

**Prevalence of Offence and Youth of Offender:** It appears that where a crime is particularly prevalent courts will tend to take less account of the youthfulness of offenders in an attempt to deter others and thereby to lessen the incidence of that type of crime.

In *Duggan, Heineger and Conway* (C.A. 135–137 of 1975) the defendants, two of whom were aged 17 years and one 18 years, were convicted of stealing from parked motor vehicles. The articles stolen were four wheel trims valued at $45 and a spotlight valued at $25. Sentences of two months imprisonment with hard labour were imposed on each defendant and appeals to the Court of Criminal Appeal on the grounds that the sentences imposed were manifestly excessive were dismissed. The judgment of Campbell J., while recognising the reluctance of the courts to impose sentences of imprisonment against young men for first offences, observed that exceptions must be made to this general principle in cases where a particular crime is prevalent:

> It appears that the offence of stealing from motor cars is prevalent in the magistrate's bailwick. There must come a time when an example has to be set. The acting magistrate had imposed a prison sentence for this type of offence in a recent case involving two persons, one a 21 year old youth who was a first offender; and this should have been a warning. While the general policy of the law is against sending young men to gaol for first offences, exceptions have sometimes to be made in the interests of the community.

The Chief Justice, with whom Mr Justice Andrews agreed, condoned the approach of the magistrate by stating that:

> In the case, the magistrate, from his own experience, which is borne out by the statistics which have been produced to us with regard to other sentences, had before him the knowledge that offences of this kind, but not precisely the same offence, were, I would think, extremely prevalent in the district where he functions; and he took that into consideration in determining the sentences which he would impose on these young persons. In the circumstances, I feel that there was ample justification for him to impose the sentences which he did, and I do not see any reason why this court should interfere with those sentences.

The prevalence of sex offences involving young men may often lessen any mitigating effect the age of the offender might otherwise have had. The attitude of the Court of Criminal Appeal was forcefully enunciated in *Downie* (C.A. 2 of 1967). The defendant was charged with rape and was convicted of attempted rape and of two counts of unlawful and indecent assault. Upon the conviction of attempted rape the defendant was sentenced to imprisonment for five years with hard labour. He was also given a concurrent sentence of six months imprisonment on one count of unlawful and indecent assault and a cumulative sentence of 18 months imprisonment on his conviction of the second count of unlawful and indecent assault. The Court of Criminal Appeal refused to upset the trial judge's sentences despite arguments that the sentence of five years for the attempted rape was manifestly excessive in itself, and that, as a matter of discretion, apart from the question of whether it may lawfully be made cumulative, the second sentence for unlawful and indecent assault should have been made concurrent.

Mr Justice Wanstall commented on the prevalence of rape as a disquieting feature of modern society and although he acknowledged the apparent failure of heavy sentences as a deterrent for this type of offence, he considered that such sentences must continue to be imposed in the hope that some degree of deterrence would be achieved. The judgment contained this passage:

> The prevalence of rape is a disquieting feature of today's affluent society and one which in my opinion is related to present economic conditions in that they put intellectual and moral beggars into motor cars, thus enabling them to create

> opportunities for rape which would not otherwise exist for them. The number of rape and attempted rape cases does not decline despite the heavy sentences the court has been imposing for the past seven or eight years and most of them involve young men of the applicant's type who are characterised by barnyard morals and cesspit minds. I think that it is the duty of judges to take a strong line with such louts for they understand nothing else and their fellows will not otherwise be deterred.

In *Mills and Nielsen* (C.A. 20 and 21 of 1971), the prevalence of offences involving motor vehicles was seen by the Court of Criminal Appeal as indicating the need for a deterrent sentence in respect of offenders aged 18 years who were convicted of stealing a motor vehicle and stripping it of various parts. The Court upheld sentences of three years imprisonment with hard labour to be suspended after one year and then to be placed on bonds on probation. The defendants were disqualified from holding a driver's licence for a period of four years. Stable J. commented:

> The pattern of this offence is one with which courts are becoming increasingly familiar. These youths desired parts of a car for their own purpose. One way of getting such things is the lawful way. But in today's climate of 'I must have it now' the proper and lawful way is tedious. So, as their counsel told us, they met by arrangement with intent to steal and strip a car . . . . In all of the circumstances of this carefully contrived crime I can see no valid reason to interfere with the sentences imposed. Indeed, there is much to be said for the view that youths who contemplate such thefts should not be encouraged to believe that they can expect to be allowed a chance the first time they are caught. In this day and age it is fashionable, even perhaps socially essential, for some youths to have a car or the use of one as soon as they are qualified to drive . . . . I am not unaware of the argument in favour of probation orders in criminal cases. I believe, however, that all the circumstances of a crime must be taken into account in deciding upon punishment. Here the offence was one of a kind which is prevalent, no-one was led unwittingly into it. All three met and agreed upon a course which, for their own benefit, involved taking the valuable property of a stranger. This done they dismembered it and shared it – all with a fine contempt for the rights of the owner.

**Violence and Youth of Offender:** A further category of offences which precludes the youth of the offender as a significant mitigating factor is that where violence is used in the perpetration of the offence.

Again the principle of deterring both the offender and others of a mind to commit similar offences appears to be the paramount consideration of the Court. In *Watts* (C.A. 10 and 11 of 1971) the defendant, aged 18 years at the time of the offence, was convicted of stealing with actual violence from a person while armed with a dangerous weapon in the company of another. A probation order for three years imposed by the trial judge was overturned by

the Court of Criminal Appeal and a sentence of imprisonment for a period of three years to be suspended after serving twelve months was imposed.

An offence which is characterised by its inherent brutality and sadism can only be dealt with by a substantial term of imprisonment despite the youth or background of an offender. In *Wilkinson* (C.A. 123 of 1972), the defendant clearly had endured a deprived and unfortunate early life. Educated only to junior standard and leaving school at the age of 15, the defendant had been in institutions for children more than once due to the early separation of his parents. At the age of 23 the defendant was convicted of attempted murder where the victim, a young woman, was raped after having been threatened with a knife and then was almost strangled. The circumstances left no doubt that the death of the woman was the purpose of the defendant. In these circumstances a sentence of imprisonment with hard labour for eight years was overturned by the Court of Criminal Appeal and a sentence of imprisonment with hard labour for 20 years was substituted.

**Bad Criminal Record of Youthful Offender**: Just as brutality can be expected to have the effect of lessening any mitigation that the youthful age of an offender may have, so too does the effect of a persistently bad criminal record. Indeed, there are cases where the defendant's youth has been given little consideration in the light of criminal histories which could not really be considered particularly serious. In *Stenzel* (C.A. 183 of 1973), the 22-year-old defendant was convicted of having unlawful carnal knowledge of a girl aged 13 years in circumstances that the court considered revolting. In refusing to interfere with a sentence of imprisonment for three years the Chief Justice stated that:

> The maximum penalty for the offence is five years. The sentence imposed is three. While he has no previous convictions for similar offences, the appellant has shown disregard for the law in other ways. He was born on 8th June, 1951; has has now, apart from a conviction for a traffic breach, convictions in February and March 1972 for receiving stolen property. The impression conveyed by the record is of a young man who has no regard for the rules of the society in which he lives. The case requires that the appellant be shown that this will not be tolerated.

As may be expected, where an offender is convicted of a crime involving personal violence and also has a long list of previous convictions, it matters little that he is young. In *Cook-Russell* (C.A. 180 of 1974 and C.A. 20 of 1975), Douglas J. placed little emphasis on the relative youth of the offender in dismissing an application to appeal against a sentence of six years imprisonment for the offence of robbery with personal violence. The defendant's use of personal violence in carrying out the crime combined with a long list of previous convictions precluded any serious argument being based on the

defendant's comparative youth.

Similarly in *Kemsill* (C.A. 180 of 1974; C.A. 20 of 1975), the defendant, who at the age of 20 years was convicted of robbery with personal violence and housebreaking, had a serious criminal record which involved at least two instances of breaking, entering and stealing and two of larceny of motor vehicles, as well as others involving the unlawful use of motor vehicles. During the commission of the instant offences the lady of the house returned home, accompanied by two young female children. Having heard their arrival, the accused armed himself with a knife which he took from a wall fixture in the house, and he used this to threaten the woman and obtain some car keys. The knife was used to threaten harm to one of the small children. On the robbery with violence charge the defendant was sentenced to imprisonment with hard labour for eight years, and on the breaking and entering charge three years, to be served concurrently. The Court of Criminal Appeal acknowledged that this was a heavy sentence to be imposed upon a man who was aged barely 20 at the time of the commission of the crime. However it was noted that the defendant had a serious criminal record and that these offences involved the threat of violence.

In *McKennariey and Knowles* (C.A. 107 and 108 of 1972), Hoare J. dealt at some length with the question of sentencing youthful offenders. Although his remarks were specifically made in relation to drug offences, it is suggested that the remarks are of general application where young offenders come before the courts. Hoare J. said that he readily agreed with the principle that under the Queensland criminal justice system, the rehabilitation of the offender is the principal objective in the case of the young offender. This objective, however, could not be allowed to override all other considerations, particularly where the interests of the community did not coincide with those of the offender.

On the vexed problem of the effectiveness of deterrent sentences, Hoare J. pointed out that some judicial pronouncements on the topic have been made on the assumption that all members of the community are likely to respond in a similar manner to the way in which a well adjusted citizen may be expected to respond. This type of person, it was pointed out, is unlikely to offend against the criminal law in any event. It is much less certain what the deterrent effect of particular sentences may have on less well adjusted individuals, especially young people of immature personality. Although a judge had to be extremely cautious and hesitate before granting a probation order to an offender who had previously had the benefit of probation, it should not be accepted that because an offender had once had probation he

should never again be given the benefit of that treatment. Hoare J.'s judgment continued:

> Everything depends on the particular circumstances of the offender and the offences of which he has been convicted. It has been pointed out by sociologists that a great number of offenders placed on probation are young people some of them of inadequate personality development, who sorely need guidance. To expect such people to reform suddenly and become well adjusted and completely law abiding citizens, is unrealistic. Even the best counselling and guidance by a probation officer can only be expected to be effective over a period rather than induce any sudden change in the probationer.

Indeed, it may be very much in favour of a defendant that he has successfully completed a previously imposed probation period. It is difficult to establish just where to distinguish between a previous record that precludes the granting of probation or other individualised measure and one which would permit a further attempt at rehabilitation in lieu of deterrence. In such situations great reliance must of necessity be placed upon the contents of appropriate probation and psychiatric reports.

**Probation for Youthful Offenders**: The importance that the Court of Criminal Appeal attaches to the imposition of periods of probation in the case of youthful offenders is seen in *Marsh and Marsh* (C.A. 80 and 81 of 1970) where the defendants, brothers aged 18 and 19 years, were convicted of the arson of a motor vehicle, the stealing of the same motor vehicle, the stealing of another vehicle and, in the case of one of the defendants, three further counts of stealing motor vehicles. All offences were committed within the duration of one month. Sentences of imprisonment were varied by the Court of Criminal Appeal so as to allow for supervision under the guidance of a probation officer for portions of the terms of imprisonment. Although the trial court had considered that both defendants were quite incorrigible despite the hopes held out in the psychiatrist's reports, the Court of Criminal Appeal did not think that it could fairly be said that: 'These men are beyond reformation when they have not been subjected to the test of complying with the requirements of probation.'

The Court continued:

> We consider that, in the present cases, the reformative aspects of punishment so outweigh the deterrent factors as to justify an appellate court in holding that the terms of imprisonment imposed are sufficiently excessive to justify interference.

Similar statements were expressed by the Court of Criminal Appeal in *Williams* (C.A. 49 of 1974) where, although the court did not feel constrained to upset a sentence of a fine together with an order for compensation, it did

express the view that more consideration might well have been given to the possibility of putting the defendant on probation. The defendant was before the court for the first time at the age of 21 years and it was considered that he was a person who quite likely would have benefited from the 'friendly co-operation and guidance of a probation officer for some considerable time'.

In *Casey and Smyth* [1977] Qd. R. 132, the Court of Criminal Appeal reaffirmed that a sentence of imprisonment should not be imposed upon a youthful first offender who has been convicted of a relatively minor criminal offence. From the judgment of the court (Wanstall, S.P.J., Douglas, J., Dunn, J.):

> It would be idle here to embark upon a philosophical disquisition on the merits, and demerits of punitive, deterrent, or rehabilitative punishment. It is not called for. It is necessary however to draw attention to the attitude of the legislature in recent years in regard to the punishment of offenders. That may be evidenced by referring to the *Offenders' Probation and Parole Act* 1959–1974, the *Weekend Detention Act* 1970 and the *Criminal Code and Justices Acts Amendment Act* 1975 whereby s. 657A was inserted *The Criminal Code*. We refer particularly to s. 8 of the *Offenders' Probation and Parole Act (supra)* and to the fact that if a probation order is breached the offender may be sent to prison. Undoubtedly there is a distinct emphasis on the rehabilitation of offenders, if at all possible. The above statement, of course, must be taken in its context, and are not applicable in the main to the more serious type of crime. We feel that we can do no better than to adopt the words of Walters, J. expressed in the case *Coles* v. *Samuels* (1972) 2 S.A.S.R. 488, at p. 492:
>
> 'In the absence of circumstances of substantial gravity surrounding a simple offence or a minor indictable offence committed by a first offender who stands to be punished for a single offence and who has no other offences to be taken into consideration, and in the absence also of a sufficient reason for sentencing him to a term of imprisonment, I am disposed to think that a reformative or a primarily deterrent sentence is scarcely indicated, and that the imposition of a fine, a release on probation, or a discharge on a suspended sentence should *prima facie* be adequate'.

## Physically Handicapped Offenders

In *Todd* [1976] Qd. R. 21, the Court of Criminal Appeal accepted that the burden of incarceration would fall more heavily on a blind person because of his affliction and the fact that the prison facilities in Queensland are not designed to cater for the peculiar problems of such a prisoner.

## Habitual Criminals

**Legislative Basis:** The New South Wales Habitual Criminal Act of 1905 was the precursor of similar legislation in the remaining Australian States as well as in New Zealand. However, the extensive amendments to the New South Wales legislation have not necessarily been mirrored elsewhere. This situation is clearly seen in the case of Queensland where the original Habitual Offender legislation of 1914 remains largely in its original form apart from an amendment in 1945.

The instances where a judge may declare a convicted person to be an habitual criminal are contained in complex provisions of the Criminal Code Chapter LXIVA.

Broadly speaking, there are six classes of offenders who may be declared to be habitual criminals:

1. Persons convicted on indictment of an offence included in the offences mentioned in Chapters XXII and XXXII of the Criminal Code and who have been previously so convicted on indictment on at least two occasions. The offences contained in the two chapters mentioned above are concerned with offences against morality and include rape, indecent assault on females, incest, indecent practices between males and attempts to procure abortion.
2. Persons convicted on indictment of an offence included in the offences mentioned in Chapters XVIII, XXIX, XXXII, XXXVI to XLI inclusive, XLVI, XLIX and LI, who have been previously convicted on indictment on at least three occasions of an offence included in this group. The abovementioned chapters contain offences relating to the coin, of endangering life or health, of stealing or some similar offence, of serious injuries to property, and of forging or similar offences.
3. Persons who have been twice previously convicted on indictment of offences falling within the group referred in (2) above and who are convicted summarily of an offence punishable by imprisonment for not less than three months, and who have been convicted summarily on at least two previous occasions of offences punishable by imprisonment for not less than three months.
4. Those convicted of an offence under the Vagrants Acts who have been previously convicted on at least four occasions of any offence mentioned in those Acts.
5. Those convicted summarily under s. 344 of the Criminal Code of an aggravated assault of a sexual nature, on a child under the age 14 years, who have twice previously been convicted of such assaults.

6. Notwithstanding that wilful exposure of the person in a public place is an offence under the Vagrants Acts referred to in (4) above any offender so convicted who has twice previously been convicted of this offence may be declared an habitual criminal.

**Release of Habitual Criminal:** Every habitual criminal is required to be detained during Her Majesty's pleasure at the expiration of his sentence.

**CRIMINAL CODE s. 659D**

If the provisions of s. 659G of the Code are followed with regard to the discharge of an habitual criminal it may be claimed that the sentences imposed under s. 659A are absolutely indeterminate.

The provisions relating to the discharge of habitual criminals enable a person detained to apply to the Supreme Court for a recommendation that he has sufficiently reformed, or for some other sufficient reason, and may be accordingly discharged.

The Supreme Court is empowered to enquire in such manner as is deemed fitting and on being satisfied that such person has sufficiently reformed, or that there is some other sufficient reason to warrant his discharge to recommend to the Governor to discharge that person accordingly.

Thereupon the Governor may direct the discharge of such person and may order that while the discharged habitual criminal remains in the State of Queensland he shall report his address and occupation to the Principal Officer of Police at the place in which he was convicted or at such other place as the Commissioner of Police may appoint for a period not exceeding two years.

It should be noted, however, that although the provisions of s. 659G of the Code pertain to the discharge of an habitual criminal, it is the provisions of the Offenders Probation and Parole Act s. 321A(a) which are normally invoked in such cases.

A prisoner who is an habitual criminal and has completed a sentence of imprisonment and thereafter is being detained during Her Majesty's pleasure shall not be eligible for release on parole until he has been detained for a period of at least two years.

**OFFENDERS PROBATION AND PAROLE ACT 1959–1971 s. 321A(a)**

To this degree, then, sentences imposed under s. 659A cannot be considered to be indeterminate in the strict sense of the word.

It should be noted that in practice all habitual criminals are released on licence for a term not exceeding two years under the supervision of a parole officer.

It should also be noted that the alternative procedure for release under the provisions of s. 659G of the Code has now fallen into disuse.

**Detention of Habitual Criminal:** Upon the making of a declaration by a judge

that a person is an habitual criminal, the judge may direct that on the expiration of the prisoner's sentence he shall be detained in a reformatory prison under the Code.

**CRIMINAL CODE s. 659A(5)**

The Governor in Council may set apart any prison or suitable place to be a reformatory prison for the detention of habitual criminals.

**CRIMINAL CODE s. 659B**

It should be noted that by Order in Council dated 25 July 1924 all Queensland prisons were set apart as reformatory prisons. This partially nullified the intentions behind the legislation pertaining to the detention and treatment of habitual criminals.

**Ineffectiveness of Legislation:**

Because the provisions pertaining to habitual criminals have fallen into disuse, they have failed to act as a deterrent to offenders with serious criminal records:

- During the period 1964 to 1969 only two persons were declared habitual criminals in Queensland.
- In February 1968 four habitual criminals were incarcerated.
- From 1971 to 1976 no person was declared an habitual criminal by the courts in Queensland.
- Between 1971 and 1976 some habitual criminals served prison sentences but these were declared prior to 1971.
- As at May 1976 there were no habitual criminals serving a sentence in any Queensland prison.

The question may legitimately be posed whether, in view of the infrequent and inconsistent application of the habitual offender legislation, there remains any purpose in allowing the provisions to remain within the Criminal Code.

# Chapter 5
# Appeals Against Sentence by Attorney-General

## Legislative Basis for Appeal

The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by:

- The court of trial.
- A court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court.

**CRIMINAL CODE s. 669A**

## Power of Court of Criminal Appeal

On an appeal against sentence by the Attorney-General, the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.

**CRIMINAL CODE s. 669A**

## Power to Refer a Point of Law

The Attorney-General may refer a point of law that has arisen at the trial upon indictment of a person who has been acquitted at that trial to the Court of Criminal Appeal for its opinion.

## Resulting Variation in Legislation on Appeals

On an appeal against sentence by a convicted person the Court of Criminal Appeal, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the

sentence and pass such other sentence in substitution therefore and in any other case shall dismiss the appeal.

**CRIMINAL CODE s. 668E(3)**

Because of the variation in the legislative provisions dealing with appeals against sentence by convicted persons and by the Attorney-General, different approaches in deciding questions of penalty exist.

## Historical Development of the Right of Appeal Against Sentence by the Attorney-General

The **Criminal Code Amendment Act** of 1913 enabled **a person convicted on indictment to appeal** to the Court of Criminal Appeal, with the leave of that Court, against the sentence passed on his conviction. Sections 3 and 9 of the same Act provided that on an appeal against sentence, the Court of Criminal Appeal, if of the opinion that some other sentence, whether more or less severe, was warranted in law and should have been passed, should quash the sentence and pass such other sentence in substitution therefore, and in any other case should dismiss the appeal.

It should be noted that these provisions now comprise ss. 668D and 668E(3) respectively of the Criminal Code.

With regard to appeals by the Attorney-General against sentence, s. 4 of the Criminal Code Amendment Act of 1939 provided that:

> The Attorney-General may appeal to the Court against any sentence pronounced by the court of trial and the Court may in its discretion vary the sentence and impose such sentence as to the Court may seem proper.

Until the enactment in 1975 of that section (s. 669A) set out at the beginning of this chapter, the provisions of the 1939 Act comprised the law relating to appeals against sentence by the Attorney-General.

The difference in the language embodying the rights of appeal against sentence of convicted persons and of the Crown, then, is readily apparent.

## How Have These Provisions Been Interpreted and Applied by the Court?

**Cases Involving Appeals by Convicted Persons:** There has been a curiously inconsistent approach by the Court in determining the view which should be taken in Queensland as to the nature and extent of the discretion conferred by s. 668E(3) of the Code.

In 1913 the High Court, in the case of *Skinner* ((1913) 16 C.L.R. 336), held that a Court of Criminal Appeal should not interfere with a sentence merely because members of the Court might have inflicted a different sentence more or less severe, nor should the court interfere unless it sees that the sentence is manifestly excessive or manifestly inadequate. In his judgment Barton A.C.J. pointed to the advantage enjoyed by the trial judge in comparison to the appellate court with regard to assessing the credibility and worth of witnesses:

> As to the second of those two points, of course 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 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.

The above passage was adopted by the Queensland Court of Criminal Appeal in *Buckmaster* [1917] St. R. Qd. 30, where an appeal against a sentence of 15 years imprisonment imposed on a conviction of unlawfully throwing a corrosive fluid (sulphuric acid) with intent to cause grievous bodily harm was dismissed. Chubb J., who delivered the judgment of the Court, noted that the legislature regarded the offence as one of the serious offences in the Code and that the trial judge had considered the present case as very little short of being the worst offence of its kind that could be committed. In the light of the principle laid down in *Skinner (supra)* the Court of Criminal Appeal refused to interfere with the sentence and dismissed the appeal.

A number of appeals against sentence were heard in 1923 by a Court of Criminal Appeal comprising five judges specially constituted in accordance with section 5 of The Supreme Court Act of 1921. The cases of *McIntosh, King, Stuart, Wallace, Johnstone, Roberts and Russell, and Wright* [1923] St. R. Qd. 278, all involved appeals brought from sentences passed by Macnaughton J., at one criminal sitting of the Supreme Court. Although a number of decisions of the Court of Criminal Appeal in England were cited during argument, it appears that no High Court of Australia decisions or

decisions of the Queensland Court of Criminal Appeal were cited, nor did the judgment of the Court make reference to any judicial precedent. Thus the two pertinent authorities discussed above, *Skinner and Buckmaster*, received no attention as the Court proceeded to emphasise the importance of standardising sentences and to state that although it would be unable to say that a little longer than its own estimate was excessive or that a little shorter was inadequate, neverthelsss it would interfere with the decision of the trial judge if the sentence passed was one which it considered substantially excessive or substantially inadequate.

In 1928 in *Whittaker* (1928) 41 C.L.R. 230, the High Court of Australia considered an appeal by the New South Wales Attorney-General against a sentence of imprisonment with hard labour for 12 months imposed on a conviction of manslaughter. The appeal was brought pursuant to section 5D of the Criminal Appeal Act, 1912 (N.S.W.), which provides that:

> The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or any Court of Quarter Sessions and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper.

It was held by Knox C.J., Gavan Duffy, Powers and Starke JJ. (Isaacs and Higgins JJ. dissenting) that this provision conferred an unfettered discretion upon the Court of Criminal Appeal to alter the sentence imposed by a trial judge.

Of the six High Court Judges only Isaacs J. considered in detail the nature of the judicial discretion conferred by the legislation. In their joint judgment Knox C.J. and Powers J. restricted their observations to noting that the Chief Justice of New South Wales, who delivered the judgment of the Court of Criminal Appeal, was of the opinion that in reviewing the exercise of the discretion of the trial judge the Court must follow the principles laid down in *Skinner (supra)* and should not interfere unless satisfied that the trial judge had proceeded upon some wrong principle. The judgment continued:

> If this be the rule upon which the Court of Criminal Appeal sought to act in exercising the power conferred on it by Section 5D, we agree with the learned Chief Justice in thinking that, for the reasons given by him, the Court was justified in the circumstances of the present case in exercising its discretion. If, on the other hand, the true view of Section 5D be, as we think it is, that unlimited judicial discretion is thereby conferred on the Court of Criminal Appeal, that Court has exercised its discretion. In either event there is, in our opinion, nothing in this case to justify this Court in granting special leave to appeal, and the application should be refused.

In another joint judgment Gavan Duffy and Starke JJ. made the bald assertion that the language of the section contained nothing to limit the exercise of discretion and that therefore the Court of Criminal Appeal was entitled to act in accordance with its own considered view of the facts.

This approach received scathing criticism in the judgment of Higgins J. who emphasised the importance of careful consideration of the legislation. The question resolved itself to the point of whether the legislature, by the use of such common words as 'in its discretion' intended to substitute the discretion of judges who have not seen or heard the accused and the witnesses for the discretion of judge who has – and who has made no mistake of principle. Higgins J. commented that:

> The absurdity of deciding a point involving such far-reaching consequences on a mere motion for special leave to appeal – without argument, without the matter being considered by the New South Wales Bench, without that Bench having even purported to exercise that absolute discretion which it is said they have under the section – seems, to my mind, to be manifest.

The sole justice to examine in detail the nature of the appellate discretion was Isaacs J. The issue was seen as whether Australia was to adhere to or depart from the settled law of appellate discretionary jurisdiction as administered for centuries in the English courts and sanctioned finally by the House of Lords and the Privy Council.

A grant of discretion to an appellate tribunal to interfere with the order of a trial judge has traditionally received restricted judicial interpretation. This approach reflects the courts' reluctance to concede immunity from review to a decision of an appellate tribunal. The significance of this interpretation with respect to grants of discretion has manifested itself in the context of the Queensland legislation of 1975 which purports to alter the very nature of the discretion. This will be considered shortly.

Isaacs J. referred to two limitations applied to the interpretation of section 5D. The first is applied to avoid the absurdity of empowering a Court of Criminal Appeal to fix sentences exceeding those provided by law. Thus, a sentence of life imprisonment for stealing a loaf of bread cannot be imposed by the appellate tribunal. Furthermore, once that tacit limitation is recognised, 'the door is opened to inquiry whether there is not also the implication that what is called by the Privy Council "sound practice" in relation to appeals from discretionary orders, is not also proper to observe.'

It is this second limitation of 'practice' rather than rigid principle which is observed to ensure proper consideration of the nature of judicial discretion. Furthermore, the Queensland Court of Criminal Appeal was ultimately to

adopt the Isaacs approach as representing the correct interpretation of the relevant Queensland legislation concerning Crown appeals prior to the 1975 amendments.

Further High Court pronouncement upon the manner in which an appeal against an exercise of discretion should be determined was forthcoming in the case of *House* (1936) 55 C.L.R. 499, where Dixon, Evatt, and McTiernan JJ. in a joint judgment confirmed that it was not sufficient that the members comprising an appellate tribunal consider that, if they had been in the position of the trial judge, they would have adopted a different course. It should be noted, however, that *House (supra)* involves an appeal against sentence by an accused person and does not directly bear on the question of interpreting the legislative provisions relating to Crown appeals.

Let us look, then, at the Queensland decisions. In 1938 the Queensland Court of Criminal Appeal in *Roberts* [1938] Q.W.N. 37, held that it had an unfettered judicial discretion to review a sentence and that it was not obliged to consider whether the judge of first instance had acted upon a wrong principle of law. Again it was urged upon the Court that *Whittaker (supra)* must be taken to have over-ruled *Skinner (supra)* although neither case was referred to by any of the judges in their reasons for judgment. Indeed, one point that was considered by Henchman J. to be of importance was the language of subsection 3 of section 668E which was observed not to give exact instructions as to what to do, 'but it is all a matter of opinion as to whether or not some other more or less severe sentence should have been passed'.

However, this approach to the review of sentence on appeal by a convicted person was not followed by the Court of Criminal Appeal in 1940. Then, in *Paterson* [1940] Q.W.N. 48, the Court considered itself bound by the decision in *Skinner (supra)* and held that a sentence could only be interfered with when the appellate tribunal was satisfied that the sentence imposed was manifestly excessive or substantially excessive. It is of interest that *Roberts (supra)* was not referred to by either the Bench or by counsel.

**Cases Involving Appeals by Attorney-General**: The illogicality of the difference of principles to be applied by the Court of Criminal Appeal in determining appeals against sentence brought, on the one hand, by the Crown, and on the other hand, by a prisoner, was noted by the Court of Criminal Appeal in *Beevers* [1942] St. R. Qd. 230. This case involved an appeal by the Attorney-General against a sentence of six months imprisonment with hard labour imposed upon the respondent after he had pleaded guilty to a charge of unlawfully and indecently dealing with a girl under the age of 12 years. Webb C.J. stated that:

> According to the judgments of Knox C.J., Gavan Duffy, Powers and Starke JJ. in *Whittaker* v. *The King*, as I understand them, this court has an unfettered discretion to alter the sentence, and is not bound by the limitations stated in *Skinner* v. *The King* to apply where an offender appeals against his sentence.

Having said this, however, Webb C.J. apparently contradicted his understanding of the decision in *Whittaker (supra)* by restricting his power as an appellate judge to interfere with sentence to those cases where a substantially greater sentence should have been imposed.

> I do not share the view of the Solicitor-General and Mr Wanstall, counsel for the appellant, that the limitations specified in *Skinner's* case control our discretion. I think, then, that I should proceed to consider what sentence I should have imposed on the accused, and that if I find that it would have been substantially greater than that imposed by the learned trial judge, I should hold that the conviction should be quashed and a heavier sentence substituted.

Mansfield J. also held that the principles to be applied in an appeal by the Crown against sentence were correctly stated by the majority of the High Court in *Whittaker (supra)* and that, accordingly, the Court of Criminal Appeal had an unfettered judicial discretion in exercising its jurisdiction. The result that different rules are applied depending upon whether the appeal is brought by the Attorney-General or by the accused person was recognised.

> However illogical it may appear, the principles to be applied by this court on an appeal by the Crown against sentence are not the same as an appeal by the prisoner against sentence.

There appears to be no judicial dictum or comment as to possible justification for this difference and reference to the relevant Parliamentary debates reveals no policy determination.

The position thus adopted in *Beevers (supra)* was to remain as the accepted statement of the law with respect to appeals against sentence by the Crown for over 30 years. Numerous statements of support for this approach came from Courts of Criminal Appeal during this period. Thus in *Watson* [1962] Qd. R. 418, the Court was of the opinion that:

> [I]t is well settled that in appeals by the Attorney-General against sentence, the Court of Criminal Appeal is not bound to approach the matter by enquiring whether the trial judge was manifestly wrong in his sentence. The Court of Criminal Appeal must accept the responsibility of determining for itself what was the proper sentence in the circumstances.

In *Walton* (C.A. 59 of 1964), the then Mr Justice Hanger, with whose judgment Jeffriess and Gibbs JJ. concurred, recognised one limitation upon

the discretion of the Court of Criminal Appeal to vary a sentence and impose such sentence as to it seemed proper – that limitation being the consideration by the appellate tribunal of the view of the trial judge. Those circumstances of the trial that were described by Isaacs J. as the trial's 'atmosphere' may be extremely difficult to assess by a court of appeal.

The decision of Sheehy A.C.J. in *Wilson* (unreported decision of the Court of Criminal Appeal, C.A. 35 of 1965), followed precisely this approach to appeals by the Crown against sentence. The one limitation to the court's absolute discretion to vary a sentence was seen as the recognition that the just sentence passed on the defendant by a trial judge may depend on circumstances not apparent or available to the court of appeal.

Again, the principles to be applied in an appeal under section 669A of the Criminal Code were accepted by Hoare J. in *Williams, Townsend and Tooma* (C.A. nos. 97, 98, 99 of 1970), as being as stated in *Beevers (supra).* Similarly, in *Eustace* (C.A. 98 of 1971), Lucas J., with whom Douglas J. agreed, commented in an appeal by the Attorney-General against an order discharging the respondent on his own recognisance for the offence of unlawful assault occasioning bodily harm that:

> It does not appear to me that the sentence imposed by the learned trial judge was manifestly inadequate, although it is appreciated that that is not the test for the purpose of appeals under Section 669A. But, at the same time, the learned judge heard the evidence; he heard the mother of the child give evidence, and, as is so often said, he had the atmosphere of the trial.

In 1973 the Chief Justice in delivering the judgment of the Court in *Wilkinson* (C.A. 123 of 1972), asserted that the function of the Court on an appeal against sentence by the Attorney-General was to impose an appropriate sentence. Furthermore in *Tacey* (C.A. 6 of 1973), Wanstall S.P.J., with whose judgment Stable J. agreed, said that:

> This Court on an appeal by the Attorney-General has an unfettered discretion to vary the sentence even where there has been no error of principle and to substitute one that it considers appropriate. We are entitled to look at events which have happened since the sentence was imposed . . .

Thus it appears that a considerable body of judicial opinion favoured the 'unfettered discretion' approach in appeals by the Crown against sentence with the sole limitation on the exercise of this discretion being a consideration of the views of the trial judge. In view of the number of occasions on which this approach had been endorsed in the Court of Criminal Appeal it might have been supposed that the issue was no longer in doubt and that the appellate tribunal could, with some regard being paid to the view of the trial

judge, substitute its own discretion for that of the lower court.

However, in a striking change of course in *Liekefett* [1973] Qd. R. 355, the Court of Criminal Appeal denied that it possessed an unfettered discretion in determining appeals by the Attorney-General against sentence, and ended the apparently unjustifiable difference of approach in dealing with Crown appeals and appeals by convicted persons by sentence. Henceforth the same considerations were to be applied in deciding both types of appeal. The judgment of the Court stated that:

> Upon the hearing of an appeal by the Attorney-General against any sentence pronounced, the Court of Criminal Appeal does not have an unfettered discretion of its own; the appeal is against the exercise of judicial discretion and should be determined by established principles. The principles to be applied in deciding whether a sentence is inadequate are the same as those applicable when the question arises of whether it is excessive.
>
> In the result we have concluded that there is no decision which binds us to any particular view as to the circumstances in which the discretion reposed in this court by s. 669A should be exercised. We think that the most satisfactory approach in an appeal by the Attorney-General is that which the High Court said should be adopted in an appeal by a convicted person in the passage we have cited from *House (supra)*. So to hold, is in accordance with the views expressed by Isaacs J. in *Whittaker (supra)* at p. 250, and by the Court of Criminal Appeal of New South Wales in *Cuthbert (supra)*. Both appeals are from the exercise of a discretion and there is no reason why the same principle should not apply.

This decision clearly removed the strange diversity of approach in dealing with appeals against sentence by the Crown and by convicted persons. Although the Court of Criminal Appeal did not deeply explore the nature of the judicial discretion in respect of which an appeal on sentence is brought, it did indicate that regardless of which party institutes the appeal the principles involved are the same. Why the position should be otherwise is not clear and there exist several reasons against having such a difference of approach in determining appeals against sentence. First, the legislature should surely indicate the reasons why it may be desirable to permit Crown appeals against sentence to proceed on a different basis from appeals against sentence brought by convicted persons. Is there some underlying social requirement that before a prisoner can succeed in having his sentence reduced he must show that the sentence imposed by the trial judge was manifestly excessive, while the Attorney-General need only invite the appellate tribunal to substitute the sentence which to its seems appropriate in the circumstances of the case? Of course, an absolute discretion of the Court of Criminal Appeal such as had been exercised prior to the decision in *Liekefett (supra)* with respect to determining Crown appeals against sentence may have the result of

precluding, or at least of restricting, the powers of the High Court in determining an appeal against a decision of the Court of Criminal Appeal in this regard.

Second, there exists a judicial tradition of reluctance to admit the existence of a decision that cannot be reviewed on appeal. The judgment of Isaacs J. in *Whittaker (supra)* referred to this particular problem:

> As to the suggestion of immunity the problem is this: Is a decision of the Court of Criminal Appeal under sec. 5D always immune from review on appeal to this Court, assuming, of course that the decision is within the jurisdiction of the Court of Criminal Appeal? In other words, is it immune from the fundamental considerations by which in all other cases the law surrounds a grant of discretion. Even under a War statute expressly conferring on a court 'absolute discretion', Lord Cozens-Hardy M.R. declined to say that there was no appeal, and Kennedy L.J. contented himself with holding that in the circumstances he had no discretion to exercise on appeal *(Lyric Theatre, London Ltd.* v. *L.T. Ltd.* [1973] Qd. R. 355). In *Morgan* v. *Morgan* [1869] L.R. I.P. & D. 644 p. 647 Lord Penzance said: 'A loose and unfettered discretion . . . is a dangerous weapon to entrust to any court'. If given at all, it must, in my opinion, be given in express term.

Thus it appeared after the decision in *Liekefett (supra)* that henceforth in Queensland the judicial discretion exercised in appeals against sentence by both the Attorney-General and a convicted person would be exercised according to the same principles – that is, that the appellate court would interfere with sentence only if it could be shown that the sentence was manifestly excessive or manifestly inadequate, or that the trial judge had made an error of principle in assessing sentence. Indeed, following *Liekefett's* case *(supra)*, several cases confirmed the above principles as being those on which a sentence will be reviewed on an appeal by the Crown and the issue seemed completely, and, it is submitted, satisfactorily, resolved.

## The 1975 Legislation

In the Criminal Code and the Justices Act Amendment Act (1975) the position was altered by the repeal of the existing section 669A of the Criminal Code and by substituting the following section:

> The Attorney-General may appeal to the Court against any sentence pronounced by –
>
> (a) the court of trial:
>
> (b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court,
>
> and the court may in its unfettered discretion vary the sentence and impose such sentence as to the court seeems proper.

# PART II

# Sentence Ranges

# Chapter 6

# Motoring Offences

## Motoring Offences

**Licence Disqualification:** For the provisions relating to the disqualification of an offender from holding or obtaining a driver's licence see Chapter 3. The courts' use of the powers to disqualify an offender from holding or obtaining a driver's licence may be viewed in the light of both the deterrent and preventive aspects of punishment. In *Groning* [1972] Q.W.N. 3, the problem of sentencing motoring offenders was considered. Hoare J. commented that:

> Obviously, no one course is appropriate to all cases but there is a good deal to commend the view that in some cases, a sentence other than imprisonment combined with a long period of disqualification from driving a motor vehicle is likely to be an effective deterrent and at the same time avoids the social stigma attached to an otherwise law abiding citizen being sent to gaol. Concurrently the public would have protection by the offender being forbidden to drive a motor vehicle for the period ordered by the sentence. At the same time it must be appreciated by magistrates that driving a motor vehicle by a disqualified driver is a very serious offence. It involves a defiance of the law. When treated as a comparatively minor offence, as unfortunately some magistrates seem to regard it, the deterrent effect of disqualification is entirely lost.

**Cases of Dangerous Driving Causing Death:** In cases of dangerous driving causing death, particularly where the consumption of alcohol by the offender plays a significant role, it appears that a term of imprisonment combined with a period of disqualification is considered appropriate.

In *Bartlett* [1966] Q.W.N. 34, the accused, while intoxicated, drove a motor vehicle past a stationary tram at a tram terminus at a speed of at least 30–35 m.p.h., keeping no look-out at all so that he did not see his victim until he was right upon her. After the collision the accused continued without stopping and was finally arrested when his car stopped owing to damage it received in the accident. In sentencing the defendant to eight months imprisonment with hard labour and suspending his driving licence for five

years, Hart J. considered both the deterrent and the reformative aspects of punishment. It was recognised by Hart J. that reformation of driving offenders could not be readily achieved by sending them to jail to mix with men who could be considered criminals. However, if the motoring offence was of a serious nature, when all circumstances were considered, the deterrent aspect of punishment must be recognised through a sentence of imprisonment. Hart J. emphasised, however, that every driver of a vehicle involved in a fatal accident should not be sent to jail merely because the car had been involved in such an accident.

A sentence of imprisonment with hard labour for 18 months and suspension of the defendant's driving licence for five years was set aside by the Court of Criminal Appeal in *Johnson* (C.A. 17 of 1972). In circumstances involving evidence of the consumption of alcohol by the defendant, and the defendant's vehicle travelling at high speed on the incorrect side of the road, the Court reduced the sentence imposed by the trial judge to one of imprisonment with hard labour for nine months. The defendant's driving licence was also suspended for a period of five years, the disqualification to run from the date of conviction. A strong dissenting judgment from Stable J. stressed the need for deterrent sentences in cases such as this. He gave little weight to the argument that is often put forward in cases involving motoring offences – that the defendant is very often a man of good character. His Honour stated that:

> It is said sometimes that people guilty of driving offences of this kind are usually of good character, so that imprisonment is not the appropriate sentence. A short answer to this is when a man drives in such a manner as the record shows the appellant was driving he is not being of good character but is more aptly described as a road hooligan. It is not the law that those guilty of dangerous driving causing death or kindred offences should be subjected to a mere pecuniary penalty.

In cases of dangerous driving causing death, where evidence of the consumption of alcohol is given together with medical evidence that the defendant's ability to drive a motor vehicle would have been impaired at the time of the offence, a sentence of imprisonment is considered necessary because of the prevalence of this type of offence. This principle was stressed by the Chief Justice in *Airens* (C.A. 50 of 1973), where a sentence of imprisonment with hard labour for six months and a period of disqualification of two years was substituted for a sentence imposed by a judge of the District Courts of a fine of $250 and disqualification for a period of one year.

Similarly, in *Rofe* (C.A. 42 of 1970), the Court placed considerable emphasis on the evidence of intoxication of the defendant in upholding a sentence of two years imprisonment imposed on a charge of dangerous driv-

ing causing death. It was conceded by D.M. Campbell J. that compared with the general run of sentences for the offence of dangerous driving causing death, the sentence of two years imprisonment imposed by the trial judge might be considered severe. However, it was considered that:

> This was not a case of a driver who was momentarily inattentive or a case where the accident could be put down to lack of experience or youthful exuberance: it is a case of a mature person who smelt of liquor and exhibited signs of drunkenness at the scene, who was proved to have been driving erratically some time before the accident and who was obviously a menace on the road that afternoon. In this case the defendant had a previous conviction for dangerous driving.

Just as proof of the part played by alcohol in an offence of dangerous driving causing death can usually be expected to result in the imposition of a sentence involving a term of imprisonment, deliberate misconduct with respect to the handling of a motor vehicle can be expected to attract similar punishment. In *Black* (C.A. 63 of 1973), the defendant told the investigating police officer that he had decided to spin the wheels of his utility truck, and as a result of this behaviour the vehicle slewed onto the incorrect side of the road into the path of two motor cyclists, one of whom was killed in the resulting accident. An appeal by the Attorney-General against the sentence imposed by the trial judge of a fine of $500 and a period of disqualification for two years was upheld by the Court of Criminal Appeal which substituted an order that the defendant be imprisoned with hard labour for a period of three months and also that he pay a fine of $250. The Chief Justice, in the course of his judgment, commented that:

> [T]he behaviour of the respondent here, however, is not that of a man who negligently fails to drive in a proper manner; it is that of a man who is deliberately trying to make a motor vehicle perform in a way remote from that for which it was designed. The conduct of the respondent was culpable in a serious measure.

However, another appeal by the Attorney-General against a sentence of a fine of $500 and disqualification for a period of two years in a case of dangerous driving causing death was dismissed by the Court of Criminal Appeal in *Fortescue* (C.A. 5 of 1973). In this case the defendant's truck was equipped with a mirror on a long arm protruding from the driving side of the vehicle. The mirror struck a boy walking in the gutter in circumstances which showed that the defendant's vehicle was on its incorrect side of the road. There was further evidence of excessive speed and driving without the vehicle's headlights being switched on. There was no evidence of the consumption of liquor. The court considered that the imposition of a $500 fine on a young married man with family responsibilities, earning a labourer's

wage, and heavily committed by hire purchase contracts was a substantial penalty. Furthermore, the court received evidence by way of affidavit as to the effect of the accident on the health of the defendant. Evidence was given that the defendant was suffering from an anxiety state attributed to the accident and the subsequent trial. The court considered that this was a relevant consideration in dismissing the Attorney-General's appeal.

D.M. Campbell J. expressed doubt in this case about the admissability of evidence of a breathalyzer reading in a case of dangerous driving where the consumption of alcohol is in issue. Such evidence was seen as at best comprising only *prima facie* evidence of the commission of an offence under section 16 of the Traffic Acts. However, it was not regarded as settled in Queensland that such evidence may not properly be admitted at trial where an accused sets up as a defence that his behaviour at the scene of the accident was attributed not to the consumption of alcohol but to injury by way of concussion and shock.

**Cases of Dangerous Driving Causing Grievous Bodily Harm:** In cases of dangerous driving where the result of the offence is not the death, but the causing of grievous bodily harm to the victim, it is unusual for a term of imprisonment to be imposed. Rather, the Court has frequently held that the imposition of a fine together with a substantial period of disqualification from holding or obtaining a driver's licence is appropriate. Although this approach may be criticised on the basis that it is the result of an offence rather than the behaviour constituting the offence itself which is being punished, it appears that the reluctance of the Court to send motoring offenders to jail is an important factor.

In *Wilson* (C.A. 35 of 1965), the Court of Criminal Appeal dismissed an appeal by the Attorney-General against a sentence of a fine of £50 in a case involving dangerous driving causing grievous bodily harm where the accused was subsequently convicted of the offence of driving a motor vehicle under the influence of liquor and was fined a further £50 and disqualified from holding a driver's licence for three months.

In such cases where there is evidence of intoxication it is not unusual for charges to be laid both for the offence of dangerous driving (whether or not there are allegations of grievous bodily harm) and also for the offence of driving under the influence of liquor. It is open to a trial judge, before whom a charge of dangerous driving which includes evidence of intoxication is being heard, to come to the conclusion in assessing sentence that the verdict of the jury may have been based merely on a view that the defendant failed to keep a proper look-out at the time and that his degree of intoxication, if any, did not affect the ultimate issue before them.

Conversely, in the view of Sheehy A.C.J., it is open to an appellate court to have regard to all the circumstances of the case, including the state of intoxication of a person found guilty of the offence of dangerous driving, when considering an appeal against the sentence imposed by a lower court.

There may of course arise two separate punishable acts in that a person may be convicted and punished for being in charge of a motor vehicle while under the influence of liquor or a drug as well as for dangerous driving causing grievous bodily harm. On one charge it is the act of driving in a particular condition, namely that of intoxication, while on the other charge the gravamen of the offence is the act of driving in a particular manner in particular circumstances that causes a certain result.

This situation was considered by the Court of Criminal Appeal at length in the case of *Gordon* [1975] Qd. R. 301. The considerations stemming from this situation are discussed elsewhere in relation to the effect of s. 16 of the Criminal Code. In this case the defendant was first punished in the magistrates' court for the offence of being under the influence while in charge of a motor vehicle. Then, when he later appeared in the district court on a charge of dangerous driving causing grievous bodily harm he was convicted and no punishment was imposed. In the circumstances of the case, which involved excessive speed and travelling on the wrong side of the road, the Court of Criminal Appeal imposed a further fine of $500 on the charge of dangerous driving causing grievous bodily harm and also ordered a period of disqualification against holding or obtaining a driver's licence for two years from the date of the appeal.

A further case of dangerous driving causing grievous bodily harm involving evidence of intoxication of the offender is *Groning* [1972] Q.W.N. 3. Although there was some evidence of excessive speed, the worst feature of the case related to the consumption of alcohol. The Court of Criminal Appeal upheld an appeal by the Attorney-General against a fine of $300 and disqualification for a period of one year, and imposed a sentence of a fine of $600 and disqualification for a period of three years from the date of conviction.

Although, as stated previously, it appears that such offences can be expected to attract penalties consisting of fines and periods of disqualification, the Court, in view of the effect of alcohol on the offender, stated that had the trial judge sentenced the defendant to a moderate term of imprisonment it would have been impossible to say the sentence was in any way excessive. Thus, although it appears to be the norm in such cases for a term of imprisonment not to be imposed, it must be accepted that a case involving severe circumstances of aggravation may attract a custodial sentence.

**Cases Involving Dangerous Driving Simpliciter**: In cases of dangerous driving,

even where evidence is given as to the consumption of alcohol by the defendant, it appears that fines combined with periods of disqualification are considered appropriate. However, where there are aggravating circumstances, such as an extremely bad traffic history, or where the defendant's dangerous driving results from deliberate behaviour on his part, terms of imprisonment have been imposed and upheld by the Court of Criminal Appeal.

In *Vates* (C.A. 139 of 1973), a sentence of a fine of $500 and disqualification from driving for a period of two years was upheld by the Court in dismissing an appeal by the Attorney-General against this sentence. The essence of the Crown case was excessive speed. There was strong evidence which established that the defendant's vehicle was travelling at speeds of up to 100 m.p.h.

In *McIntosh* [1968] Qd. R. 570, the case for the Crown was that the defendant was driving a sports car with three passengers – all in the front seat – when the vehicle got out of control, skidded, struck the curb and then a rubbish bin on the edge of the footpath, and finally came to rest against an electric light pole, narrowly missing an elderly pedestrian who was proceeding across a zebra crossing in the vicinity. Three police officers who were sitting in a patrol car near the scene of the incident estimated the speed of the defendant's vehicle at about 60 m.p.h. The Court of Criminal Appeal upheld a sentence of a fine of $150, an order that the defendant enter into a recognizance to keep the peace and be of good behaviour for 18 months and an order disqualifying the defendant for 18 months from holding or obtaining a driver's licence.

Similarly, a fine and a period of disqualification was considered appropriate in *Juraszko* [1967] Qd. R. 129, where the defendant was observed by police officers in the course of his driving over a few hundred yards of straight road, including a pedestrian crossing controlled by traffic lights in the city. The police evidence was that the defendant was seen to travel through an amber light at an intersection, accelerate to a fast speed, collide with a stationary vehicle, travel through a red pedestrian light, continue along a city street at between 50–55 m.p.h. swerve from the right-hand lane to the left-hand lane, swerve back to the right-hand lane, almost collide with three pedestrians at a further intersection, and then proceed along a city street at speeds of between 50 – 55 m.p.h. The defendant agreed with the police evidence. In upholding the sentence of a fine of $250 and a period of disqualification of 12 months, Stable J. commented that:

> [T]his type of traffic offence is prevalent, and the applicant's counsel conceded that he could not submit that the fine alone was excessive. He directed his submission to the period of suspension. The Traffic Acts . . . provide for a

> minimum period of six months suspension for this offence. In all of the circumstances I am unable to regard the suspension for twelve months as in any degree excessive.

In *Walton* (C.A. 59 of 1964), the defendant was convicted of dangerous driving in circumstances involving failure to keep a proper look-out and driving at a speed which, in the circumstances, was excessive. The Attorney-General appealed against a sentence of a fine of £100 on the ground that the sentence imposed was inadequate and insufficient in the circumstances. The Court of Criminal Appeal held that the trial judge was in error in approaching the question of sentence on the basis that there was a charge of being in charge of a motor vehicle while under the influence of liquor pending against the defendant. The duty of the trial judge was seen as being to fix the sentence for the offence of which the defendant was convicted having regard to the circumstances in which it was committed. That some degree of intoxication contributed to, or was directly associated with, the offence of dangerous driving was a very relevant circumstance for consideration by the trial judge on the question of sentence. The criminal history of the defendant was another matter considered to be of special significance by the Court of Criminal Appeal. The judgment of Hanger J., with which Jeffriess J. and Gibbs J. concurred, included reference to this matter:

> The criminal history of the respondent indicates that the sentence imposed is inadequate merely as a deterrent to the respondent himself . . . That, except in very exceptional circumstances a man with these two previous convictions, should escape with a moderate fine after an additional conviction for dangerous driving, I find somewhat staggering. I adopt at least a portion of the remarks of Lord Goddard in *Whithall* v. *Kerby* [1947] K.B. 194 at p. 203 quoted by Stanley J. in *R.* v. *Skelton* [1947] Q.W.N. 17.
>
> 'The offence of dangerous driving is one of a serious character. A man should certainly not be convicted of that offence unless the court is completely satisfied that he has so driven as to endanger the public. If he has, he has put the lives and limbs of others of His Majesty's subjects in peril and deserves severe punishment; and it is difficult to understand how any court can consider this other than a serious crime.'
>
> The other members of the Court of Criminal Appeal concurred in these remarks.

The fine of £100 was set aside by the Court of Criminal Appeal and a sentence of imprisonment with hard labour for three months was imposed, together with a period of disqualification of 18 months.

**Manslaughter Arising out of Criminal Negligence while Driving a Motor Vehicle:** Punishment in cases of manslaughter arising out of criminal negligence while driving a motor vehicle cannot be standardised. The court has emphasised that such cases are dependent upon their own particular facts. In *Watson* [1960] Qd. R. 332, a sentence of five years imprisonment was set

aside and a sentence of 18 months imprisonment with a licence suspension of three years was imposed on a defendant who ran down from behind a cyclist who was proceeding well over on his correct side of the roadway in the same direction as the defendant. It was shown that the defendant was driving while under the influence of liquor; that the collision occurred in daylight and in fine weather; that there was nothing which would have prevented the defendant from altering his course to avoid the cyclist; and that such fatalities were prevalent in the North Queensland area.

**Offences Relating to Motor Vehicles other than Driving Offences:** In cases involving the unlawful taking of a motor vehicle (either in circumstances showing the theft of the vehicle or alternatively the unlawful use of the vehicle) and the subsequent destruction, usually by way of arson, of the vehicle with the purpose of avoiding detection, sentences involving a term of imprisonment have been imposed by the Supreme Court and upheld by the Court of Criminal Appeal.

Even where the offender is shown to have had no previous offences of any kind a sentence involving a period of imprisonment is considered appropriate. In *Nielsen* (C.A. 21 of 1971), a sentence of three years imprisonment, to be suspended after one year and then to be converted to probation combined with a period of disqualification from holding a driver's licence, was upheld by the Court of Criminal Appeal where a vehicle was stolen and stripped of its seats, magnesium wheels, engine, gearbox, tailshaft, cross-member, battery, radiator and console. The three youths involved in these offences shared in the destruction of the stolen motor vehicle parts. The stripped shell of the vehicle was set on fire to destroy any fingerprints. The planning of the theft, and the breaking down of the vehicle into parts for sharing by the defendants was emphasised in the judgments of both Wanstall and Stable JJ. In these circumstances, despite the previous good record of Nielsen, the sentence imposed by the trial judge was upheld.

Similarly, in *Weger and Allsbury* [1970] Q.W.N. 42, where both defendants had no previous convictions, the circumstances of the offence involved arson of a motor vehicle which had been previously unlawfully used by the defendants. The material before the Supreme Court showed that the purpose of burning the vehicle was to remove any fingerprints that may have been found on it by the police. Again, periods of imprisonment were considered necessary for both the offence of unlawfully using the motor vehicle and the offence of arson.

In *Brix* [1973] Qd. R. 5, the defendant pleaded guilty to a charge of breaking and entering a bowling club and to stealing large quantities of beer and cigarettes from that club. A co-defendant also pleaded guilty to the same

charge. Both defendants were sentenced to nine months imprisonment with hard labour and each was also disqualified from holding or obtaining a driver's licence for a period of 18 months. The defendant sought leave to appeal against his disqualification on the ground that as he was not the driver of the vehicle the trial judge had no power under the Traffic Acts to suspend his licence. The application for leave to appeal against sentence was refused by the Court of Criminal Appeal and the circumstances under which a court was entitled to disqualify a person from holding a licence was considered. It was stated by Hart J. that it was not necessary to connect any use of a licence held by an offender with the offence committed. The connection was seen as being between the use of a motor vehicle and the commission of an offence. Accordingly, the provisions of section 54(1)b of the Traffic Act were capable of being invoked to prohibit the defendant from obtaining a licence, even though he was not the driver of the vehicle involved in the commission of the offence.

However, in *Hobbs* (C.A. 57 of 1970), where the defendant pleaded guilty to a charge of receiving three tyres, an order by the trial judge that the defendant be disqualified from holding a driver's licence for a period of 12 months was quashed by the Court. Wanstall J., with whose judgment both Campbell and Matthews JJ. agreed, considered that the trial judge had over-emphasised the fact that it was tyres for a motor vehicle which were involved in the receiving charge. By giving undue emphasis to that aspect of the offence and without expressing an opinion as to the proper interpretation of section 54(1)b of the Traffic Act, it was held that that part of the sentence imposed by the trial judge which deprived the defendant of his licence should be quashed.

Cases involving the unlawful use of a motor vehicle commonly come before the Court of Criminal Appeal in conjunction with offences arising out of the same circumstances as those related to the charge of unlawfully using a motor vehicle. Under these circumstances, terms of imprisonment of approximately nine months for the offence of unlawful use of a motor vehicle are considered appropriate. This term of imprisonment will usually be less than the term imposed for the other offences arising out of the same circumstances. In such cases the term of imprisonment imposed for the unlawful use of a motor vehicle can be expected to be ordered to be served concurrently with the other terms imposed.

Thus, in *Williams* (C.A. 138–157 of 1974), a sentence of two years imprisonment for each of eight charges of unlawfully using a motor vehicle was imposed to be served concurrently with a sentence of four years imprisonment for three charges of burglary.

In *Coles and Poor* (C.A. 36 and 39 of 1975), sentences of four years and three years imprisonment respectively were imposed on the defendants for the offence of unlawfully using a motor vehicle in circumstances involving the terrorising of the vehicle's owner by, among other things, simulating the use of a gun and representing themselves to be dangerous criminals recently escaped from prison.

In *Lihou* (C.A. 70–85 of 1974), the Court of Criminal Appeal imposed a sentence of two years imprisonment for each of 10 charges of breaking, entering and stealing, four charges of breaking and entering with intent, one charge of attempted breaking and entering and one charge of unlawfully using a motor vehicle. The Court recommended that the defendant be considered for parole at the end of nine months from the date the sentences appealed from were originally imposed.

In *Coe* (C.A. 5–7 of 1975), the defendant pleaded guilty to unlawfully using a motor vehicle, intent to alarm, and discharging a loaded firearm. On the charge of unlawful use of a motor vehicle the Court of Criminal Appeal imposed a sentence of two years imprisonment with hard labour and on the other charges sentences of nine months imprisonment with hard labour were imposed and ordered to be served concurrently.

In *Parsons* (C.A. 28 of 1975), the defendant was convicted of a charge of attempted robbery and also of a charge of unlawfully using a motor vehicle. A sentence of imprisonment for 12 months with respect to the charge of unlawfully using a motor vehicle was ordered to be served concurrently with one of three years on the attempted robbery charge. The sentence was upheld by the Court of Criminal Appeal.

# Chapter 7

# Drug Offences

## Definitions and Prescribed Penalties

**Definitions**: The penalties relating to the possession of and trafficking in dangerous drugs and prohibited plants have their legislative basis in s. 130 of the Health Act 1937–1976.

'Dangerous drug' is defined under s. 5 of the Health Act as every substance or article prescribed as such.

'Prohibited plant' is defined by s. 5 of the Health Act as a plant or species of a genus of plant declared under the Health Act to be a prohibited plant. The term includes, with respect to a plant so declared or a plant of a species so declared, the seeds and all other parts thereof, whether attached thereto or detached therefrom.

**Prescribed Penalties**: The possession of a dangerous drug or a prohibited plant, except under and in accordance with the authority of a licence or other authorisation provided under the Health Act, makes an offender liable on conviction to a penalty of imprisonment with hard labour for two years or a fine of $2,000 or both.

**HEALTH ACT 1937–1976 s. 130(1)a**

Similar penalties are prescribed for the possession of a pipe, needle, syringe, or other utensil used in connection with the preparation or administration of a dangerous drug.

**HEALTH ACT 1937–1976 s. 130(1)b**

Where a person produces a dangerous drug or cultivates a prohibited plant the penalties are increased substantially. Upon conviction on indictment an offender may be imprisoned with hard labour for life or fined $100,000.

**HEALTH ACT 1937–1976 s. 130(2) penalty clause (a)**

If an offender is convicted in summary proceedings the penalty is limited to imprisonment with hard labour for two years or a fine of $2,000 or both.

**HEALTH ACT 1937–1976 s. 130(2) penalty clause (b)**

These more severe penalties also apply in the case of an offender convicted

of selling or supplying to another person a dangerous drug or a prohibited plant.

**HEALTH ACT 1937–1976 s. 130(2)c.**

The same remarks apply in the case of an offender who permits premises of which he is an owner or occupier to be used for the production of a dangerous drug or for the cultivation of a prohibited plant.

**HEALTH ACT 1937–1976 s. 130(2)e**

Where a person has in his possession or at his order or disposition money or acknowledgement entitling the bearer to money for the purpose of the commission of an offence against s. 130 (2) of the Health Act, substantial penalties apply. If an offender is convicted on indictment, the penalty is imprisonment with hard labour for life or a fine of $100,000 or both. If an offender is convicted in summary proceedings, the penalty is limited to imprisonment with hard labour for two years or a fine of $2,000 or both.

**HEALTH ACT 1937–1976 s. 130(2A)**

The administration of a dangerous drug to another person carried out otherwise than in accordance with the authority of a licence provided under the Health Act is also punishable upon conviction on indictment by imprisonment with hard labour for ten years or a fine of $10,000 or both.

**HEALTH ACT 1937–1976 s. 130(3) penalty clause (a)**

The punishment in the case of conviction by way of summary proceedings renders an offender liable to imprisonment for two years or a fine of $2,000 or both.

**HEALTH ACT 1937–1976 s. 130(3) penalty clause (b)**

**Availability of Treatment Facilities for Drug Offenders:** The scale of sentences and penalties provided by the legislature in respect of the possession of and trafficking in dangerous drugs demonstrates the seriousness with which such offences are viewed. However, it has largely been left to the courts themselves to determine sentencing policies with respect to the various offences established by section 130 in relation to dangerous drugs and prohibited plants. For example, the legislation draws no distinction between the offender who cultivates a prohibited plant for his own consumption or use and the offender who cultivates a prohibited plant for the purpose of sale or supply to other persons. Again, sentencing policy in relation to offenders who may be considered addicts has been influenced by the type and extent of medical and psychiatric facilities available for the confinement and treatment of such offenders.

In 1970 the question of available facilities for the treatment of drug offenders was raised in the case of *Turnbull* (C.A. 49 of 1970). This case involved the defendant's third conviction for breaking and entering pharmacies

in order to steal drugs. In sentencing the defendant the trial judge remarked that:

> In your case it is recommended that you be kept in a place of confinement as being the best way to treat you and since there is no adequate institution where I can send you it is unfortunate that I do have to send you to prison.

In view of the remarks of the trial judge, the Court of Criminal Appeal requested Counsel for the Crown to make enquiries as to whether there was some place in Queensland in which a person might be confined by order of the Court in which effective, curative treatment for drug addicts was available. The information supplied to the Court revealed that the basis on which the trial judge sentenced the defendant was correct, and that there was no place available in Queensland other than prison for the treatment of drug addicts convicted of an offence.

However, pursuant to section 16 of the Prisons Act, the Comptroller-General of Prisons is given authority to order the removal of a prisoner from a prison to a hospital. Such removal may be ordered where a medical officer satisfies the Comptroller-General that the removal is required for the medical treatment, observation or examination of the prisoner concerned. The order may not be made by way of a court order or as part of a sentence. The Court was further informed that the place to which a drug addict would be removed by such an order would be to Wolston Park Hospital which, although not a security patients hospital, did contain two security wards. Persons who were taken there pursuant to the Comptroller-General's order were kept under strict guard. Unfortunately, when an addict is in strict security, such as the security ward, it will usually not be possible to give him the best and most effective treatment.

It appears that the only basis in law for certifying a drug addict as such, as opposed to classifying the addict as a prisoner, is by way of section 19 of the Mental Health Acts. However, admission to a hospital for treatment under this provision in the case of a drug addict can only be achieved if the addiction can be classified as a mental illness. In *Turnbull (supra)*, the then Acting Chief Justice expressed doubt whether drug addiction could be considered on the same basis as a mental illness. He commented that:

> We all feel that the circumstances of this case, as a matter of principle, might be referred to the appropriate authorities for consideration. It is not only this case, but also the fact that other cases may arise which are similar. We feel that it is doubtful whether the court has any power to make what we think may be an appropriate order in a case of this kind.

Partly because of the problems identified by the Court of Criminal Appeal in *Turnbull,* section 9 of the Health Act Amendment Act of 1971 provided for the detention of a drug offender for treatment. This section inserted section 130B of the Health Act 1937–1976, which provides that if the court before which a person is convicted of an offence, against any provision of section 130 of the Act, is satisfied that it is desirable that the offender should receive treatment in respect of his consumption of a dangerous drug, and provided that the court does not sentence the offender to be imprisoned in the first instance, it may order that the offender be detained in an institution declared by the Governor in Council to be an institution for the purposes of the section. An offender admitted to an institution under such an order is liable to be detained in that institution or in such other place to which he is removed under the authority of the Director General of Health until he is discharged in accordance with the Act.

**HEALTH ACT 1937–1976 s. 130B(3)**

A person detained under such an order is required to be examined by a medical practitioner appointed by the Director General of Health at least once every six months, and the medical practitioner is required to report as to whether, in his opinion, the best interests of the detainee require that he continue to be detained, or that he be granted leave of absence, or released on parole, or discharged.

**HEALTH ACT 1937–1976 s. 130C(2)**

## Ranges of Sentences According to Type of Drug and Extent of Supply

**Ranges of Sentences in Cases Involving Cannabis:** Generally speaking, the cultivation of cannabis and the possession of cannabis for the purpose of sale or supply to another person can be expected to result on conviction in a sentence of approximately three years imprisonment.

In *Davis* (C.A. 173 of 1974), the defendant, who had been previously convicted of two offences involving the possession of cannabis, was convicted of an offence involving the cultivation of between 90 and 100 cannabis plants. Evidence disclosed that the accused had been cultivating the plants mainly for his own use although anything in excess of that would be used for the purposes of sale. The sentence imposed by the trial judge was a sentence of 34 months, no doubt based on the fact that the appellant had been in custody for a period of two months previously, before sentence was imposed, so that in effect he was to have been imprisoned for a total of three years.

The Chief Justice and Stable J. agreed that the application for leave to appeal against the sentence on the grounds that it was manifestly excessive should be refused. In the course of his judgment Stable J. stated that:

> This court has on a previous occasion, in the case of *The Queen* v. *Howarth* expressed its attitude towards drugs, in particular cannabis, and at p. 437 of the report of that case in [1973] Queensland Reports 431 it was said by myself, with the agreement of the other members of the court – 'I think it apposite to bear in mind the common knowledge that in recent years the Australian community, particularly in the capital cities, have become alarmed at the growing and dangerous use of narcotic drugs, particularly by young people'. I realise that that particular case was one which dealt with a 'pusher'. It is not established that the applicant in this case essentially was a 'pusher'. But I consider that the remarks which I have quoted are apt to be considered in a case such as this.

In a dissenting judgment, D.M. Campbell J. drew a distinction between hard drugs and soft drugs. He also distinguished between a case where a person is growing cannabis for commercial purposes and dealing in it as a peddler, and a case where he is growing it for his own consumption.

In *Poole* (C.A. 181 of 1974), the Court of Criminal Appeal set an effective sentence of two years eight months in a case involving the possession for the purposes of sale of a quantity of cannabis. This sentence reduced that imposed by a judge of the District Courts who had sentenced the defendant to two and a half years imprisonment, such period to be cumulative upon another sentence of two years which had been imposed in respect of a closely related offence of selling dangerous drugs.

The Court of Criminal Appeal substituted an order that the two sentences were, so far as possible, to be served concurrently. The offence for which the defendant was convicted in respect of the earlier matter comprised the sale of cannabis resin. The sale was made to a detective in disguise who did not then and there disclose his identity or take any measures to arrest the seller. The detective went to the defendant's house approximately one month after the commission of the earlier offence and on searching the premises he found in the defendant's bedroom the drugs which were the subject of the latter charge. The detective then arrested the defendant in respect of the earlier sale, and also in respect of the possession of the drugs discovered in his visit to the defendant's house.

An exception to the general rule of imprisoning distributors of cannabis is seen in *Evans and Gerraghty* (C.A. 124 and 125 of 1974), where both accused had pleaded guilty in the District Court to a charge of attempting to supply to another person a dangerous drug, namely, cannabis. In essence, the circumstances were that the defendants acted as intermediaries between a

person who had a supply of the drug and wanted to sell it and a Customs and Excise officer who posed as a purchaser.

Both defendants were placed on probation for a period of two years and the Attorney-General appealed against the orders on the ground that the sentences imposed were inadequate and insufficient. However, because the Court of Criminal Appeal had knowledge of the response of the two defendants to probation, it considered that this was a case where an exception to the general rule could be made. Wanstall S.P.J., with whom the other members of the court agreed, stated that he was prepared to make an exception on the basis of the defendants' response to the probation orders. He indicated that the trial judge took a justified risk with them in the circumstances and that it would have been unjust of the appellate tribunal to take them out of probation and sentence them to a term of imprisonment. This approach was adopted in spite of the court's recognition of the general rule in such cases, that is, that a sentence of imprisonment should have been imposed because the defendants in their capacity as go-betweens were engaged in the distribution of drugs.

A further exception to the general rule that a term of imprisonment will be ordered in the case of the sale or supply of cannabis, can be seen in *Howard* (C.A. 130 of 1975). On conviction for possession of cannabis sativa for the purpose of sale, the trial judge imposed a penalty of 16 months imprisonment with a recommendation that the defendant be considered for release on parole after serving six months. The defendant's co-defendant had been placed on probation for a period of two years, by a different trial judge. Each judge was unaware of the sentence imposed by the other, and the Court of Criminal Appeal therefore set aside the sentence of imprisonment, and admitted Howard to probation for 18 months on the terms on which the probation order had been made in the case of his co-defendant.

A penalty of a fine of $500 upon conviction for supplying cannabis to another person was upheld by the Court of Criminal Appeal in *Sloan* (C.A. 26 of 1972). The Court of Criminal Appeal heard evidence which had established that the defendant had become involved in the offence primarily to provide transport for another offender. Whereas the magistrate had acted upon the impression given from the statement of the prosecuting officer that the defendant was the active party in arranging the supply and in making contact with the persons who had the drug in their possession, a different interpretation was open upon the facts revealed to the appellate tribunal. Wanstall S.P.J., with whose judgment Hart and Lucas JJ. concurred, stated that:

> In my view, any offence under Section 130 and particularly the one here charged

> of supplying a drug to two youths merits heavy punishment, having regard to the growing evil of drug dependence in the community, and the wickedness of setting youth upon the path to it. Accordingly if the facts had been as they appeared to the magistrate I should have been inclined to increase the penalty. But knowing as this court now does the defendant became involved in the offence on the fringe rather than at the centre, it is my view that the punishment inflicted by the magistrate is not insufficient or inadequate.

Thus, it appears that the correct punishment was imposed by the magistrate for the wrong reason.

In *Cameron* [1978] Qd. R. 118, the applicant sought leave to appeal against sentences imposed on summary conviction of two charges. The first charge concerned the cultivation of cannabis *sativa* on which he was sentenced to one month imprisonment. The second charge concerned the possession of cannabis sativa, on which he the applicant was fined $400, in default of payment 50 days imprisonment, and no time to pay was allowed. The applicant was unable to pay the fine immediately and appealed against sentence. Douglas, J. stated that:

> Had the situation been that there was an appeal against the sentence of one month's imprisonment and nothing else, I do not feel that I would have been in a position to substitute my view for that of the magistrate. However, in doing what he did and refusing to allow time to pay, the magistrate by imposing a fine effectively increased the initial sentence imposed since neither of the applicants was in a position to pay the fines without time to pay. I do not think that it is proper sentencing procedure for a magistrate to impose a penalty in the manner in which he did in these circumstances. He was wrong in law (see *Reg.* v. *Reeves* (1972) 56 Cr. App. R. 366). That being so, I think the matter is at large so far as this court is concerned.
>
> Both of these applicants were young men. They had had not much contact with the drug. They were cultivating four plants, one of which on the evidence was either sick or dead, for their own use exclusively in a most amateurish manner.
>
> I quite realise this is a prevalent offence and that examples must be made. But more humane reasoning should prevail in circumstances like this. I think that no good would be done to the community nor to these two young men in serving the sentence imposed on them. It is far better that they be given a chance to rehabilitate themselves, and to that extent I would propose that in lieu of the sentences imposed on them they be admitted to probation for a period of two years with the special condition imposed on them that they refrain from selling, cultivating, smoking, dealing in or having in their possession cannabis *sativa* during the period of the probation. That, of course, is in addition to the usual condition that they abstain from violation of the law and the other usual terms of probation orders are applied.

W.B. Campbell, J. and Andrews, J. agreed with the judgment of Douglas, J.

**Ranges of Sentences in Cases Involving Heroin:** In cases concerning the

importing of heroin for the purpose of sale, it appears that a sentence of less than five years will not be upheld by the Court of Criminal Appeal. In *Daxenos* (C.A. 162 of 1974), the defendant was sentenced to five years imprisonment on a charge of being in possession of heroin for the purpose of sale. This sentence was imposed by the trial judge on the basis that the defendant was a first offender with respect to offences involving drugs. Douglas and Hoare JJ. agreed with Wanstall S.P.J. that:

> [F]or a person who has engaged in selling such a dangerous drug as heroin a sentence of five years, even though it is the first time he is convicted, is not only an appropriate sentence but anything less would not be appropriate in most cases. It is the duty of judges of the District Court and of this Court, if such matters come before us, to impose sentences which will stop the growing criminal activity of peddling dangerous drugs in our community. Fortunately, we are well below some other places in the world in relation to the use of drugs in our community, but the number of cases that do come before the courts, and the number of seizures, which are made by customs and prevention officers generally, show that the flow of drugs in Australia is reaching greater volume. It is therefore particularly important that judges should impose sentences on the relative few who are caught which will act, so far as sentences go, as deterrence.

A comparable sentence was imposed by the trial judge in *Cheng Wah* [1972] Q.W.N. 45, where the defendant had been convicted of two charges brought under the Customs Act 1901–1971. Both charges involved heroin: the first alleging importation and the second alleging unlawful possession. The quantity of heroin which the defendant had brought into the country and of which he had been in possession was 136.9 grams (approximately 5 ounces). Primarily because of the advanced age of the defendant the sentence of five years imposed by the trial judge was reduced to three years. Hanger C.J., with whose judgment Skerman J. agreed, commented that:

> [I]t is clear that the offence is regarded by the legislature as a very serious one. Quite independently of that, of course, it is a matter of which we are all aware that the offence is a matter of great gravity and a matter of great consequence to people in Australia. As the age of the appellant at the time of the commission of the offence was 69 years, it is quite probable that he would not be able to engage in smuggling drugs into Australia for much longer; from the point of view of deterring him or preventing him from repeating his offence it would seem to me that the punishment of considerably shorter time would have met the case.

**Importing of Drugs**: Individualisation in the assessment of punishment can be considered to be unusual in sentencing for the importing of heroin. The leniency evidenced in the decision in *Cheng Wah (supra)* is emphasised by comparison with *Howarth* [1973] Qd. R. 431. In this case 10½ pounds of cannabis sativa had been imported into Australia after the drug had been

packed into the hollow sides of three boxes. The defendant admitted that he intended to sell the cannabis in bulk deals at $500 a pound. In refusing an application for leave to appeal against a sentence of five years imprisonment, the Court of Criminal Appeal adverted to the calculated cunning displayed in the importing of the drug for sale in pound lots at enormous profit. The judgment of Stable J., with which the Chief Justice agreed, is notable in that it did not distinguish between hard drugs, for example, heroin, and soft drugs, for example, cannabis. This view, it will be recalled, is contrary to that expressed by D.M. Campbell J. in a dissenting judgment in *Davis (supra)*. Stable J. commented that:

> [W]ith the learned Judges who sat on the Court of Criminal Appeal in *Reg.* v. *Peel* [1971] 1 N.S.W.L.R. 247, I am aware that there is a view held by some people that the drug in question here is innocuous. Indeed, their Honours said (p. 261) that the Trial Judge, in imposing the sentence which he did, appeared to be giving weight to his personal view that cannabis is innocuous and that illicit trafficking is to be similarly regarded. They held that he was in error in so regarding the offence. Amidst the competing and conflicting views the law stands embodied in an act of parliament whose object is to contain trade in cannabis and heroin, and other specified drugs, and keep the use of these things for medical and scientific purposes. The courts take the law as it is – not as some people say it ought to be.

Despite this judgment, it does appear that the Court, in assessing penalty is prepared to distinguish between cases involving the supply of heroin and cases involving the supply of cannabis. This distinction is more likely to be found in cases involving the possession by the defendant of a quantity of cannabis primarily for his own use than in cases where the predominant intention is the distribution and supply of the drug to other people.

**Cannabis Resin:** In cases involving the possession of cannabis resin for the purposes of sale, even a clear need for the rehabilitation of an offender by way of cure of his addiction can be expected to be considered by the court to be of secondary importance to the aspect of deterrence. In such cases what is seen as the interest of the community is given greater recognition than that of the individual offender. By adopting this approach the court is plainly relying on the assumption that penalties imposed for drug offences become quickly known among offenders and potential offenders.

In *Starr and Kiriazis* [1973] Qd. R. 472, the defendants both pleaded guilty to a number of offences which, stated generally, were: 1. That both men had possession of hashish for the purposes of sale; 2. That Kiriazis had hashish in his possession; 3. That Kiriazis had opium in his possession; 4. That Kiriazis had in his possession a pipe which he had used for smoking a dangerous drug; 5. That Starr had in his possession hashish; and 6. That Starr had

in his possession a pipe which he had used for smoking a dangerous drug.

A carton collected by the accused from a post office was shown to have contained about 10 pounds of hashish and it appeared that the drug had been sent to the accused from Sydney and that they intended to sell it at hotels and on the beaches of the Gold Coast. The drug consisted of four blocks which might be expected to realise, sold in blocks, a total of $4,400. The defendants intended to sell it a package at a time or in deals. A deal consists of about one ounce and would be sold for $25. They had previously sold two pounds of hashish on the Gold Coast for about $2,300. Their profit from this sale was between $150 and $200 each.

On the first charge each of the defendants was fined $300; in default four months imprisonment, and on the other charges each was ordered to be detained in Wolston Park Hospital pursuant to section 130B of the Health Act.

In upholding appeals by the Attorney-General against the sentences on the ground that each sentence was insufficient and inadequate in the circumstances, the Court of Criminal Appeal sentenced each accused for the offence of possession for sale to three years imprisonment with hard labour in addition to the fine imposed by the District Court. For the other offences each accused was ordered to be imprisoned for six months with hard labour; all sentences of imprisonment to be concurrent. The Court rejected defence submissions asking it to give priority to the interests of the defendants who were, according to medical evidence, addicts. It held that the nature of the offences and their gravity as shown by the penalties provided for by the legislation made it clear that, notwithstanding the arguments as to the interest of the offenders, the sentences imposed by the trial judge were inadequate.

**Supplying a Dangerous Drug**: Perhaps the clearest indication of the approach of the Court to the possession and to the supply of a dangerous drug is seen in *Elphick* [1972] Qd. R. 393. The defendant was charged with possession of cannabis and lysergic diethylamide (LSD) and with possession of a pipe for the smoking of cannabis. The defendant was sentenced to imprisonment for nine months, the magistrate exercising a discretion in making the sentences on the two charges cumulative. An application for leave to appeal against the sentences was granted by the Court of Criminal Appeal, which set aside the orders made by the magistrate and substituted sentences, to be served concurrently, of such duration as would enable the applicant then to be released forthwith.

The Court considered that the magistrate had wrongly associated the defendant with the offence of his companion, who had brought prohibited plants into the area in a vehicle in which he had travelled from Sydney. The

possession of these plants strongly suggested that the owner was not merely a user but a person who intended to supply these plants to other people and to thereby profit. The Chief Justice drew a clear distinction between possessing and supplying drugs:

> Certain offences with reference to plants attract a maximum penalty on indictment of imprisonment for ten years and a fine of $10,000; and once the magistrate allows himself to identify the applicant with the guilt of his companion. I can well understand the sentences which he imposed on the applicant. But in the statement of facts made to the magistrate by the prosecution to which the applicant gave his assent, there was no suggestion that the applicant had any hand in the guilt of his companion though one may have no doubt of his knowledge of what his companion was doing. The magistrate was not entitled to do more than take the facts stated by the prosecutor and assented to by the applicant in considering the sentences to be imposed on him for his offences. It is in going outside this area that I think he erred. If the applicant had been a party to these other offences, I would be able to see no ground for the interference of this court whether it were a first offence or not.

**Jurisdiction to Hear Appeal**: It should be noted that since *Demack, ex parte Edwards* [1973] Qd. R. 3, the Court of Criminal Appeal has no jurisdiction to hear appeals from persons summarily convicted of an offence against s. 130 of the Health Act 1937–1975.

# Chapter 8

# Offences Involving Personal Violence

### Where the Violence Results in Death

**Murder**: A person who is convicted of the crime of murder must be sentenced to imprisonment with hard labour for life. The sentence cannot be mitigated or varied under s. 19 of the Criminal Code.

**CRIMINAL CODE s. 305**

**Manslaughter**: A person who is convicted of the crime of manslaughter is liable to imprisonment with hard labour for life. The sentence may be mitigated or varied under s. 19 of the Code.

**CRIMINAL CODE s. 310**

It is quite wrong to say that all cases of manslaughter by criminal negligence merit the same punishment; each case must depend upon its own circumstances.

**GALEANO** [1961] Q.W.N. 13

As a generality it is preferable that a conviction for manslaughter by reason of diminished responsibility should be by jury verdict. In such cases the trial judge will have had the benefit of detailed evidence concerning the actual killing, the behaviour and actions of the accused, and the testimony of witnesses who have knowledge of the accused's background and personality in addition to the medical evidence.

**BROWN** (C.A. 109 of 1972)

There will occasionally be cases so clear that it is appropriate for a plea of guilty to manslaughter with diminished responsibility to be accepted by the trial judge. However, if that course be taken, it is of the utmost importance that adequate evidence be led on all matters which bear on the issue of the mental state of the offender, the degree of moral responsibility, and sufficient evidence led of the circumstances surrounding the killing to enable the trial judge to appreciate and evaluate the evidence adduced. It is the duty of the Crown to take a positive attitude in assisting the Court to determine sentence.

**BROWN** (C.A. 109 of 1972)

On a charge of murder where the jury returns a verdict of manslaughter the trial judge will not know on what basis the jury negatived an intent to kill. In such circumstances a judge is entitled to be guided by his own view of the evidence before him.

**LEE** (C.A. 24 of 1973)

Where an offender has been convicted of manslaughter due to diminished responsibility, the usual course is to impose a sentence of imprisonment for life and to leave the future of the offender in the hands of those authorities who would be best fitted to determine his treatment and the time at which he should be released.

**McCORMICK** (C.A. 117 of 1975)

**Sentences in Cases Involving Manslaughter**: In *Galeano* [1961] Q.W.N. 13, the offender was a 22-year-old male of Italian background who worked on a partnership farm with the victim, the victim's wife (who was the offender's sister) and the victim's father. A dispute on the farm resulted in the fatal shooting of the victim from a gun fired at close range by the offender. The offender had no previous convictions. A sentence of 18 months imprisonment was quashed by the Court of Criminal Appeal and a sentence of six years imprisonment was imposed.

In *Brown* (C.A. 109 of 1972), the offender was a 28-year-old male who, from the age of at least 10 years, had suffered a nervous illness known as a phobic disorder. He was abnormally frightened that there were murderers at large in the area where he lived and he constantly went in fear of his life. The victim was shot twice at close range by a shot-gun fired by the offender following a dispute over ownership of an agricultural implement. The Court of Criminal Appeal upheld an appeal by the Attorney-General against a sentence of two years probation and sentenced the offender to imprisonment with hard labour for five years and added a recommendation that he be considered for release on parole by the Parole Board after serving 12 months of such term. The court further recommended that the period of confinement be spent at a prison farm or some such place of minimum security and that the offender be examined by psychiatrists and given adequate psychiatric treatment.

From the judgment of W.B. Campbell J:

> How far is a court justified in exposing the community to risk by allowing the respondent to live freely within it in order that he may the more readily be restored to health? It is a question of the balancing of one interest against the other.

From the judgment of Hoare J:

> However, the unavailability of some kind of secure hospital rules out the possibility of security (for the public) while the person concerned receives treatment without imprisonment. It seems to me that the interests of the community require that the (offender) be imprisoned for a period sufficiently long to ensure (as far as that can be done) that he is not a serious risk to the community while he receives psychiatric or other treatment which it is hoped will assist him to take his place in the community in due course.

In *Lee* (C.A. 24 of 1973), the death of the victim was caused by an assault with a heavy, long, iron bar wielded by the offender with considerable force in a frenzy of rage. The Court of Criminal Appeal dismissed an appeal by the offender against a sentence of 14 years imprisonment with hard labour.

In *James* (C.A. 27 of 1973), the offender threw a tin containing a quantity of petrol at the deceased. The tin struck a wall spilling petrol onto the wall, the deceased, and the floor nearby. The offender then threw a lighted cigarette at the deceased, whereupon the petrol ignited and caused the deceased's death by burning. A verdict of guilty of murder was set aside by the Court of Criminal Appeal on the ground that the trial judge had misdirected the jury on the question of provocation, and a verdict of guilty of manslaughter was substituted pursuant to the provision of s. 668F(2) of the Criminal Code. A sentence of imprisonment with hard labour for 10 years was imposed and it is recommended that the offender receive such necessary psychiatric treatment from the visiting psychiatrist as the superintendent and the visiting psychiatrist considered necessary.

In *McClurg* (C.A. 61 of 1973), the offender was tried for the murder of his wife and was convicted of manslaughter on the basis of diminished responsibility. The victim died of a number of stab wounds, some of which completely penetrated her body. Psychiatric evidence, which must have been accepted by the jury, was to the effect that at the time the offender was suffering from a reactive depression which affected him in relation to each of the capacities referred to in s. 304A of the Code. The offender's wife had grossly neglected the two young children and her husband. One of the children required daily medical attention and had a life expectancy of only 14 years. The trial judge, in making a probation order for four years, stated that:

> The condition of mind of (the offender) was no doubt caused solely by his wife's conduct. The measure of his loss of self-control may be gauged by the violence and the number of blows which he inflicted on her. The abnormality of mind from which he suffered was not only caused by his wife but it was such that his aberrant behaviour was directed against her alone; there is no question of his

> being a menace to anyone else in the community. The mother of the children is dead; they need the affection and attention of a father. This affection he can give. There seems no question of the affection of the children for him. That imprisonment for any period would [not] do him any good is not to my mind doubtful.

The Court of Criminal Appeal dismissed an appeal by the Attorney-General brought on the grounds that the sentence was inadequate and insufficient in the circumstances. Kneipp J., with whom the other members of the Court agreed, stated that:

> We have before us a report from the Chief Probation Officer, given some four months after the (offender) was placed on probation which is optimistic about his prospects, and an affidavit by Dr Parker made a little earlier, saying that
> 'At no time since his trial has there been any evidence of mental or emotional disturbance and, in my opinion, there is no risk to the community whatever by his not being in prison.'
> The principles on which a sentence will be reviewed on an appeal of this nature have recently been considered by this Court in *R.* v. *Liekefett* (Q.L.R. 25 August 1973), and *R.* v. *Saunders* (Q.L.R. 20 October 1973), and I need not repeat them. It could only be in an exceptional case that a conviction of manslaughter on the ground of diminished responsibility did not result in the imposition of a term of imprisonment, but I think that His Honour was entitled to regard this as such a case. The (offender's) abnormality was purely temporary, and his consequent misbehaviour directed only against his wife. He is not a danger to any other member of the community. His children have a special need for his care. Imprisonment would not be of any benefit to him. His Honour felt that these considerations outweighed other relevant considerations, and I do not think that it could be said that he was wrong in taking that view. In my opinion the appeal should be dismissed.

In *Williams and White* (C.A. 172 of 1974; C.A. 5 and 6 of 1975), the offenders, both in their early twenties and both of Aboriginal descent, were jointly indicted on a charge of murder and were both convicted by a jury of the crime of manslaughter. Williams had a very long criminal record and had been previously convicted on a number of charges of breaking and entering and of other offences of dishonesty. White had been convicted of a series of comparatively minor offences six year prior to the commission of the present offence. The two offenders, together with a third person, whose whereabouts was unknown at the time the trial commenced, were alleged to have assaulted the deceased while all three were armed with fence palings. It was not established that either Williams or White struck any actual blow upon the deceased but that they were involved in the offence by the effect of ss. 7 and/or 8 of the Criminal Code.

The assault which brought about the death of the victim occurred near an hotel at which the offenders had been drinking for some considerable time prior to the commission of the offence. Three men were observed by the offenders near the hotel and it was assumed that these men were responsible for some previous altercation with Williams in the hotel. The offenders armed themselves with wooden fence palings, one of which (that used by White) had a nail in it. The unfortunate victim, who had consumed a considerable amount of drink, had absolutely no association whatever with those involved in the altercation in the hotel, but was merely standing near a telephone box apparently awaiting some form of transport which he had requested. Williams was sentenced to seven years imprisonment with hard labour and White to three years imprisonment with hard labour and the Attorney-General appealed against both sentences as being insufficient and inadequate. Williams also appealed against his sentence as being manifestly excessive. The Court of Criminal Appeal dismissed both appeals in relation to Williams but upheld the Attorney-General's appeal in respect of White. A sentence of five years imprisonment with hard labour was imposed. W.B. Campbell J. stated that:

> A consideration of all the circumstances had led me to conclude that the sentence of 7 years imprisonment imposed upon Williams should not be disturbed on appeal. It is not a heavy sentence when one considers the brutality of the attack and the criminal record of Williams, but I do not think it is such that an appellate court would be justified in holding that it is inadequate.
>
> The respondent White received a prison sentence less than half the length of that which was imposed upon Williams. A term of imprisonment for three years appears, on the face of it, to be insufficient for the crime of manslaughter arising from an attack of this nature. It is true that the evidence disclosed that White did not strike Nolan, although there was evidence, disputed by him at the trial, that he struck Roberts. Although Williams may have been the prime instigator of the attack, White drove the motor vehicle and pulled a paling from a fence; this was the paling he held as he approached the victims. He did not desist from the attack at any time, although he was led by Williams who was out, in a spirit of revenge, to assault these three persons whom he, Williams, believed had attacked and injured White's brother earlier in the evening in a fracas at an hotel.
>
> I think there is force in the submission made on behalf of the Attorney-General to the effect that His Honour placed too much importance on the subjective facts, including White's reasonably satisfactory past, and too little on the gravity of the crime. When listening to the submissions on sentence made by White's counsel, the learned Judge said: 'I must say I had a broadly favourable impression of him. He seemed a decent type of young fellow I thought.' I fully appreciate the fact that the learned and experienced Judge had considerable opportunities, during a long trial and by hearing and seeing White in the Witness box, to enable him to form this opinion. An appellate court does not possess such an advantage.

I am conscious of the fact that a sentencing Judge should, inter alia, have regard to the public interest element which requires that an offender be afforded the opportunity of turning from criminal ways to the leading of an honest life. This was a matter which His Honour took into account, for he urged White, on his release from prison, to become a good, hard-working citizen. But this is not a case where a very short prison sentence was imposed nor one where the offender was released on probation; White will, on the trial judge's sentence, be spending a considerable time in gaol isolated from the community. His Honour referred to the fact that his duty was such that he must send White to prison, and, in a case of this nature, involving as it does the form of manslaughter by violence, I am of the opinion that too much emphasis should not be placed upon the rehabilitative element at the expense of the deterrent and punitive aspects of punishment.

Having regard to my view that the sentence imposed upon Williams was by no means excessive, to the principle based upon the public interest that sentences upon co-offenders should, generally, compare favourably with one another, and to the other matters to which I have referred, it is my opinion that the sentence imposed upon White is such as to warrant the interference of this Court. I would allow the appeal against sentence, in the case of White by the Attorney-General, and order that a sentence of imprisonment with hard labour for five years be substituted for that of three years. I would dismiss the appeal by the Attorney-General against sentence in the case of Williams, and I would refuse leave to Williams to appeal against such sentence. The resultant differentiation in treatment between White and Williams, namely one of two years, is justified by a consideration of, and gives sufficient weight to, the matters to which His Honour referred, namely, the differences in their antecedents, the fact that Williams played a more dominant part in the attack, and the learned Judge's view that White was a decent type of man.

For sentencing in a case involving unlawful killing where the deceased died as a result of a physical abnormality, see *Martyr* [1962] Qd. R. 398.

**Abortion**: In *Kelly* [1960] Q.W.N. 30, the offender, a 33-year-old female, who was a deserted wife with six children was convicted of the offence of attempting to procure an abortion. She did not herself attempt to procure the abortion of the girl in question but at the request of another woman, she took the girl to the home of the man who performed the abortion. For that she received $20. There was no evidence that the offender was engaged in the business of procuring abortions. The offender was sentenced to imprisonment for 18 months with hard labour and sought leave to appeal against this sentence as being manifestly excessive. The Court of Criminal Appeal reduced the sentence to that of six months imprisonment with hard labour to date from the time of sentence in the inferior court.

## Non-fatal Violence: General Principles

**Assault**: Where an assault is of a sexual nature such as to bring into operation the circumstances of aggravation referred to in s. 344(a) of the Code, a magistrate may not take into account such circumstances unless they are specifically charged.

**MATTHEWS [1960] Qd. R. 396**

Where an offender who was a member of the Queensland Police Force was charged with unlawful assault occasioning bodily harm and was convicted accordingly, it was held that a sentence of nine months imprisonment with hard labour was not manifestly excessive as the highest standards of conduct are to be expected from policemen at all times, whether they are on duty or off duty, and whether they are in uniform or in plain clothes.

**O'MALLEY [1964] Qd. R. 226**

The power to make a sentence of imprisonment imposed on conviction on a charge of assault occasioning bodily harm cumulative with a sentence involving deprivation of liberty does extend to an order of a court directing imprisonment in the event of non-payment of a sum of money. Section 20 of the Criminal Code has been consistently construed as authorising the imposition of more than two sentences to be served cumulatively.

**ANDERSON [1967] Qd. R. 599**

An order for compensation comes within the definition of 'sentence' in s. 668 of the Code. Such an order comes within the definition as being an order made by the court of trial with reference to the person convicted. An order for compensation is not one for extra punishment. Although the terms of s. 668E(3) appear to apply more appropriately to the infliction of any of the punishments provided for in s. 18 of the Code, they should be construed to include a power to interfere with an order for compensation if, taken into consideration with imprisonment or a fine imposed, the order for compensation is too 'severe'.

**MUCKAN [1975] Qd. R. 393**

Where the nature of a crime and the defects of an offender's personality raise for serious consideration the risk that the offender's misconduct, or misconduct of a similar nature, might be repeated, such a matter can be dealt with adequately only by the imposition of a sentence which will leave the time at which the prisoner is to be released, if he should be released, wholly within the discretion of the Executive.

**CHURCH (C.A. 39 of 1974)**

However, in *Wilkinson* (C.A. 123 of 1972) this approach was not adopted and a lengthy fixed term of imprisonment was imposed in circumstances

remarkably similar to those in *Church (Supra)*. For details of both cases, see below in section on Attempted Murder.

Where an offender was diagnosed as psychopathic with periods of depression and withdrawal suggestive of a schizoid personality, and as addicted to alcohol which precipitated schizophrenic delusions resulting in irresponsible behaviour, such as attempts at suicide and homicidal attacks as the present charge involved, it was held by the Court of Criminal Appeal that a sentence of life imprisonment was inappropriate. A sentence of imprisonment with hard labour for five years was imposed with a recommendation that the Comptroller-General of Prisons favourably consider action under s. 16 of The Prison Act 1958:

**GASCOIGNE [1964] Qd. R. 539**

Note the remarks of the Court of Criminal Appeal in *Murdock* (C.A. 82 and 158 of 1978) concerning the effect of decision in *Gascoigne*. (See also p. 181).

Where an offender assisted others in a plan which involved the attempted killing of a victim, it was stated by the Court of Criminal Appeal that loyalty to one's friends or fellow union members and pressure from them to cooperate in the circumstances of the case do not justify a punishment by way of fine.

**CROSSINGHAM (C.A. 38 of 1974)**

**Robbery with Actual Violence while Armed with an Offensive Weapon:** The essence of this crime is the premeditation usually associated with it. The seriousness of this type of offence results from the possibility of causing injury to innocent people, and terror to both the people robbed and to innocent bystanders.

**LOBBAN (C.A. 94 of 1969)**

**Stealing with Actual Violence:** This offence is one of the most serious in the Code, and regard should be had to this fact and to the principle that the deterrent effect of punishment upon other possible offenders is a factor to be considered in imposing sentence.

**WATTS (C.A. 10 and 11 of 1971)**

The increasing prevalence of the offence of robbery and the fact that taxi-drivers, particularly at night, are in an extremely vulnerable position because they are alone, and because that as an adjunct of their occupation it is necessary for them to carry sums of money, call for sentences commensurate with the seriousness of the offence.

**MARTIN (C.A. 23 of 1970)**

Stealing with actual violence is the kind of offence which calls for something more than a sentence involving a good behaviour bond.

> It seems to me that the giving of the chance, in the terms in which it was given in this case, is, in the words of the test recently enunciated by this Court, 'manifestly wrong.' I consider myself that this is the class of offence which should be hit with a salutary sentence wherever it be committed right at the onset, to act as a deterrent to other people similarly inclined, who might be desirous of coming to the belief that in the district in which they live they will be allowed one bite before the law bites back.

From the judgment of Stable J. in **YASSYRIE (C.A. 109 of 1973)**

**Threatening to use Actual Violence**: Where an offender was convicted of assault with intent to steal and threatening to use actual violence in order to obtain the things which he intended to steal and at the same time being armed with a dangerous weapon, namely a rifle, it was held to be a circumstance of aggravation that the intended victim stated that he saw one of the offenders load the gun.

**PARSONS (C.A. 28 of 1975)**

**Robbery by a Young Offender with Circumstances of aggravation of being Armed with an Offensive Weapon, Being in Company and Wounding the Victim of the Robbery**: Deprivation of liberty in an institution for the care and control of young people does not have or retain the social stigma of a term of imprisonment.

**VAN OPSTAL (C.A. 5 of 1974)**

## Examples of Sentences Imposed in Cases Involving Non-fatal Violence

**Aggravating Factor – Assault**: In *Matthews* [1960] Qd. R. 396, the offender was a 19-year-old male who was charged with common assault under section 344 (a) of the Code. The circumstances surrounding the offence were that the offender had committed an unlawful assault on a five-year-old girl by placing his hand over her vagina while driving her home. Evidence was given that the offender had consumed a quantity of liquor. A sentence of a fine of £10, in default imprisonment for 14 days, was upheld by the Full Court because the charge had failed to allege that the assault was of a sexual nature and thus the magistrate was correct in not taking into account the aggravating circumstances of the offence.

### Assault

In *Muckan* [1975] Qd. R. 393 the offender was charged with assault causing grievous bodily harm and pleaded not guilty. He was acquitted of this charge, and convicted of assault. He was sentenced to imprisonment with hard labour

for one year and nine months. Application for compensation was made almost 12 months after the offence was committed, by which time the offender had been released on parole. An order to pay $800 by way of compensation to the victim was made. The circumstances surrounding the offence were that the offender had thrust a broken bottle into the face of the victim who suffered ten separate lacerations requiring the insertion of some 60 stitches. Damage was also done to the victim's teeth. The incident occurred at a suburban hotel at a time when the victim was lawfully going about his duties as a trainee manager.

The grounds of appeal to the Court of Criminal Appeal were that the order for payment of compensation added to the previous order for imprisonment made the total sentence excessive, the order for compensation being part of the sentence. It was further argued that the order for compensation could only be made at the trial and was therefore wrongly made because it was made nearly 12 months after the trial. In upholding the sentence and refusing the application for leave to appeal against sentence, Hanger C.J. stated that:

> The order for compensation comes within the definition of 'sentence' in Section 668. The order for compensation comes within it as being an order made by the court of trial with reference to the person convicted. A provision for compensation is not one for extra punishment. While the terms of section 668E(3) seem to be more appropriate to the infliction of any of the punishments provided for in Section 18, I think they must be construed to include a power to interfere with an order for compensation if, taken into consideration with imprisonment or fine imposed, the order for compensation is too 'severe'. The order for compensation in this case is appealable and can be varied by this court. As I do not regard the order for compensation as punishment, I am unable to say that, as punishment, the combined effect of the orders was excessive. This means that the only matter for our consideration is whether the amount of the compensation was itself excessive, regard being had to the provisions of Section 663A. I do not think that it was.

In *O'Malley* [1964] Qd. R. 226, the offender, a 34-year-old male, who was a first class constable of police, was charged with unlawful assault occasioning bodily harm. After an argument at an hotel the offender punched the victim several times, dislocating the victim's shoulder and leaving him at the side of the road. A sentence of imprisonment with hard labour for nine months was upheld on the ground that the highest standards of conduct are to be expected from policemen at all times, whether on duty or off duty, whether in uniform or in plain clothes.

In *Anderson* [1967] Qd. R. 599, the offender was convicted on a charge of assault occasioning bodily harm. The circumstances surrounding the offence were that the offender kicked a police constable in the stomach,

attempted to hit him with a shifting spanner, struck him on the side of the head with a bottle of wine, breaking the bottle and then attempted to push the jagged end of the bottle into the contable's face. A sentence of imprisonment with hard labour for two years directed to take effect from the expiration of the deprivation of the offender's liberty for the offence of failing to pay maintenance was upheld by the Court of Criminal Appeal.

In *Eustace* (C.A. 98 of 1971), the offender was a 39-year-old male with a fairly long criminal record although he had apparently served only one term of imprisonment, that being for the non-payment of a fine. In 1964 he had been convicted of the offence of aggravated assault on a female, and the particulars of that offence were before the trial judge when passing sentence in the present case. The particulars disclosed a somewhat trivial assault on a girl on the previous occasion, the victim being 16 years of age and engaged to the offender at the time of the assault. Many of the offences in the offender's record related to stealing and false pretences and there had been one offence of resisting arrest.

In the present case it appeared that the respondent was living in a *de facto* relationship with the mother of the girl who was assaulted, and that the offender was, at the time, in *loco parentis* to the girl. The girl's age was about 7 years. From photographs tendered in evidence it appeared that the beating which the offender gave to the girl was very severe. There were bruises and weals over a large part of the girl's body – some 20 in number. The Attorney-General appealed to the Court of Criminal Appeal against a sentence discharging the offender upon entering into his own recognisance in the sum of $200, conditioned to appear and receive the judgment of the Court at any time when called upon within three years, and further conditioned that he should in the meantime keep the peace and be of good behaviour. From the judgment of Lucas J., with whom Douglas J. agreed:

> At the same time, the learned judge heard the evidence; he heard the mother of the child give evidence; and, as is so often said, he had the atmosphere of the trial.
>
> The record shows that he gave deep consideration to the question of sentence; and in my opinion, in this case it is important that he saw and heard the witnesses, an advantage which is denied to us.
>
> In all the circumstances, while the sentence is not necessarily the one which I would have imposed, I do not think that there has been, in this case, any ground for interfering and I would order that the appeal be dismissed.

**Assault Causing Grievous Bodily Harm**: See *Muckan* (C.A. 189 of 1976) in section on Assault.

In *Djordjevic* [1970] Q.W.N. 43, the offender was a Jugoslav who had been

resident in Australia for approximately two years prior to his conviction for assault occasioning bodily harm. He had no previous convictions of any type. The charge of assault arose from an incident which occurred during the course of a demonstration in Queens Street, Brisbane. The offender was in the front rank of what was described in evidence as a procession of persons walking towards the Stock Exchange when the procession was intercepted by police at an intersection. One policeman approached the offender and demanded that he hand over a flag that he was carrying in the procession. A struggle developed between this policeman and the offender and a second policeman approached to assist the first. The offender said to the second policeman 'Get out of my road copper or I'll do you' and almost simultaneously the offender kneed the second policeman in the testicles. The policeman suffered pains and nausea and was absent from work for five days. The offender was sentenced to imprisonment with hard labour for nine months. The Court of Criminal Appeal upheld the sentence and refused the offender's application for leave to appeal against sentence. From the judgment of W.B. Campbell J.

> I would not myself have passed as heavy a sentence on the applicant as did the learned District Court Judge. I was influenced by the facts that the applicant had not been convicted previously of any offence, and that the assault occurred during a protest demonstration and following upon a struggle with another police officer over the possession of a flag. Moreover, I am inclined to doubt whether Constable Rogerson (the first policeman) had any legal right to take the flagpole or to seize the flagpole from the applicant. What I have said is not to be taken in the least as condoning the use of violence on such occasions, particularly violence of the character used by the applicant. It seems that the blow was one made in the excitement of the moment. However, I cannot see that His Honour acted upon any wrong principle of law and I am unable to say that the sentence was so excessive as to warrant interference by an appellate court.

In *Cornwall* (C.A. 68 of 1970), the offender pleaded guilty to two charges of assault occasioning bodily harm on a child of the age of five years. He was sentenced to imprisonment with hard labour one year for the first offence and to 18 months imprisonment with hard labour for the second offence; the sentences to be cumulative. The Court of Criminal Appeal upheld both sentences.

In *King* (C.A. 137 of 1973), the offender pleaded guilty to three charges; first, that he attempted to commit rape upon a young woman, second, that he unlawfully did grievous bodily harm to the young woman and, third, that he unlawfully and indecently assaulted her. The facts in relation to each of the three offences to which the offender pleaded guilty were all part of what could be described as one incident. The trial judge, in fixing the sentence for

attempted rape, made it clear that he was disregarding so many of the facts as constituted the offence of doing grievous bodily harm, and sentenced the offender for the two offences. In respect of the charge of doing grievous bodily harm, having considered it separately from the offence of attempted rape, the trial judge made the sentence cumulative on that for attempted rape. With regard to the offence of unlawful and indecent assault, the trial judge ordered that the sentence for that offence should run concurrently with the sentence for grievous bodily harm. The sentences imposed by the trial judge were eight years for the attempted rape and six years for the offence of grievous bodily harm. From the judgment of Hanger C.J.

> Counsel representing the Crown has pointed out to us that the act which constituted the basis of the charge of unlawful and indecent assault was separable from the acts which constituted the attempted rape on the young lady. It is a matter for consideration in the circumstances of any particular case whether it is advisable that offences of this kind should be joined with a charge of attempted rape or rape.
>
> However, the only matter for consideration by this court in the circumstances is whether the sentences imposed are manifestly excessive. As I take the view that the offence of causing grievous bodily harm was quite separable and distinct from the act of attempted rape, I do not see why the two matters should not have been made the subject of separate sentences.
>
> I am not satisfied in the circumstances that the sentences in these cases were manifestly excessive. Therefore I think the application for leave to appeal against the sentence should be refused.

From the judgment of Stable J.

> I agree, and in particular do I agree that the charges of attempted rape and grievous bodily harm were, in the circumstances, properly separated. In my view the record discloses that violence beyond that ordinarily associated with rape cases was committed upon this girl. She had inflicted on her by this applicant and appellant, according to the record, a huge left orbital haematoma which completely closed her left eye, lacerations on her left upper eyelid, nose swollen and movable due to a clinical fracture, she was tender and bruised over her right mandible, X-rays showed that she did in fact have a fractured nose and a probable fracture above her left orbit, and one final result of these matters is that she has had at least substantial partial destruction of the vision of her left eye.
>
> The learned trial Judge regarded this – and I agree with him – as showing circumstances of extreme violence.
>
> Beyond these remarks I have nothing to add to what has fallen from the Chief Justice. I would agree that the appeal against conviction be dismissed and the application for leave to appeal against sentence be refused.

From the judgment of D.M. Campbell J.

> Whatever objection might have been open to the joinder of the two charges of grievous bodily harm and indecent dealing with the more serious charge of

> attempted rape, in fact the applicant pleaded guilty to the lesser charges. Looking at the circumstances surrounding the commission of the offence of attempted rape, which only fell short of rape because of the resistance shown by the complainant, I am not able to see that any injustice is done him by a cumulative sentence of 14 years which I would have regarded as the appropriate sentence if the charge of attempted rape stood by itself. I agree with the order proposed by the presiding judge.

In *McNally* (C.A. 4 of 1975), the offender was convicted of unlawfully doing grievous bodily harm in circumstances that showed that the victim and the offender were acquainted with each other, both being members of or associated with, a motor cycle organisation. Following an altercation over the ownership of a jacket, the offender produced a knife and inflicted four wounds upon the victim – one in the abdomen, one in the chest, one in the armpit and one in the shoulder. The offender was sentenced to imprisonment with hard labour for ten years and the Court of Criminal Appeal upheld this sentence. In their judgments the members of the Court of Criminal Appeal commented upon section 139 of the Children's Services Act. From the judgment of Hoare J.

> I only wish to say a few words in relation to the application for leave to appeal against sentence. In this respect, this is another in a line of many cases in which the extraordinary provisions of section 139 of the Children's Services Act have to be considered. It has been said – and I think rightly said – that the section bears the imprimatur of having been drafted by the author of Alice in Wonderland. One can see the general muddled intention that the section was designed to protect children against publication in any way of the circumstances of certain punishments imposed by a Children's Court. However, the section has, in fact, a much wider application. One result is that in appeals before the Court of Criminal Appeal, the court is able to have the whole criminal history of an appellant before it in so far as concerns offences committed by that appellant as a child in every other state of the Commonwealth. The result is that this court has a full criminal history of an appellant in so far as it relates to his activities as a child except as to this state. Why this curious state of affairs should continue to apply is a mystery to me. However, there is a further aspect of the absurdity of this provision in that while the intention no doubt was to protect an accused person, the application of the section is such that matters which may be considered favourable to the appellant must also be suppressed. That, indeed, was the legal position in this case. There were two reports from the Department of Children's Services which were placed before the trial judge. The appellant's counsel considered that these reports were favourable to the appellant and likely to assist him both in regard to the appropriate sentence by the trial judge and of resistance to this court in considering the same matter. However, it appears to me that even if in disregard of the section this court were to consider the matter relating to the character and antecedents of the appellant, a course which is in breach of the section, nevertheless, even these matters do not persuade me in any way that the sentence was in any way excessive.

**Assault Occasioning Bodily Harm:** In *Tacey* (C.A. 6 of 1973), the offender was a 23-year-old male who was employed as a physical education teacher at a high school in Brisbane. He had no previous convictions. The offender pleaded guilty to a charge of assault occasioning bodily harm where the girl victim also was a school teacher of comparable age. The two had been keeping company over a period of some seven months in an emotional relationship in which the stronger feeling was on his side. The victim had declined to formalise the relationship into a betrothal. The offender hit the victim about the face and head and also punched her twice in the side of her stomach and started to kick her. The offender also grabbed the victim by the hair and banged her head on the floor several times. This behaviour was apparently the result of the offender's displeasure with the attitude of the victim towards himself. The assault was entirely out of character. The only explanation offered by counsel for the offender's outburst was that he was in an 'emotional frenzy' stemming from jealousy or unrequited love. The offender was admitted to probation for two years and an appeal by the Attorney-General against this sentence was dismissed by the Court of Criminal Appeal. From the judgment of Wanstall S.P.J., with whom Stable J. agreed:

> This Court on an appeal by the Attorney-General has an unfettered discretion to vary the sentence even where there has been no error of principle and to substitute one that it considers appropriate. We are entitled to look at events which have happened since the sentence was imposed, and doing so we know that the respondent has been engaged as a teacher by a church school in the country, teaching science, history, mathematics, music and physical exercises. Although his employers are aware of this offence they have confidence in him and are satisfied with his performance.
>
> It is my opinion that the exclusion of the respondent from the teaching profession because of this offence would be manifestly excessive punishment for it. The probation order had the effect of keeping open a door to that profession, which would most probably have been closed if he had been imprisoned. If this court imprisons him he will certainly lose the chance of rehabilitation now in his grasp, and he may not find another on his release. Keeping this in mind as well as the fact that his conduct though frenzied and violent was aberrant and out of character, that it is unlikely to be repeated, and that his victim sustained no permanent injury, I am not satisfied that this order putting him on probation was an insufficient or inadequate sentence. I would not disturb it and would dismiss the appeal.

In *Bushby* (C.A. 107 of 1973), the offender was a female nurse who pleaded guilty to the unlawful assault of an infant, thereby occasioning the infant bodily harm. The victim of the assault was only a few weeks old at the time of the offence. The offender had successfully completed three years training as a nurse and at the time of the offence she was working in the

midwifery section of a hospital. The baby apparently was discontented and irritable immediately prior to the offence and after telling it in an aggressive voice to 'shut up', the offender picked up the child by its left arm and left leg, shook the child a couple of times and dropped it back on the mattress face downwards. Medical evidence showed bruising to the leg, a fracture of the arm between the elbow and the shoulder and a fracture-separation of the distal left tibial metaphysis of the left leg. The offender was sentenced to imprisonment for 12 months with a recommendation that she be released after five months. The Court of Criminal Appeal upheld an appeal against sentence and imposed a sentence of imprisonment for three months. From the judgment of Hanger C.J.

> Notwithstanding the importance of complete control of behaviour by a nurse in circumstances which may at times make control difficult, I think that the sentence of imprisonment for twelve months with the recommendation that the appellant be considered for release after five months calls for the interference of this Court. I see no reason why the appellant should be put on parole at all. Nothing in the facts of the incident itself nor in her previous history suggests that the appellant is in need of supervision by a parole officer and I am sure that the services of our parole officers can be used to much better advantage than in attending to the appellant. She has been serving her sentence since 17th July. In my opinion, the sentence should be set aside and a sentence of seven weeks imprisonment with hard labour should be imposed in lieu thereof.

From the judgment of Douglas J.

> In my opinion also the learned trial judge erred in that he inflicted a sentence which, in the circumstances was manifestly excessive. As has been indicated in the reasons of the learned Chief Justice, this is not a case for after detention supervision. Although release after five months is recommended, the effective sentence imposed was one of twelve months imprisonment. As the legislation presently is framed it is by no means certain that a bare five months necessarily would be served. I gain the impression that the learned judge imposing sentence visualised imprisonment for an effective five months, and then supervision. This Court must look at the sentence as though a sentence of twelve months simpliciter was imposed. It was imposed in respect of a conviction on a plea of 'Guilty' to a count of unlawful assault occasioning bodily harm, such count being in the alternative to a count of unlawfully doing grievous bodily harm. The primary count was not proceeded with.
>
> Broad D.C.J. correctly dealt with the case on the basis that no permanent injury to health was likely. The applicant was a first offender, and hitherto had borne a good character. She had since become married, and is pregnant. She could be made the subject of disciplinary proceedings under the provisions of The Nurses Act of 1964, although this court was not informed as to whether such proceedings were likely. On the other hand the victim of the assault was a child, a few weeks old, and quite helpless. Whilst the applicant was not in the position of a

> parent, she was in a position where she held a grave responsibility for the well-being of the child. Her action, albeit taken on the spur of the moment, was callous, and hurtful.
> Balancing the matters to be considered I am of the opinion that a sentence of 3 months imprisonment with hard labour would be adequate.

In *Dreier* (C.A. 114 of 1972), the offender pleaded guilty to two charges of assaulting and occasioning actual bodily harm to his five-months-old son. Non-custodial sentences were set aside by the Court of Criminal Appeal or by the Attorney-General and the offender was ordered to be imprisoned with hard labour for six months on each charge. From the judgment of Williams J.:

> It has been suggested that prison would achieve no good for the respondent in that he is of such a makeup that he cannot be changed he being what he is. I do not accede to that proposition. It is suggested also on his behalf that to send him to jail will not act as a deterrent to others bearing in mind the possibilities of detection for this type of offence. Again, I do not agree with this submission. To my mind, jail will not do this man any harm and may do him some good. I think that the deterrent and retributive aspects of punishment are most important in this type of case and demand that the Court show its displeasure at this inhuman treatment of an infant son by imposing a period of imprisonment.

**Assault with Intent to Steal:** In *Parsons* (C.A. 28 of 1975), the offender was a 29-year-old male who had a good work record although he was unemployed at the time of his arrest. He had previously worked at an hotel for eight years. He was convicted of assault with intent to steal and threatening to use actual violence in order to obtain the things which he intended to steal and at the same time being armed with a dangerous weapon, namely, a rifle. He was further convicted of unlawfully using a motor vehicle. Two other persons were involved in the commission of the offences. The evidence disclosed that it was this offender who suggested that they rob the victim, that it was he who directed his two confederates to the place of the attempted robbery, and that it was he who instructed them what to do. He also provided a gun. All three men were involved in the unlawful use of the motor vehicle. This offender waited in the car while the attempt was made, the evidence being that he did so because he was known to the intended victim.

The Court of Criminal Appeal upheld a sentence of imprisonment for three years on the charge of attempted robbery and a sentence of imprisonment for 12 months on the charge relating to the unlawful use of a motor vehicle. From the judgment of D.M. Campbell J., with whom the other two members of the court agreed:

> However, it is a circumstance of aggravation that the intended victim stated that he saw one of the men load the gun. This is an offence which is attracting severe penalties at the present time, and I do not see that the sentence of three years imprisonment can be characterised as excessive.

**Assault with Intent to Steal, Using Actual Violence**: In *Miers, Appleton and Hill*, the three offenders were convicted of assault with intent to steal with actual violence in company. Miers was sentenced to imprisonment with hard labour for 18 months and Appleton and Hill were each sentenced to imprisonment for two years with hard labour. The Court of Criminal Appeal upheld all three sentences. From the judgment of Gibbs J.

> In relation to the applications for leave to appeal against sentence, it seems to me that it is impossible to say that the sentences imposed were manifestly excessive, having regard to the gravity of the offence committed and to the circumstances of it which showed that it was a bare-faced breach of the law involving violence against an ineffensive citizen in a public place. I would refuse the applications for leave to appeal against sentence.

**Attempted Murder**: In *Netz* [1973] Qd. R. 145, the offender was indicted for attempted murder, with, as a second count, a charge of unlawfully doing grievous bodily harm to his wife, with intent to do her grievous bodily harm. The circumstances surrounding the offence were that the repondent and his wife lived on a farm near Mundubbera. He was aged 32 and she 22. After a quarrel, which had for background the husband's suspicion of his wife's infidelity – conceded to be unfounded – she packed her personal effects and called a taxi to take her to the railway station from which she intended to travel to Maryborough. The respondent first intercepted her at their home, then followed her taxi in his utility and intecepted it en route and finally renewed argument with her at the railway station. It seems that he was trying to persuade her not to leave him. The train arrived about noon. He went to his vehicle, got his rifle and eight-shot magazine and returned to the station platform where his wife was standing. He then fired two shots into her. The assistant station master gave an account of hearing a shot followed by a scream, and of seeing the accused with rifle at the shoulder aiming at his wife, of hearing the sound shot a couple of seconds after the first, and of seeing the woman spin and fall to the ground. The accused left her where she fell and drove himself back to his farm where he told his brother of the shooting and his brother brought him back to the police.

The Attorney-General appealed against the inadequacy of an order admitting the offender to probation for five years. The Court of Criminal Appeal upheld this appeal and sentenced the offender to imprisonment with

hard labour for three years. From the judgment of Wanstall S.P.J., with whom the other members of the court agreed:

> I have endeavoured in this analysis to indicate what I conceive to be the considerations which influenced His Honour's decision, so far as the record can reveal them. Counsel for the respondent submitted in this Court that the case for the Attorney-General did not and could not reproduce the 'atmosphere of the trial', and referred to *R.* v. *Beevers* [1942] St. R. Qd. 230. But this is a case in which the record conveys to me the clear impression that the prevailing atmosphere after verdict was one of sympathy for the prisoner. With respect I do not suggest that His Honour overlooked any relevant aspect of his duty – on the contrary analysis is in part intended to refute any such suggestion. However, I have the strong feeling that His Honour allowed the quality of mercy to evaluate the touching reconciliation in marriage of the prisoner and his victim too highly in the scales of justice. A probation order was clearly in my view an insufficient and inadequate sentence for this crime in all the circumstances. I would set it aside and impose a sentence of three years imprisonment with hard labour.

In *Church* (C.A. 39 of 1974), the offender pleaded guilty to a charge of attempted murder in circumstances involving the abduction of a girl who had hitched a ride with him, and the keeping in captivity of the girl for a considerable period of time. At no time after she became aware of his apparent intentions did the girl consent to anything the offender proposed or to her remaining in his company. Over a lengthy period he subjected the victim to a number of serious threats of violence and other indignities culminating in his raping her and then, with the intention of killing her, stabbing her many times. He left her in the bush in the belief that he was leaving her for dead. The Attorney-General appealed against a sentence of imprisonment with hard labour for 15 years. The Court of Criminal Appeal upheld this appeal and sentenced the offender to imprisonment with hard labour for life. From the judgment of Kneipp J.

> I think that the imposition of a term of 15 years imprisonment constituted a failure to deal adequately with the matter in all the circumstances, and in that sense I think that the sentence was manifestly inadequate. I think that there was, in this case, one factor additional to the factors which are usually relevant to deciding what is the appropriate term of imprisonment. Having regard to the nature of the crime and to the defects of the prisoner's personality, which, to my mind, raise for serious consideration the risk that the prisoner's misconduct, or misconduct of a similar nature, might be repeated, I think that the matter can be dealt with adequately only by the imposition of a sentence which will leave the time at which the prisoner is to be released, if he should be released, wholly within the discretion of the Executive. This, I think, is necessary in the interests both of the public and of the accused. The only sentence which will achieve that object is one of imprisonment for life.

From the judgment of D.M. Campbell J.

> The accused pleaded guilty to this offence, and consequently this court is in as good a position as the court below to consider the gravity of his crime. He acted in a depraved manner, yet with purpose, over a lengthy period of time, and I do not think in this case that the fact that he co-operated with the police after he was found with scratch marks on the back of his hand, and pleaded guilty at his trial, should have been taken into consideration in mitigation, as it was, when it came to sentence.
>
> The accused has been described as having a schizoid personality, as being withdrawn, sensitive and an isolated loner. But, according to the psychiatrist's report, factors other than his personality have played the important part in the motivation of this crime – his repressed anger to his mother and what he misrepresented as provocative behaviour by the girl following her rejection of him. He obviously intended to kill her, so as to escape detection for rape, and left her believing that she was dead.
>
> I agree that the appropriate sentence in all the circumstances was a sentence of life imprisonment, and that this sentence should be substituted.

In *Wilkinson* (C.A. 123 of 1972), the offender, a 23-year-old male, was convicted of attempted murder of a young woman aged 21 years who accepted a lift from him. The car was driven to an isolated place where the woman was raped by the offender after she had been threatened with a knife. When the two had got out of the car prior to the rape the respondent took with him a length of strong cord. After the rape the respondent placed his hands around her throat and attempted to strangle her. There was sufficient evidence that his purpose was to prevent the woman from giving information about the rape. There was also evidence that the cord referred to had been placed around her neck and drawn tight. She became unconscious before this was done, but that it was done was a clear inference from the medical evidence of marks on her neck. The attempted strangulation did not succeed, but the circumstances left no doubt that the death of the woman was the purpose of the respondent and that the purpose was not achieved only because the respondent believed it had been. The offender was sentenced to imprisonment with hard labour for eight years. On appeal by the Attorney-General against the inadequacy of this sentence the Court of Criminal Appeal upheld the appeal and sentenced the offender to be imprisoned with hard labour for 20 years. From the judgment of Hanger C.J.:

> In passing sentence the learned trial judge commented that the respondent had been guilty of a vicious, brutal assault on a defenceless girl and that as far as he was concerned she may have been dead when he left her. The medical evidence showed she suffered mental as well as physical harm, and he could find no extenuating circumstances in the case.

> The function of this Court on an appeal against sentence by the Attorney-General is to impose an appropriate sentence. We think that the sentence imposed by the learned trial judge should be set aside and that the appropriate order is that the respondent be imprisoned with hard labour for 20 years.

**Attempted Unlawful Killing**: In *McLaren* (C.A. 11 of 1975), the offender, in company with two other men, went to the residence of the victim, with whom he had an altercation the previous night. One of the three men knocked on the door so as to bring the victim out. One of the men, not the offender, fired a cartridge from a shotgun through the door. The shot did not do any harm to the intended victim; in fact it aroused him to pursuit whereby he caught one of his attackers. The offender was sentenced to imprisonment for five years and 10 months. The sentence took into account the fact that he had been in jail for two months. The Court of Criminal Appeal upheld this sentence. From the judgment of Wanstall S.P.J. with whom the other members of the court agreed:

> This accused has been sentenced to a term of imprisonment which is double that imposed upon Crossingham. Although I think this sentence of six years is in the circumstances a severe sentence the crime was a very serious one in which a man could have been murdered. The shot was fired through the timber of the door after he had been lined up on the other side of it by one of them knocking on the door. It was not this appellant who fired the shot. However, he certainly was a participant, carrying an equal burden of responsibility in regard to its commission as any of the others, including the one who fired the shot. Although, as I say, I think six years can be regarded as a severe sentence, if the three years imposed by this Court on Crossingham is the appropriate sentence in his case, I am not disposed to interfere, having regard to the seriousness of the crime.

In *Crossingham* (C.A. 38 of 1974). the offender pleaded guilty to a charge of attempted unlawful killing. The circumstances surrounding the offence involved an altercation between the offender and three other men concerning the payment of money lost in wages. On the following night the victim was shot through the front door of his flat by a shotgun discharged by one of the men involved in the altercation. Questioned by the police, this offender said that he had been forced at gunpoint to take two men, whom he did not know, from his flat to where the victim lived and that he had done this under compulsion. Later he told a different story, saying that he had voluntarily accompanied the other two men to show them where the victim lived. The offender knew that it was the intention of the other two men to shoot the victim with a shotgun. He also knew that one of the men had a shotgun in his possession. The Court of Criminal Appeal set aside a sentence of a fine of $200 in upholding an appeal by the Attorney-General and ordered that

the offender be sentenced to imprisonment with hard labour for three years. From the judgment of Hanger C.J., with whom the other members of the court agreed:

> Whatever word is used to describe the respondent's share in the actions of the other men, it is clear that he intended to assist and did in fact assist them in their attempt to carry out their design. I cannot regard this conduct in assisting the men in a plan which would involve the killing of another man as calling for other than a substantial term of imprisonment. Where an intent to kill is involved, loyalty to one's friends or fellow union members and pressure from them to co-operate in the circumstances of the case, before us, does not justify a punishment by way of fine.
>
> For these reasons, I think the sentence of imprisonment with hard labour for three years which we ordered at the conclusion of the hearing of the appeal was called for.

In *Turner* (C.A. 54 of 1972), the offender was convicted of unlawfully attempting to kill. The evidence disclosed that this attempt was planned. The offender procured six sticks of gelignite, placed them in the boot of the car, made arrangements for the explosives to be detonated and activated when the victim got into the car and commenced to drive it. The victim was the offender's mother-in-law. The offender was sentenced to imprisonment with hard labour for 10 years. The Court of Criminal Appeal upheld this sentence.

**Robbery**: In *Curzi* (C.A. 153 of 1975), the offender was convicted of robbery and the unlawful use of a motor vehicle and was sentenced to six years imprisonment. The Court of Criminal Appeal allowed an application for leave to appeal against sentence and, in view of the offender's youth, made the sentence imposed in respect of the unlawful use of a motor vehicle concurrent with the other sentences.

**Robbery and Assault Occasioning Bodily Harm**: In *Moggs* (C.A. 18 and 19 of 1976), the offender was convicted of robbery committed on 22 September 1975, and assault occasioning bodily harm on 13 October 1975. The Court of Criminal Appeal set aside non-custodial sentences for these offences. From the judgment of Hanger C.J.

> The principles to be applied in determining appeals of this kind are not in doubt, and we have taken every consideration of the age of the offender and his early background, but nevertheless in all the circumstances we think that on the charge of robbery he should be sentenced to a period of imprisonment with hard labour for a period of two years and on the charge of assault occasioning bodily harm that he should be sentenced to imprisonment with hard labour for a period of one year, sentences to be served concurrently, the service of the sentence to date of his arrest pursuant to a warrant.

**Robbery in Company with Personal Violence**: In *Profaca* (C.A. 8 of 1970), the offender was convicted of the offence of robbery with violence while in company and was sentenced to imprisonment for five years. The Court of Criminal Appeal dismissed an application for leave to appeal against sentence on the grounds that the sentence was manifestly excessive.

In *Curtis* (C.A. 99 of 1975), the offender was aged 16 when the first of the present offences was committed. On conviction for robbery in company with personal violence, where a considerable degree of violence was used, the offender was sentenced to five years imprisonment with hard labour. Then certain further indictments were presented against him – one of stealing and one of the unlawful use of a motor vehicle – these offences having been committed on the same day as that upon which he committed the robbery which was the subject of the first indictment. Then a final indictment was presented against the offender which charged him with robbery in company with personal violence at a time at which he was out on bail in respect of the other robbery charge. The judge sentenced the offender to three years imprisonment with hard labour on the charges of stealing and unlawful use of a motor vehicle and made those sentences concurrent with the sentences imposed in respect of the robbery subject of the first charge. For the robbery which formed the subject of the final indictment, which again involved a vicious assault, the offender was sentenced to imprisonment for eight years with hard labour. From the judgment of Lucas J., with whom the other members of the court agreed:

> The proceedings before the learned judge on 25 August were perfectly regular and I can see no ground whatever for interfering with the conviction.
> So far as the sentence is concerned, despite the youth of the appellant (and he was 16 in December 1974 when the first three offences were committed) the learned judge elected to deal with him as though he were an adult, he having become 17 before he appeared. I am unable to say that the sentence was in any way manifestly excessive. In my opinion, in so far as it is an appeal against conviction, it should be dismissed and in so far as it is an application for leave to appeal against sentence, it should be refused.

In *Hopkins and Tolliday* (C.A. 71, 73 and 78 of 1973), the offenders were convicted of robbery in company with violence and were sentenced to imprisonment with hard labour for six years. The Court of Criminal Appeal dismissed applications for leave to appeal against sentence. From the judgment of Hanger C.J.:

> On the question of sentence I have little to say because in my opinion the sentence imposed on each of them was not manifestly excessive. Not one of them comes before the court with an unblemished record and the particular

> offence consisted of a combined attack upon an elderly gentleman and the removal from him of all the money that he had. In my opinion, having regard to the prevalence of offences of this kind, the trial judge cannot be said to have imposed a sentence which was manifestly excessive in the circumstances and unless it is manifestly excessive in the circumstances this court has no justification for interfering with it. In my opinion the application for leave to appeal against sentence in each case should be dismissed.

In *Willshire* (C.A. 53 of 1976), the offender pleaded guilty to a charge of robbery in company with personal violence. The offender and a co-offender picked up a man of 55 years who had just been discharged from the watch house on a charge of drunkenness. They drove the victim to a remote place in the hope that during the drive he would go to sleep. The victim did not go to sleep. The car was stopped and the offender and his co-offender left it under the pretence of adjusting the engine. The victim was invited out of the car – it is not clear by whom – and was asked how much money he had. The victim said he would hand over some money if he was taken home. The present offender moved towards the victim to try to put his hands in the victim's pocket, and the victim fell down and started to kick. The victim then handed some money over. The offender's co-offender hit the victim and more money was taken. The present offender denied that he had taken part in this assault and he was sentenced on this basis. He was sentenced to imprisonment with hard labour for four years and application for leave to appeal against the sentence was refused by the Court of Criminal Appeal. Unfortunately the offender and his co-offender appeared before different judges. The co-offender was sentenced to four years imprisonment with hard labour, with a recommendation that he be considered for parole after 18 months. It was argued before the Court of Criminal Appeal that it was basically unfair to the present offender that he, in the ordinary course of events, would not be considered for parole for two years. From the judgment of Douglas J.

> It seems to me, as I said before, rather a pity that two judges took part in the sentencing of these two men. I would mention in passing that the confederate had a much greater record than the applicant. Four years imprisonment with hard labour is at least an appropriate sentence for what happened, and I think that the judge who sentenced the applicant probably bore this in mind.
>
> There is no reason in law why one sentencing judge should follow a sentence inflicted by another judge. It is desirable that there should be uniformity, but when a wholly inappropriate sentence has been imposed, that sentence does not have to be followed.
>
> My own view is that the confederate Campbell should have been sentenced to four years or more in the first place. The fact that the applicant was sentenced

> to four years and no recommendation for parole was made does not concern me at all, and I do not think it is a matter to be taken into consideration.
> I think that what we have to look at is whether a sentence manifestly excessive was imposed by the trial Judge. I do not think that it was. In the circumstances, I am of the opinion that the application for leave to appeal should be refused.

In *Scheutz and Young* (C.A. 65, 68 and 69 of 1975), the offenders were convicted of robbery in company with personal violence. Scheutz was sentenced to six years imprisonment. In the case of Young, more than one offence was involved. For the first offence seven years imprisonment with hard labour, and for a second offence four years imprisonment with hard labour cumulative upon the previous sentence. Both offenders appealed against sentence on the grounds that the sentences were manifestly excessive.

The Court of Criminal Appeal refused the application of Scheutz and the sentence of six years' imprisonment was upheld. With respect to Young the sentence of seven years was upheld and the application refused. So far as the sentence of four years imposed upon Young was concerned, leave to appeal was granted and the appeal was allowed, it being ordered that the sentence of four years be made concurrent with that of seven years. From the judgment of Douglas J. with whom Kneipp J. agreed:

> I agree with my brother presiding in respect of the application by Scheutz. I also agree in respect of the first sentence imposed on Young. So far as the second sentence is concerned, I unfortunately differ. No doubt these sentences, imposed as they were in respect of very serious crimes, were deserved and apposite to the crimes committed. What troubles me is that Young at the time of the imposition of both sentences was aged some 18 years. He came from a deprived background and, in effect, had not had much of a chance. There is no doubt that he must be punished, and punished severely, in the interest of the community. However, when one looks at the first sentence imposed objectively, 7 years is a very long time for a young man aged 18 years to serve. In itself, it would have the effect of being a deterrent, and a severe deterrent, to those who are inclined to perform in the same manner as he did. To impose the further 4 years, in my view, could have the effect of destroying hope so far as the applicant is concerned. If he served 7 years there is some chance of his rehabilitation. If the further 4 years is to be served after the 7 years, I have no doubt that he would start off with an attitude of hopelessness. I quite agree with all that has fallen from my learned brother, the presiding Judge, in respect of the seriousness of the crimes. Nevertheless, I feel that, in the circumstances, to make the second sentence cumulative with the first was, in turn, to make that sentence manifestly excessive. In my opinion, the second application for leave to appeal against sentence by Young should be allowed and the sentence varied by making it concurrent with the first sentence.

In *Van Opstal* (C.A. 5 of 1974), the offender, a 16-year-old female, pleaded guilty to a charge of robbery with the circumstances of aggravation that she was armed with an offensive weapon, was in company, and wounded the victim of the robbery. The offender, together with her co-offender, hired a taxi and the offender rode in the front seat while her co-offender sat in the rear. When the driver pulled up at the curb-side, the offender's co-offender hit the driver on the head with an iron bar some 18 inches long, and about one inch square, and the offender took what money he had. The iron bar was taken into the taxi for the purpose for which it was used. The taxi driver was a man of 60 years and he suffered a head wound requiring eight stitches. The offender was sentenced to imprisonment with hard labour for five years. Application for leave to appeal against sentence was granted by the Court of Criminal Appeal. The sentence of five years imprisonment was quashed and it was ordered that the offender be dealt with on the basis that she was a child, and that she should be directed by the Minister administering the Children's Services Act. From the judgment of W.B. Campbell J. with whom Matthews J. concurred:

> The learned Judge of first instance was informed by The Crown Prosecutor that 'her parents lived apart and her upbringing was not all that could be desired'. After leaving school at the age of 15 she came under the notice of the police due to her absconding from home and associating with a juvenile delinquent element. A report of Pastor Fullwool of the New Life Centre, which was tendered before the Judge, shows that she resided at the Ipswich New Life Centre from February 4, 1972 until February 16, 1973. This can be described as a favourable report. Some time in 1973 with her mother's consent she went to South Australia where she met her co-accused. They hitch-hiked to Queensland where the offence was committed.
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> Both accused were commited for trial by the Children's Court at Inala on November 6, 1973. The applicant had her 17th birthday on December 13, 1973 and thereby ceased to be a 'child' within the meaning of the Children's Services Act 1965–1971. His Honour decided that he would not deal with her on the basis that she was a child, as he could have done pursuant to the second paragraph of s. 28(2) of that Act which provides that:
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> 'Where a defendant concerning whom the taking of an examination of witnesses in relation to an indictable offence charged against him is commenced while he is a child has ceased to be a child at the time he stands before a court of competent jurisdiction to be sentenced or otherwise dealt with according to law in respect of that offence or of any other offence arising out of the same circumstances the Court may, if it thinks fit, sentence or otherwise deal with him on the basis that he is a child.'
>
> Her co-accused was still under 17 years of age at the time of the sentence and His Honour ordered that she be detained during Her Majesty's pleasure in such place and on such conditions as the Minister may, from time to time, direct, pursuant

to s. 63 of the Act. In not choosing to deal with the applicant as a child His Honour gave as his reason that treating her as an adult enabled him to impose a sentence which would be definite and which would not keep her in suspense about it. The record shows that her counsel told the Judge that he had not any information which could persuade him to urge that His Honour do anything other than direct that the co-accused, Davidson, be detained during Her Majesty's pleasure but that, in the case of the applicant, 'there could be some justification for more lenient treatment for her'. Her present counsel argues that the sentence of 5 years imprisonment with hard labour was manifestly excessive in the case of this youthful offender and that this Court should alter it to a detention order during Her Majesty's pleasure as provided by s. 63.

Not without some hesitation I have come to the conclusion that the sentence of imprisonment should not be allowed to stand. I have been so persuaded because I think that the accident of the slight difference in ages of the two accused did not justify different treatment of them and the Judge did not give sufficient consideration to the need for some custodial training and rehabilitation for the applicant having regard to her age, to the fact that this was her first offence, and to modern principles of punishment applicable to youthful offenders. The learned Judge made it clear that he was influenced by the gravity of the offence. When imposing the sentences he said: '. . . this is a very serious offence accompanied by grave circumstances of aggravation . . . These girls are quite young, but I think, having regard to the seriousness of the offence of which they stand convicted here, no leniency at this stage is called for. . . . I think this is an offence which calls for a severe punishment or sentence'. His Honour expressed the opinion that Davidson should be under strict supervision for quite some time and appears to have taken the view that it would be in the applicant's interests if her detention was for a fixed rather than for an indefinite period. This persuaded him to order that she be detained in prison rather than pursuant to s. 63 which reads, inter alia: –

'A child so ordered to be detained shall continue to be detained in such place or on such conditions as the Minister from time to time directs notwithstanding that in the meantime such child has attained the age of eighteen years.

In this section the term "place" includes any prison within the meaning of "The Prisons Acts, 1958 to 1964", and any hospital, institution or any place declared by the Governor in Council by Order in Council to be a "place" within the meaning of this section.'

We were informed that certain places had been so declared, in one of which the child Davidson is detained. This is a difficult case, and I am conscious that His Honour considered that, in imposing a prison sentence upon the applicant, he was treating her more leniently than were he to impose a detention order under s. 63. I do not consider that the learned Judge gave sufficient weight to the reformatory aspects of punishment, a feature which was considered by Burbury C.J. in *Lahey* v. *Sanderson* [1959] Tas. S.R. 17. There, after referring to the observations of the Court of Criminal Appeal in *R.* v. *Ball* (1951) 35 Cr. App. R. 164 at p. 165, His Honour said at pp. 21–22: –

'It is because the public interest is best served if an offender is induced to turn from criminal ways to an honest living that a court rarely sends a youth to gaol

except in the case of crime of considerable gravity (such as a crime involving violence), or in the case of a persistent offender who has shown himself not amenable to disciplinary methods short of gaol. The courts have recognised that imprisonment is likely to expose a youth to currupting influences and to confirm him in criminal ways, thus defeating the very purpose of the punishment imposed. There has accordingly been a universal acceptance by the courts in England, Australia, and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and in the ordinary run of crime the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord Goddard the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. With that I respectfully agree.

Statutory recognition of this principle in relation to young offenders was given by Parliament in England by s. 17(2) of the Criminal Justice Act 1948(4) which provides that: –

"No court shall impose imprisonment on a person under twenty-one years of age unless the court is of the opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition."

This is but a recognition of the modern approach to the punishment of youthful offenders as worked out by experienced judges and magistrates. And notwithstanding the high incidence of juvenile crime in England the emphasis continues to be upon avoiding sending young people to gaol except in the worst cases.

As recently as 2 February 1959 the Home Secretary presented to Parliament a white paper on penal problems (Cmd. 645) which proposed that to give effect to the principle that young offenders should only be sent to gaol in the worst cases more detention centres should be opened and provision should be made for custodial training in specially allocated prisons and Borstals in the case of all but the worst young offenders. (see [1959] Crim. L. Rev., pp. 183–184).

See also *Reg.* v. *Mather and Rogers* [1962] Tas. S.R. 25.

This case is complicated by the fact that counsel at the hearing did not ask His Honour to treat the applicant as a child and to order her to be detained pursuant to s. 63, as we are now requested to do. It seems that this, at least is part, led His Honour to consider that he was extending greater clemency to the applicant than he felt he could do in the case of Davidson, and neither he nor counsel appears to have adverted to the distinction between a prison sentence and a detention order in a reformatory institution. Deprivation of liberty in an institution for the care and control of young people does not have or retain the social stigma of a prison sentence. Moreover, I accept, as we were so informed by the applicant's counsel, that the institutions (other than prisons) in which a child may be detained under the section are of a reformative nature. I think this is borne out by s. 63(2) which provides that a child so ordered to be detained shall be deemed

to have been ordered to be committed to the care and control of the Director of the Department of Children's Services.

Had His Honour been so requested I consider it probable that he would have made a detention order in the case of both accused. It seems to me that it was an alternative which His Honour rejected because he considered he would be, in effect, more merciful to the applicant. When he said that it would be an unreal approach were he to avail himself of the benevolent sections of the Children's Services Act, he was clearly referring to the powers conferred on him by s. 62(1). When imposing the sentence on them both he was obviously concerned with the punitive aspect of sentencing in the light of the violence used in the crime. Also, he may well have considered that a deterrent sentence was necessary, although there was no reference by either counsel or by himself to the prevalence of such crimes.

In view of the way in which submissions were placed before the learned Judge by the applicant's counsel I think he was led to place too much emphasis on the punitive aspect at the expense of notions of rehabilitation, care and treatment of a youthful first offender. I think that His Honour failed to give sufficient weight to the care and treatment needed in the case of a young girl who was 16 years of age at the time of the offence and that this was her first transgression of the Criminal Law. In the peculiar circumstances of this case I consider that, for the reasons I have stated, this Court is justified in interfering with the exercise of the Judge's discretion. In *Cranssen* v. *The King* (1936) 55 C.L.R. 509, Dixon, Evatt and McTiernan JJ. said at pp. 519–520: –

'The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error or law may have been made.'

As I have said, we were asked by counsel, who had received information from the applicant's mother, to alter the sentence to one of detention in accordance with s. 63, and I think that such a course is appropriate. It will remove her from a prison atmosphere with its attendant risk of corruption arising from association with adult offenders, and enable her to be under the care and control of the Director of Children's Services. It is my view that this indefinite sentence is one which would be proportionate to the crime and one acceptable to the community generally.

I would grant the applicant leave to appeal against sentence, quash the sentence imposed by the learned Judge and in substitution therefore order that the applicant be dealt with on the basis that she is a child and further order that she be detained during Her Majesty's pleasure in such place and on such conditions as the Minister administering the Children's Services Act may from time to time direct.

**Robbery with Personal Violence:** In *Cook-Russell* (C.A. 3 of 1975), the offender, a 26-year-old male, was convicted of the crime of robbery with personal violence. He had a long list of previous convictions including one for an offence of a like nature for which he received a sentence of four years imprisonment with hard labour. In the present case the allegation against the offender was that he was attacked by the complainant in a city street and made off with a cassette recorder which was the property of the complainant and which the complainant was carrying at the time. The offender was sentenced to six years imprisonment and the Court of Criminal Appeal dismissed an application for leave to appeal against sentence. From the judgment of Douglas J.

> The sentence of 6 years imprisonment was somewhat higher than I would have imposed myself in the circumstances. Nevertheless, I consider there to be no reason why it should be interfered with. The applicant, although only 26 years of age, has a formidable list of previous convictions, including one for an offence of a like nature for which he received a sentence of 4 years imprisonment with hard labour.

In *Clifford* [1965] Q.W.N. 23, the offender was convicted of robbery with personal violence. The offender and three of his friends were driving on a main highway when they came across a broken-down vehicle with three men on the side of the road. They offered assistance and then drove off. One of the offender's friends informed the offender that the men were those who had attacked another friend of the offender and the offender thereupon decided to return to the broken-down vehicle. The offender punched one man in the head and hit another and dragged him out of the car. He then obtained money from this person which was offered in order to prevent further assault. The offender was fined £50 and ordered to enter into his own recognisance to keep the peace and be of good behaviour for three years. An appeal by the Attorney-General against this sentence on the ground that it was manifestly inadequate was upheld by the Court of Criminal Appeal, which sentenced the offender to imprisonment with hard labour for three years with provision for release on a recognisance after two years.

In *Kemsill* (C.A. 180 of 1974; C.A. 20 of 1975), the offender, a 20-year-old-male, was convicted of robbery with personal violence and housebreaking to which charges he pleaded guilty. The offender had a previous criminal record which involved at least two instances of breaking, entering and stealing, and two of larceny of motor vehicles. Other convictions related to unlawfully using motor vehicles. In the course of the commission of this offence, a woman accompanied by two young female children returned to

her home which the offender had illegally entered. Having heard their arrival, the offender armed himself with a knife which he took from a wall fixture in the house, and he used this knife to threaten one of the children and obtain the keys of the woman's car. This action had sufficient effect to obtain possession of the keys of the vehicle. The offender drove the vehicle away, abandoned it nearby, and continued on foot. The offender was sentenced to imprisonment with hard labour for eight years on a charge of robbery with violence, and to imprisonment with hard labour for three years on the breaking and entering charge, the sentences to be served concurrently. The Court of Criminal Appeal refused leave to appeal against this sentence. From the judgment of Wanstall S.P.J., with whom the other members of the court agreed:

> So far as sentence goes, this is a heavy sentence to be imposed upon a man who was aged barely 20 at the time of the commission of the crime, and 20 at the time he was sentenced. On the other hand, he had a serious criminal record which involved at least two instances of breaking, entering and stealing, and two of larceny of motor vehicles, and others involving unlawfully using motor vehicles.
>
> Although technically on the material now before us the view is open that he did not really have the intent of permanently depriving the owner of the keys of them, on the material before the court which sentenced him there was no doubt on the plea that he did have the intention, and in these circumstances the sentence should not be interfered with, and nor should the conviction.

In *Saunders, Saunders, Summers and Meech* [1973] Qd. R. 532, the offenders, all young men, and with previous criminal histories involving offences of a like nature to those relevant to the present case, were sentenced in respect of multiple offences of robbery, the victims being mainly elderly women. The following sentences were imposed: Saunders to serve four years imprisonment; the second offender Saunders to serve two and a half years imprisonment (the five years imprisonment imposed in respect of the present offences was made concurrent with a sentence of three years imprisonment imposed six months previously, thus effectively imposing an extra two and a half years imprisonment for the offences presently being dealt with); Summers received similar penalties to the second offender Saunders; and Meech receiving 18 months imprisonment. From the judgment of Douglas J. with whom Hanger C.J. concurred:

> These are appeals by the Hon. The Minister for Justice and Attorney-General of Queensland against certain sentences imposed on the respondents. I have had the opportunity of perusing the reasons of this Court consisting of Hart, Matthews and Kneipp JJ. in the case of the *Queen* v. *Liekefett*, the Hon. the Minister for

Justice and Attorney-General of Queensland (Appellant) (unreported), and have expressed my agreement with the conclusions expressed therein as to the principles which should apply in appeals of this nature. It is not necessary to enter into further discussion, in these appeals, of these principles.

There are four respondents to the particular appeals, who were jointly, and severely involved in the commission of a very large number of offences. The only approach possible is to deal with the case in respect of each individual respondent in the order in which his name appears on the court record.

Richard Charles Saunders at the time he was sentenced was 23 years of age being born on 8 June, 1949. He is a married man, and by occupation a labourer. His criminal record shows that in the year 1967 he had four convictions for stealing. In the year 1968 he had 8 convictions for stealing, one for receiving, and one for having in his possession property suspected of being stolen. In the year 1969 he had one conviction for stealing, and one for driving whilst disqualified from holding or obtaining a licence to drive. He sustained no convictions in the years 1970, 1971 and 1972. The sentences with which this Court is concerned were imposed in February, 1973 in respect of convictions recorded in that month. On 1 February, 1973 he was convicted, having pleaded 'not guilty', and on 2 February, 1973 sentenced on a charge of robbery with personal violence committed on 27 September, 1971. The sentence imposed was one of three years imprisonment with hard labour. On 21 February 1973 he pleaded 'guilty' to two charges of robbery with personal violence, one of robbery, four of stealing from the person, and one of receiving. These offences took place between September 1971 and February 1972, the great majority being in September. In respect of the charges of robbery Saunders was sentenced to four year imprisonment with hard labour in every case, in respect of the charges of stealing from the person three years in every case, and in respect of the charge of receiving, two years. All of the sentences were concurrent one with the other. In all of the charges of robbery, or stealing the victims were women. Some of them were very elderly, and none was younger than 35 years. The victims were accosted in the street and usually whatever they were carrying was taken from them by one of Saunders' confederates, often with considerable violence. In no instance was the respondent the main actor. His role was that of driver or look-out man. Nevertheless it is obvious from the evidence that he knew that violence would be likely to be used if the women did not part with their possessions. In the case dealt with on 2 February, 1973 the victim was a Mrs Bygott, aged 72 years, who was walking in a suburban street with her husband, also elderly, when suddenly she was set upon. She resisted her attacker, and in the process suffered relatively severe injuries including broken bones. What was taken from her did not amount to much, but that is a matter for little consideration. I think, that, even though the learned trial judge had the advantage of seeing the accused in court, and hearing the evidence, and the submissions on his behalf, the infliction of a sentence of three years imprisonment with hard labour was manifestly inadequate. In my view this sentence should be varied by imposing a sentence of five years imprisonment with hard labour in its stead. I do not think that any other of the sentences imposed should be varied as individual sentences. Nevertheless I think that when one looks at the number of offences involved it is not

apt that all sentences imposed should be concurrent. I am conscious that the decision whether to make sentences concurrent, or cumulative is very much a matter of discretion. It is interesting to refer to a statement made in the joint judgment of Cockburn C.J., Blackburn and Lush JJ. In the *Queen* v. *Cutbush* [1866–7] L.R. 2QB 379 at p. 382:

'. . . and also as right and justice require, when a man has been guilty of separate offences, for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence, merely because he is already sentenced to be imprisoned for another offence, and as it would be contrary to public policy and expediency that he should so escape with but one punishment.'

That statement may not be of such general application now as it was when uttered. However I think it can be applied to the situation in this case. I think that, apart from the individual sentence I have referred to already, and which I consider manifestly inadequate, the over-all period of time of imprisonment reflected in the aggregate of the sentences imposed is manifestly inadequate. I have come to the conclusion that in order to do justice the sentence of two years imprisonment with hard labour imposed in respect of the charge of receiving should be made cumulative with the sentence of five years imprisonment with hard labour I have proposed on the first charge of robbery with personal violence. This would cause the respondent Richard Charles Saunders to serve an effective seven years imprisonment with hard labour.

Gary Thomas Saunders at the time he was sentenced was 20 years of age being born on 15 October, 1952 and engages mainly in labouring work. He is single. His criminal record shows that in the year 1970 he had three convictions for false pretences, and six for stealing. In the year 1971 he had four convictions for stealing and one for using obscene language. In the year 1972 he had one conviction for resisting arrest, one for stealing with actual violence whilst in company, four for entering a dwelling house with intent, five for stealing, one for stealing from the person, and one for wilful damage to property. In respect of an offence of stealing for which he was sentenced on 29 July 1971 he was admitted to probation for two years. Subsequent to a conviction on a charge of stealing with actual violence whilst in company in respect of which he was sentenced on 1 August, 1972 he confessed to a long series of offences. In respect of these offences he pleaded 'guilty' on dates between November, 1972 and February, 1973. He was sentenced on 2 February, 1973 on a total of 37 charges in respect of offences occurring between June, 1971 and February, 1972 he having been arrested on 1 March, 1972. It is the sentences imposed on 2 February with which this Court is concerned. The charges were 11 of robbery with personal violence, two of robbery, 15 of entering a dwelling house with intent to commit a crime therein, 6 of stealing from the person, one of stealing, one of receiving and one of housebreaking. On every one of the charges of robbery with personal violence he was sentenced to imprisonment with hard labour for five years, on the robberies four years each, on the enterings two years on every one, on the stealings from the person two years on every one, on the stealing one year, on the receiving three years, on the housebreaking four years. These sentences were all made concurrent one with the other, and with a sentence of three years imprison-

ment with hard labour imposed in August, 1972. The result was that he received an effective 2½ years extra imprisonment for the 37 offences. The vast majority of the victims of the respondent were elderly women. In the discussion of the case of Richard Charles Saunders I have mentioned the incident which involved Mrs Bygott. This respondent was the principal actor in that case, as indeed he was in virtually every case in which he was involved. It is pointless to consider all of the 35 sentences in detail. Having regard to the nature of the robberies with personal violence in which the respondent was involved, and the sheer number of the offences a heavy sentence should have been imposed. I advert to what I have said earlier in this judgment, and am of the opinion that more than one sentence should be served. In my opinion all of the sentences imposed in respect of the charges of robbery with personal violence should be varied from five to seven years, the sentences imposed in respect of the charges of robbery varied from four to five years, and the sentence on the first conviction of robbery with personal violence should be made cumulative with the first sentence for robbery. The sentences on the remaining 35 charges should be concurrent with the sentence on the first conviction above. This means he would be sentenced to an effective 12 years imprisonment with hard labour.

Twelve years may seem a harsh sentence to impose on a young man of 20. Nevertheless the sheer enormity of his criminal career even though it extends over a relatively short period is such that it calls for condign punishment. It also must reflect as a deterrent to anyone of like mind to this respondent. In an instance like this the matter of rehabilitation is best left to those authorities who are in a position to observe the respondent's conduct under detention, and who have powers to take such steps as are warranted to that end.

Gregory Paul Summers at the time he was sentenced was aged 20 years being born on 21 March, 1952. He is a married man with one child, and has followed various occupations. His criminal record shows that in the year 1971 he had one conviction for stealing and one for false pretences. In the year 1972 he had one conviction for receiving, and two for entering a dwelling house with intent. In May, 1972 he was admitted to probation for two years, and in August of that year for three years. The sentences with which this court is concerned were imposed in February 1973 in respect of convictions recorded in that month. On 1 February, 1973 he was convicted, having pleaded 'not guilty', and on 2 February, 1973 sentenced on a charge of robbery with personal violence on 27 September, 1971 the sentence imposed was three and one half years imprisonment with hard labour. On 21 February, 1973 he pleaded 'guilty' to eight charges of robbery with personal violence, two of robbery, four of stealing from the person, one of stealing, 16 of entering a dwelling house with intent, one of housebreaking, one of false pretences and one of dangerous driving. The offences took place between June 1971 and December 1972, by far the heaviest proportion of them late in 1971 and early in 1972. Again the victims were mainly elderly women. On the charges of robbery he was sentenced to imprisonment for five years with hard labour, on all of the stealing charges except one to three years, on one stealing charge to two years, on the charges of entering a dwelling house with intent to three years in every case, on the charge of housebreaking to five years, on the charges of false pretences to six months, and on the charge

> of dangerous driving to six months. These sentences were ordered to be concurrent except the last two which were made cumulative one with the other, and cumulative on the other sentences imposed. The effective sentence was that of six years, which meant that over and above the sentence of three and one half years imposed on this respondent on 2 February, 1973 he would be serving an extra two and one half years imprisonment in respect of the 34 further offences mentioned above. The sentence of three and one half years imprisonment imposed on 2 February, 1973 was in respect of the charge of robbery with personal violence on Mrs Bygott which has been referred to in the discussion on the appeals in relation to the first two respondents. In that offence this respondent played a greater part than Richard Charles Saunders, and a lesser part than Gary Thomas Saunders. In my opinion the sentence of three and one half years imprisonment imposed was manifestly inadequate. That sentence should be varied to one of five and one half years imprisonment with hard labour. Having in mind my statements in respect of the sentences imposed on the two previous respondents I think that justice would be best served by varying the order made on 21 February, 1973 so that the sentences made cumulative with each other and the other sentences are made concurrent with those sentences, and that the first sentence imposed on 21 February, 1973, that in relation to the charge of robbery with personal violence upon Mrs Mead, should be made cumulative with the sentence imposed on 2 February, 1973 as varied. Thus the respondent, Summers would serve an effective ten and one half years imprisonment with hard labour. The remarks I have made in respect of weight of sentence in the other cases apply also in this matter.
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> In respect of the respondent Meech, he was involved in two charges of stealing from the person and was sentenced to 18 months imprisonment with hard labour on each charge. the sentences being concurrent. No good reason has been advanced as to why the sentences should be varied.

**Armed Robbery in Company**: In *Williams, Townsend and Tooma* (C.A. 97, 98 and 99 of 1970). the offenders. aged 21, 18 and 20 years respectively were convicted of the offence of armed robbery in company. Williams was the instigator of the crime and Townsend and Tooma were persuaded to join him. There was an attempted hold-up of a branch of the Commercial Bank of Australia Limited by way of threats to a teller. Williams was armed with a stick of gelignite, fitted with a detonator and fuse while Tooma, armed with a bottle of petrol with a wick and a cigarette lighter, was to assist in covering the escape and hinder pursuit had they been followed from the bank. Townsend remained with the vehicle in an adjacent carpark to assist in the escape. Williams was sentenced to four years imprisonment with hard labour and Townsend and Tooma were each admitted to probation for five years.

The Attorney-General appealed against all sentences but the Court of Criminal Appeal dismissed the appeals and upheld the sentences. From the judgment of Hoare J.

Williams, the offender who actually held up the teller, was armed with gelignite and a detonator and fuse and whatever his intentions the risk of serious injury to innocent persons was at the very least comparable to the situation which applies where the offender is armed with a loaded firearm. Armed robbery in these circumstances is an extremely serious offence and persons convicted of such an offence should ordinarily be sentenced to a very long term of imprisonment. If there is to be any deterrent aspect of punishment at all, it seems to me that it should be understood by the community that offences of this nature ordinarily carry a very heavy penalty.

Williams, the main offender, was aged 21 at the time of the offence and, as I have indicated, had some minor convictions but no obviously serious offences recorded against him. The evidence disclosed that he is of a somewhat unstable character but is likely to respond to psychiatric treatment, which I have no doubt that he will obtain in gaol. However, taking into account all the circumstances favourable to Williams, in my opinion he should have been sentenced to a considerably longer term of imprisonment than imposed upon him and were it not for other circumstances to which I shall advert in a moment, I would be in favour of a substantial increase in his sentence.

It is next necessary to consider the position of both Townsend and Tooma. The former was aged 18 at the time of the offence and the latter 20. Each of these persons had borne a good character and neither had convictions of any kind. Their participation in such a crime was out of character for each of them.

I have much sympathy for young men in the situation which existed at the time of their conviction, but Courts must bear in mind that the interests of the public, including the possible deterrent aspects of punishment, must be kept to the fore as well as the interests of the offender. It may well be that offenders in the position of these two persons are unlikely to offend again. This is an important matter but it is also important that the Courts recognise the public interest and the necessity to indicate the public disapproval of grossly anti-social acts by the imposition of terms of imprisonment which may act as a deterrent to others. In all the circumstances, while Townsend and Tooma did not warrant imprisonment for as long a period as Williams, nevertheless the circumstances of the crime were such that in my opinion they should each have been sentenced to a substantial term of imprisonment.

However, the position is greatly complicated by the fact that both of these persons, having been admitted to probation, have in fact returned to their families and apparently are living useful lives. In the case of Townsend it would appear that the probation officer reports most favourably on his conduct on probation. It seems to me that this Court is now in a serious dilema. I consider that these offenders should have been sentenced to a substantial term of imprisonment, but due to a series of delays this Court is now dealing with a situation where the offenders have in fact been on probation since 22 September, 1970 – a period of nearly 8 months. Had it appeared that the delays had been intentionally caused by these respondents, of course different considerations would have applied, but there is no suggestion that there was any calculated action to lead to this result. Should the Court now send to prison young men who have apparently made a serious and so far successful attempt to rehabilitate themselves? It appears to me

that such a course is likely to have a seriously adverse effect on them and could well turn them into anti-social misfits who will find it very difficult to adjust to community standard. If probation stands they will be under supervision and guidance for a period of five years. Should either of these offenders breach the terms of his probation he could then be dealt with. It seems to me that in the particular circumstances which now apply it would be preferable to allow the probation orders to stand.

Turning now to the case of Williams, as I have indicated, in my opinion he should have been sentenced to a considerably longer term of imprisonment than was in fact imposed. Also, as I have indicated, both Townsend and Tooma should, in my opinion, have been sentenced to a substantial term of imprisonment, though less than that of Williams. However, Townsend and Tooma in fact were admitted to probation and for the reasons I have given, in my opinion their sentences should be allowed to stand. In the administration of criminal law, as in other aspects of the law, it is important that justice should appear to be done as well as being done. It is also important that the Courts preserve a proper inter-relation of sentences imposed on joint offenders. Accordingly, in my opinion, while Williams should have been sentenced to a considerably longer term of imprisonment than was imposed upon him, as I feel that the sentences imposed on Townsend and Tooma should be allowed to stand, I also consider that in the circumstances, Williams' sentence should not be increased. Accordingly, in my opinion although I feel that more substantial sentences should have been imposed on all respondents, in the particular situation which now applies, in my opinion the appeals should be dismissed.

**Robbery with Actual Violence while Armed with an Offensive Weapon:** In *Lobban* (C.A. 94 of 1969), the offender was convicted of bank robbery with actual violence while armed with a dangerous weapon, a sawn-off .22 calibre rifle, and while in company with another. The offender was sentenced to five years imprisonment with hard labour which was increased by the Court of Criminal Appeal to imprisonment with hard labour for eight years. The sentence was ordered to date from the date of the previous sentence. From the judgment of Stable J.

Erl Ralph Labbon, the Court by a majority is of the opinion that the sentence of five years imprisonment with hard labour imposed upon you on 14 November, 1969 is manifestly inadequate.

Robbery under arms is so far relatively unknown in Queensland, whatever may be happening elsewhere in Australia. It is a particularly vicious kind of crime which exposes people, by-standers as well as those robbed, to violent injury or death, a factor to which the learned trial Judge adverted in the course of sentencing you.

It must not be accepted for one moment that for this type of crime a first offender will escape comparatively lightly. Punishment must be such as to punish and such as to make it clear to others that the price for this type of crime in Queensland is indeed heavy.

> The sentence imposed upon you on 14 November, 1969 is quashed and the court sentences you in lieu thereof to be imprisoned with hard labour for 8 years. The sentence is to date from the date of the previous sentence, 14 November 1969.
> As I have said, the decision of the court is a majority decision.

**Stealing with Actual Violence:** In *Watts* (C.A. 10 and 11 of 1971), the offender, at the time of the offence, was aged 18 years and had been previously convicted of unlawfully using a motor vehicle and breaking and entering with intent. The offender was convicted of stealing with actual violence while armed with a dangerous weapon, a shotgun, while in the company of another. The facts of the offence were that the offender and his accomplice approached a man and a woman, pointed shotguns at them and demanded money. The male victim threw down eight dollars which the offender picked up. The victims were told to turn around and soon after the male victim heard a car drive away. The offender and his accomplice were subsequently questioned and admitted the offence, although both claimed that the two shotguns were unloaded. The present offender was placed on probation for three years and the Attorney-General appealed against this sentence as being insufficient and inadequate.

The Court of Criminal Appeal upheld the Attorney-General's appeal and the offender was ordered to be imprisoned for a period of three years and that after 12 months of that sentence execution of the remaining portion was to be suspended under section 19(7) of the Criminal Code. From the judgment of Hanger S.P.J.

> While appreciating that the learned trial judge was anxious that Watts should have the benefit of the supervision which probation would afford him, I think that the serious circumstances of this particular case called for more salutary treatment. The offence is one of the most serious in our Code; and regard is had to this fact and to the principle that the deterrent effect of punishment upon other possible offenders is a factor to be considered in imposing it . . .

In *Martin* (C.A. 23 of 1970), the offender, a 26-year-old male, appeared to have spent most of his life in institutions. He pleaded guilty to an indictment which charged him with having stolen from a taxi driver with actual violence a sum of money, being at the time armed with a knife. As the driver reached for his money bag to change a $20 note, the offender stabbed him in the chest with a large knife which he was carrying. A struggle developed, during which the taxi driver was stabbed several times. The medical evidence indicated that it was only a matter of extreme fortune that the taxi driver was not killed. During the assault the taxi went out of control and hit a fence,

and the offender then got out of the vehicle and ran away with the money which he had taken, which was only $2.50. The offender was sentenced to a term of imprisonment with hard labour for ten years. The Court of Criminal Appeal refused an application for leave to appeal against sentence. From the judgment of Lucas J. with whom the other members of the court agreed:

> It is now said on the applicant's behalf that if this is considered as an ordinary case that is, without having regard to the mental situation of the applicant, a sentence of 10 years imprisonment is far too long. I am not able to accept that submission having regard to the prevalence of offence of this nature to which I have referred, and the circumstances in which this particular offence was committed. Alternatively, it is said on the applicant's behalf that the learned Judge proceeded along a wrong principle because he had regard to the mental condition of the applicant and the desirability that the community should be protected from him by keeping him under restraint for some period. Because of the fact that he had regard to these matters it is said that he imposed a sentence which was not commensurate with the circumstances of the offence, and that he did this without regard to what has been said by this Court in The *Queen* v. *Gascoigne*, [1964] Qd. R., at page 539. It is quite clear, however, that the learned Judge was fully alive as to what was said in that case. It was, in fact, quoted to him upon the occasion on which he imposed sentence. Had it been the case that the learned Judge had imposed a sentence out of all proportion because of the applicant's mental condition and need to be confined, then it would have been open to this Court to interfere; but the learned Judge made it quite clear that he was not doing this. In my opinion the sentence was not manifestly excessive, nor did the learned Judge proceed upon any wrong principle, and therefore, in my view, the application should be refused.

In *Gluck* (C.A. 34 of 1972), the offender was convicted of the offence of robbery on a charge that he stole from a person, with actual violence, a set of keys and a sum of money; that he was armed with a dangerous weapon, namely a .22 calibre sawn-off rifle; and that he was in company. The offender was sentenced to imprisonment with hard labour for six years and the Court of Criminal Appeal dismissed an application for leave to appeal against that sentence. From the judgment of the Chief Justice, with whom the other members of the court agreed:

> This was a very serious case of robbery. It was planned and it appears from the evidence that the accused drove with his fellow conspirator from Brisbane to Miles, for the purpose of carrying out this particular offence. It resulted in quite serious violence to the victim . . ., and in all the circumstances I am unable to say that the sentence was manifestly excessive. In fact, in my opinion, I think the sentence was a very proper one.

In *Yassyrie* (C.A. 109 of 1973), the offender pleaded guilty to stealing from a person with actual violence a sum of money, namely $1.50. The

circumstances of the offence were that the victim was going about his normal business when he was attacked by the offender with fists and feet, knocked to the ground, and as a result of this attack suffered a fractured nose, fractures of the ribs and a haematoma of the left eye. Medical evidence asserted that these injuries could have resulted from several blows with a clenched fist.

The Attorney-General appealed against a sentence ordering that the offender enter into his own recognisance in the sum of $500, conditioned that he keep the peace and be of good behaviour for 12 months. The Court of Criminal Appeal upheld the appeal by the Attorney-General and ordered that the offender be imprisoned with hard labour for three years. From the judgment of Stable J. with whom Andrews J. agreed:

> To my way of thinking the nature of the assault – the violence of it as evidenced by the injuries suffered by Ryan – would indicate that this was a very serious offence, and indeed His Honour so regarded it, because he referred to it as a serious offence accompanied by very considerable violence. He had regard to the respondent's age, and considered it to be in the interests of the respondent and the community that, in spite of the seriousness of the offence, he be given a further chance, which he gave him in the terms to which I have referred at the outset of these reasons.
>
> His Honour also referred to the fact that up until about 18 months ago he had had to deal with several cases of robbery with actual violence in the northern district, but for the 18 months immediately preceding the event with which we are concerned he could not remember having had to deal with one such offence, and he held that this showed, happily, that the offence was apparently not prevalent in North Queensland at present.
>
> Nevertheless, to my way of thinking, this is the kind of offence which calls for something more than the sentence which was imposed. It seems to me that the giving of the chance, in the terms in which it was given in this case, is, in the words of the test recently enunciated by this Court, 'manifestly wrong'. I consider myself that this is the class of offence which should be hit with a salutory sentence wherever it be committed, right at the outset, to act as a deterrent to other people similarly inclined, who might be desirous of coming to the belief that in the district in which they live they will be allowed one bite before the law bites back.
>
> I consider that the learned Judge was manifestly wrong in the course which he took, and, for myself I would set aside the sentence which he imposed and order that the respondent be imprisoned with hard labour for three years.

**Threatening to Use Actual Violence**: See *Parsons* (C.A. 28 of 1975) in section on Assault With Intent to Steal.

**Unlawful Wounding**: In *Gascoigne* [1964] Qd. R. 539, the offender, a 28-year-old male, was convicted of unlawful wounding with intent to do grievous bodily harm. The circumstances surrounding the offence were that the

offender, with intent to do grievous bodily harm to a person whom he mistakingly believed to be a girlfriend, unlawfully wounded another girl, a stranger, who was looking in a shop window in a city street at night. The offender came up behind the victim, caught her by the shoulder, stabbed her in the back with a knife and then hurried off down the street. The offender was medically examined after conviction, and three doctors, two of them psychiatrists, gave evidence prior to the trial judge pronouncing sentence. All three agreed that the offender should be kept under strict control, two being of the opinion that a minimum period of five years was necessary. The offender was sentenced to life imprisonement and the offender appealed against this sentence on the ground that it was manifestly excessive.

The Court of Criminal Appeal upheld the appeal and ordered that the offender be sentenced to imprisonment with hard labour for five years. A recommendation was made that the Comptroller-General of Prisons favourably consider action under section 16 of the Prisons Act of 1958 which authorises the Comptroller-General of Prisons to direct and order the removal of any prisoner from any prison to any mental hospital where a medical officer has satisfied him that such removal is required for the medical treatment, observation or examination of the prisoner concerned.

Section 33(2) of the Mental Health Act of 1962 provides, *inter alia*, that such a prisoner shall be detained in such hospital until the responsible medical practitioner certifies that he is recovered or is not mentally ill.

The effect of this decision was considered by the Court of Criminal Appeal in *Murdock* (C.A. 82 and 158 of 1978). This has been referred to in relation to sentences designed to protect the community.

**Unlawful Wounding with Intent to Disable:** In *Cooper* (C.A. 30 of 1975), the offender, a 22-year-old male, pleaded guilty to a charge of unlawful wounding with intent to disable. He had a serious record of criminal offences but had no prior convictions for any crime of violence. He was, at the time of sentence in the present case, serving a sentence of three years imprisonment with hard labour imposed for the crime of breaking, entering and stealing together with an accumulative sentence of two years imprisonment for another charge of breaking with intent. The circumstances surrounding the offence were that the victim had invited the offender to spend the night in his flat as the offender had no where to go. In consequence of his becoming enraged, under circumstances of some degree of provocation, the offender attacked his sleeping host with a bottle and continued to assault him, getting a fresh bottle as each one broke, and ultimately breaking three bottles over his victim and finishing with a fresh bottle with which he continued to beat him. He inflicted quite substantial wounds upon the victim who was a man of

approximately 59 years. After the victim was rescued by a neighbour the offender hastily gathered up the readily available property of the victim and fled.

A sentence of eight years imprisonment with hard labour was set aside by the Court of Criminal Appeal which sentenced the offender to five years imprisonment with hard labour to date from the date of the decision of the appellate court. From the judgment of Wanstall S.P.J., with whom the other members of the court agreed:

> It is our duty to look at the sentence imposed in this instance as a sentence imposed for the crime for which it was imposed. In that view it seems to me to be anomalous and out of line with sentences imposed for crimes of violence sometimes, crimes which could readily be considered to be more serious and more vicious than this one. In my view an appropriate sentence in all the circumstances in this case would have been five years imprisonment, and I would leave the question of parole or remissions to the authorities who are responsible for making decisions in those matters, and simply impose a sentence which in my view was appropriate for this offence, keeping in mind of course that he has already been punished for two other associated offences.
>
> Consequently I reach the view that this sentence is manifestly excessive and in lieu thereof I would impose a sentence of five years imprisonment with hard labour, which will date from today in view of the fact he has not in reality served any imprisonment in respect of the sentence under appeal because he is already in prison serving an earlier sentence. For those reasons I impose a sentence of five years imprisonment with hard labour to date from today.

**Unlawfully Doing Grievous Bodily Harm**: See *Groning* [1972] Q.W.N. 3, in section on Driving Offences, and *Netz* [1973] Qd. R. 145 in section on Attempted Murder.

In *Rossato* (C.A. 142 of 1975), the offender pleaded guilty to an offence of unlawfully doing grievous bodily harm under section 320 of the Criminal Code. The offender was engaged in a dispute with his wife as a result of matrimonial troubles which had arisen between them. His wife appeared to have been living with another man, and the accused's main preoccupation seemed to have been that he wished to prevent his hard-earned money (for he appears to have been a man who was accustomed to working very hard) from passing into the possession of his wife's paramour. There was a conference between the parties' solicitors, at which there appears to have been a demand on behalf of the wife for a payment of $20,000 by way of a property settlement. This caused the offender's intense resentment. He left the conference, had a considerable amount to drink, and purchased a shotgun from a sports store. He then went to his wife's house, loaded the gun, and shot her at close range in the buttocks. The injuries which the victim sustained were severe,

although she made a satisfactory recovery from them. The offender was sentenced to five years imprisonment and the Court of Criminal Appeal upheld this sentence in refusing applications for leave to appeal against sentence by the offender. From the judgment of Lucas J.

> This was a bad case of the infliction of grievous bodily harm, taking into account the fact that no specific intent is required in order to constitute the offence. But there was no suggestion that the shotgun was discharged other than deliberately.
>
> In sentencing the applicant the learned judge remarked that the maximum punishment for the offence to which he had pleaded guilty was imprisonment with hard labour for 14 years. This was a reference to the amendment which was made in 1975. The offence had been committed on 29 April 1975 and the amendment had come into force on 1 July 1975.
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> The situation therefore was that pursuant to section 11 of the Criminal Code the maximum penalty to which this particular applicant was liable was that of seven years and not 14 years.
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> There is no reason, however, to think that a judge of the wide experience of the Northern Judge was under any misapprehension whatever in that regard.
>
> The learned judge went on to express the view that he had already, that very day, commented on the number of cases which had come before him arising out of the use of firearms. In my opinion there was nothing improper or out of place in the learned judge making a comment of that nature.
>
> I am unable to conclude that the learned judge took any wrong consideration into account or failed to direct his mind to the correct principles.
>
> The question therefore is whether the sentence so imposed was manifestly excessive. In his persuasive argument for the applicant Mr Sheehan has drawn our attention to a sentence imposed on an Attorney-General's appeal in *R. v. Netz*, 1973 State Reports. I, for myself, find great difficulty in comparing sentences imposed in different circumstances so as to enable one to be a reliable guide to another.
>
> I am unable to conclude that the sentence is manifestly excessive.
>
> In my opinion the application for leave to appeal ought to be refused.

From the judgment of Williams J.

> I agree entirely with all that my brother, the Presiding Judge, has said. As the trial judge in Netz's case I should perhaps add that there are many points that appeared to me to distinguish that case from the present. The matter of gaol or no gaol is always a difficult consideration in a case of that nature. There were several factors that pointed, in my view, towards not sending Netz to gaol. The Court of Criminal Appeal decided that the other factors that required gaol outweighed those. In those circumstances once gaol was decided, it seems to me that the case was an inappropriate case for a period of imprisonment at any such less than three years for an offence under section 317. The range of sentences in the class of case before this court on this application is such that it is extremely difficult, viewing the facts as I see them here, to conclude that the sentence is manifestly excessive. In my view it plainly was not.

# Chapter 9

# Sexual Offences

## Offences Against Females

**General Principles**: In *Breckenridge* [1966] Qd. R. 189, where a trial judge sentenced an offender in a particularly bad case of rape on the basis that the offender would be released from prison earlier than the actual sentence imposed by the court intended, it was held by the Court of Criminal Appeal that:

> It is not right in principle for a judge in Queensland to increase the sentence he imposes because of the possibility that the prisoner may be released on parole. In imposing sentence the trial judge must consider what is the appropriate length of imprisonment to impose for the particular offence, and he should not impose a sentence of greater length because the Parole Board may exercise its statutory powers and release the prisoner before he has served the full term of the sentence imposed by the judge. (From the judgment of Gibbs J.).

In *Haselich* [1967] Qd. R. 183, a case of rape where the complainant was the sister of the offender's wife, it was submitted by the defence that the trial judge should, as a matter of law, take a more lenient view of the facts or assume that the jury took a more lenient view which would support the verdict without conflicting with it. Skerman J. held that:

> Although there may well be cases in which the trial Judge in passing sentence ought to take into account the possibility that the jury may have taken the more lenient of two possible views of the facts, he is not bound to do so in every case. The responsibility of awarding punishment once a jury has convicted a prisoner lies solely upon the judge. He has to form his own view of the facts and to decide how serious the crime is that has been committed, and how severely or how leniently he should deal with the offender. In forming his view of the facts the judge must not form a view which conflicts with the verdict of the jury, but so long as he keeps within those limits, it is for him and him alone to form his judgment of the facts.

In *Aidi* [1970] Q.W.N. 4, where the Court of Criminal Appeal was considering an appeal against imprisonment for hard labour for life imposed upon

an offender convicted of the rape of a woman of 70 years of age in extremely violent circumstances, the Chief Justice stated that:

> The question of this Court is whether, when regard is had to the standard principles of our time to be applied in determining punishment, the sentence of life imprisonment is manifestly excessive. In *Skinner* v. *The King* (1913) 16 C.L.R. 336 at p. 340, Barton A.C.J. said:
> 'A court of Criminal Appeal is not prone to interfere with the Judge's exercise of 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 underestimated or misunderstood some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but short of such reasons, I think it will not.
> In approaching the question, it is right that we should have regard to other sentences imposed by judges of the Supreme Court and by the Court of Criminal Appeal.

In *Ives* [1973] Qd. R. 128, considering an appeal against a sentence of six years imprisonment for the offence of rape committed upon a girl who clearly contributed to her own downfall, D.M. Campbell J. stated that:

> The conduct of the complainant must enter into all sentences for rape.

In *Downie* (C.A. 2 of 1967), commenting upon the problem of sentencing in rape cases generally, Wanstall J. (as he then was) stated that:

> The prevalence of rape is a disquieting feature of today's affluent society and one which in my opinion is related to present economic conditions in that they put intellectual and moral beggars into motor cars, thus enabling them to create opportunities for rape which would not otherwise exist for them. The number of rape and attempted rape cases does not decline despite the heavy sentences the Court has been imposing for the past 7 or 8 years and most of them involve young men of the applicant's type who are characterised by barnyard morals and cesspit minds. I think that it is the duty of Judges to take a strong line with such louts for they understand nothing else and their fellows will not otherwise be deterred.

In *Giffin* [1970] Qd. R. 12, considering an appeal against a sentence of 12 years inprisonment imposed for rape brought by the offender on the grounds that such sentence was manifestly excessive, the Court of Criminal Appeal stated that:

> It is true that violence was not used and that it is usually this circumstance which induces a trial judge to impose a very heavy sentence for rape. However, as stated by the trial judge, it is a most important circumstance that the offence was committed while the accused 'Invaded the sanctuary of a woman's home in the dead of night at a time when any woman in Australia is entitled to believe she is safe and in a place where she is entitled to feel safe'.

*Richardson and Young* (C.A. 33 and 34 of 1965), involved an appeal against the conviction and sentence of the offenders for rape and is important for the following passage from the judgment of Hanger J. (as he then was):

> I think I should record here that I presided at the trial of the appellants and that I sat as a member of this Court of Criminal Appeal at the request of the appellants and with the agreement of the Crown the appellants being anxious that their petitions be heard as soon as possible without waiting for the Court of Criminal Appeal to be constituted of which I was not a member.

**Examples of Sentencing Decisions in Rape Cases:** In *Schloss* (C.A. 64 of 1974), the offender, a 43-year-old male, pleaded guilty to a charge of rape committed upon a six and a half year old girl. The victim was the child of the the offender's sister. The Attorney-General appealed against a sentence of five years imprisonment with a recommendation that the offender be considered for release on parole after serving two years. The Court of Criminal Appeal upheld the appeal by the Attorney-General and sentenced the offender to eight years imprisonment with hard labour. In commenting upon the medical, psychiatric and probation reports the Chief Justice stated that these were:

> [O]f course concerned only with the interests of Schloss. We have also to think of the interests of the community at large regarded separately, and of those persons in the community who are potential offenders of the same kind. All things considered, I cannot feel that a sentence of less than for a period of 8 years is adequate. In fact, sentences of more than twice as long have been imposed for similar offences on young, defenceless girls. I therefore think that the sentence of the trial Judge should be set aside and a sentence of imprisonment with hard labour for 8 years should be substituted.

In *May* [1962] Qd. R. 456, the offender was convicted of the offence of the rape of an 11-year-old girl. The victim was seized by the offender, who was a stranger to her, threatened with a knife, and forced into the offender's motor vehicle. The vehicle was driven to an isolated place where the offence took place. In view of the age of the victim, her apparent physical immaturity, the fact that she was a stranger to the offender, and also in view of the forcible abduction and threats with a knife prior to the act of rape, the Court of Criminal Appeal upheld a sentence of ten years imprisonment with hard labour.

In *Breckenridge* [1966] Qd. R. 189, the offender, a 35-year-old man, had two previous convictions involving the sexual molestation of sleeping women. One case involved bashing the victim with a piece of wood and fracturing her skull. In the present case the offender pleaded guilty to a charge of rape in

circumstances where he took the girl from a vehicle in which her parents had left her outside an hotel and in which she was sleeping with other children. He held her clothes over her head to keep her quiet and carried her to a lonely place where he raped her. The girl's body was split by the force involved. Having so dealt with the girl he left her alone, and went to try to hide the clothes which he was wearing at the time and which bore evidence of his crime. The offender was sentenced to imprisonment with hard labour for 30 years and it was argued on behalf of the offender before the Court of Criminal Appeal that the trial judge had increased the sentence he imposed by taking into consideration potential remissions for good conduct or the possibility of release on parole. From the judgment of Gibbs J.

> It is not right in principle for a judge in Queensland to increase the sentence he imposes because of the possibility that the prisoner may be released on parole. In imposing sentence the trial Judge must consider what is the appropriate length of imprisonment to impose for the particular offence, and he should not impose a sentence of greater length because the Parole Board may exercise its statutory powers and release the prisoner before he has served the full term of the sentence imposed by the judge.

It was held further by Gibbs and Douglas JJ. that as the trial Judge had exercised his discretion on a wrong principle, the court, having the materials for doing so, should exercise its own discretion in substitution for his.

The sentence imposed by the trial judge was quashed, and a sentence of life imprisonment with hard labour was substituted.

In *Aidi* [1970] Q.W.N. 4, the offender was a 24-year-old Torres Strait Islander and an assisted Islander within the meaning of the Aborigines and Torres Strait Islanders Affairs Act of 1965. He had been on the mainland for two years prior to the commission of this offence. The offender had one previous conviction and that was for being unlawfully in a dwelling house, an offence for which he was sentenced to four months imprisonment. In the present case the offender was convicted of rape upon his own confession. The offence was committed upon a woman of 70 years of age. It was vicious in the extreme; it was accompanied by threats to take the victim's life, by repeated assaults, by blows to her head and possible by a pretended attempt to strangle her. The offender was sentenced to imprisonment with hard labour for life. This sentence was set aside by the Court of Criminal Appeal and a sentence of 16 years imprisonment with hard labour was imposed. From the judgment of Hanger C.J.:

> Regarded as a deterrent both to the offender and to others and as a means of preventing the appellant from repeating the offence, was the sentence required?

If any retributive element is to be considered in a sentence so as to satisfy the 'moral indignation' of the community, was a life sentence called for in the circumstances?

The only previous conviction of the appellant of which we have knowledge is one for being unlawfully in a dwelling-house in February 1965, an offence for which he was sentenced to four months imprisonment. What the purpose of the appellant was in being in the dwelling, we do not know.

Evidence was placed before us as to the result of an examination of the appellant by Dr W.H. Tait, a specialist in psychiatry, subsequent to the imposition of the sentence. Dr Tait summarised his conclusions as follows:

1. Aidi's intelligence is within the normal.
2. He is not suffering from any mental illness.
3. I have no indication that his sexuality is perverse.
4. Alcoholic intoxication appears to be a factor and probably a substantial one in the commission of the assault.
5. A determinate sentence would probably be in his interest in allowing some planning for the future.
6. He would be better returned to Stuart Prison where he can be visited by relatives.

We are also informed that the Department of Aboriginal Affairs is prepared to accept the appellant back under its supervision at Murray Island where the appellant's father lives. The father is a person of some standing in the community there.

All things considered, I think that the particular circumstances of the case warrant interference by this Court with the sentence of life imprisonment. In my opinion, the sentence should be set aside and a sentence of imprisonment with hard labour for sixteen years should be imposed.

The order of the Court is: Application for leave to appeal against sentence granted. Appeal allowed. Sentence imposed by the learned trial judge set aside and in lieu thereof sentenced to imprisonment with hard labour for sixteen years.

In *Ives* [1973] Qd. R. 128, the offender, a 21-year-old male, was jointly charged with another with the rape of a girl aged 17 years. The victim had previously had intercourse with a man, T, on the evening of the offence. The victim, T, and another male person had played a card game, 'strip-jack-naked', at a rubbish dump, during which the victim became naked. Later, those three persons met the offender and his co-offender who were told of the victim's fate in the card game. The five persons then went to an isolated area where the offender seized the victim; tried to place her in a car, causing her to fall to the ground; struck her on the face; and had intercourse with her without her consent. A sentence of six years imprisonment with hard labour was reduced by the Court of Criminal Appeal to one of four years imprisonment with hard labour. From the joint judgment of Stable and W.B. Campbell JJ.:

> The appeal against sentence has given us anxious consideration but we have concluded that, in all the circumstances of this case, a six year term of imprisonment is so excessive as to justify us, sitting on this appeal, interfering with the trial judge's discretion. The appellant is a young man who had been told by Steele, a youth who had had intercourse with the girl that she 'would be an easy mark' and he had been present at the hamburger shop when a discussion took place in her presence about her having to remove all her clothes at the game of 'strip-jack-naked'. With this background, including the consumption of liquor by the party, the girl accompanied Steele and the other youths at night to the remote Serpentine area. On the other hand, the appellant struck the girl on the face to make her submit, although it appeared to the learned judge that she had suffered no serious physical or psychological harm. The matters to which we have referred were all considered by His Honour. Having regard to them all, and not overlooking the deterrent aspect of punishment, we were initially inclined to vary the sentence under the provisions of s. 19(7) of the Code. As this section is being amended we abandon this course, but, in the special circumstances of this case, we consider the sentence should be reduced to imprisonment with hard labour for four years.

In *Donohue* (C.A. 46 of 1975), the offender, a 19-year-old Aborigine, was convicted of the offence of rape committed upon an elderly woman. A sentence of six years imprisonment was upheld by the Court of Criminal Appeal on an appeal by the Attorney-General that such sentence was inadequate and insufficient. From the judgment of Hanger C.J. with whom the other members of the court agreed:

> The Crown suggests that the sentence is so low as to call for interference by this Court. To me, sitting as a member of an Appeal Court, the sentence certainly appears low, but the learned trial judge has been for many years acquainted with the Northern District and the circumstances there, and having regard to all the relevant circumstances as I see them, I am not prepared to say that the sentence should be altered. In my opinion, therefore, the appeal should be dismissed.

In *Drummond* (C.A. 24 of 1972), the offender was convicted of the rape of an 88-year-old widow after he had illegally entered her house. A sentence of 10 years imprisonment was upheld by the Court of Criminal Appeal. From the judgment of Wanstall S.P.J., with whom the members of the court agreed:

> I am satisfied that there is no ground of appeal reasonably open. There is no miscarriage of justice and I would dismiss the appeal against conviction. In regard to the sentence I am satisfied that the sentence of 10 years in all the circumstances is not manifestly excessive. It was a particularly revolting crime of rape involving burglarious entry of the house of an 88 year old widow and she was raped in her own bed. In the circumstances 10 years is no more than adequate.

In *Eggins* (C.A. 172 of 1973), the offender, a 22-year-old male, was convicted of the rape of a girl aged 17 years. The victim had attended a cabaret party and had consumed too much liquor. During the night she felt unwell, left the party and lay down in a car; she became sick and vomited. She was later found and taken to a house where she lay on the bed. It appears that the girl slept for a short time and, on awakening, she asked to be taken home. The offender offered to drive here home but instead drove the victim to a rubbish dump where the rape occurred. It seems clear that the girl, in addition to offering physical resistance, screamed and told the offender that she was a virgin. Medical evidence was given of her physical condition on the following morning which disclosed little physical injury except tenderness around the genitals; it also showed nothing inconsistent with her previous virginity.

The Attorney-General appealed against sentence of imprisonment for five years and the Court of Criminal Appeal upheld this appeal and imposed a sentence of imprisonment for eight years. From the judgment of the Chief Justice, with whom the other members of the court agreed:

> The failure of the respondent to appreciate the seriousness of his offence and the complete absence of any contrition on his part for what he had done appears clearly from the transcript of the evidence.
>
> Having regard to what I have already said, to the girl's protests to the respondent that she was a virgin, to the fact that he knew she was under the influence of alcohol, to the fact that she had gone with him on his offer to drive her home; that he had borrowed a car for the purpose; and that he was on his own statements in the witness-box not constrained by any physical sexual urge to satisfy an immediate lust, I think the offence a bad case. In my opinion, the case calls for interference by this Court with the sentence.
>
> Giving weight to the opinion of the learned trial Judge on the matter, I think the appropriate sentence is one of eight years to run from the date the sentence was imposed by the learned trial Judge.

In *Price* (C.A. 21 of 1974), the offender was convicted of raping a girl who was hitch-hiking a ride to her home. The offender offered to drive the victim home but instead drove the car onto a side road and raped her. At the trial the offender denied that he was the man involved in the incident. A sentence of imprisonment with hard labour for 10 years was upheld by the Court of Criminal Appeal despite the court's acknowledgement of the victim's foolishness in accepting the lift in the offender's car.

In *Langford* [1974] Qd. R. 67, the offender, who had a serious criminal record involving many counts of stealing, false pretences, housebreaking, forging and assault and robbery, was convicted of the rape of a single woman

aged 28 years. The offender entered the front seat of the motor vehicle of the victim and two female companions and ordered the victim to drive off while pointing a gun in her face. The offender informed the occupants of the vehicle that he had just killed a man and ordered the victim and one of her companions to undress, which they did. After certain indecent conduct on the part of the offender the two women were ordered to dress and the car was driven to a motel where the victim was ordered into the offender's motel room where the rape occurred. Numerous acts of intercourse and further indecent behaviour occurred until about 5 a.m. when the offender fell asleep. At this stage the victim made her escape and contacted the police. A sentence of 12 years imprisonment was upheld by the Court of Criminal Appeal. From the judgment of Skerman J.:

> The learned trial judge obtained a pre-sentence and a pyschiatric report before imposing sentence. It is clear that he regarded the offence as a very serious case of rape and took into account various circumstances including the use the appellant made of the pistol, terrifying, on his assessment of the evidence, the women concerned who were held in the car and the indignities to which they were subjected by the appellant. The sentence was a heavy one, but in all the circumstances I am unable to come to the conclusion that it was so manifestly excessive as to warrant the interference of this Court.

In *Giffin* [1970] Qd. R. 12, a sentence of 12 years imprisonment imposed for the rape of a woman in her own home was upheld by the Court of Criminal Appeal despite the fact that violence was not used. Although the Court of Criminal Appeal acknowledged that the sentence was a heavy one and that other judges may have imposed a shorter sentence, it was considered that the sentence in the circumstances was not manifestly excessive.

In *Cole* (C.A. 37 of 1976), the offender was convicted of the rape of a girl who had voluntarily gone to a house where a party was being held. A large number of people attended the party. Many of them were 'bikies'. Soon after the arrival of the victim she was forcibly stripped of all her clothing, taken to a room and there raped by a number of men. Later she was taken to another room where she was again the subject of multiple rape. A sentence of 10 years imprisonment with hard labour was upheld by the Court of Criminal Appeal as being not manifestly excessive having regard to the sentences imposed on other persons who had committed rape during the same evening.

In *Ole* (C.A. 60 of 1973), the offender, a 20-year-old male, was convicted of the rape of a girl after a wine and cheese evening which the victim had attended with her fiance. They attended the evening in simulated Roman togas, sheets being used for the purpose. About 12.30 a.m., after the last

dance had been announced, the victim was sitting near the door waiting for her fiance. She apparently dozed and was awakened by the offender asking whether she was alright. The offender told the victim that her fiance was in the car and wished to see her. The victim started to walk with the offender towards the car but then became suspicious and went to turn back. She was pushed by the offender into a car which was driven some distance away by another man who left the vehicle and walked away after stopping the car. Notwithstanding the victim's resistance, the offender succeeded in his purpose. The driver of the vehicle then reappeared and also raped the victim. The victim was then driven to her home. A sentence of imprisonment with hard labour for 12 years was set aside by the Court of Criminal Appeal and a sentence of imprisonment with hard labour for 10 years was substituted. From the judgment of the Chief Justice, with whom the other members of the court concurred:

> Medical examination disclosed that the complainant was sore about the shoulders and neck; there was soreness in the crutch area, generous bruising on the arms and legs and lower body, a bruise on the forehead, a scratch on the right loin, graze marks on the right upper thigh. She was not a virgin at the time; but I find it impossible to read the transcript without being convinced that she had resisted to her utmost.
>
> A reading of the admissions made to the police by the appellant does not make the case any better for him if an allegation that the complainant was drunk at the time is rejected. The case was a bad one of rape. There can really be no question that the complainant was first deceived by the appellant into thinking she was going to speak to her fiance, and also no question that she resisted to the utmost of her capacity. The appellant acted in concert with his companion and I think that there is no doubt that it was the intention of them both that she should be ravished by them both. The resistance put up by the complainant is a measure of the determination of the appellant to effect his purpose.
>
> Nevertheless, I feel that a sentence of less than twelve years would be adequate, having regard to the age of the appellant to meet the requirements of the law. This Court recently increased to twelve years a sentence imposed on a man for a second offence of rape committed while he was on parole in respect of the first sentence. I think that the circumstances of the present case call for the interference of this Court and that the sentence should be reduced to ten years.
>
> The question of sentence was obviously for the trial Judge and is now for this Court, a difficult matter. The retributive element in punishment is one which, I believe, modern thinking is inclining against. The appellant was 20 years of age at the time of the offence. Giving the best consideration that I can to the circumstances of the case, I think the requirements of the principles of sentencing do not call for a sentence of more than ten years, and I would reduce the sentence accordingly.

**Examples of Sentencing Decisions in Attempted Rape Cases:** In *Walczuk* [1965] Q.W.N. 50, the offender was convicted of the attempted rape of a woman in a woman's public lavatory. The offender had secreted himself on a ledge above the cubicles and let himself down into one of the cubicles after the victim in the case had entered. The offender, who had a bad previous criminal history, sought leave to appeal against a sentence of five years imprisonment with hard labour. The Court of Criminal Appeal dismissed the application and upheld the sentence.

In *Williams* [1965] Qd. R. 86, the offender, a 21-year-old male, was convicted of the attempted rape of a girl at a private hotel. The offender entered the victim's hotel room, sat astride her and struck her several times about the face and other parts of her body with his fist. The victim testified that the offender inserted his fingers into her genital organs but that she was able to scratch his face and escape. The offender was admitted to probation for four years, one of the conditions of the order being the payment of $150 compensation to the victim. The Attorney-General appealed against this sentence on the grounds that it was manifestly inadequate and the Court of Criminal Appeal upheld the appeal and ordered that the offender be imprisoned for a period of three years. From the judgment of Hanger J.

> The trial judge had then before him for sentence a young man aged twenty one years, whose character and standing prior to the commission of the offence was good. According to the evidence his previous sexual experience had been limited to that of a young man brought up on sound moral principles; he had consumed a considerable quantity of alcohol to which he was not accustomed. Let it be assumed that but for this consumption of alcohol and the particular circumstances in which he found himself, the offence would not have been committed – it was certainly quite out of keeping with his previous character. The incident took place in circumstances in which it was extremely improbable that an attempt at rape was likely to succeed.

From the judgment of Stable J.

> At the same time the appellant is a 'cut above the average type' whom the courts are used to seeing arrainged on such charges. The kind of problem presented by him was faced by the Court of Criminal Appeal of New South Wales in *R. v. Aitken* [1961] N.S.W.R. 914. In that case the applicant for leave to appeal against a sentence of 18 months hard labour for his first offence, one for larceny of a motor car, was a young man of good character. He had been educated to the age of 17 years at two great public schools. He was in regular employment and came from a good home, his parents, for whom the court expressed 'great sympathy', being 'estimable citizens'. The court said that perhaps the applicant was over-indulged by his parents and lacked some elements of discipline as is so often

the case today. He was weak enough to give way to temptation to help in stealing and stripping a car because of a false sense of loyalty to his fellows. In its reasons for refusing the application the court said:

'We have, since this appeal was argued so earnestly and capably by Mr Samuels, given every consideration to the extenuating circumstances pressed upon us; and it is with some regret that we feel compelled to conclude that the application must be dismissed. We say with regret because we do not overlook that the applicant is being sent to prison for the first time and for his first offence. But this court is bound to consider not only the interests of the applicant himself and his family, but the community. The retributive aspect of punishment must be given full weight. Perhaps this would be met in this case by the exposure of the crime, the arrest of the applicant, the disgrace with which it is accompanied, and the disruption of his life of previous good character. We do not think that the applicant is likely to be led or to fall again into a crime of dishonesty. His school and family background should be a guarantee of this. But there remains the question of the deterrent aspect. A sentence such as this is imposed to deter others as much as to deter or punish the individual. For many years judges at Quarter Sessions have taken a serious view of car stealing, owing to its prevalence and serious loss of property involved, and have frequently imposed sentences of two or three years imprisonment on young offenders and this court has consistently supported them.'

I consider that the substance of this statement expresses the problem in the present case and helps in the making of the hard decision whether or not to send a young man such as the appellant to gaol. For years sentences of imprisonment have been imposed by our courts for violent sexual offences, and I have no doubt that one result is that many young men who would otherwise have offended have been induced to turn aside and walk straightly. Of course, punishment can never prevent or stamp out crime. Wilful murder continued despite hangings, and stealing continued despite the punishments of mutilation or deportation, or both, imposed in earlier days. But for serious crime imprisonment remains the only effective brake upon anti-social pressures and passions which may be indulged bringing fear and agony to men, women and children who are entitled to live freely in the protection of the law. While imprisonment may not be the perfect answer in such a case as this I consider it is the only real answer available to the court. In my regretful view the probation order amounted to a sentence which in the circumstances was manifestly inadequate. I would allow the Minister's appeal. While, were I sitting alone, I would award a greater punishment, I concur in the punishment proposed by my brothers. Application to extend time for making of appeal refused. Appeal against sentence allowed.

In *Downie* (C.A. 2 of 1967), the offender, aged 19½ years at the time of the offence, was convicted of attempted rape and also of two counts of unlawful and indecent assault. The vicitm was aged 16½ years and was of good character. She was not a friend of either the offender or his companion but did know the offender slightly. Upon a chance encounter in a street at about 4 p.m. the offender persuaded her to enter his companion's vehicle on

the pretext of driving her to her place of employment. Having got into the car the offender's companion drove towards the bush, and when challenged by the victim he explained that he had to look for a ring that his brother had lost at his aunt's farm. This apparently allayed the victim's anxiety and on driving into the bush the offender's companion said that it was his aunt's farm, stopped the vehicle, got out and appeared to search for something. The attempted rape and two counts of unlawful and indecent assault then took place. Upon his conviction of attempted rape the offender was sentenced to imprisonment for five years with hard labour. He was given a concurrent sentence of six months imprisonment on conviction of the first count of unlawful and indecent assault, and a cumulative sentence of 18 months imprisonment on conviction of the second count of unlawful and indecent assault. The Court of Criminal Appeal upheld the sentences. From the judgment of Wanstall J.

> This Court is now asked to upset the learned trial Judge's sentences on the ground that the one of 5 years for the attempted rape is manifestly excessive in itself, and that, as a matter of discretion, apart from the question whether it may lawfully be made cumulative, the second one should have been made concurrent. Looking intrinsically at the sentence of 5 years I cannot say that it is manifestly excessive. Statistics put before the Court show that in the past four years sentences of that duration or longer have been imposed for attempted rape on no fewer than six occasions. Without trying to make any comparison between the circumstances of those cases and those of this one, I am content to say that the circumstances revealed in the foregoing narrative stamp this as a very bad example of this offence. The extenuating circumstances that extreme physical force was not used on the girl is offset by the aggravating circumstances of the applicant's initial treachery, his persistence and his use of terror, combined with disgustingly lewd talk and conduct. The sentence imposed is well within the maximum of 14 years. I do not think that any assistance can be gained from reference to sentences imposed for rape, because I do not accept as a principle that any rape must attract a heavier sentence than any attempt to rape as the appellant contended. One must come back to the question whether this sentence is manifestly excessive for this crime. Turning to the next argument, that 18 months should not have been added for the indecent assault, I can see no reason why it should not. The punishment for attempted rape should not look to events occurring after that attempt ceased. Is the subsequent and separate offence to escape all real punishment and if so upon what principle? The facts I have set out above show that the applicant committed a second criminal act specifically because he had been frustrated in his attempt to rape the girl, and this is in my view a compelling reason for inflicting on him an effective punishment for that offence, not one which would subject him to no real penalty. The nature of his second offence shocks the sensibilities of every decent person and intrinsically it merits the sentence imposed. I am unable to say that it is manifestly excessive either in itself or because it was made cumulative with the previously imposed sentence. The

> prevalence of rape is a disquieting feature of today's affluent society and one which in my opinion is related to present economic conditions in that they put intellectual and moral beggars into motor cars, thus enabling them to create opportunities for rape which would not otherwise exist for them. The number of rape and attempted rape cases does not decline despite the heavy sentences the Court has been imposing for the past 7 or 8 years and most of them involve young men of the applicant's type who are characterised by barnyard morals and cesspit minds. I think that it is the duty of Judges to take a strong line with such louts for they understand nothing else and their fellows will not otherwise be deterred.

In *King* (C.A. 137 of 1973), the offender pleaded guilty to three charges. First that he attempted to commit rape upon a young woman; second, that he unlawfully did grievous bodily harm to the young woman; and third, that he unlawfully and indecently assaulted the young woman. The sentences imposed by the trial judge were eight years in respect of the attempted rape and six years in respect of the offence of doing grievous bodily harm. These sentences were made cumulative. The sentence for the offence of unlawful and indecent assault was ordered to run concurrently with the sentence for grievous bodily harm. The offender appealed against these sentences on the grounds that the charges of grievous bodily harm and indecent assault should not have been allowed because he was sentenced to eight years for attempted rape on the same charge. The Court of Criminal Appeal refused the application for leave to appeal against sentence and upheld the sentences imposed by the trial judge. From the judgment of the Chief Justice:

> Counsel representing the Crown has pointed out to us that the act which constituted the basis of the charge of unlawful and indecent assault was separable from the acts which constituted the attempted rape on the young lady. It is a matter for consideration in the circumstances of any particular case whether it is advisable that offences of this kind should be joined with a charge of attempted rape or rape.
>
> However, the only matter for consideration by this court in the circumstances is whether the sentences imposed are manifestly excessive. As I take the view that the offence of causing grievous bodily harm was quite separable and distinct from the act of attempted rape, I do not see why the two matters should not have been made the subject of separate sentences.
>
> I am not satisfied in the circumstances that the sentences in these cases were manifestly excessive. Therefore I think the application for leave to appeal against the sentence should be refused.

From the judgment of Stable J.

> I agree, and in particular do I agree that the charges of attempted rape and grievous bodily harm were, in the circumstances, properly separated. In my view the record discloses that violence beyond that ordinarily associated with rape cases was committed upon this girl. She had inflicted on her by this applicant and appellant, according to the record, a huge left orbital haematoma which completely closed her left eye, lacerations on her left upper eyelid, nose swollen and movable due to a clinical fracture, she was tender and bruised over her right mandible, X-rays showed that she did in fact have a fractured nose and a probable fracture above her left orbit, and one final result of these matters is that she has had at least substantial partial destruction of the vision of her left eye.
>
> The learned trial Judge regarded this – and I agree with him – as showing circumstances of extreme violence.
>
> Beyond these remarks I have nothing to add to what has fallen from the Chief Justice. I would agree that the appeal against conviction be dismissed and the application for leave to appeal against sentence be refused.

From the judgment of D.M. Campbell J.

> Whatever objection might have been open to the joinder of the two charges of grievous bodily harm and indecent dealing with the more serious charge of attempted rape, in fact the applicant pleaded guilty to the lesser charges. Looking at the circumstances surrounding the commission of the offence of attempted rape, which only fell short of rape because of the resistance shown by the complainant, I am not able to see that any injustice is done him by a cumulative sentence of 14 years which I would have regarded as the appropriate sentence if the charge of attempted rape stood by itself. I agree with the order proposed by the presiding judge.

**Examples of Sentencing Decisions in Cases of Unlawful Carnal Knowledge:** In *Williams* [1961] Q.W.N. 12, the offender, who was the stepfather of the 15-year-old victim, pleaded guilty to a charge of unlawful carnal knowledge of a girl under the age of 17 years. Prior to the commission of this offence, the victim had on more than one occasion had sexual intercourse with a pack of youths, and had provoked the offender into committing this offence upon her. The trial judge sentenced the offender to imprisonment with hard labour for two years. The offender sought leave to appeal against this sentence and also to place fresh matters before the Court of Criminal Appeal. It was argued before the appellate court that it had been suggested before the lower court that the girl was of virginal purity and good character and had been debauched by her stepfather. The Court of Criminal Appeal held that the trial judge would have been greatly influenced by the facts as disclosed to the Court of Criminal Appeal as to the girl's previous sexual intercourse with a pack of youths. The sentence imposed by the trial judge was set aside and the offender was sentenced to imprisonment with hard labour for six months.

In *Williams* [1962] Q.W.N. 22, the offender, a 19-year-old youth, who had one previous minor conviction for stealing, was indicted for rape, and convicted of the offence of unlawful carnal knowledge of a girl under the age of 17 years. The victim, a 15-year-old girl, was attending a dance with her parents and the offender was also present at this function. The offender threatened the girl and forcibly removed some of her clothing when she went to a motor vehicle to change her shoes. The act of sexual intercourse took place some little distance from the vehicle and although it appears that no force or threats were used at this stage there was evidence that the offender had spoken to the victim in a threatening tone, that the victim was frightened of him and that he put his hand over her mouth after she cried out when the act of intercourse caused her pain. The offender was sentenced to imprisonment with hard labour for four years and nine months and appealed against this sentence on the ground that it was manifestly excessive. It was argued before the Court of Criminal Appeal that the trial judge had not given sufficient weight to the offender's youth, his previous good character and his somewhat unfortunate upbringing. The Court of Criminal Appeal reduced the sentence to one of imprisonment with hard labour for three years and nine months.

In *Rielly* [1963] Q.W.N. 6, the offender, a 16-year-old youth, pleaded guilty to a charge of having unlawful carnal knowledge of a girl under the age of 12 years. In fact, the victim was aged two years and four months, but did not appear to have suffered any permanent ill effects from her experience. The trial judge ordered that the offender be detained for 15 years in such place and under such conditions as the Minister may direct in terms of section 25A of the State Children Act 1911-1955.

The offender appealed to the Court of Criminal Appeal on the grounds that the sentence was manifestly excessive and that he would be required to serve the full period of 15 years detention, even though his condition might have been cured within that time. It was held by the Court of Criminal Appeal, in upholding the sentence, that such an order was not manifestly excessive and that under section 19 of the State Children Act, 1911-1955, the Governor-in-Council has power, upon the recommendation of the Minister, to order the discharge of a person who, when a child, was sentenced under section 25A and whose age, at the time the order for discharge is made, exceeds 17 years.

In *Newfong* [1964] Q.W.N. 19, the offender, a 16-year-old male of Pacific Island or Aboriginal ancestry, was convicted of having unlawful carnal knowledge of a girl under the age of 17 years. The victim was aged 15 years and had had intercourse on previous occasions. The offender was one of four

youths who had intercourse with the girl within a very short space of time. He was sentenced to imprisonment with hard labour for 18 months. This sentence was set aside by the Court of Criminal Appeal which ordered the offender to enter into his own recognisance in the sum of £50 conditioned that he should keep the peace and be of good behaviour for a period of 18 months, and further conditioned that he should appear and receive judgment at some future sittings of the court if called upon within that time. The Court of Criminal Appeal stated that although intercourse among young people was most deplorable and becoming increasingly prevalent, nevertheless in this case it appeared that the most guilty party was the girl.

In *Grills* (C.A. 126 and 127 of 1973), the offender pleaded guilty to two offences. First, that he attempted to have unlawful carnal knowledge with his nine-year-old daughter; and second, that he unlawfully and indecently dealt with his daughter, a girl under the age of 12 years. In the opinion of the probation officer, the two offences probably followed a drinking bout. No physical force was applied to the girl, and no harm was done to her. The daughter had been abandoned by her mother and had spent most of the two years since with her father. The father had a genuine affection for the child, and she apparently for him. As it was put by the probation officer, the daughter was the only person whom the offender loved and cared about. The trial judge ordered that the offender be placed on probation for two years in respect of each charge and the Attorney-General appealed against each order on the ground that each was insufficient and inadequate in the circumstances. The Court of Criminal Appeal dismissed both appeals and upheld the orders made by the trial judge. From the judgment of the Chief Justice:

> The offences with which the Court is concerned were extremely serious in view of the age of the girl; and I do not doubt that twenty years ago, the offences would have occasioned substantial terms of imprisonment. But there is today an attitude towards the treatment of offenders which indicates a much saner approach to crime than existed previously. The feelings of the community illustrated by the not unreasonable statement, 'I like a rascal to be punished' have become of much less weight than they used to be. The placing of offenders on probation under supervision is one indication of this attitude; the legislation enabling this to be done does not exempt the offender from punishment unless the conditions of probation are complied with; and the supervision of competent probation officers is, in many cases, of great value to the offenders placed in their care. My own experience on the Parole Board has provided me with much evidence of this.
>
> While the effect of punishment as a deterrent to others has always been regarded as a factor for consideration, cases do arise in which the effect is doubtful. To the extent that a sentence is framed and imposed, not for the purpose of deterring

the particular offender and not for the purpose of hoping to reform the offender but as a deterrent to others, the individual is penalised for the benefit of the community. Such a result is to be avoided if possible. That there should always be a coincidence in the appropriate penalty when the individual alone is regarded, with the appropriate penalty when other potential offenders are considered, is not possible. Questions arise whether the penalty is fair to the offender, fair to potential offenders who need and are perhaps almost entitled to have, the threat of punishment brought to their attention; and whether it is otherwise fair to the community as a whole. The Court is to reconcile the answers as far as possible.

I do not wish it to be thought that I agree entirely with the approach of the learned trial Judge to the question in this case. He has put aside completely the value, as a deterrent to others, of any sentence which he might impose. In doing this, I doubt whether he was right. But while a decision whether the present application should succeed has caused me more than usual concern, I am not prepared to say that His Honour's decision should be interfered with.

From the judgment of D.M. Campbell J.

The general policy of the ciminal law is to prescribe maximum penalties for offences which means that a judge has usually a very wide discretion when it comes to sentence. Dicta in earlier Queensland cases that the Court of Criminal Appeal had an unfettered discretion in considering an appeal against sentence brought by the Attorney-General under s. 689A of the Criminal Code was expressly disapproved in *R.* v. *Liekefett, Ex parte Attorney-General* (C.A. 81, 82, 83/1973), after the opinion of other judges was sought. Viewing the present appeal as an appeal against what appears to me to be a careful exercise of judicial discretion, I can see no good reason for interfering with the sentence imposed.

The offences are serious offences, of a type which are likely to arouse strong feelings of indignation in normal people, but, nevertheless, they are not offences which should always be visited by imprisonment as circumstances vary greatly as do individuals. Before deciding to place the accused, Grills, on probation, the learned judge obtained a pre-sentence report. The two offences were committed with his nine year old daughter . . . In the opinion of the probation officer, they probably followed a drinking bout. No physical force was applied to the girl, and no harm was done her, so far as is known though that must always be open to speculation in these cases. The story is that she was abandoned by her mother in 1971 and has spent most of the time since with her father. He has a genuine affection for the child, and she apparently for him. As it was put by the probation officer, she is the only person in the world whom he loves and cares about. He is a motor mechanic by trade – a conscientious worker according to his employers. But unfortunately he has a drink problem. He has two recent convictions for driving under the influence. He has another conviction on a charge of unlawful assault occasioning bodily harm arising out of a fight with the man with whom his wife is living. On the credit side, however, he has seen active military service in Korea and the Pacific.

> It is clear that His Honour was influenced by the pre-sentence report to take the course he did. This was a detailed report of some ten pages in length, compiled after three interviews with Grills. The recommendation of the probation officers, whose report it was, is as follows:
>
> 'It would seem likely that [the daughter] will be taken out of his care and placed under the protection of the Children's Services Department. This will, I feel, be felt by him more than any prison sentence he might receive. The offence is reprehensible and it may be felt that a prison term is indicated for obvious deterrent reasons. It is not felt, however, that the behaviour points to his being a menace to society.
> A substantial period of probation could ensure that the child is being cared for in a situation safe from any chance of repetition of the offence. It is assumed that the child will remain under the care and protection of the Director of Children's Services, but it may be considered in the child's best interests to be fostered rather than be required to remain in a Home.
> It is likely that access to the child under supervision would be considered desirable, even for the child, and there would be advantage in having the father accountable to the Court through the Probation Officer for his obedience to directions.'
>
> His Honour thought that, as no publicity could attend the proceedings, a sentence of imprisonment would have no general deterrent effect. He might be criticised for so thinking. But this was not the only consideration by far. He was very concerned not to break the only contact the child has and has had for some time with one parent, for both their sakes. Aided by the pre-sentence report, as I say, he decided upon probation. I am unable to take the view that he exercised his discretion wrongly because he underestimated the gravity of the offence or allowed an extraneous matter to weigh too much with him, and I would therefore dismiss the appeal.

In *Meech* (C.A. 27 of 1970), the offender, a 20-year-old man, pleaded guilty to a charge of having unlawful carnal knowledge of a girl under the age of 17 years. At 7.30 a.m. on the day of the offence the girl went to the offender's hotel room where sexual intercourse occurred. The offender told the police that he knew the girl was aged 13 years at the time of the offence. He was sentenced by the trial judge to pay a fine of $125 and was given three months in which to pay the fine. It was further ordered that if the fine was not paid the offender would appear to show cause why sentence of imprisonment with hard labour for six months in default of payment should not be executed.

The Attorney-General appealed against this sentence on the ground that it was inadequate, but the Court of Criminal Appeal dismissed the appeal and upheld the sentence. The Court of Criminal Appeal stated that the statement of facts made to the inferior court was inadequate in that nothing

had been stated as to the girl's physical maturity nor as to her previous sexual experience. From the judgment of Hanger A.C.J. (as he then was):

> It is no doubt the fact that section 215 has as one of its objects the protection of young women against themselves but the question of who seduced whom is nevertheless a relevant factor to be considered on the question of sentence. In the circumstances I am not prepared to say that, on the information placed before the District Court, the sentence was inadequate.

In *Stenzel* (C.A. 183 of 1973), the offender, a 22-year-old male, was convicted of having unlawful carnal knowledge of a girl aged 13 years. He was sentenced to imprisonment for three years and appealed against this sentence on the ground that it was manifestly excessive. From the judgment of Hanger C.J.:

> The question of sentence raises some difficulty. I would expect the learned trial Judge to have had in mind the circumstances surrounding the second act which took place at the home of the appellant and the appellant's behaviour at that time. The attitude of the appellant to the complainant regarding the first act was bad enough; his behaviour on the second occasion was revolting in reference particularly to a girl aged thirteen, precocious though she may have been. It would seem that when the girl was taken to the bush in the vehicle she was a virgin. Before the first act of the appellant, her virginity may have gone due to the behaviour of another man, at least connived at by the appellant. In any case, he knew very well that he was the second man to interfere with the girl on that night; and he was well aware that she was only thirteen years of age.
>
> The maximun penalty for the offence is five years. The sentence imposed is three. While he has no previous convictions for similar offences, the appellant has shown disregard for the law in other ways. He was born on 8th June, 1951; he has now, apart from a conviction for a traffic breach, convictions in February and March 1972 for receiving stolen property. The impression conveyed by the record is of a young man who has no regard for the rules of the society in which he lives. The case requires that the appellant be shown that this will not be tolerated. I see no sufficient reason to interfere with the sentence.

**Examples of Sentencing Decisions in Cases of Indecent Assault:** In *Paterson* (C.A. 14 of 1976), the offender was convicted of indecently dealing with his daughter, who was under the age of 14 years. He was sentenced to five years imprisonment with hard labour and sought leave to appeal to the Court of Criminal Appeal on the ground that that sentence was manifestly excessive. The Court of Criminal Appeal allowed the application and ordered, in lieu of the sentence imposed by the inferior court, that the offender be imprisoned with hard labour for three years from the date of the decision of the appellate court. From the judgment of Douglas J. with whom Hoare and Andrews JJ. agreed:

> It appears to me that the Court need not primarily go into the question of whether the sentence was manifestly excessive or not. The Court has been furnished with a report from the learned sentencing judge, and the Court has deemed it proper to place before the parties the substance of that report. In the ultimate paragraph of his report the judge says, 'I regarded the offence as, in the circumstances, very serious. In passing sentence I consider inter alia the provisions of the Criminal Law Amendment Act of 1945'. It appears fundamental that if His Honour considered the terms of the Criminal Law Amendment Act of 1945, His Honour was considering section 18 of that Act.
>
> Now, section 18 is a section which deals with the detention of persons incapable of controlling sexual instincts. It is a section under which particular and prescribed procedures have to be undertaken. Indeed, it is a matter which calls for a trial by itself, or at least a trial within a trial. Before His Honour, it would appear that no matter in relation to the Criminal Law Amendment Act of 1945 was raised.
>
> It seems to go without saying that if His Honour took into consideration the terms of the Act in sentencing, he acted upon a wrong premise. If that is so, it seems to me that the sentence itself should be set aside.
>
> If the sentence is set aside, it is open to this Court to consider what would be an appropriate sentence in the circumstances. For myself, having regard to the facts disclosed in the transcript, I would be of the opinion that a sentence of three years imprisonment with hard labour to date from today would be an appropriate sentence.
>
> I think it also appropriate that the Court should request – although it has no power to direct, as far as I know – that the attention of the Director of Children's Services be directed to the family situation when the applicant for leave to appeal is ultimately released from prison.
>
> In my opinion, the application for leave to appeal should be allowed, and the appeal should be allowed, and a sentence of three years imprisonment with hard labour to date from today substituted for the sentence which was imposed.

**Example of Sentencing Decisions in Cases of Indecently Dealing with a Girl Under 17 Years:** In *Schneider* (C.A. 42 of 1972), the offender pleaded guilty to a charge of unlawfully and indecently dealing with a girl under the age of 17 years. A custodial sentence imposed by the trial judge was set aside by the Court of Criminal Appeal and the offender was admitted to probation for three years. From the judgment of the Chief Justice:

> The offence with which the appellant was charged and to which he pleaded guilty was that of unlawfully and indecently dealing with a girl under the age of 17 years. But two other charges had been made in the indictment – an offence of attempted rape, and of attempted carnal knowledge.
>
> On the Crown agreeing to accept a plea of guilty to the charge of unlawfully and indecently dealing with a girl under the age of 17 years, the learned trial Judge, in imposing the sentence of imprisonment which he did, indicated clearly that he had read the depositions which had been taken before the magistrate, and it appears quite clear from what the learned trial Judge said that he proceeded to

> sentence the applicant on the basis that the girl was not a consenting party to what was done to her. It appears also from the record before us that this was not admitted by the applicant or his counsel, and, consequently, the duty of the learned trial Judge in these circumstances was either to hear the evidence to establish the girl was a non-consenting party or, if he did not do that, to proceed on the basis that there was no proof that she was a non-consenting party. But as I have already said, they proceeded on the basis that she did not consent to what was done to her; and, in the circumstances, seeing that the accused (as he was at the time) did not agree that this was the case, I think the law establishes that the learned trial Judge proceeded on a wrong basis.
>
> In the circumstances it has been our duty to reconsider the matter, and applying ourselves merely to evidence which was properly material to be taken into consideration to decide what was the proper sentence to be imposed – the applicant has already served a period of two months imprisonment – it is for that reason, and taking that back into consideration along with the other circumstances of the case, I am of the opinion that the order which we have made admitting the prisoner to probation is the proper order to be made in the circumstances.

**Examples of Sentencing Decisions in Cases of Unlawfully and Indecently Dealing with a Girl Under 12 Years:** In *Byrne* (C.A. 128 and 129 of 1974), the offender, a 28-year-old male, pleaded guilty to two offences of unlawfully and indecently dealing with a girl under the age of 12 years. The first offence was committed while the offender was a guest in the home and was reading a story to the child and her younger sister in a bedroom. The details in his own words were: 'I just began to put my hand up her dress and feel her vagina. Then I bent down and pulled her pants to one side and licked and kissed her there'. He told her not to tell anyone about the incident and apparently the girl acted upon that direction because it was not until after the second offence that she told her mother of them. The circumstances of the second offence, as recited by the offender to the police, are that he drove to the family home, called out the father's name, and not having attracted any response from him or from the child whose name he also called, he widened the opening of her bedroom window and climbed in. He awakened the sleeping child, told her not to be frightened, received confirmation that her father was not home, and put his hand 'on her pyjamas and rubbed her vagina'. When she told him to stop and go home he desisted and left through the window. The offender was admitted to probation for a period of 18 months, subject to the special condition that he undergo such psychiatric or psychological treatment as his probation officer may recommend.

The Attorney-General appealed in each case on the ground that such sentences were insufficient and inadequate in the circumstances. The Court of Criminal Appeal dismissed the appeal and upheld the orders imposed by the trial judge. From the judgment of Hoare J.:

So far as concerns deterrent sentences, a good many past judicial utterances on the deterrent effect of sentencing are, at best, of doubtful validity. Fortunately there is much less judicial dogmatism on this subject than was once the case. In the case of premeditated crimes committed for personal gain, I would readily agree that substantial prison sentences are likely to act as a deterrent against such crimes. However many of the assumptions as to the deterrent effect of sentences are based on the fundamental fallacy that prospective offenders are likely to respond to influences in the same way as a normal, well adjusted citizen. Of course such an assumption is not warranted.

In view of the circumstances that the offence with which we are presently concerned would simply not be committed by a normal well adjusted citizen the deterrent effect of publication is extremely doubtful, to say the least. Further in the present case the offender was well-known to the parents of the child and publication of his name would reveal the identity of the child, the very thing which the section seeks to avoid. It is true that it would theoretically be possible for the details of the offence to be published without mentioning the name of the offender. However I can see no merit in any such course. The details would be distasteful to a normal person. Any prospective offender who might be influenced by a publication of such details would certainly not be a normal, well adjusted person. Thus deterrence would be very doubtful. There is also the prospect that some unstable individual may well be encouraged to similar behaviour by the very act of publication.

I would agree that there are cases in which it would be desirable for publication to be ordered under section 138 of the Children's Services Act but I am strongly of opinion that the present case is not one of them.

I turn now to the sentence imposed by the trial Judge. The offender was twenty-eight years of age and has had no previous offences of any kind recorded against him. He has a very good work record. He was clearly ashamed of his conduct and sought to avoid any further embarrassment to the child by her being required to give evidence. His action in this respect is commendable and in marked contrast to the actions of many rapists who think nothing of causing the greatest embarrassment and shame to the victim by unjustified attempts to blacken her reputation. The psychiatric evidence suggests that he is unlikely to offend again.

For the reasons I have indicated the imposition of a prison sentence is unlikely to act as a deterrent. In the circumstances this is not a case where the imposition of a long prison sentence can be justified on the basis of being 'denunciatory'. It seems to me that some persons, no doubt on the basis of harsh retribution, would support the imposition of a lengthy prison sentence. However so far as this offender is concerned it seems to me that the imposition of any prison sentence is unnecessary for his reformation and indeed could even be harmful. From the point of view of the public interest it seems to me that far more is likely to be served by ensuring (as far as it can be done) that the offender should be encouraged and assisted to be a responsible member of society rather than that he be sent to prison.

I would dismiss the appeal.

In *Mothie* [1965] Q.W.N. 22, the offender was convicted of unlawfully and indecently dealing with a girl under the age of 12 years. The act comprising the offence consisted in substance of the offender's lying on the girl who was aged just under seven years and rubbing his penis which was not taken outside of his trousers against the girl's vagina which was not exposed. The girl was considerably upset and frightened and when she screamed out the offender placed his hand over her mouth. The offender was sentenced to imprisonment with hard labour for four years and sought leave to appeal against this sentence on the ground that it was manifestly excessive. The Court of Criminal Appeal upheld the appeal by the offender and ordered that he be sentenced to imprisonment with hard labour for three years. From the judgment of Hanger J.

> There were before His Honour statements alleged to have been made by the accused, which indicated that what had been done was much more serious, that His Honour indicated that he was putting those out of his mind in proceeding to impose the sentence and accepting the view that I have indicated, as His Honour was bound to do, that the facts were as the accused had stated in the statement that he handed up to His Honour. To my mind the matter is not by any means easy to determine, but giving it the best consideration I can, I feel that the sentence imposed by His Honour was, in the circumstances – having regard to the maximum penalty provided for this offence – such as to come within the class of the case in which it should be said that the sentence is manifestly excessive. I reached that conclusion and, in the circumstances, I feel that the sentence that should be imposed is one of imprisonment with hard labour for three years, and, in my opinion, the sentence imposed should be reduced accordingly.

From the judgment of Gibbs J.

> Those facts show that this is a very serious offence, but it is a much less serious offence than that originally admitted by the applicant, and, as my brother said, much graver circumstances can be envisaged which would constitute an offence against section 216 of the Criminal Code. I agree that, viewing only the facts finally admitted by the applicant, the sentence was manifestly excessive and that it should be reduced to a sentence of imprisonment with hard labour for three years.

From the judgment of Hart J.

> I agree with the judgments of both my brothers. The thing that influences me, on the facts as we must take them, is that no part of the applicant's body touched the private parts of the little girl.

In *Donges* (C.A. 43 of 1972), the offender was convicted of unlawfully and indecently dealing with a girl who was five years of age. He was sentenced

to imprisonment with hard labour for three years and sought leave to appeal against this sentence as being manifestly excessive. The Court of Criminal Appeal decided that the sentence was to stand but that there should be a recommendation from that court to the Parole Board to consider the offender as a candidate for parole at the expiration of 12 months.

**Examples of Sentencing Decisions in Cases of Unlawful and Indecent Assault:** See *Downie* (C.A. 2 of 1967) and *King* (C.A. 137 of 1973) in section on Examples of Sentencing Decisions in Attempted Rape Cases.

In *Danes and Taylor* [1965] Qd. R. 338, the offenders were convicted of unlawful and indecent assault and were sentenced to imprisonment with hard labour for two years. These sentences were confirmed by the Court of Criminal Appeal but the indictment was quashed on the ground that the defendants should not have been jointly indicted. Wanstall J. (as he then was) commented that:

> In the light of the facts I consider the application, drawn by the appellants themselves, for leave to appeal against the imposition of the maximum sentences of two years hard labour to be no more than cynical impertinences. They should be refused.

## Offences Against Males

**Sodomy:** In *Phillips and Lawrence* [1967] Qd. R. 237, the offenders were both aged 22 years and both had bad criminal records for men of their age. Phillips was convicted of unlawful and indecent assault, sodomy and robbery in company with personal violence. Lawrence was convicted of two counts of unlawful and indecent assault, attempted sodomy and robbery in company with personal violence. All charges arose out of an incident one night when a young student returning home after an evening out was attacked by the offenders and three others. The following terms of imprisonment were imposed by the trial judge: In Phillips' case on the charge of sodomy, 14 years imprisonment; and on the charge of unlawful and indecent assault, two years imprisonment, to be served concurrently with the first sentence. In Lawrence's case, for the first count of unlawful and indecent assault, three years; on the second count of unlawful and indecent assault, two years to be served concurrently with the first sentence; and on the count of attempted sodomy seven years imprisonment cumulative with the first sentence.

The Court of Criminal Appeal quashed the convictions of both offenders in respect of the charges of robbery in company with personal violence. The Court upheld the sentences for the other offences, holding that the trial judge

acted within the provisions of section 20 of the Criminal Code in making two of the sentences cumulative.

In *Manning* (C.A. 150 of 1975), the offender, a 19-year-old male, pleaded guilty to the offence of sodomy, committed as part of a ritual for admission to a 'bikie' gang. The offender was admitted to probation for a period of two years and the Attorney-General appealed against this sentence on the grounds that it was insufficient and inadequate. From the judgment of Stable J., with whom Hoare J. and Matthews J. agreed:

> Undoubtedly the offence – apparently an isolated act in the life of the accused – was acknowledged to be revolting, and committed apparently as part of a ritual for admission to a 'bikie' gang. What was before the Learned Trial Judge was a case of the accused, a person of low intelligence and affected by liquor, giving way to a dare by his associates.
>
> The case for the appellant before us was that the episode amounted to a rape of a male person. This was not conceded, and there is material before us which indicates that the act may have been consented to. The record is not such as to enable this Court, in my view, to be persuaded to one conclusion or the other. If indeed it was established that there was a rape of a male person, then in my opinion the appeal should succeed and a sentence of imprisonment be imposed; but that is not this case.
>
> Revolting as the episode may be, do the facts, taken as a whole – bearing in mind that this Court is not persuaded of a male rape any more than the learned Trial Judge appears to have been – call for the exercise of our unfettered discretion to impose another sentence? We have not the atmosphere of the Court below, which was persided over by a judge of very considerable experience in criminal law. I am not persuaded that the circumstances of the present case, with its lack of clarity as to an important aspect, call for this Court to interfere with the admission to probation for two years ordered by the learned Judge. I would dismiss the appeal.

In *Warbrook* (C.A. 24 of 1970), the offender had a long criminal record which, however, did not contain any conviction for an offence of a similar nature. He pleaded guilty to a charge of sodomy committed upon a boy aged 10 years to whom the offender was in the position of parent although he was not in fact the boy's father. The offender was sentenced to imprisonment with hard labour for seven years and sought leave to appeal against the sentence on the ground that it was manifestly excessive. The Court of Criminal Appeal refused the application and upheld the sentence. From the judgment of Lucas J. with whom the other members of the court agreed:

> The person upon whom the act was committed was a boy 10 years old to whom the applicant was in the position of a parent, although he was not in fact the boy's parent, and this, of course, adds, in my opinion, to the gravity of the offence.
>
> The applicant has a long criminal record which, however, does not contain any

> conviction for an offence of a similar nature. The learned trial Judge specifically said, in sentencing the applicant, that he was not taking into account any allegations that the applicant had on any previous occasion attempted to interfere with the boy for the purpose of sexual gratification. The learned Judge had the benefit of a list of sentences which have been imposed in various circumstances for this offence, and we also have had the benefit of this list. In all the circumstances, I am unable to say that the sentence is manifestly excessive, and in my opinion, the application ought to be dismissed.

In *Howie and Hill* [1978] Qd. R. 386, the Court of Criminal Appeal upheld appeals by the Attorney-General against sentences of six months imprisonment on a charge of sodomy carried out upon a fellow prisoner with whom Howie and Hill were confined. Wanstall, C.J., with whom Stable, S.P.J. and Andrews, J. agreed, stated that:

> The court takes the most serious view of the offence of sodomy committed in those circumstances. It is an offence which, when committed in such circumstances, is uncommonly difficult to prove, principally because of the fear induced in the victims when they have to remain in the same prison as those about whom they complain to the authorities of this kind of conduct. It is a heinous offence committed upon an unwilling victim because of his helplessness in the situation in which this young man found himself. One of the respondents was aged 18, the other was aged 21, and the victim's age was 19. Because of these considerations, the court has come to the conclusion that we must correct the sentence imposed below by replacing it with one which will emphasise the need for deterrent punishment for this kind of offence. Such an offence, committed in these circumstances, in a prison, upon an unwilling victim, is one which, above all, calls for the imposition of deterrent punishment. We have therefore decided to allow the Attorney-General's appeal and set aside the sentences imposed below and, without endeavouring to relate our sentence to the totality of incarceration which will result from the sentences being currently served, which we would need to do if we were to impose it cumulatively, we have decided to impose a sentence which we think is appropriate to effect an additional punishment, to be effective from March 1, 1978, the date on which the original sentences under appeal were imposed.
>
> The sentence which this court imposes, to operate from March 1, 1978 in each case, is a sentence of five years imprisonment with hard labour.

## Incest

Section 222 of the Criminal Code provides that any person who carnally knows a woman or girl who is, to his knowledge, his daughter or other lineal descendant, or his sister or his mother, is guilty of a crime and is liable to imprisonment with hard labour for life. Attempted incest under the same section renders an offender liable to imprisonment with hard labour for

seven years. Incest by an adult female, however, is classified as a misdemeanour and renders an offender liable to imprisonment with hard labour for three years.

The majority of cases of incest that come before the Court of Criminal Appeal involve instances of a father carnally knowing his daughter. Cases involving incest committed by brothers with their sisters are much less common. Even taking into account a greater degree of leniency extended by the Court to offenders at present, it is still unusual for a term of imprisonment not to be imposed in the case where a father carnally knows his daughter. On the other hand, in cases involving incest committed by a brother with his sister, a probation order is deemed appropriate.

**Incest Between Brother and Sister:** In *Ruler* [1970] Q.W.N. 44, the defendant, who was 15 years of age at the time of the offence, pleaded guilty to a charge of incest committed with his sister who was aged 14 years. An order that the defendant be placed on probation for a period of four years was set aside by the Court, and in lieu thereof it was ordered that the offender be discharged upon his entering into his own recognisance in the sum of $200 pursuant to section 19(9) of the Criminal Code. The conditions pertaining to the recognisance were similar to those of the probation order ordered by the lower court.

In *Johnson* [1962] Q.W.N. 37, the defendant, aged 17 years, was convicted of having carnal knowledge of his sister who was aged 15 years. It appeared that the girl had had intercourse with other boys on occasions before the offence was committed. The defendant frankly admitted that in order to induce his sister's compliance he threatened to tell their mother of the other instances in which she had had intercourse. It appeared from the defendant's conversation with the police and with the doctor who later examined him that he had no conception of the immorality of his act. The Court of Criminal Appeal ordered that the defendant was to be placed under the supervision of a probation officer for a period of three years.

**Incest Between Father and Daughter:** Sentences in cases involving carnal knowledge by a father of his daughter can be expected to range from approximately two years up to four years, with higher sentences being imposed in cases where the circumstances of aggravation are particularly serious.

In *Petersen* [1963] Q.W.N. 25, the defendant was convicted on his own confession on a charge of having unlawful carnal knowledge of his 18-year-old daughter who was, prior to the commission of the offence, wayward and uncontrollable and who had already been pregnant to another man. The defendant persuaded his daughter to allow photographs to be taken of her having intercourse with him by promising her a sum of money from the

proceeds of the sale of the photographs. In upholding an appeal by the Attorney-General against an order discharging the defendant under section 19(9) of the Criminal Code on his own recognisance of $200 conditioned to appear and receive judgment within three years if so called upon, the Court of Criminal Appeal imposed a sentence of imprisonment with hard labour for two and a half years.

In *Nancarrow* [1972] Q.W.N. 1, the Court of Criminal Appeal sentenced the defendant to three and a half years imprisonment with a recommendation that he be given such medical and psychiatric treatment as may be considered appropriate. The defendant, aged 44, was convicted of committing incest with his 18-year-old daughter. The daughter gave birth to a child of whom the defendant was the father and it appeared that sexual intercourse between the father and the daughter had been taking place for a period of some 12 months. Hoare J., with whose judgment the other members of the Court agreed, stated that:

> A review of sentences imposed in Queensland for this offence over the past ten years indicates a tendency on the part of the judges to impose sentences somewhat lighter than were formally regarded as appropriate. During this period the sentences have usually varied between two years and eight years. The longer sentences almost invariably related to very young children. The Court of Criminal Appeal in *Reg.* v. *Petersen* [1963] Q.W.N. 25 increased a sentence to one of two and a half years imprisonment with hard labour. In *R.* v. *Roberts* (unreported; C.A. 63 of 1970), the Court of Criminal Appeal reduced a sentence of six years imprisonment with hard labour to three years. The circumstances of the present case were little, if any, worse than in *R.* v. *Roberts.* All cases of incest are serious and most of them are revolting. It is very desirable that, for such offences, the Court should impose a sentence sufficiently severe to indicate the disapproval of the community (cf. the article of Clemens J. 'To treat or punish?' (1968) 43 A.L.J. 358). In most cases a longer sentence than one sufficient for the objective indicated would serve no useful purpose.

Striking exceptions to the range of sentences considered above are seen in cases where the circumstances of aggravation are serious.

In *Holden* (C.A. 178 of 1974), a sentence of imprisonment with hard labour for 10 years was upheld by the Court in circumstances involving the carnal knowledge by the defendant of his nine-year-old daughter. The material before the trial judge indicated that the defendant had been having intercourse with the child since she was seven years of age. Medical opinion of which the judge was informed confirmed that intercourse had been taking place over a lengthy period. The girl's mother was aware of what was going on but she condoned it on the condition that her husband left a younger daughter of the marriage alone. The Court accepted that the trial judge had

carefully discussed the range of sentences imposed in recent years in father-daughter incest cases. They were discussed in full realisation of the fact that the case with which the Court was dealing was beyond the ordinary run and it was accepted by the Court that the sentence imposed, though greater than those in the cases referred to, was not such as to indicate that the discretion of the trial judge had miscarried. No doubt the Court had in mind the protection of the younger daughter.

In *Hall* (C.A. 131 of 1974), the defendant was convicted of committing incest with his 10-year-old daughter in circumstances of aggravation that were considered to be most serious. It appeared that the father had initiated the girl into acts of sexual intercourse and other indecent acts and that consequent upon that initiation the girl had had intercourse with another man of 29 years and also with a great number of schoolboys. The accused had no contrition whatever about the offence and its consequences. A sentence of six years imprisonment was upheld by the Court of Criminal Appeal and Wanstall S.P.J. stated in his judgment, with which the other members of the Court agreed, that:

> The sentence of six years is on the high side of the scale. That can be deduced from looking at sentences imposed over recent years. On the other hand, there are some imposed by the Court of Criminal Appeal, one in respect of a child of ten or eleven in *The Queen* v. *Hewitt*, where the Court of Criminal Appeal reduced a sentence from seven years to five years . . . It is quite obvious in the circumstances that he is mentally deranged or was mentally deranged, but the sentence is not so much in excess of a standard, if there be a standard which could be deduced from the other sentences imposed by Supreme Court or adjusted by this Court, as to require our interference, and in all of those circumstances I would not interfere with the sentence imposed.

**Attempted Incest Between Father and Daughter**: In *Draper* [1970] Q.W.N. 20, it is recognised that if it was necessary to sentence an offender to a term of imprisonment, then the term should not be so short that the effects of imprisonment would be lost. Accordingly, a sentence of imprisonment with hard labour for two years to be suspended after a period of three months was overturned by the Court and the sentence of two years was ordered to be suspended after the defendant had served a period of 12 months. This was for a case involving the attempted carnal knowledge by the defendant of his daughter who was aged 14 years.

In *Timmermans* (C.A. 124 of 1975), a sentence of four years imprisonment imposed in circumstances involving two charges of attempted incest by the defendant on two of his daughters aged 10 and 12 years respectively, was upheld by the Court in a majority decision. The dissenting judge, D.M.

Campbell J., was in favour of reducing the sentences in each instance to three years imprisonment. The discrepancy between the sentence imposed in *Timmermans (supra)* and that in *Draper (supra)* may, perhaps, be explained in terms of the ages of the daughters involved.

*Grills* (C.A. 126 and 127 of 1973) provides an outstanding exception to the principles that have generally been accepted by the courts in assessing sentence in cases of incest between father and daughter. Here, the father pleaded guilty to a charge of attempting to have unlawful carnal knowledge of his nine-year-old daughter. Pre-sentence reports showed that the offence probably followed a drinking bout and that no physical force was applied to the girl. It appeared that the girl had been abandoned by her mother two years prior to the commission of the offence and that she had since spent most of her time in the care of her father. A relationship of genuine affection between the father and daughter was shown to exist.

The Court of Criminal Appeal dismissed an appeal by the Attorney-General against a sentence of probation for two years and this decision may be taken as indicating that the court is not prepared to consider a sentence involving a term of imprisonment as being required in all cases of incest between father and daughter. The Chief Justice, although expressing doubt as to whether the approach of the trial judge in sentencing in this case was correct, was not prepared to interfere with the decision. In particular, the Chief Justice emphasised the benefits stemming from supervision of an offender by a competent probation officer:

> The offences with which the Court is concerned were extremely serious in view of the age of the girl; and I do not doubt that 20 years ago, the offences would have occasioned substantial terms of imprisonment. But there is today an attitude towards the treatment of offenders which indicates a much saner approach to crime than existed previously. The feelings of the community illustrated by the not unreasonable statement, 'I like a rascal to be punished' have become of much less weight than they used to be. The placing of offenders on probation under supervision is one indication of this attitude; the legislation enabling this to be done does not exempt the offender from punishment unless the conditions of probation are compiled with; and the supervision of competent probation officers is, in many cases, of great value to the offenders placed in their care. My own experience on the Parole Board has provided me with much evidence of this.
>
> While the effect of punishment as a deterrent to others has always been regarded as a factor for consideration, cases do arise in which the effect is doubtful. To the extent that a sentence is framed and imposed, not for the purpose of deterring the particular offender and not for the purpose of hoping to reform the offender but as a deterrent to others, the individual is penalised for the benefit of the community. Such a result is to be avoided if possible. That there should always be a coincidence in the appropriate penalty when the individual alone is regarded.

> with the appropriate penalty when other potential offenders are considered, is not possible. Questions arise whether the penalty is fair to the offender, fair to potential offenders who need and are perhaps almost entitled to have, the threat of punishment brought to their attention; and whether it is otherwise fair to the community as a whole. The Court is to reconcile the answers as far as possible.

The apparent lessening of emphasis placed by the Chief Justice on the deterrent aspect of punishment, particularly in such cases as incest between father and daughter, represents a most significant principle in Queensland sentencing policy. In a dissenting judgment, however, Stable J. considered that the deterrent aspect of punishment in such cases required the imposition of a term of imprisonment:

> Very often sentences in any event do not achieve publication through what are called the 'media'. But people who would do as the respondent did to a girl child if they were not caused to think twice about it are to be found. I should consider, serving sentences in one or other of Her Majesty's prisons wherein the 'grapevine' is a hightly efficient form of communication. If even a few are persuaded to turn away from a path which they might otherwise consider they may tread with impunity then the deterrent aspect may be said to have served a purpose. And there is the need to deter the offender himself, no matter how contrite he may have appeared to be in court.

The third member of the Court in *Grills (supra)*, D.M. Campbell J., although recognising the offence of incest as a serious offence, and of a type which is likely to arouse strong feelings of indignation in normal people, stressed that it was not necessarily an offence which should invariably be visited by imprisonment:

> The offences are serious offences, of a type which are likely to arouse strong feelings of indignation in normal people, but, nevertheless, they are not offences which should always be visited by imprisonment as circumstances vary greatly as do individuals. Before deciding to place the accused, Grills, on probation, the learned judge obtained a pre-sentence report. The two offences were committed with his nine year old daughter. In the opinion of the probation officer, they followed a drinking bout. No physical force was applied to the girl, no harm was done to her, so far as is known though that must always be open to speculation in these cases . . . It is clear that His Honour was influenced by the pre-sentence report to take the course he did. This was a detailed report of some ten pages in length, compiled after three interviews with Grills . . . Aided by the pre-sentence report, as I say, he decided upon probation. I am unable to take the view that he exercised his discretion wrongly because he underestimated the gravity of the offence or allowed an extraneous matter to weigh too much with him, and I would therefore dismiss the appeal.

Again, this indicates a significant change of emphasis by the Court of Criminal Appeal in dealing with such cases.

# Chapter 10

# Theft/Dishonesty

## Housebreaking/burglary

In *Williams* (C.A. 138-157 of 1974), the offender, an 18-year-old youth, pleaded guilty to three charges of burglary, one of housebreaking, one of breaking, entering and stealing, two of stealing property to the value of $2,000, five of stealing and eight charges of unlawfully using a motor vehicle. The 20 offences may be subdivided into three distinct phases commencing late in 1973 and concluding about the middle of 1974. On some of the charges the trial judge imposed sentences ranging from 15 months to 12 months imprisonment with a recommendation that the offender be considered for parole after serving six months, and on the other charges he made probation orders. At the time he was dealing with the case the trial judge was unaware of the unreported decision of the Court of Criminal Appeal in *Lihou* in which it was held that there is no power for a judge to make a probation order for some offences combined with a sentence of imprisonment for other offences with which he is dealing simultaneously.

The Attorney-General appealed against the sentences on the grounds that they were manifestly inadequate and that the trial judge exercised his discretion improperly because of the decision in the case of *Lihou*. Despite the Court of Criminal Appeal's sympathy for the offender, who had an unfortunate background due to a broken home and the early death of his mother, and who had not had many opportunities in his lifetime, it was held that the long list of previous offences indicated that the interests of the public must be considered. Accordingly, the most serious of the offences, the burglaries, attracted sentences of four years imprisonment. The housebreaking and the breaking, entering and stealing brought sentences of four years imprisonment and each offence of stealing and unlawfully using a motor vehicle attracted sentences of two years imprisonment. It was directed that all sentences imposed after the first one were to be served concurrently with the sentence imposed for the first offence and it was further directed that

all sentences were to commence from the date of imposition of sentence by the trial judge.

In *Moore* (C.A. 19 of 1975), the offender, a 32-year-old-male, had eight previous convictions since 1964, mainly for offences involving dishonesty. The last occasion was two years prior to the present offence. In the present case the offender was convicted of housebreaking and was sentenced to imprisonment for three years. A medical report stated that the offender was an epileptic and also suffered from chronic depression. In the opinion of the examining doctor the offender '. . . should be placed in a mental hospital immediately. Unless he receives more appropriate treatment for his depression then there is the substantial risk that he will kill himself'. The Court of Criminal Appeal refused the offender's application for leave to appeal against sentence and stated in its judgment that it was assumed that the medical report and the recommendation of the trial judge that the offender receive psychiatric treatment were brought to the notice of the authorities and that appropriate action had been or would be taken.

In *Myers* [1971] Q.W.N. 11, the offender had an extensive record which included four convictions for multiple breaking, entering and stealing upon some of which he had been sentenced to terms of imprisonment of up to four years. In the present case the offender pleaded guilty to 32 charges of housebreaking, three of entering dwelling houses and stealing, and one of attempting to break and enter a dwelling house and steal. The series of housebreaking took place in a large number of suburbs in Brisbane. The sentences imposed by the trial court may be regarded as an effective sentence of five years for all the present offences after the judge had taken into consideration the fact that he had served three months in jail awaiting sentence. The trial judge in fact subdivided the offences and on each of the first 12 he imposed a term of imprisonment with hard labour for two years, all of them to be concurrent; and on each of the remaining offences he imposed imprisonment with hard labour for two years and nine months, making those concurrent with each other but cumulative with the concurrent sentences he had imposed on the first 12 offences.

The offender sought leave to appeal from those sentences and the Court of Criminal Appeal tentatively formed the view that a more severe sentence should be imposed pursuant to section 668E(3) of the Criminal Code and brought the offender before the Court to call formally upon him to show cause why the sentence should not be increased. The offender was not told that the Court had given leave to appeal but he was given an adjournment to obtain legal aid. Prior to the matter coming before the Court again the offender sought to abandon the appeal by giving notice to the Registrar, and,

on the matter being called, his counsel abandoned the appeal and argued that he was entitled to do so under Order IX Rule 22 of the Criminal Practice Rules of 1900. From the judgment of Wanstall J.

> In my view once an appeal is on foot, as I prefer to think that this one was when it was called this morning, an applicant has no right unilaterally to abandon the appeal because to concede him that right would plainly stultify the statutory right of this Court under s. 688E(3) to exercise its jurisdiction to impose a more severe sentence as well as one that is less severe. But, in view of the situation which has developed and lest it be thought that justice does not appear to be done by reason of the failure of myself as the presiding judge to point out to the applicant on 24 March that the appeal so far as this court was concerned was in being, I would prefer to give him leave to abandon his appeal. I am not prepared to accede to the view that he has a right to do so once leave has been given and the appeal has been started. The question is whether it is not at least doubtful that the appeal had actually started before counsel sought to abandon it. Rather than appear to do any injustice on that account I am in favour of giving leave to abandon the appeal. Before I do so I want to make it perfectly clear, for myself, that I think, with all respect to the learned judge of the District Court, that such a catalogue of house-breakings committed by a man with such a bad previous record for house-breaking certainly merits a much severer punishment than was inflicted in this case. Breaking into people's homes, whether it be in the day-time or in the night – particularly if it is in the night – is in my view one of the most serious crimes in the Criminal Code. When it is carried out upon a wholesale scale over a long period of time as it has been by this prisoner, on his own admission, when it involves property valued in excess of $5,000, when it involves, as it did in a number of cases, invading homes in which there were women and children actually present at the time, when it involves using practically every known method of breaking into a person's home, when it is so committed by a person who, on his record, should be regarded as nothing but a professional burglar and house-breaker, then I think this Court and other courts should meet it with the most severe punishment. I would have imposed nothing less than 10 years if I had been the trial judge in this case.

See also *Kemsill* (C.A. 180 of 1974 and C.A. 20 of 1975) in section on Robbery with Personal Violence.

In *Brimson* (C.A. 88 and 92 of 1972), the offender was just 18 years of age at the time of the commission of the present offences and had no previous criminal record. He pleaded guilty to six charges of housebreaking, all of which had been committed on the same evening. He was sentenced to imprisonment with hard labour for 18 months with a recommendation that he be considered for release on parole after serving six months of that sentence. The offender sought leave to appeal against the sentence and it was argued on his behalf that for a person who was a first offender and who had low intelligence a period of probation would be more appropriate. The Court

of Criminal Appeal refused the application and upheld the sentence. From the judgment of Hanger C.J.

> It seems to me that the only obstacle in the way of making a probation order in respect of this applicant, is the possibility that other young men of the age of the applicant similarly circumstanced may get the idea into their heads that it necessarily means, that, for a first offence, even though it is a serious charge such as house-breaking, they can expect, in the normal run of things, that they will be given a period of probation. That is the difficulty as I see it in the way of making a probation order in respect of this young man. It is always difficult to know what is the best thing to be done in these circumstances. Naturally the owners of the flat or the occupants of the flats which were broken into feel justly incensed that their homes have been broken into during their absence and I think that is a factor to which the Court may have regard. However, in all the circumstances, applying the principle which we have to apply that we can interfere with the sentence only on the footing that it is manifestly excessive, I think that the sentence should stand.

In *Clavarino* (C.A. 28 of 1972), the offender pleaded guilty to three separate charges of housebreaking and one of receiving proceeds of another housebreaking, all committed in the flats or homes of people living in Brisbane. In the process of the commission of the offences there was complete ransacking and looting of the houses, a substantial amount of valuable property was stolen, some of it was disposed of and some, valued at $860, was never recovered. Although the sentence of the trial court is not disclosed in the judgment of the Court of Criminal Appeal, that court refused the offender's application for leave to appeal against sentence. From the judgment of Wanstall S.P.J., with whom the other members of the court agreed:

> House-breaking is extremely prevalent in our community. It is notoriously difficult of detection and in my view the learned Judge of District Courts is to be commended for taking a strong stand as a deterrent against this troublesome and prevalent offence. Although the accused was a person with no previous convictions and was a young man, I am reminded of the adoption by this Court in an appeal by the Honourable the Attorney-General in *The Queen* v. *Williams*, of the remarks which fell from the Court of Criminal Appeal in N.S.W. in the case of Aitkin. In that case there was an application for leave to appeal against a sentence of 18 months hard labour for his first offence, one for larceny of a motor car, and he was a young man of good character. He had been in regular employment and came from a good home and the Court said that after giving every consideration to the extenuating circumstances they had been compelled to conclude that the application must be dismissed; and they did say with regret because they did not overlook that the applicant was being sent to prison for the first time and for his first offence, but they added:
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> 'The court is bound to consider not only the interests of the applicant himself and his family, but the community. The retributive aspect of punishment must

be given full weight. Perhaps this would be met in this case by the exposure of the crime, the arrest of the applicant, the disgrace with which it is accompanied and the disruption of his life of previous good character.'

They added that they did not think that he was likely to fall again into a crime of dishonesty and they went on:

'There remains the question of the deterrent aspect. A sentence such as this is imposed to deter others as much as to deter or punish the individual. For many years Judges have taken a serious view of car stealing owing to its prevalance and the serious loss of property involved and have frequently imposed sentences of 2 or 3 years imprisonment on young offenders and this Court has consistently supported them.'

In my view every word of that extract is applicable to the present case particularly as it is one of house-breaking, the prevalance of which in our community needs no emphasis. I therefore think that far from the sentence being manifestly excessive it is a just one.

In *Choyce and Lukasik* (C.A. 19 and 20 of 1970), the offenders, aged 17 and 18 years respectively, were convicted jointly of the offence of stealing from a dwelling house and breaking out of the dwelling house, that is, with housebreaking. Both offenders had been convicted previously and had long records of offences although mainly through the Children's Courts. Both offenders were sentenced to imprisonment with hard labour for two years and sought leave to appeal against the severity of the sentences. From the judgment of Lucas J., with whom the other members of the court agreed:

Having regard to the prevalance of these offences and to the fact that this was not the first time upon which either of the applicants have been before a Court, it cannot in my opinion, be said that the sentences were manifestly excessive, or that the learned Judge in any way proceeded upon a wrong principle. Reference should have to be made to matter which emerges in the case of Lukasik and that is that although he has a long record of offences including stealing offences, which were dealt with in the Children's Court, it appears that because of the orders made in each case by that Court a statement of these offences should not have been included in the statement of Lukasik's antecedents which was supplied to the learned Judge. This is because of the provision in that regard which is contained under section 139 of the Childrens Services Act of 1965. It seems to me that the effect of this provision, if complied with, and it was not complied with in Lukasik's case is at least in a case in which the offender has a number of convictions, the matter is dealt with in quite an unrealistic atmosphere. In Lukasik's case, however, even if one disregards his record, which of course it is quite absurd to do so, the sentence is not thereby in my opinion rendered manifestly excessive. In Choyce's case he was in fact on probation at the time at which he committed the offence for which he was sentenced. Having been placed on probation for a year less than two months before the offence. In my opinion there is nothing in either of these two applications and they should both be dismissed.

In *Caporn and Howe* (C.A. 88 and 89 of 1970), the offenders were convicted on their own confessions of eight charges of breaking, entering and stealing, one charge of breaking and entering with intent, a charge of housebreaking and a further charge of unlawfully using a motor vehicle. On one of the charges of breaking, entering and stealing the offenders were sentenced to imprisonment with hard labour for five years, and on other charges appropriate sentences were imposed which would be served concurrently as a matter of course under the Criminal Code with the sentence of five years on the breaking, entering and stealing charge. Although one of the charges was a charge of housebreaking, the particular offence on which the trial judge imposed the sentence of five years was that of opening a safe by use of oxy-acetylene gas equipment, which itself was stolen. The Court of Criminal Appeal refused the offenders' applications for leave to appeal against sentence and upheld the sentences imposed by the trial judge.

In *Milroy and Williams* (C.A. 158-167, 168-177 of 1975), the offenders pleaded guilty to five charges of breaking, entering and stealing, four charges of housebreaking and one charge of entering a dwelling house with intent. All the offences were committed in little more than a week in or near eight northern and north-western towns, and property valued at more than $800 was taken. Property valued at approximately $713 was never recovered. The Attorney-General appealed against probation orders with conditions of restitution on the grounds that such orders were insufficient and inadequate punishment in the circumstances.

The Court of Criminal Appeal upheld the appeals by the Attorney-General and sentenced each offender to imprisonment with hard labour for three years on each charge of breaking, entering and stealing, three years on each charge of housebreaking and one year on the charge of entering a dwelling house with intent; the sentences to be concurrent. The court added the recommendation that both offenders be considered for parole at the expiration of 12 months from the commencement of serving the sentences. From the judgment of Stable J.

> Important as the matter of probation is in the case of young offenders, as they were, in my view it is quite inappropriate in circumstances such as those disclosed in this case to grant probation. I consider that the orders should be set aside and each offender sentenced to imprisonment with hard labour.

In *Mallett* (C.A. 126 of 1975), the offender, a 17 year-old youth had, since leaving school at the age of 14, managed for most of the time to live without working. The probation officer reported that he had a very sporadic employment history staying no longer than days or weeks in any job; that he had

been content for some time to live on unemployment benefits, while making little or no effort to find employment; that although so young he habitually drank excessively and was so doing at the time of these offences and at the times of the interviews for the probation report. The offender admitted to breaking into houses since his early teens and he apparently did not experience any concern for the victims of these offences. In the present case the offender pleaded guilty to six charges of housebreaking and five of unlawfully using a motor vehicle. A total of $256 in cash was stolen from the six houses, as well as numerous articles including radios, a movie camera, a cassette recorder, an overnight bag and a rifle. None of the money was recovered and goods worth over $100 were also not recovered. The offender caused $300 worth of damage to one of the motor vehicles. The offender was sentenced to six months imprisonment on each of the 11 charges to be served cumulatively, making a total of five years and six months.

The offender sought leave to appeal to the Court of Criminal Appeal against these sentences on the grounds that they were manifestly excessive. Leave to appeal was granted by the Court of Criminal Appeal, each sentence was set aside and five years imprisonment with hard labour for each conviction of house breaking, and two years imprisonment with hard labour for each conviction of unlawful use of a motor vehicle were imposed. All sentences were ordered to be served concurrently and to commence from the date of imposition of the original sentences. From the judgment of Wanstall S.P.J. with whom the other members of the court agreed:

> The learned judge remanded him for sentence so that he could procure a pre-sentence report and a psychiatric assessment. At that stage His Honour was minded to order week-end detention coupled with probation, if such orders might lawfully be made in combination. However, both reports proved to be so damning that the learned judge felt it his duty to impose a long sentence of imprisonment for the protection of society. The way he did this was to sentence the applicant to six months imprisonment on each of the eleven charges to be served consecutively, making a total of five years and six months, . . . with hard labour.
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> The same learned judge had, some months previously, adopted the same method for the same reason, i.e., the need of society for protection from the offender when he sentenced one Agland to five months imprisonment on each of 13 charges of house-brraking.
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> The Court of Criminal Appeal refused Agland leave to appeal against his sentence, without stating reasons. Thus it ratified both the method and its effect, one of which would be to render the prisoner ineligible for parole without the approval of the Governor in Council upon the recommendation of the Parole Board. Section 32 (1A)(c) of the Offenders Probation etc. Act 1959-1971 reads:

'Unless the Governor in Council, upon the recommendation of the Board, otherwise determines

(c) a prisoner undergoing a sentence of imprisonment not exceeding six months shall not be eligible for release on parole.'

It has been laid down in *R.* v. *Phillips and Lawrence* [1967] Qd. R. 237, and again in *R.* v. *Anderson* [1967] Qd. R. 599, that the right to impose cumulative sentences is not limited to the imposition of a total of two terms of imprisonment. Hence there was not in *Agland's* case any error of law to attract the Court's interference. Moreover *Agland's* age – he was 27 – and his atrocious record as a professional housebreaker during the preceding ten years called for the summary rejection of the plea that the total of the terms was excessive. For the same reason there was no occasion for the Court to feel concern that the method of sentencing would deprive that offender, in any realistic sense, of a chance of being paroled.

But on the facts of this case the last mentioned consideration assumes real importance. This applicant is a 17 year old first offender who well may benefit from parole after he has savoured his first taste of gaol. The pre-sentence material indicates that his anti-social behaviour is motivated in part by his disposition to reject authority and discipline. Treatment by a court in a way which could deprive him of his normal chance of parole may, I think, aggravate that disposition. In any event it is my view that this method of sentencing, in this case, reflects a wrong principle, because it erects a barrier against the chance of parole which a 17 year old first offender would normally be expected to have. There being eleven separate sentences each of six months s. 32(1A) (c) of the Act operates to render him ineligible for release on parole without the intervention of the Governor in Council, whereas he could be released by the Board alone after serving two years and nine months of concurrent sentences of 5½ years. If his criminal conduct merits imprisonment of 5½ years he should have been sentenced to that period on the first conviction, and on each succeeding conviction to an appropriate term to be served concurrently with the first.

I agree with the view of the trial judge that the need to protect society from the depredations of this housebreaker called for a lengthy sentence notwithstanding his youth. Since leaving school at the age of 14 he seems to have managed to live without working. The probation officer reports that he has had a very sporadic employment history staying no longer than days or weeks in any one job; that he has been content for some time to live on Unemployment Benefits, whilst making little or no effort to find employment; that although so young he habitually drinks excessively and was doing so at the time of these offences and at the times of the interviews for the report; that he admits to breaking into houses since his early teens; that he does not appear to be experiencing any concern for the victims of his offences. I note that one of the grounds on which he claims that his sentence is too severe is that he is 'serving five and a half years imprisonment for what may be considered petty larceny'.

I would grant leavet to appeal, set aside each sentence and in lieu I would impose on each conviction for housebreaking a sentence of five years imprisonment with hard labour. On each conviction for unlawfully using a motor vehicle I would

> impose a sentence of two years imprisonment with hard labour. I would then direct that all the sentences be served concurrently, commencing on the date of the imposition of the original sentences.

In *Johnson* (C.A. 60 of 1965), the offender, a 21-year-old male, was convicted of breaking and entering a dwelling house at night with intent to commit a crime and with entering a dwelling house at night with intent to commit a crime. The offender and an accomplice broke and entered a dwelling house at Surfers Paradise, looking for money to steal. As they did not find any money, they left the dwelling house, taking nothing but leaving the back door open. While they were in the house they had seen some tinned food, and after they had left they decided to go back and take it. Some 20 or 30 minutes after they had first broken in they returned to the house, entered it again and took the tins. The offender was sentenced to imprisonment for two years with hard labour and the Court of Criminal Appeal upheld his sentence. From the judgment of Gibbs J.

> Finally it was submitted that the sentence imposed on the first charge, namely imprisonment with hard labour for two years, was manifestly excessive. Reliance was placed on the appellant's age (21) and the fact that he had no proper home life, and it was pointed out that although he had a number of previous convictions, there were extenuating circumstances in respect to some of them, and the last conviction was in respect of an offence committed in 1963. Notwithstanding these matters, having regard to the circumstances of the offence, the prevalence of offences of this kind and the difficulty of detecting offenders, and the fact that the accused had previous convictions, I find it quite impossible to say that the sentence was manifestly excessive. The appeal should be dismissed and the application for leave to appeal should be refused.

## Theft

In *Macsloy* (C.A. 187 and 188 of 1974), the offender was convicted of the offences of stealing $7,000 as a servant and of stealing $800. He was sentenced to imprisonment for two years and sought leave to appeal to the Court of Criminal Appeal against this sentence on the ground that the trial judge had acted on a wrong principle in that he had either ignored or not given sufficient weight to the fact that the offender was ready and able to make restitution of a considerable proportion of the amounts stolen. The Court of Criminal Appeal refused the application and upheld the sentence having regard to both the seriousness of the offences and to the circumstances in which they were committed.

See also *Williams* (C.A. 138-157 of 1974) in section on Burglary.

In *Marsh and Marsh* (C.A. 80 and 81 of 1970), the offenders aged 18 years and 19 years were convicted of the arson of a motor vehicle, stealing (the same motor vehicle); stealing (another vehicle) and in the first offender's case, three further counts of stealing motor vehicles. All offences were committed within one month. Both offenders had previous criminal histories and both were reported as being socially maladjusted with unfortunate histories of a disturbed home background; inadequate parental care, especially from their father; indifferent school achievement; and, throughout adolescence, an unstable pattern of behaviour. Each offender was sentenced to imprisonment with hard labour for three years for the offence of arson. The first offender was given sentences of 12 months imprisonment on each of the five stealing offences committed by him, of which four were to be served concurrently with the three year term, but one to be cumulative with it. The second offender received sentences of 12 months imprisonment on each of the two stealing offences to be served concurrently with the three year term. The effect of the sentences was that the second offender was sentenced to imprisonment for three years and the first offender (the younger of the two) to a four year term.

Both offenders sought leave to appeal against the severity of the sentences and the Court of Criminal Appeal set aside the sentences of the trial court in upholding the appeals. In the case of the first offender, a sentence of four years imprisonment with hard labour was imposed for the offence of arson, and it was ordered that he be released on his own recognisance and on probation after serving 12 months. The sentences imposed on him for four of the stealing charges were not disturbed, but the sentence of 12 months for the stealing charge, which was to be cumulative, was made concurrent with the sentence for arson. In the case of the second offender, a sentence of imprisonment with hard labour for three years was imposed for the offence of arson. It was also ordered that the offender be imprisoned for 12 months of that term and that the execution of the sentence for the remaining portion thereof was to be suspended upon his entering into a recognisance in the sum of $100 pursuant to section 19(7) of the Criminal Code, with the further condition that, during the remaining portion of the term, he was to be under the supervision of a probation officer. The sentences of 12 months in respect of each of the stealing charges which were to be served concurrently with the sentence imposed for the arson charge were not disturbed. From the judgment of W.B. Campbell J. with whom the other members of the Court agreed:

> I do not think that it can fairly be said that these men are beyond reformation when they have not been subjected to the test of complying with the requirements of probation and I consider that, in the present cases, the reformative aspects of punishment so outweigh the deterrent factors as to justify an appellate court in holding that the terms of imprisonment imposed are sufficiently excessive to justify interference.

See also *Myers* [1971] Q.W.N. 11 in the section on Housebreaking/burglary.

In *Janezic* (C.A. 161 of 1974), the offender pleaded guilty to four charges. First, with an accomplice, to receiving a motor vehicle engine; second, with the same accomplice, to receiving a motor vehicle; third, with the same accomplice, to stealing a motor vehicle, and fourth, with the same accomplice and another accomplice, to stealing a motor vehicle of a value of upward of $2,000. At the time of these offences the offender was aged 18 years. He had left school at the age of 16 years and was employed from time to time in casual labouring jobs, remaining for short periods in each job. He was unemployed at the time of his arrest. On the first, second and third of the present convictions the offender was ordered to be imprisoned with hard labour for two years. On the fourth conviction he was sentenced to imprisonment with hard labour for three years, to be served concurrently with the previous sentences. The offender sought leave to appeal to the Court of Criminal Appeal against the severity of these sentences. That Court refused the application and upheld the sentences. From the judgment of Wanstall S.P.J., with whom the other members of the Court agreed:

> The learned judge correctly, in my opinion, when sentencing the present appellant described the activities of the appellant and his associate as 'an example of organised criminal activity', and he said that 'in this day and age in this city, organised criminal activities call for severe consequences'. He also pointed out that in respect of the offence which was latest in time, that for which he imposed a sentence of three years imprisonment, that he had an opportunity of considering whether or not he would continue to assist William Bowman; that he knew that Bowman wanted the car for the purpose of escaping from criminal activities. Thus the judge correctly appreciated that that was a much more serious offence, apart from the question of the value of the vehicle, than the others.
>
> In my opinion, the sentences which he imposed here were quite proper in the circumstances, and they do not call for interference by this Court.

In *Bland* (C.A. 72 of 1972), the offender, who was aged 16 years, was employed in a branch of the Australian and New Zealand Bank. He pleaded guilty to a charge of stealing $5,200.10 as a servant of the Bank. In his employment as a teller, the offender was responsible for paying approx-

imately $1,000,000 annually and for receiving over the counter about $1,400,000 annually. The offender worked at an agency office with one other employee a short distance away from the branch office to where he returned the cash every afternoon. The offender's lapse was occasioned by betting on horse races. At the stage when he had taken $400, the offender decided to take much more money, go to Brisbane and try to win back what he had lost. He took $4,800 and went to the races in Brisbane. But he won only $80 and decided to go to Sydney. There he indulged in some high living for a very short period before going to Western Australia. The offender was sentenced to imprisonment with hard labour for three years and it was recommended by the trial court that he be released from prison on parole after serving 15 months.

He sought leave to appeal against this sentence as being manifestly excessive and the Court of Criminal Appeal upheld the appeal. The order of the lower court was quashed and it was ordered that the offender be imprisoned with hard labour for three years with a recommendation that he be considered for release on parole at the end of nine months. It was further ordered that the sentence should begin from the date on which it was imposed by the trial judge. From the judgment of Hanger C.J.

> In considering this matter, it is the deterrent aspect of the punishment that I find troublesome – that is, the deterrent effect upon other possible offenders, not the appellant. Many sentences imposed by the Courts, perhaps most of them, do not come to the knowledge of any persons other than those immediately concerned with the matter. And I think that this case is not of that kind. It concerns a bank employee and I think it very probable that whatever sentence is imposed will come to the knowledge of bank employees generally. There are in the community and amongst bank employees, persons whose moral fibre is such that to keep them from giving into the temptations in their way the knowledge is needed that offences will entail the consequence of punishment – persons for whom this is a positive deterrent. From this view point, the presence of this knowledge is a benefit, a definite help in keeping on the straight and narrow path which would otherwide be steep and difficult. To indicate that offence of the kind now before us may go, in substance, unpunished is to deprive these persons of the very help that they need, the very prop which supports them. This is a fact which would not be ignored. It is true that if the appellant had been apprehended and brought before a court whilst still under 17, he could not have been sent to gaol. This does not, to my mind, touch the matter to which I have referred. What would be conspicuous to other potential offenders in this case, would be the fact that a court with ample power to order imprisonment, had dealt with the matter. It should at least be made obvious to those people that the view of the courts is that the offence attracts a severe penalty and that only the particular character of the offender and the particular circumstances of the offence can have any effect in reducing this penalty. The problem for the trial Judge was difficult. No perfect

> solution was open. But in all the circumstances of the case, I think the material justifies interference with the order. I would set it aside and substitute imprisonment with hard labour for 3 years with a recommendation that he be considered for release on parole at the end of 9 months; with the further order that the sentence begin to run from the date it was imposed by the trial Judge.

In *Skeates* [1978] Qd. R. 85, the Court of Criminal Appeal heard an application for leave to appeal against sentence by a former manager of a bank who had pleaded guilty to six charges of forgery and six charges of uttering. The charges arose from the applicant's conduct while he was managing the bank. Hanger, C.J. repeated the above remarks.

In *Kelso* (C.A. 121 of 1973), the offender, who had a bad previous criminal history, was convicted on a charge of stealing and sentenced to imprisonment with hard labour for two and a half years. He sought leave to appeal against the severity of the sentence but the Court of Criminal Appeal upheld the sentence and dismissed his application. From the judgment of Stable J., with whom the other members of the court agreed:

> As to the application for leave to appeal against sentence, a sentence of 2½ years imprisonment with hard labour was imposed. One must, of course, in considering the matter of sentence have some regard to the previous criminal history of an applicant, and I regret to say that since a very early age the criminal history of this applicant has been such as not to inspire a Court with confidence in his probable reform by any lessening of the sentence which is imposed. In short my view as to the sentence is that it is not manifestly excessive and I would dismiss the application for leave to appeal against sentence.

See also *Choyce and Lukasik* (C.A. 19 and 20 of 1970) in the section on Housebreaking/burglary.

In *Russell* (C.A. 125 of 1972), the offender, a 33-year-old male, pleaded guilty to a charge of stealing $1,911, the property of the South Coast Fire Brigade Board. The offender had previous convictions for stealing, assault, aggravated assault on a female, and driving a motor vehicle while under the influence of liquor. With regard to the present offence, the Secretary of the Board made up pay packets for the fire station crew. Some packets were distributed, but 14 packets containing $1,911 were locked in a metal cash box bolted to a shelf in a locked cupboard in the watchroom. At 11 a.m. a phone call was received reporting a fire some distance away, and the brigade turned out to attend to it. No fire was found there, nor any evidence of any fire having been there. While the men were away the offender had entered the premises of the brigade, opened the cupboard, and levered the lid of the cashbox with a screwdriver. He was discovered by two firemen who had happened to arrive at the station, not having been on duty when the false call

was made. These men wrestled with the offender who, however, succeeded in escaping. However he dropped an overnight bag which contained the pay packets. His fingerprints were found on the cash box, and he was subsequently arrested. The trial judge ordered that the offender be discharged on entering into his own recognisance to appear and receive judgment when called upon within a period of four years, and in the meantime to keep the peace and be of good behaviour.

The Court of Criminal Appeal upheld on appeal by the Attorney-General on the ground that the sentence was inadequate and insufficient in the curcumstances. The offender was sentenced to imprisonment with hard labour for 18 months. From the judgment of Hanger C.J., with whom the other members of the Court agreed:

> The circumstances suggest deliberate planning by the respondent. He entered the premises when the Brigade was out on duty on the day when the money for the pay had arrived, and had almost accomplished the work of opening the cupboard, opening the cash box, and getting away with the pay packets before he was interrupted.
>
> Cases of this kind are all too frequent, and it seems to me that to release the respondent on a bond is to ignore both the gravity and the prevalence of the offence. I think a sentence of imprisonment with hard labour for 18 months was certainly called for. I think the order of the District Court should be set aside, and a sentence of imprisonment with hard labour for 18 months should be ordered; that a warrant should issue for the arrest of the respondent and his conveyance to Her Majesty's Prison.

In *Munro* (C.A. 110 of 1972), the offender, a 37-year-old male, pleaded guilty to one charge of false pretences and one charge of stealing. The false pretences charge related to a quantity of opals worth $4,722.98 and the stealing charge related to a quantity of rough diamonds worth $18,000. The offender obtained possession of the opals and diamonds in what was classed by the trial court as a very polished exhibition of the prowess of a high class 'con-man'. Having obtained the opals, the offender apparently left Australia for New Zealand. Although throughout his life the offender had held several positions of responsibility, he had a serious record of previous offences and from 1953 to 1966 he had spent nine or 10 years in jail. On the false pretences charge he was sentenced to be discharged upon his entering into his own recognisance in the sum of $100 to keep the peace and be of good behaviour for five years, and on the charge relating to the theft of the diamonds he was sentenced to imprisonment with hard labour for two years.

The Attorney-General appealed against these sentences on the grounds that they were inadequate and insufficient in the circumstances. The Court

of Criminal Appeal upheld the appeal by the Attorney-General, set both sentences aside and imposed a sentence of four years imprisonment with hard labour on each charge. From the judgment of Williams J. with which Hoare J. agreed:

> When sentencing a person who has pleaded guilty the Court has not the same advantage as a Judge who conducts the trial from which the conviction results. In sentencing, after a contested trial, the Judge is obliged to act upon the view which he has formed of the evidence, consistent with the jury's verdict. In addition he has to take into account all other relevant materials put before him. Where the accused has pleaded guilty the practice is for the prosecution to state the relevant facts of the offence together with all other matters including the criminal history, (if any) of the accused. It is clear that if the accused disputes any fact stated by the Crown the Judge cannot take that fact into account unless it is proved to his satisfaction. In my experience the practice in this State has always proceeded upon the basis that it is not necessary for the accused to admit the truth of every fact stated by the prosecution before the Judge may act upon it. Rather, those facts not disputed by or on behalf of the accused are taken as admitted. If any doubt is raised as to the truth of any of those facts then if the Crown does not see fit to clarify the matter it seems to me that the Court must disregard such facts or else form a view upon them consistent with what the accused is prepared to concede them to be. In this case before the trial Judge no attempt was made by the Crown to clarify the matters expressly raised by the respondent in respect of the events between 1966 and his imprisonment in 1971 in Adelaide, omitting, of course, the facts in relation to the charges in question. It seems to me quite unsatisfactory for a Court to be told that whilst the accused had absconded from bail, he was sentenced to nine months imprisonment in South Australia for some charge the nature of which the prosecutor was unaware. It indicates the need for some system whether by way of computerisation or otherwise to ensure the collation and ready availability of details of convictions recorded, (including where possible the date of the alleged offence); at the least, throughout Australia. In my view on this appeal the accused must be given full credence in relation to what he says were the facts dealing with his criminal record during this period.
>
> Accordingly the accused must be regarded as a man who for approximately five years following his marriage attempted without success to rid himself of his criminal inclination. His criminal tendencies eventually got the better of him in a manner which caused substantial loss and expense to others. The maximum punishment for the first offence is 5 years imprisonment with hard labour, whilst for the second offence it is seven years imprisonment with hard labour.

His Honour, in sentencing the accused, said:

> As well as the punishment to you, I propose to put you on a five year bond so that, when you come out at the end of two years less remissions, if you do not behave yourself you will have another sentence which can be imposed upon you in respect of this indictment presented in this Court.

> If it were certain that this man would serve approximately two years in jail the need to increase his sentence might not be so clear. However a substantial change has been made recently to certain powers of Judges when sentencing. I refer to the deletion of the provisions to s. 19(7) of the Criminal Code by the Amending Legislation of 1971.
> In all the circumstances I think the appeal should be allowed, both sentences set aside and a sentence on each charge of four years imprisonment with hard labour be substituted. If the respondent is sincere in his attempts to reform, the whole matter can be considered at an appropriate time by the Parole Board. In the normal course of events he will be eligible for parole after he has served a period of two years imprisonment.

In *Mills and Nielsen* (C.A. 20 and 21 of 1971), the offenders, who were both aged 18 years, were convicted of the theft of a motor vehicle. Although the offender Nielsen had no previous convictions, the offender Mills had two prior convictions for stealing. For the present offence each was sentenced to imprisonment with hard labour for three years to be suspended after serving one year and then placed on bonds with probation. Each offender was also disqualified from holding a driver's licence for a period of four years. Both offenders sought leave to appeal against the severity of the sentence, but the Court of Criminal Appeal dismissed their applications and upheld the sentences. From the judgment of Stable J.

> The pattern of this offence is one with which Courts are becoming increasingly familiar. These youths desired parts of a car for their own purpose. One way of getting such things is the lawful way. But in today's climate of 'I must have it now' the proper and lawful way is tedious. So, as their counsel told us, they met by arrangement with intent to steal and strip a car. They chose one which was suitable – Minon's Monaro which he was buying under hire purchase. Having stolen it they stipped it of its seats, magnesium wheels, engine, gearbox, tailshaft, cross-member, battery, radiator, and even the horn bar and console. Each went his way with a share of these things, and each, when they were caught, was considered equally responsible for the theft. In all of the circumstances of this carefully contrived crime I can see no valid reason to interfere with the sentences imposed. Indeed, there is much to be said for the view that youths who contemplate such thefts should not be encouraged to believe that they can expect to be allowed a chance the first time they are caught. In this day and age it is fashionable, even perhaps socially essential, for some youths to have a car or the use of one as soon as they are qualified to drive. Very often indeed their funds permit no more than the purchase of a battered rattletrap which is barely roadworthy for the moment. When the inevitable failure of a component occurs there is no money for repairs, so the car of some unwary stranger is stolen and cannibalised for parts. Often, as in the present case, the stripped carcase is set on fire to destroy fingerprints – but only two of the three youths did this.
> I am not unaware of the arguments in favour of probation orders in criminal

> cases. I believe, however, that all the circumstances of a crime must be taken into account in deciding upon punishment. Here the offence was one of a kind which is prevalent, no one was led unwittingly into it. All three met and agreed upon a course which, for their own benefit, involved taking the valuable property of a stranger. This done they dismembered it and shared it – all with a fine contempt for the rights of the owner. This is the kind of conduct referred to by the Court of Criminal Appeal of New South Wales in *R.*v. *Aitkin* [1961] N.S.W.R. 914 which I referred to and quoted in *R.* v. *Williams e.p. The Minister for Justice and Attorney General* [1965] Qd. R. 86 at p. 104. I again adopt the considerations which I quoted and expressed in the latter case.
> I would refuse both applications.

From the judgment of Wanstall J.

> This was a premedicated and carefully planned stealing to which my comments in Nielsen's case apply with equal force. I can see no justification for interfering with Mills' sentence.
> Nielsen was sentenced to a term of three years imprisonment, to be suspended after one year, on probation. Again I can see no reason for interfering with that sentence.
> The theft of the car, the breaking down of it into parts for sharing amongst the three thieves, and the destruction of the body shell, were planned in concert and carried out ruthlessly and efficiently. In the result they wrecked a motor car worth $2,200. Nielsen took the engine and gear box away and installed them in another car he owned.
> Although it is my policy, wherever I consider it proper, to give the benefit of probation without gaol to young first offenders – Nielsen is only 18 and had no criminal record – I cannot say that in the circumstances of this case the sentence imposed is manifestly excessive. He will in effect serve one year in gaol and therefore be under a suspended sentence and recognizance for good behaviour, and under probation, for two years. He has been punished justly whilst being also given a chance to rehabilitate himself.
> I would refuse both applications for leave to appeal against the sentence.
> The order of the Court is application refused in each case.

In *Duggan, Heineger and Conway* (C.A. 135, 136 and 137 of 1975), the offenders, aged 17, 17 and 18 years respectively, pleaded guilty to stealing four wheel trims valued at $45 and a spotlight valued at $25 from parked motor vehicles. Each offender was sentenced to imprisonment with hard labour for two months and each sought leave to appeal against the severity of his sentence. The Court of Criminal Appeal dismissed each application and upheld the sentences. From the judgment of Hanger C.J.:

> I have expressed my views with regard to the attitude of the Court when the Court is dealing with young persons who have committed offences, serious or otherwise, on a previous occasion on which I had to deal with a case which

involved a young bank clerk; and I do not propose to repeat what I said on that occasion.

In this case, the Magistrate, from his own experience, which is borne out by the statistics which have been produced to us with regard to other sentences, had before him the knowledge that offences of this kind, but not precisely the same offence, were, I would think, extremely prevalent in the district where he functioned: and he took that into consideration in determining the sentences which he would impose on these young persons.

In the circumstances, I feel that there was ample justification for him to impose the sentences which he did, and I do not see any reason why this Court should interfere with those sentences. In my opinion, the applications should be dismissed.

From the judgment of D.M. Campbell J.

In *The Queen* v. *Draper*, 1970 Queensland Weekly Notes 2, Mr Justice Hoare, speaking on behalf of the Court of Criminal Appeal, questioned the wisdom of imposing short prison sentences on youthful offenders. I would not wish to be taken as detracting in any way from what Mr Justice Hoare said on that occasion. Indeed, I would particularly like to stress that the remarks of Mr Justice Hoare in that case, and those of McCracken D.C.J. in *Haura* v. *Gorman*, 1973, Queensland Lawyer, 330, as to the desirability of making the fullest inquiry dealing with an unrepresented youthful offender, ought always to be in the forefront of a Magistrate's mind. However, we have had the advantage on the hearing of this appeal of listening to Mr Doulton, who has represented the appellants.

It appears that the offence of stealing from motor cars is prevalent in the Magistrate's bailiwick. There must come a time when an example has to be set. The Acting Magistrate had imposed a prison sentence for this type of offence in a recent case involving two persons, one a 21 year old youth who was a first offender; and this should have been a warning. While the general policy of the law is against sending young men to gaol for first offences, exceptions have sometimes to be made in the interests of the community.

Having regard to the prevalence of this type of offence in the Nambour district – a factor which the Magistrate has reported to us that he took into account – I do not feel justified in interfering with the sentences on the ground that they are manifestly excessive.

I would agree with the order proposed by the Chief Justice.

In *Wilson* (C.A. 687 of 1974), the offender, who was employed as a bank officer, was convicted of stealing and admitted to probation. The Attorney-General appealed to the Court of Criminal Appeal against this sentence on the ground that it was insufficient and inadequate in the circumstances. The Probation Order was set aside and the offender was sentenced to 12 months imprisonment. From the judgment of Hanger C.J.:

In my opinion the circumstances are such as to call for interference by this Court with the sentence imposed by the trial judge. Speaking for myself, I would have imposed a longer sentence, but in view of the concurrence of my brothers in the sentence of imprisonment with hard labour for 12 months I see no useful purpose in discussing the matter any further, other than to say that I have endeavoured in the case of Bland to set out my approach to a case of this kind, which has certain similarities, and that I do not see any reason to depart from anything that I said in the case of Bland.

In the circumstances, the order will be that the order of probation made by the learned trial judge be set aside and that in lieu thereof this Court orders that the sentence imposed be imprisonment with hard labour for a period of 12 months, such sentence to run from the date of his apprehension under a warrant. The warrant is to be issued for the apprehension of the respondent and for his conveyance to Her Majesty's Prison at Brisbane.

## From the judgment of Hoare J.

In my opinion, the trial judge had a difficult task in determining the proper sentence to impose in this case, and the reasons for his conclusion, appearing at pages 13 and 14 of the record, indicate a very careful consideration of the matters relevant in so far as they applied to the convicted offender. However, it seems to me that His Honour did not pay sufficient regard and give sufficient weight to the deterrent aspect of a sentence appropriate to an offence of such gravity.

Here was a case of a bank officer who had stolen a very large sum of money and there had been at least some premeditation. It seems to me that in those circumstances, leaving aside for the moment circumstances which are extenuating in so far as they applied to the particular offender, a substantial term of imprisonment was called for. As was pointed out by His Honour the Chief Justice in Bland's case it would be highly undesirable having regard to the interests of the community if bank officers and others in a position of trust were led to believe that defaications would or might be regarded as other than serious offences.

Had there been no extenuating circumstances in this case it would have been appropriate for a substantial prison sentence to be imposed. However, the trial judge – rightly, in my opinion – paid great attention to these circumstances of extenuation which included, firstly that the offender had previously borne an unblemished reputation – he was a first offender – plus the fact that restitution was made in full, and then there were the particular matters referred to in Dr Parker's report to which the trial judge gave particular attention. Under those circumstances it seems to me that while some prison sentence was called for, in the particular circumstances of this case a sentence of 12 months imprisonment would be sufficient, and that is the sentence which in my opinion should be imposed in lieu of the order made by the trial judge.

## Stealing and Receiving

In *Cummings* [1978] Qd. R. 49, the Court of Criminal Appeal held that when a person has been acquitted of an offence of stealing where the maximum punishment would have been three years imprisonment with hard labour, and has been convicted of receiving the property which was the subject of the stealing charge, if there is no evidence that the accused held himself out as a receiver and thus induced the stealing, it is not desirable that he should be sentenced to a greater term of imprisonment than he would have been liable to had he been convicted of stealing.

In *Wayne* (C.A. 25 of 1970), the offender pleaded not guilty to a charge of stealing and receiving property which he knew had been stolen. He was tried in a district court and was convicted by a jury – the jury bringing in a verdict of guilty of stealing or receiving but they did not know which. In accordance with the relevant provisions of the Criminal Code the trial judge directed that a verdict of guilty of stealing be recorded, that being the offence for which the lesser penalty was provided. A sentence of 12 months imprisonment with hard labour was upheld by the Court of Criminal Appeal in dismissing the offender's application for leave to appeal against the severity of the sentence.

## Receiving

In *Bedington* [1970] Qd. R. 353, in an indictment presented against one Stokes and the offender Bedington, both were charged jointly with armed robbery of a large sum of money and two revolvers from a bank. Bedington was also charged with receiving the two revolvers and $23. Separate trials were ordered and both Stokes and Bedington were acquitted on the charge of armed robbery. Bedington, however, was found guilty of receiving and was sentenced to five years imprisonment with hard labour. He appealed against his conviction and sentence on the grounds, *inter alia*, that he had been prejudiced by the joinder of charges and that a charge of robbery might not properly be joined with a charge of receiving. His application for leave to appeal against sentence was based on the ground that the sentence imposed was manifestly excessive having regard to the small value of the articles received. The Court of Criminal Appeal dismissed the appeals and upheld the sentence imposed. From the judgment of the Court:

> So far as concerns the application for leave to appeal against sentence, the sentence of five years imprisonment with hard labour although, undoubtedly,

a heavy sentence for receiving articles of comparatively small value and a small amount of money, is not manifestly excessive.

The crime of receiving has always been regarded as a very serious offence. There are a number of reasons for this, one of them being that, as stated by Cullen C.J. in *R.* v. *Ragen* (1916) 33 W.N. (N.S.W.) 106, in the New South Wales Court of Criminal Appeal:

'The legislature has marked out the crime of receiving as more heavily punishable than that of stealing, because the receiver is the carefully concealed instrument which makes theft on a wholesale scale possible.'

It is an incorrect approach when considering an appropriate sentence for receiving to consider merely the articles received and if they are not of substantial value to regard the offence as somewhat venial. While it is entirely true that the value of the property received is relevant so that if the value is high that is an aggravating circumstance, it does not always follow that, because the value of the property is comparatively low, the offence is not serious. The provisions of s. 433 of the Criminal Code draw a clear distinction between property received in consequence of an act which constituted a crime and property received in consequence of an act which was not a crime. In the former case – and that is the one with which we are concerned here – the maximum punishment is fourteen years imprisonment with hard labour.

A moment's reflection will indicate that this legislative provision is founded on sound common sense. The offence of receiving the same property which has been obtained by means e.g. of an armed hold-up in which some innocent person lost his life is a far more serious offence than receiving the same property after it was stolen e.g. from an open motor car.

Approached in this way, it becomes apparent that the circumstances under which property received had been obtained are most material. In the present case there had been an armed hold-up of a bank and the property which the appellant received constituted part of the proceeds of this armed robbery. No perpetrator of the armed robbery has been convicted. The man Stokes with whom the appellant had been associated was indicted and was found not guilty. Whether or not Stokes was the actual bank robber is immaterial. It is, of course, sociologically undesirable that the actual perpetrator of an armed hold-up should go scot free but there is no reason on that account why a person convicted of receiving part of the proceeds of the armed hold-up should be treated leniently. The offence of armed robbery carries a maximum of life imprisonment and any person convicted of the type of armed robbery such as a bank hold-up should ordinarily receive a very heavy sentence indeed.

It is well established that the trial judge is entitled to take any view of the facts consistent with the jury's verdict (*R.* v. *Haselich* [1967] Qd. R. 182; *R.* v. *Harris* [1961] V.R. 236). In the present case, the trial judge was entitled to take into account the circumstances that the appellant undoubtedly knew that an armed hold-up was intended to be committed and knew that the property which he had received, was obtained from that robbery. As a consequence of the jury's verdict, it could not be held against him that he took any active part in the hold-up. However, he received the stolen property knowing that this very serious crime had been committed. It is also relevant that the property received included

> two revolvers. Unlawful possession of such property cannot be equated with possession of, say, ordinary merchandise of the same monetary value.
> The trial judge undoubtedly took and rightly took a very serious view of the offence. The appellant has a bad criminal record. The sentence of five years imprisonment with hard labour was not manifestly excessive and leave to appeal will be refused.
> In the result the appeal against conviction is dismissed and the application for leave to appeal against sentence is refused.

## Stealing as a Servant

See *Macsloy* (C.A. 187 and 188 of 1974) in section on Theft.

In *O'Neille* (C.A. 25 of 1974), the offender, a 38-year-old male, pleaded guilty to the offence of stealing as a servant under section 398 of the Criminal Code. He was charged with stealing divers sums of money totalling $4,248 which had come into his possession on account of his employer. The offender had two previous convictions for offences of a similar nature, and on one of these he was sentenced to a term of imprisonment of two and a half years. The present offence was committed in the offender's capacity as a clerk and acting bar manager when he took $1,300 from the safe, of which he had the key, and falsified the cash receipt books. When the company held a stock-taking and a check audit, the offender made off, taking another $3,000 with him. The offender was admitted to probation for five years conditioned that he make restitution in the amount of $2,000.

The Attorney-General appealed against this sentence as being inadequate and the Court of Criminal Appeal varied the order by allowing the Probation Order to stand but by requiring the offender to pay the sum of $2,000 by way of restitution in instalments of $40 per month. From the judgment of D.M. Campbell J. with whom the other members of the Court agreed:

> The sentence imposed was a very light sentence, and I think the appeal should be upheld. However, in view of the time he has been free, and the favourable report of the Probation Officer, I am in favour of allowing the Probation Order to stand with the exception of the special condition relating to restitution.

In *Don* (C.A. 89 of 1975), the offender, a married woman, was convicted of the offence of stealing as a servant. The total amount stolen was in excess of $5,000. The offences were committed over a period of 10 months and involved the conversion of 56 cheques. The offender was sentenced to imprisonment with hard labour for 18 months and the trial judge recommended that she could be considered for parole after the expiration of six

months of the sentence. The offender sought leave to appeal to the Court of Criminal Appeal against the severity of the sentence but that Court dismissed the application and upheld the sentence.

## Stealing as a Trustee

In *Jany* [1966] Qd. R. 328, the offender, a 37-year-old woman who was separated from her husband and was caring for a 15 year old illegitimate child, was convicted of stealing $16,500 as a trustee. The offender was of Austrian background who, on arrival in Australia, obtained employment as a saleswoman in a department store in Brisbane where she remained for eight years. In 1959 she entered the real estate business as a saleswoman and in the following year she obtained her own real estate agent's licence and went into business on her own account. She was naturalised in January, 1965. The present offence was discovered when an auditor appointed by the Minister of Justice discovered that money had been stolen from 44 people, the smallest amount involved being $150 and he largest $3,500. None of the money was recovered. The offender was sentenced to imprisonment with hard labour for three years. She sought leave to appeal against the severity of this sentence, submitting that the trial judge had departed from the principles to be observed in imposing sentence in two respects. First, that he had ignored the fact that the offender was the mother of a very young illegitimate child and was living apart from her husband; and second, that he had ignored an offer of restitution. The Court of Criminal Appeal refused the application and upheld the sentence. From the judgment of Lucas J., with whom the other members of the court agreed:

> In these circumstances, I am unable to say that the sentence is manifestly excessive or that the learned Judge in any way approached the matter without regard to correct principles. Fortunately, a situation such as this would seldom arise, but it is not to be thought that a different standard of sentence is necessarily appropriate when the offender is the mother of an illegitimate child of tender years. If the result of the sentence imposed were that the mother would inevitably or probably lose her child, I would regard the additional punishment thereby inflicted as unwarranted, but, as I have said, that is not the case here. The applicant was guilty of a serious offence, involving a calculated course of dishonesty over a long period; it seems to me that the sentence imposed was quite appropriate.

## Stealing Cattle

In *Bridge* (C.A. 12 of 1971), the offender, a 37-year-old male, pleaded guilty to stealing 50 oxen and 14 cows. The offender was considered to be a man of impeccable character and his work record consisted of 24 years of hard industrial work in the country districts of Queensland. The Crown conceded as a fact that the offender had committed this offence because of his desperate financial position brought about by the inability of certain people to pay him for work that he had performed. The offender was discharged upon his entering into his own recognisance in the sum of $200 conditioned that he should appear and receive judgment when called upon within a period of 18 months, and further conditioned that he should, in the meantime, keep the peace and be of good behaviour.

The Attorney-General appealed agaisnt this sentence on the grounds that it was insufficient and inadequate in the circumstances and submitted that the trial judge did not pay sufficient attention to the deterrent aspect of punishment; that he paid too little attention to the public interest; and that he gave too much weight to the circumstances of hardship in which the offender found himself at the time. The Court of Criminal Appeal dismissed the appeal and upheld the sentence. From the judgment of Wanstall J. (as he then was), with whom the orther members of the Court agreed:

> In fact, there was material before His Honour to show that those people owed the accused something of the order of $5,000. He was in imminent danger of losing his bulldozer which, it transpires, was subsequently re-possessed. The Crown conceded the truth of those circumstances, and thereby lead His Honour to believe that the Crown acknowledged that the accused was led into an out-of-character offence by reason of his desperate need at the time.
>
> In passing sentence His Honour said:
>
> 'I suppose it was one of the tragedies of the economics of the State of Queensland at the present time that brought you into this Court room. Had it not been for that situation, I doubt that you would have been here. The Crown clearly has indicated right from the outset that it was your desperation for money that prompted you to commit this act. It seems to me, from all the material before me, had you not been put in that drastic financial situation that has been outlined, you would not have done it. It is not to say, of course, that it is not other than a very serious offence.'
> And then he referred to the maximum punishment to which the accused was liable. He then went on to say –
>
> 'However, I think the circumstances of this particular case take it well out of the ordinary class of cattle stealing cases that we are called upon to deal with in these

> Courts. In all the circumstances I think that the most appropriate thing to do is to put you on a bond.'
>
> It seems to me that His Honour did, in the passage to which I have referred, give proper consideration to the need for a deterrent aspect to be included in the sentence he was about to propose, and rightly, if I may say so, decided it was a case which by reason of its very special circumstances made the deterrent aspect of little or no relevance.
> This is not a case of plain cattle duffing, and it is not a case which calls, in my view, for punishment which will act as a deterrent, because of the very particular circumstances taken into consideration. It seems most unlikely that such a combination of circumstances as exists here would be likely to occur in cattle stealing cases of the normal kind.
> It is therefore my view that the appeal by the Honourable the Attorney-General should be dismissed.

In *Smith* (C.A. 157 of 1973), the offender pleaded guilty to a charge of stealing seven bull calves, six heifer calves and one ox calf. He was sentenced by the trial judge to imprisonment for a period of nine months. The Attorney-General appealed against this sentence on the grounds that it was insufficient and inadequate in the circumstances, and that the trial judge had not given sufficient weight to the deterrent aspect of punishment – particularly in view of the prevalence of cattle stealing in the district where the offence occurred. The Court of Criminal Appeal dismissed the appeal by the Attorney-General and upheld the sentence imposed.

In *Levis and Rawnsley* (C.A. 59 and 60 of 1972), the offenders each pleaded guilty to an indictment charging them with conspiring together to steal 24 head of cattle. In the district Court, the offender Rawnsley was fined $300 and ordered to be imprisoned for six months if the fine was not paid within three months. The offender Levis was fined $200 and ordered to be imprisoned for four months if the fine was not paid within the three months. The Attorney-General appealed against the sentences on the grounds that they were insufficient and inadequate in the circumstances. The Court of Criminal Appeal upheld both appeals and varied the sentences by increasing the fines to $750 in the case of Rawnsley and $500 in the case of Levis. From the judgment of Skerman J., with whom the Chief Justice agreed:

> I find myself in much the same dilemma as did the Court in the Williams, Townsend and Tooma appeal. While I feel that Levis and Rawnsley should have been sentenced to a fairly substantial term of imprisonment, I am unable to persuade myself in all the circumstances that this Court would now be justified in imposing such a sentence after the time which has elapsed since they were convicted and fined in February this year. Nevertheless for the reasons mentioned and applying the basic principles of punishment referred to herein, I consider a heavier punishment than was imposed should be imposed and such as will go some

> distance towards making the respondents and others aware of the gravity of the offence and take into account in some measure the prevalence of live-stock offences and the duty of the Courts to have regard to the interests and protection of the community in imposing sentences as well as to the interests of offenders against the law and the prospects of reforming and rehabilitating such persons. In all the circumstances I think these objectives can best be served by substantially increasing the fines imposed in each case. In my opinion the appeal should be allowed and the sentences varied . . .

## Fraud

In *Hally* [1965] Qd. R. 582, the offender, who was a practising solicitor, was convicted of the fraudulent disposition of trust property. The defalcations occurred over a period of years, were committed with deliberation, and the offender attempted to disguise them by ridiculous fabrications. The offender had previously been sentenced to imprisonment for three and a half years for, while being trustee, converting money for use not authorised by the trust with intent to defraud. The offender was sentenced to two years imprisonment with hard labour to be cumulative on the previous sentence of three and a half years imprisonment.

The offender sought leave to appeal against the severity of the sentence but the Court of Criminal Appeal dismissed his application and upheld the sentences, holding that the two offences arose out of different transactions and were quite distinct. Accordingly, the trial judge had not wrongly exercised his discretion when he ordered that the sentences be cumulative, and the effect of so ordering was not to impose upon the offender a punishment that was manifestly excessive.

See also *Munro* (C.A. 110 of 1972) in section on Theft.

## Forgery

In *Perry* [1969] Q.W.N. 17, the offender was convicted on his own confession of 193 charges of forgery of cheques. At the time of his arrest, the offender was a partner with one C. in a firm engaged in the business of buying and selling skins. The partnership account was with the Australian and New Zealand Bank Limited and the original instructions given to the bank were that any cheques negotiated on behalf of the firm were to be signed by both C. and the offender. For a period of 14 months before his arrest, the offender had written both his own and C.'s signature on a large number of cheques drawn on the firm's bank account. On each charge the offender was

sentenced to imprisonment with hard labour for 12 months, but three of the sentences were made cumulative so that, in effect, the sentence was imprisonment with hard labour for a period of three years.

The offender sought leave to appeal to the Court of Criminal Appeal against these sentences on the grounds that they were manifestly harsh and excessive for the nature of the offences. The Court of Criminal Appeal upheld the appeals and set aside the sentences imposed. On the first charge the offender was sentenced to imprisonment with hard labour for a period of two years. The Court of Criminal Appeal further ordered that after he had served one year of that sentence, calculated from the date on which the original sentence was passed, the remaining portion should be suspended upon his entering into his own recognisance in the sum of $100 conditioned to keep the peace and be of good behaviour. It also conditioned that if called upon he would appear and receive judgment in respect of his service of the suspended portion of the sentence. The Court further directed, the terms of clause 8(6) of the Offenders Probation and Parole Acts having been complied with, that the recognisance should contain a condition that the offender be under the supervision of a probation officer during the period of the suspended portion of the sentence. In addition, the Court ordered that in respect of the other charges, the offender be sentenced to imprisonment with hard labour for one year, such sentences to be served concurrently with that portion of the sentence on the first charge which had not been suspended, and that each of these other sentences should be calculated from the date on which the original sentence was passed. From the judgment of W.B. Campbell, J., with whom the other members of the Court agreed:

> It seems to me that His Honour over estimated the amount of money which the applicant converted to his own use, and that he failed to appreciate that, because the applicant was a partner in the firm, this sum was only one half of the amount involved in 193 charges namely $2.893 approximately.
>
> In imposing such sentence His Honour also placed undue emphasis on the forgery of [C's] signature on the cheques. Because of my opinion that His honour over-estimated the amount of money involved and placed too much emphasis on the aspect of the applicant's making false documents knowing them to be false, I have come to the conclusion that we are justified in reviewing the sentence in imposing what we consider to be punishment to fit the crime.

# Chapter 11

# Arson and Malicious Damage

See *Marsh and Marsh* (C.A. 80 of 1970) in section on Theft.

In *Weger and Allsbury* [1970] Q.W.N. 42, the offenders, aged 18 years and 17 years respectively were convicted on a charge of arson of a motor vehicle which they had previously unlawfully used. In addition, the offenders were convicted on a number of other charges of unlawfully using motor vehicles. Weger pleaded guilty to ten such charges, and Allsbury to five. All the offences had occurred in the space of two weeks. On each of the charges of unlawfully using a motor vehicle the offenders were imprisoned with hard labour for a period of one year with a recommendation that they be eligible for parole after serving six months, the remainder of the sentence to be suspended upon their entering into their own recognisance of $50 to keep the peace and be of good behaviour. On the charge of arson the offenders were sentenced to imprisonment with hard labour for four years. The trial judge directed that in the event that the execution of any portions of the sentences for unlawfully using a motor vehicle were suspended under the terms of the previous order, the execution of the remaining portion of the sentence for arson be suspended upon the offenders entering into their own recognisances in the sum of $50. It was further directed that after serving a period of 12 months imprisonment in respect of the arson charge, the remaining portion of the sentence should be suspended. Each offender was disqualified from holding or obtaining a driver's licence for a period of two years from the date of sentence.

In *Warburton* (C.A. 54 of 1970), the offender was convicted of the arson of a motor vehicle. The Attorney-General appealed against the sentence imposed by the trial court, the terms of which were not disclosed in the appeal decision. The Attorney-General emphasised three matters in support of the appeal that the sentence was insufficient and inadequate in the circumstances. These were, first, the nature of the offence; second, the disparity between the punishment imposed on the offender and the sentences of two years and nine months previously imposed in respect of each two

co-offenders; and third, the fact that the offender was the instigator of the offence, the case against him being that he counselled its commission. The Court of Criminal Appeal dismissed the appeal. From the judgment of Kneipp J., with whom the other members of the Court agreed:

> These are of course all relevant considerations, and on first impression I feel that the appellant had a strong case. However, after hearing the careful analysis of the relevant factors and considerations put before us by Counsel for the respondent, I am not satisfied that the order of Matthews J. should be altered. The appellant had not taken any part in the original stealing of the vehicle. He had been deprived of his liberty, under his original sentence and prior to the making of Matthews J.'s order, for 5 months. His record was by no means such as to suggest that he was beyond redemption or reformation. Perhaps most important, Matthews J., had before him a probation report which put forward what he called a 'feasible plan' for the respondent's future, in the event of his being released from prison. We were informed that in fact the respondent has now married one of his co-accused. . . . of whom the probation officer apparently took a favourable view; that they have set up a home of their own, which involves the removal of the accused from a previous unsatisfactory environment; and that the accused is in employment. We were also informed that his conduct has been most satisfactory to the probation officer to whom he has been assigned.
>
> No doubt the matter for consideration is the correctness or otherwise of the order made by Matthews J., at the time he made it, but I think that this Court may look to subsequent events to assist it in determining whether the Judge, who had the task of dealing with the matter, failed to impose an appropriate sentence.

# Subject Index