SENTENCING ROBBERS IN NEW SOUTH WALES

Principles, Policy and Practice

IVAN POTAS

S E N T E N C I N G R O B B E R S
IN NEW SOUTH WALES

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A number of important developments, both legislative and judicial, have taken place while this book was being printed. First, the *Crimes (Life Sentences) Amendment Act* 1989, was passed. This Act, which commenced on 12 January 1990, amended, *inter alia*, the penalties relating to sections 96 and 98 of the *Crimes Act* 1900, by substituting 25 years penal servitude for the previous maximum penalty of penal servitude for life.

Secondly, the Court of Criminal Appeal decision in *Maclay*, 16 February 1990, is the first case to consider how the new minimum term under the *Sentencing Act* 1989 should be determined. In an unanimous judgment (Gleeson CJ, Hunt and Loveday JJ), the Court rejected the approach, advocated in this book, that judges should work out what non-probation or non-parole period they would have imposed under the previous legislation and then deduct approximately one third to derive the minimum term under the new Act. Rather, the Court said, sentencers should adopt a fresh approach to sentencing and apply the new sentencing system according to the terms of the statute. In short, while sentencers should pay "due deference to established general principles of sentencing" it was not their primary function to replicate what they had done under the old system.

Caution would henceforth be required in translating sentencing patterns current before 25 September 1989 into actual decisions under the new legislation.[1]

Thirdly, in *T*, 15 March 1990, the Court (Gleeson CJ, Campbell and Allen JJ) was faced with the problem of substituting a less severe sentence *after* the commencement of the Sentencing Act 1989, upon an appellant who had been sentenced *prior* to the commencement of that Act. It held that such cases were in a special category and that it was appropriate that the new sentence should be the translated equivalent of the sentence which should have been imposed in the first place.[2]

The principle here is that a prisoner should not spend longer in custody that he or she might otherwise have spent had the sentencing judge imposed the appropriate sentence in the first place.

The views expressed in this book must now be read in the light of their Honours' remarks in both *Maclay* and *T*.

Ivan Potas
April, 1990

[1] A recent article on *Maclay* by Judge Harvey Cooper, entitled "Bottom up, remissions away: Off they go and in they stay, it's all explained in *R v Maclay*!" is found in (1990) Volume 2 No. 7 *Judicial Officers Bulletin* 1.

[2] see *Sentencing Act* 1989 s 57; schedule 2

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Preface

In 1980 *Sentencing Violent Offenders in New South Wales* was published in loose-leaf form by the Law Book Company, in association with the Australian Institute of Criminology. Some 150 pages of that work was devoted to the sentencing of offenders who had been convicted of robbery, armed robbery, or like offences in New South Wales, and additionally some relevant statistics relating to these offences were published. Unfortunately the publishers had decided to discontinue the work in 1982, and so little was done on this topic for several years. The present work therefore, is intended to up-date that information and accordingly the cases analysed in these pages cover just over a decade of decisions commencing in 1978. The latest statistics available at the time of going to press have also been included.

As in the previous publication, the offences have been classified according to cases sharing similar characteristics, so that legal practitioners or members of the judiciary can locate offences of a similar type and determine the penalty ranges for that kind of offence. Inevitably in a reference book of this kind some repetition is necessary on the basis that the book will not be read from cover to cover. Repetition also serves to reinforce the more important aspects of sentencing in a system which is so strongly grounded on common law principles.

In order to further assist readers, each case has been carefully annotated. Details of these, giving brief circumstances of the offence, background of the offender and sentencing outcomes, are set out under relevant headings cross-referenced to a forthcoming separate publication.

Finally I wish to acknowledge and express my appreciation for the considerable assistance I received from my secretary Irena Le Lievre, from Christine Nixon for research assistance, from Angela Grant for indexing and from François Debaecker for statistics, graphics and layout design.

Chapter 1

Introduction

The robbery and armed robbery decisions presented in this work are, in the main, unreported judgments of the New South Wales Court of Criminal Appeal covering the period 1978 to 1988 inclusive. Some more recent decisions coming to the notice of the author as recently as September 1989 have also been referred to in the text. The object of the work is to provide assistance to those who would seek to understand the sentencing patterns of the courts of New South Wales, to help identify the range of penalties imposed for robbery and armed robbery offences, to identify some of the key principles that underpin the sentencing decision, to promote consistency in the sentencing process, and in a broader sense, to promote and encourage the pursuit of justice and fairness in the administration of criminal justice.

That there is a need to provide courts with guidance in matters of sentencing has long been recognised. One study by Professor Tony Vinson and colleagues, published in 1986 and entitled *Accountability and the Legal System: Drug Cases Terminating in the District Court 1980–1982* examined some 276 drug decisions. It found some glaring inconsistencies in the sentencing of drug offenders, and generally concluded that similar offences do not consistently attract like penalties.

In order to ameliorate the situation and create a fairer and safer system of criminal justice than had been revealed by their findings, the authors proposed that the following four steps should be taken:

i. development of an adequate court information system;

ii. establishment of a Sentencing Council;

iii. establishment of a Probity Council;

iv. provision of statutory support for necessary data collection.

The Government responded by setting up the Judicial Commission. Whether the Commission can achieve all the goals encapsulated by the four pronged assault on the 'old' system remains to be seen. Certainly the present work does not attempt to identify disparities or reveal weaknesses or inconsistencies in the system of sentences. Rather it attempts to identify patterns of similarity and principles of general application thereby continuing a tradition of research into sentencing decisions first

commenced by Mary Daunton-Fear at the very birth of the Australian Institute of Criminology in the early 1970's. That was a time when the study of sentencing was a novel undertaking and when there was very little appreciation of the importance of sentencing. An earlier analysis of armed robbery sentencing decisions of the New South Wales Court of Criminal Appeal, covering the period 1974 to 1976 inclusive, was presented in a previous publication entitled *Sentencing Violent Offenders in New South Wales* (Law Book, Sydney 1980). The present work up-dates that earlier material and, like its predecessor, is tailored to meet the needs of the judiciary, legal practitioners, law reformers, students and others who may have an interest in the practice and in the principles ofsentencing.

1.1 Fundamental legislative changes

During the period under review there were three changes in sentencing laws of such fundamental importance, that they altered quite dramatically the policy and the practice of sentencing in New South Wales. The first change occurred with the introduction of the *Probation and Parole Act* 1983, and its subsequent amendments. The second occurred when non-parole periods were required to be three-quarters of the head-sentence. The third relates to the reforms introduced by *Sentencing Act* 1989. An appreciation of these changes are of vital importance to sentencing practice if a proper understanding is to be obtained of the relevance of prior sentencing decisions to future cases .

The *Probation and Parole Act* was assented to and commenced to operate on 31 December 1983. It was accompanied by Regulations, gazetted on 24 February 1984. The Act inter alia, repealed the *Parole of Prisoners Act* 1966,[1] abolished parole for persons sentenced to three years or less,[2] and introduced non-probation periods for persons sentenced to terms of imprisonment of between 6 months and 3 years.[3] A feature of this legislation was that remissions could henceforth be deducted from the non-parole period in the same proportion as remissions were deducted and continued to be deducted from the head sentence.[4]

Regulation 18 of the *Probation and Parole Regulation,* 1984 provided a complicated formula for calculating how remissions were to be deducted from the the non-parole period. In practice this meant that most prisoners sentenced after February 1984 could anticipate having their specified non-parole periods reduced by about one-third. Thus, for example, a prisoner with a head sentence of seven years penal servitude coupled with a non-parole period of three years would no longer be required to serve a minimum term of three years, but could anticipate being released on parole after serving a minimum term of (only) two years. Indeed as parole was granted almost automatically[5] the vast majority of offenders were released in the

[1] *Probation and Parole Act* 1983 s. 51 and Schedule 2, subject to some savings and transitional provisions in Schedule 3.

[2] See generally *Probation and Parole Act* 1983 ss. 19 and 20.

[3] *Probation and Parole Act* 1983 ss. 5 and 6.

[4] Section 25 of the Act. See *O'Brien* [1984] 2 NSWLR 449 at p. 453.

[5] see section 26 of the *Probation and Parole Act* 1983

minimum time.[6]

Soon after this new sentencing scheme was introduced there was evidence indicating that the courts were beginning to increase their non-parole periods. Weatherburn, for example, examined sentencing trends shortly after the 1983 legislative changes had been introduced and concluded that the courts were subverting the intentions of the legislation 'by increasing minimum terms to offset the effects of remissions'.[7]

Whereas prior to 1984 non-parole periods were often about one-third of the head sentence (admittedly with considerable variation either side of this proportion), after 1984 they were seldom less than one-third, and more often than not, at least one-half of the head sentence. Typically, prior to 1984, a sentence of 10 years penal servitude might be coupled with a non-parole period of about three or four years duration. After 1984 however, a similar head-sentence would more likely be coupled with a non-parole period of about five or six years. Thus, after 1984 the specified non-parole period appeared to be increasing but the actual time served by prisoners in custody in comparable 'before and after' cases was about the same.

One can discern a struggle between the Executive and Judicial arms of government over which should have primary responsibility for determining the actual minimum term of imprisonment. In *Power, Selenski & Lyons*,[8] the High Court had held that the non-parole period was the minimum term that the sentencing court considered the prisoner must serve as a punishment for the offence before he or she could be released by the Parole Board. However after 1984, in order to neutralise the impact of remissions, the courts simply raised the minimum terms. This was in spite of the principle, also enunciated by the High Court, that judges should not impose a longer sentence simply because the prisoner may earn remissions for good conduct.[9]

By mid–1986 a further amendment to the legislation[10] resulted in giving the courts power, in certain circumstances, to deny the prisoner the benefit of remissions which were ordinarily applicable to the non-parole period.[11] If then the court was not disposed to raise the minimum term in order to negate the likely benefit of remissions, it could, subject to providing adequate reasons, achieve a similar result by applying s.21A of the *Probation and Parole Act*.

Not content with these reforms, the Government further amended the legislation so that, in the normal course of events, sentencing judges were obliged to specify non-parole periods which were seventy-five percent of head sentences.[12] This amend-

[6]The Parole Board's Annual Report of 1987 indicates that approximately 83 per cent of applications for parole were successful

[7]Weatherburn, D. *Appellate Review, Judicial Discretion and the Determination of Minimum Periods* (1985) 18 ANZJ Crim. 272, 278. See also South Australian Office of Crime Statistics, *The Impact of Parole Legislation in South Australia*, August 1989 at pp. 24-31.

[8](1974) 131 CLR 623

[9]See *Paivinen (No 2)* (1985) 158 CLR 489, 494–495; *Watt* (1989) 63 ALJR 4; (1989) 35 A Crim R 371; *Hoare & Easton* (High Court) unreported (at time of writing), 30 June 1989.

[10]s.21A of the *Probation and Parole Act* 1983

[11]*Watt* (1989) 63 ALJR 4; (1989) 35 A Crim R 371; *Zsolnai*, 22 March 1989

[12]*Probation and Parole (Serious Offences) Amendment Act* 1987

ment was introduced by s.20A of the *Probation and Parole Act* 1983, and commenced to apply on 1 January 1988. This reform placed considerable constraints upon an hitherto extremely flexible sentencing discretion.

In *Griffiths*, unreported, 23 March 1989, the New South Wales Court of Criminal Appeal, constituted by Gleeson CJ, Lee CJ at CL, and Hunt J, had occasion to consider the effect of s.20A. This was a Crown appeal against the adequacy of an aggregate sentence of twelve years penal servitude with a non-parole period of four years and six months, imposed upon a respondent who had pleaded guilty to five counts of armed robbery, one count of armed robbery with wounding and several other counts relating to the possession of firearms and larceny of motor vehicles (some 15 charges in all, two of which were committed after 1 January 1988). In the course of upholding the appeal, and substituting an aggregate sentence of 15 years coupled with a non-parole period of eleven years and three months, the Court said,

> Three-quarters of the head sentence, as a matter of sentencing practice in New South Wales prior to the amending legislation, would have been regarded as a long non-parole period. It was at the top, or close to the top, of the range within which non parole periods were ordinarily set. Parliament must have been aware of this. The amending legislation was plainly intended to have a punitive effect.

and later the Court added,

> The evident purpose of the amending legislation was to establish a statutory norm in relation to non-parole periods in respect of serious offences, and to provide that such norm could be departed from, but only in exceptional cases.

The case was subsequently taken to the high Court[13] where a successful appeal resulted in it being remitted to the Court of Criminal Appeal for re-sentencing. On this occasion the Court again choose a head sentence of 15 years but concluded that there were exceptional circumstances present which enabled it to avoid the application of s.20A. A not insignificant consideration leading to this conclusion was that only two of the 15 charges related to offences committed after 1 January 1988, the date of commencement of s.20A. In the result, a non-parole period of nine years was specified.[14]

The most radical change in New South Wales sentencing laws however, and probably the most radical since the turn of the century, was heralded by the *Sentencing Act* 1989. This Act swept aside the *Probation and Parole Act* and introduced the so called 'truth in sentencing' scheme. Instead of sentencing from the 'top down' — i.e. determining the head sentence first then the non-parole period, judges would henceforth work from the 'bottom up' — i.e. set the minimum term first, then, in most cases, add an 'additional term' equal to no more than one-third of the minimum term to obtain the sentence. This means that under normal conditions the minimum term must now constitute at least three-quarters of the whole sentence.

[13] *Griffiths*, (HCA) 14 September 1989

[14] *Griffiths*, 21 September 1989

In summary, offenders sentenced to terms of imprisonment after the commencement of the *Sentencing Act* are no longer entitled to have remissions deducted from their sentences or minimum terms. Instead they must serve in custody either a 'fixed term' of imprisonment[15] or they must serve a 'minimum term' of imprisonment as determined by the sentencing court.[16] If a minimum term of imprisonment is imposed the court is also required to set an additional term during which the person may be released on parole.[17] The additional term must not exceed one-third of the minimum term unless reasons are given[18] and the minimum and additional terms together comprise the sentence of the court.[19]

Where a minimum term is set, the prisoner is eligible for release on parole at the expiration of that term.[20] Parole is not granted automatically in the case of sentences of more than three years.[21] The releasing authority is no longer the Parole Board it has now been substituted by the Offenders Review Board. If parole is not granted the prisoner must serve the additional term in custody.[22] If parole is granted the prisoner must serve the balance of the 'additional term' on parole.

Section 9 of the *Sentencing Act* concerns the way in which cumulative sentences are to be imposed. It provides, inter alia, that sentences should commence to run from the end of the minimum term or, where there are several minimum terms, from the end of the minimum term that last expires. Where the minimum term has expired, and the prisoner is serving the additional portion of his or her sentence, any new sentence must commence on the day it is imposed or on an earlier day specified by the court.

1.2 Application of the Sentencing Act 1989

It is not the object of this book to elucidate the finer points of the *Sentencing Act*,[23] and, until the new legislation is tried and tested in the courts, there will be some uncertainties in its application. Here it is proposed to outline how the old sentencing decisions might be used in order to assist sentencers in reaching comparable decisions under the *Sentencing Act*.

Perhaps the first point of significance is that the *Sentencing Act* does not change the general principles of sentencing. Thus those factors which previously were taken into account as either aggravating or mitigating the otherwise appropriate penalty will continue to be relevant to the sentencing decision. What has changed is the

[15]This applies where the sentence does not exceed six months or the sentencer considers it is otherwise inappropriate to set an 'additional term'. See *Sentencing Act* 1989 ss.6 and 7

[16]*Sentencing Act* 1989 s.5(1)(a)

[17]ibid s.5(1)(b)

[18]ibid ss.5(2) and 5 (3)

[19]ibid (s.5(4)

[20]ibid ss.14(2)

[21]ibid ss.16 and 17

[22]ss.5(4) and 15

[23]For a brief analysis of the key provisions of the *Sentencing Act* 1989, see volumes 14 and 15 of the *Judicial Officers Bulletin*, June and July, 1989. Also see *The Sentencing Act 1989, An Introduction*, Dept. of Corrective Services, N.S.W., 1989

sentencing currency, and some method needs to be devised which will ensure that the resultant sentence, measured against past practice, is neither excessively severe, nor unduly lenient.

In approaching this problem an assumption is made that there is no intention on the part of the framers of the legislation to increase the general level of imprisonment beyond that which obtained under the old sentencing regime. This intention was made crystal clear in the Parliament of New South Wales during the second reading speech and the ensuing debate upon the sentencing bill. On 10 May, in the Legislative Assembly, the Minister for Corrective Services, Mr M. Yabsley, said,

> ... I feel I should say something about the implications of the new sentencing scheme on the level of prison overcrowding. By this bill the Government is not seeking to make sentences longer[24]

In the Legislative Council this same point was made again and again. For example, when moving that the bill be read a second time, the Minister for Police and Emergency Services (Mr E.P. Pickering) said,

> The essential point to remember is that the bill is not designed to increase the actual time served by prisoners in gaol; it is designed to restore truth in sentencing, not to make sentences longer[25].

and in the same speech he said,

> ... [L]et me emphasize again that the Government does not intend by this bill to increase the period of time that an offender will spend in gaol[26]

1.3 How to interpret 'old' decisions

Given that the new legislation is not intended to increase the length of time offenders will spend in gaol, it is vital that sentencers, when examining prior sentencing decisions for the purpose of guiding future decisions, make the appropriate adjustments to the new scale. In this regard, the date of the offence or prior sentencing decision is critical. If, for example, the non-parole period was imposed prior to the commencement of the *Probation and Parole Act* 1983, then the non-parole period can be taken as the minimum term which the prisoner must serve in custody as a punishment for his offence.[27] Here as previously explained, the non-parole period may safely be equated with 'the minimum term' under the provisions of the *Sentencing Act* because general remissions did not apply to non-parole periods prior to 1984. Using the non-parole period as a base, the conversion table (Table 1.1) sets out for pre-1984 cases the equivalent minimum term, additional term and sentence under the *Sentencing Act* 1989.

[24]Hansard, 10 May 1989, at p. 7905 and p. 7907
[25]Hansard, 23 May 1989, at p. 8190 and p. 8192
[26]ibid at p. 8194
[27]*Power, Selenski & Lyons* (1974) 131 CLR 623

Table 1.1:
Non-Parole Period Conversion Chart

Pre 1984 Non-Parole Period		Post September 1989 Minimum Term		Additional Term		Sentence	
6		6		2		8	
12	**1**	12	**1**	4		16	
18		18		6		24	**2**
24	**2**	24	**2**	8		32	
30		30		10		40	
36	**3**	36	**3**	12	**1**	48	**4**
42		42		14		56	
48	**4**	48	**4**	16		64	
54		54		18		72	**6**
60	**5**	60	**5**	20		80	
66		66		22		88	
72	**6**	72	**6**	24	**2**	96	**8**
78		78		26		104	
84	**7**	84	**7**	28		112	
90		90		30		120	**10**
96	**8**	96	**8**	32		128	
102		102		34		136	
108	**9**	108	**9**	36	**3**	144	**12**
114		114		38		152	
120	**10**	120	**10**	40		160	
126		126		42		168	**14**
132	**11**	132	**11**	44		176	
138		138		46		184	
144	**12**	144	**12**	48	**4**	192	**16**
150		150		50		200	

The figures are given in months. Their year equivalents are shown in bold. This table may also be used for 1984 to 1989 cases after deducting one-third of the specified non-parole period (for explanation see text).

For persons sentenced under the *Probation and Parole Act* 1983 however, Table 1.1 may not be used until the specified non-parole period has been reduced by an amount which takes into account the likely effect of remissions. Conversely this Table should be used for such cases only after one-third of the non-parole period has been deducted.

To proceed to sentence prisoners on the basis that post 1984 non-parole periods should be equated with minimum terms under the new legislation is to significantly extend custodial terms. This is because, as previously explained, from 1984 onwards the courts actually raised the general level of the non-parole periods in order to compensate for (or neutralise) the likely effect of remissions. Such was the conclusion of Weatherburn (see above) and is also a conclusion which can be supported by the Court of Criminal Appeal decisions analysed in this book. Certainly cases decided after 1 January 1988, such as *Griffiths*, 23 March 1989, where the prisoner convicted of serious offences was generally expected to serve at least half the head sentence in custody (the non-parole period being specified as three-quarters of the head sentence), suggests that the Government was concerned to ensure that the gap between the head sentence and the non-parole period should not be too great.

This provides a second way of comparing sentencing decisions decided before and after the commencement of the 1989 Act. The comparable minimum term can be determined simply by halving the head-sentence, and from this the (maximum) additional term and the sentence under the new scheme can be calculated. An 'head sentence based' conversion chart is set out in Table 1.2. It should be noted however, that this method of deriving a comparable sentence is less reliable than one based on the non-parole period, as the latter more accurately reflects the minimum term which the court intended the prisoner to serve.[28]

To illustrate how these conversion tables should be used, consider the following hypothetical examples:

Example one

An offender who has committed a similar offence to that of a person sentenced in 1980 is before the court. The sentencing judge considers that a similar minimum term should be imposed in the present case. The specified non-parole period in the earlier case was four years. What sentence should be imposed in the case before the court?

As the non-parole period was specified before the commencement of the *Probation and Parole Act* 1983 the **Non-Parole Period Conversion Chart** (Table 1.1) can be used without modification. The minimum term is the same as the non-parole period (four years), the additional term is 16 months (one year and four months) and the sentence is 64 months (five years and four months).

[28]The Head Sentence Conversion Chart should be used with caution. It is based on the assumption that non-parole periods were 75 per cent of the head sentence (less remissions). Certainly this was the case in some decisions decided after 1 January 1988, but the vast majority of cases considered in this work did not employ this formula. The majority of non-parole periods seldom exceeded 50 per cent of the head sentence. Thus for cases decided before 1988, the post-1989 head sentence equivalent is likely to be significantly less than that shown in Table 1.2 and may be as low as the minimum term in that Table.

Table 1.2:
Head Sentence Conversion Chart

Pre September 1989 Head Sentence		Post September 1989 Minimum Term†		Additional Term		Sentence	
12	**1**	6		2		8	
18		9		3		12	**1**
24	**2**	12	**1**	4		16	
30		15		5		20	
36	**3**	18		6		24	**2**
42		21		7		28	
48	**4**	24	**2**	8		32	
54		27		9		36	**3**
60	**5**	30		10		40	
66		33		11		44	
72	**6**	36	**3**	12	**1**	48	**4**
78		39		13		52	
84	**7**	42		14		56	
90		45		15		60	**5**
96	**8**	48	**4**	16		64	
102		51		17		68	
108	**9**	54		18		72	**6**
114		57		19		76	
120	**10**	60	**5**	20		80	
132	**11**	66		22		88	
144	**12**	72	**6**	24	**2**	96	**8**
156	**13**	78		26		104	
168	**14**	84	**7**	28		112	
180	**15**	90		30		120	**10**
192	**16**	96	**8**	32		128	
204	**17**	102		34		136	
216	**18**	108	**9**	36	**3**	144	**12**
228	**19**	114		38		152	
240	**20**	120	**10**	40		160	
252	**21**	126		42		168	**14**
264	**22**	132	**11**	44		176	
276	**23**	138		46		184	
288	**24**	144	**12**	48	**4**	192	**16**
300	**25**	150		50		200	

The figures are given in months, their year equivalents are shown in bold.

† Based on the notion that non-parole periods were 75% of the head sentence (less remissions). (see footnote 28)

Example 2

The same as Example 1, except that the earlier decision was decided in 1986.

In these circumstances the non-parole period must be reduced by one-third before the Non-Parole Period Conversion Chart is used.

$$Minimum\ Term = Non\text{–}Parole\ Period - \frac{Non\text{–}Parole\ Period}{3}$$

Thus the calculation in months is as follows

$$Minimum\ Term = 48 - \frac{48}{3} = 32\ months$$

There is no equivalent to 32 months in the Table 1.1 as it is divided into six monthly incremental steps. However the next lowest figure (in this case 30 months) may be selected as a guide for choosing the additional term to ensure that it is no more than one-third of the minimum term.[29] The sentence itself would then consist of the following components:

minimum term	32 months	(2 years and 8 months)
additional term	10 months	
total sentence	42 months	(3 years and 6 months)

Example 3

In this example the use of both conversion charts will be illustrated. Assume that a prisoner was sentenced in 1988 to an aggregate term of 14 years penal servitude, coupled with a non-parole period of nine years in consequence of his pleading guilty to several counts of armed robbery. Suppose also that the sentencing court has a similar case before it and must sentence the prisoner under the terms of the *Sentencing Act* 1989. It wants to know what a corresponding sentence might be under the provisions of the *Sentencing Act*.

The Head Sentence Conversion Chart (Table 1.2) indicates that an equivalent sentence to a term of 14 years penal servitude would be made up of the following components:

minimum term	84 months	(7 years)
additional term	28 months	(2 years and 4 months)
total sentence	112 months	(9 years and 4 months)

As for the non-parole period of 9 years, we note that one-third of it must be deducted before the Non-Parole Period Conversion Chart (Table 1.1) may be used. The comparable sentence under the *Sentencing Act* would then consist of the following elements:

[29]Note that an additional term exceeding one third of the minimum term may be selected only where special circumstances exist and reasons for doing so have been given, see *Sentencing Act* 1989, ss.5(2) and 5(3).

minimum term	6 years
additional term	2 years
total sentence	8 years

It is apparent that the two conversion charts will rarely provide the same results. Where there is a significant discrepancy in the conversion outcomes the most persuasive guide must surely be the one which provides the lower sentence. That this should be so is consistent with the aim of containing the custodial impact of pronounced sentences to a level which accords with or is below that indicated by previous sentencing practice. Any conversion is further complicated by the knowledge that minimum terms which are imposed after 25 September 1989 will no longer carry a presumption in favour of parole.[30] Hence the added need for parsimonious selection of minimum terms.

Judges will need to modify their thinking in order to impose numerically lower sentences of imprisonment. The temptation to slip back into the old levels or, for that matter, to imperceptibly increase penalties because they may appear inadequate having regard to previously pronounced sentences, will have to be resisted. It will not be an easy task for the judiciary to apply, nor indeed for the general public to accept, the new sentencing currency. The task will involve both courage and vigilance on the part of sentencers in order to ensure that custodial terms, that is, the real time that prisoners must serve in gaols, are not increased.

1.4 The Meaning of Uniformity

Uniformity is often cited as a major goal of sentencing and the term 'disparity' is generally used in a pejorative manner to identify injustices in the system. Yet 'uniformity' and 'disparity' are concepts which have fluid meanings. To some these concepts may imply that similar named crimes should be visited with similar punishments. On one view this means that a person who commits an offence of armed robbery should be punished in precisely the same way, both in terms of quantum (length of sentence) and kind (type of sentence) as any other person who commits an armed robbery. On another view uniformity may mean that only those crimes which are committed in similar circumstances by offenders with similar backgrounds should attract similar punishments. It is the latter meaning of uniformity that is to be preferred. It is better to speak in terms of 'justified' and 'unjustified' disparity where the fairness of the sanction imposed is measured by reference to all the circumstances of the offence, both in an objective sense (pertaining to the circumstances of the offence) and in a subjective sense (pertaining to the circumstances of the offender). Where similar offences or offenders are treated differently it is important that the basis for that difference be identified, that the rationale for treating one offender more harshly than the other be articulated, and finally that the outcome be consonant with good sense and principle. If this is done, if the relevant criteria can be identified and then applied consistently to later cases they form the principles which in turn guide the exercise of discretion and lead to consistency or

[30] *Sentencing Act* 1989 s.17(1)

uniformity of approach in sentencing. Uniformity of approach then, rather than uniformity of sentence, must be the guiding light in any genuine attempt to achieve a fair and just sentencing system. Such a view is supported by case law, the most commonly cited reference being, *Bibi* [31] where Lord Lane, Lord Chief Justice of England said

> (W)e are not aiming at uniformity of sentence ... (W)e are aiming at uniformity of approach

Disparities in sentencing outcomes are justified if and only if they are grounded on principle. Otherwise such disparities are properly categorised as unjustifiable and call for correction.

1.5 Justice in Sentencing

The sentencing task is largely a backward looking exercise. It is not only concerned with determining the punishment that is appropriate for the offence that has been committed, it is also concerned with limiting the State's authority to punish and it does this by reference to the proven circumstances of the offence (or offences). It seeks to achieve justice by matching penalties to the perceived criminality of the offence. Some guidance is given by statute, but in general the acceptable scale or level of penalty is derived by reference to the penalties imposed in similar cases and to the principles of sentencing. Of course courts often refer to utilitarian, forward looking considerations, such as the need to deter the prisoner and other like minded offenders from committing similar crimes, or the desirability of rehabilitating the offender, or the need to incapacitate the prisoner by isolating him or her in prison in order to protect the community, but all these general principles are limited to ensuring that the penalty imposed does *not* exceed the deserved punishment.

Again, what is to be regarded by the Courts as a fair or 'deserved' punishment is largely determined by practice. 'Desert' is a hypothetical construct that has historical roots and it is precisely for this reason that an adequate analysis of past sentencing decisions is required. By 'justice' is meant that like cases are decided alike and unlike cases are decided differently. No attempt is made to question the appropriateness of the general range of penalties imposed for robbery offences — that is whether the courts 'in justice' ought to impose more severe or less severe penalties. That is a political or philosophical question that goes beyond the scope of this work.

1.6 Guidance for Sentencers

The present work is aimed primarily at identifying the principles and the range of relevant circumstances which the Courts take into account when imposing sentences

[31] (1980) 2 *Criminal Appeal Reports (Sentencing)* 177 at p. 179

for armed robbery, and then indicating what sentences are in fact imposed in such cases.

It will be seen that robbery[32] can be categorised a number of ways in order to assist in the delineation of the sentencing patterns applicable to these cases. In addition, the presentation of court statistics is also designed to provide guidance to those who seek to understand the range of penalties that are actually imposed for these offences. However, as at the time of writing there are no data available on sentencing practice under the *Sentencing Act* 1989, reference may be had to older decisions and statistical material and adjustments made in accordance with the changes described in the earlier part of this chapter.

1.7 Commencement Date of Sentence

Caution should be exercised when comparing the specified sentence lengths set out in this work. For example, a sentence may have been ordered to run from the expiration of a previous sentence — a date in the future. In such circumstances the sentence so imposed may have been less severe than otherwise in order to avoid the imposition of a crushing sentence. Again, it is sometimes overlooked that the prisoner may have served a lengthy term of pre-sentence custody and it is not always clear on the face of the record whether, in the course of determining the length of sentence, the trial judge has taken this factor into account. In *McHugh*[33], a case involving a solicitor's misappropriation of valuable securities and moneys from his trust account, the Chief Justice, Sir Laurence Street, observed that in setting the duration of a sentence and non-parole (or non-probation period) it is preferable that sentencing courts should back-date their sentences so that they commence to run from the time that the prisoner is taken into custody. This practice was to be preferred to the practice of assessing the proper sentence and non-parole period or non-probation period and then subtracting or discounting the period of pre-sentence custody and thus setting a notionally shorter sentence and non-parole or non-probation period. In the words of the Chief Justice:

> [This] desirable practice will promote the accuracy of the record, preventing there being a hidden factor affecting the length of the custody involved in consequence of the sentencing order. In addition, this practice will remove inequalities and unfairness as between prisoners arising from delays prior to the sentencing, in particular in relation to remission or reduction entitlements; recognition of this does not infringe the principle in *O'Brien* [1984] 2 NSWLR 449 that remissions and reductions are to be disregarded when determining the length of sentences, non parole and non probation periods. A judge departing from this practice could be expected to indicate his reasons for so doing.

[32] Throughout this book the term 'robbery' should generally be taken to include armed robbery and like offences

[33] [1985] 1 NSWLR 588

This general principle has been enunciated only recently and accordingly it is not unlikely that many of the cases cited in in this work were derived by the application of a 'discounting' rather than a 'back dating' method. It is important to recognise this distinction because first, it may help to explain why two similar cases may appear to attract dissimilar sentences and secondly, it warns users of this material to exercise extreme care in accepting on face value many of the assumptions that underlie the bold statement that ultimately is taken to constitute the sentencing decision.

Under the sentencing scheme introduced by the *Sentencing Act* 1989 care will be needed in determining how the ultimate sentence is to be derived. Section 9 of the Act enunciates how cumulative sentences should be imposed. If, for example, the offender is already serving a sentence made up of a minimum term and an additional term, then a further sentence (if it is to be accumulated) must commence at the end of the existing minimum term.[34] If there are several existing minimum terms, then the further sentence must commence from the minimum term which last expires.[35] If the existing minimum term (or terms) have expired, but the prisoner has not been released from gaol any cumulative sentence must commence on the day it is imposed or on an earlier day specified by the court.[36] The new legislation does not recognise the concept of a total sentence which is coupled with an aggregate minimum term and the order in which sentences are imposed can affect the length of time that an offender may serve on parole.[37]

1.8 Principle of Back-dating Sentences

In *Armstrong*, 9 November 1984, the appellant had been in custody after being arrested on 4 May 1984 for two armed robbery charges involving building societies. He was sentenced to eight years and four years consecutively for these offences, and was also sentenced upon two counts of larceny for which he received three years each, to be served concurrently with the armed robbery offences. This made an aggregate of 12 years. A non-parole period of five years was also specified. The trial judge had directed that these sentences should commence on 30 July 1984, the date of sentencing. However, the Court of Criminal Appeal held that while the aggregate sentence and non-parole period lay within his Honour's discretion, the Judge ought to have given the appellant the benefit of the nearly three months of pre-sentence custody, and the sentences were adjusted accordingly.

Street, C.J., who delivered the judgment of the Court, said:

> As a generality it is a desirable sentencing practice when a convicted person has been in custody for a period running up to the date when sentence is passed,[38] such custody being solely and exclusively referable

[34] s.9(1) of the Act

[35] s.9(2)

[36] s.9(3)

[37] For examples of this, see (1989) Vol. 1 No. 15 *Judicial Officers Bulletin* at pp. 2–4

[38] Conversely where the appellant's pre-sentence custody was not referable to the offences before

> to the matters for which sentence is being passed, to date back the commencement of the sentence and non-parole period to the commencement of the pre-sentence custody. A sentencing practice to that effect serves, amongst other things, three particular purposes. In the first place the convicted person will not be under any misapprehension that the Judge may have overlooked the earlier custody. In the second place, the practical effect of the sentence in terms of nominal length will appear correctly from the record in that there will be no hidden prior custody involved in the penal consequences of the crime for which sentence is passed. And in the third place, the operation of the remission and reduction system, although not proper to be taken into account in determining the nominal length of sentences and non-parole periods, does not operate upon periods of pre-sentence custody if they are not included within the nominal sentence or non-parole period; plainly enough it is the legislative policy that the remission and reduction system should apply to penal custody in consequence of conviction of an offence and this will be effectuated by the adoption as a generality of a sentencing practice of dating back to the commencement of the pre-sentence custody.

The last point in the preceding quotation has little relevance after the abolition of remissions. However it is an important consideration when reviewing cases decided before the commencement of the *Sentencing Act* 1989.

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the court, it had been held that the non-parole period should commence on the day that it was fixed. *Larkin v. Parole Board* [1987] 10 NSWLR 57; *Perret*, 17 June 1988; *Hoole*, 17 March 1989

Chapter 2

The Legislation and The Statistics

2.1 The Statutory Penalties

There are five sections under the New South Wales Crimes Act dealing specifically with robbery offences. These are summarised in the following table.

Statutory Limits for Robbery Offences[1]
Crimes Act 1900 (NSW)

Section	Offence	Max. Penalty
94	Robbery or assault with intent to rob, or steal from the person	14 years P.S.
95	Same as s. 94 but with striking	20 years P.S.
96	Same as s. 95 but with wounding	P.S. for life
97	Robbery, or assault with intent to rob etc., while armed, or in company	20 years P.S.
98	Robbery, or assault with intent to rob while armed, or in company but with wounding or inflicting grievous bodily harm	P.S. for life

Section 94 of the Act concerns the less serious forms of robbery (robbery or stealing from the person) and carries a maximum penalty of 14 years penal servitude.

[1]Potas, I. 1980, *Sentencing Violent Offenders in New South Wales*, Law Book Company, Sydney at p. 3004.

Where robbery or the intention to rob is accompanied by the use of corporal violence (robbery with striking) the maximum penalty increases to 20 years penal servitude (s. 95). Further, if in the course of the robbery or intended robbery in which corporal violence is used, any person is wounded, the maximum penalty increases to penal servitude for life. Under s.97 of the Act a person who is armed with an offensive weapon or instrument, or equally, a person who is in company with another person, robs or assaults with intent to rob any person, is liable to penal servitude for 20 years. If in the circumstances encompassed under s.97 the accused robs, assaults, wounds or inflicts grievous bodily harm upon the victim of the attack he or she may be sentenced to life imprisonment.

A close examination of the full text of these provisions which is set out below, shows that the heaviest penalties are reserved for those acts which occasion, or are likely to occasion, the most harm.[2]

Act No. 40, 1900
Crimes Act 1900 (NSW)
Robbery

94. Whosoever robs or assaults with intent to rob any person, or steals any chattel, money, or valuable security from the person of another, shall, except where a greater punishment is provided by this Act, be liable to penal servitude for fourteen years.

95. Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money or valuable security, from the person of another, and immediately before, or at the time of, or immediately after such robbery, assault, or larceny from the person, strikes, or uses any other corporal violence to any person, shall be liable to penal servitude for twenty years.

96. Whosoever commits any offence under section 95, and thereby wounds any person, shall be liable to penal servitude for life.

97. Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs or assaults with intent to rob, any person, or stops any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, or search the same, shall be liable to penal servitude for twenty years.

98. Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person so armed, robs or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such a robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to penal servitude for life.

It should be noted however, that the offence that is charged will limit not only the maximum penalty but also the kind of aggravating factors which a court may

[2] ibid

consider as relevant to sentencing. In *Parmenter*, 7 September 1988, for example, the Court said that it is not appropriate to sentence an offender for an offence under s.94 by taking into account circumstances which might support a more serious charge under s.95, s.97 or s.96.

2.2 Crime Statistics

Although the present work focuses principally on the sentences imposed on offenders who have appealed to the New South Wales Court of Criminal Appeal, an adequate understanding of the range of sentences imposed in robbery and armed robbery offences in New South Wales may best be pursued by making some general observations relating to the incidence of such offences generally. Armed robberies have increased at a steady pace over the last decade, both in Australia and elsewhere. Figure 2.1 and Table 2.1 provide some interesting comparisons, showing that while robberies in Australia have doubled in recent times, the overall incidence of these offences in Australia, expressed as a rate per 100,000 of the general population, assumes nowhere near the proportions of Canada or the United States. Indeed the United States boasts about five times the rates prevailing in Australia.

2.2.1 U.S. Figures

The United States' experience reveals robbery to be the 'quintessential urban crime'.[3] In 1980 for example, the six largest cities, containing 8 per cent of the total population of the United States, shared 33 per cent of all robberies in that country. New York City alone claimed 18 per cent of the total number of reported robberies.[4] The fastest growth in commercial robberies was found to be bank hold-ups. The United States data showed an increase from 278 bank robberies in 1957 to 6,515 in 1980.[5] The average take for bank hold-ups was about $7,000, which was far higher than for other types of robberies.[6] Forty per cent of robberies involved the use of guns and were generally directed against the more lucrative targets. Furthermore it was found that if discharged, guns were five times more likely to result in the victim's death compared with other forms of robbery. Note however that injury rates are lower for gun robberies generally because victims are less likely to offer resistance when firearms are pointed at them.

United States research also shows that there is a close relationship between the proportion of gun robberies and extent of gun ownership in cities.[7] Similarly, there is a relationship between victims killed and gun availability or ownership.

[3]National Institute of Justice, *Research in Brief*, June 1983, p. 1.

[4]ibid, at p. 2.

[5]ibid

[6]ibid

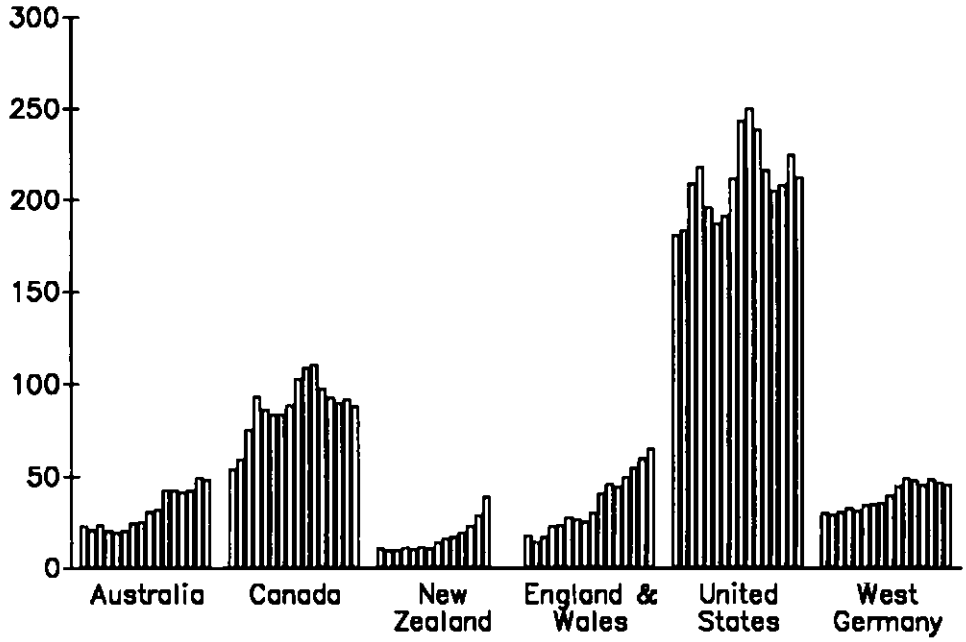
[7]Cook, 'The Effect of Gun Availability on Robbery and Robbery Murder: A cross-Section Study of Fifty Cities' in R.H. Haveman and B.B. Zellner *Policy Studies Review Annual* Vol. 3. Beverly Hills, Sage Publications 1979.

Table 2.1:
Number of Robberies Reported per 100,000 Population for Selected Countries 1972–87

Year	Australia	Canada	New Zealand	United Kingdom	United States	West Germany
1972	23.3	54.2	11.4	18.3	180.7	30.5
1973	21.4	59.6	10.3	15.1	183.1	29.5
1974	24.1	75.5	10.6	17.8	209.1	30.6
1975	20.8	93.4	11.5	23.2	218.2	32.9
1976	20.1	86.8	10.9	28.0	195.8	31.6
1977	21.1	83.6	11.9	27.1	187.1	34.6
1978	24.9	83.7	11.2	25.9	191.3	35.3
1979	25.4	88.8	14.7	25.4	212.1	35.8
1980	31.1	102.8	16.7	30.5	243.5	39.9
1981	32.5	108.6	17.6	37.1	250.6	44.9
1982	43.2	110.6	19.2	41.7	238.9	49.4
1983	43.1	98.0	23.0	43.2	216.5	48.1
1984	42.1	93.0	28.9	50.0	205.4	45.8
1985	42.9	90.0	39.2	–	208.5	48.7
1986	49.7	92.0	–	54.0	225.1	46.8
1987	48.3	88.0	–	58.0	212.7	46.0

Source: S.K. Mukherjee et al., *The Size of the Crime Problem in Australia*, 2nd Edition, forthcoming, A.I.C., Canberra

Figure 2.1:
Number of Robberies per 100,000 Population for Selected Countries 1972–1987
plotfile a:rob-2-1.hp



Source: S.K. Mukherjee et al., *The Size of the Crime Problem in Australia*, 2nd Edition, forthcoming, A.I.C., Canberra

In the United States, 93 per cent of those arrested for robbery were male, 58 per cent were black and 66 per cent were between the ages of 15 and 24.[8]

Robberies in company involving two or more offenders accounted for half of all robberies in 1979. The extent to which offenders robbed in groups also related to age — only 38 per cent of young offenders worked alone, while 58 per cent of adults committed their offences alone.[9]

2.2.2 New South Wales Police Statistics

New South Wales data on homicide and hold-ups are equally interesting. On 9 March 1985 in the Sydney Morning Herald, Greg Roberts published some statistics on homicide and armed hold-ups showing that in the 16 years between 1968 and 1981, 2,757 people died in New South Wales as a result of gunshot wounds. Between 1976 and 1982, 1,036 people took their own lives with guns. In the same period, 299

[8] *Research in Brief*, op. cit. p. 3.
[9] ibid

were murdered, 114 were accidentally killed and the cause of death[10] of a further 38 others could not be determined. Guns, however, were implicated in about one out of every three murders.

Roberts went on to observe that while armed robberies had increased at a rapid rate in recent years, the biggest single increase, from 1982 to 1983, coincided with the single biggest drop in shooters' licences, caused by an increase in licence fees that year. He added that the police estimated that four out of five armed robberies involved firearms and that pistols were used in only a 'negligible' number of crimes.

The Australian Institute of Criminology has compiled data showing the numbers and rates of robbery offences reported or becoming known to the police in each State of Australia, the Northern Territory and the Australian Capital Territory.[11] These data reveal that New South Wales has by far the highest numbers and rates of these offences. For example, in 1973–74 the number and rate for New South Wales were 1,492 and 30.82 respectively. For the next three years there was a slight decline and the following two years saw the numbers fluctuating at about the same level. However by 1979–80 a dramatic increase was evident. In that year the figures had jumped to 1,964 (a rate of 37.98 per 100,000 of the general population).

The figures and rates continued to climb over the next few years until they reached an all time high of 3,798 or 70.85 per 100,000 in 1982–83. In the following four years (with the exception of 1985–86 when the rate dropped back to 61.3) the rates stabilised at around 70 per 100,000, only to increase again in 1987–88 to a new high of 75.03 (total number reported to Police: 4,276).

Table 2.2 sets out the rates of robberies reported to Police from 1977–78 to 1987–88 for the whole of Australia. From the data presented, it is clear that New South Wales maintains the highest incidence of reported robberies. Based on the 1987–88 data New South Wales has a rate 36 per cent higher than South Australia and 43 per cent higher that Victoria. The margin is even greater when other States are compared. Thus, New South Wales has a rate which is 3 times that of the Northern Territory, Queensland and Western Australia, 4 times that of the Australian Capital Territory and 7 times that of Tasmania.

A troubling feature of robberies in New South Wales is that the growth of this crime is outstripping by far the growth in the number of offences cleared. This is seen in Figure 2.2.

A robbery study undertaken by the New South Wales Bureau of Crime Statistics and Research.[12] examined a sample of one in eight cases of robbery reported to police during 1983 and found that the number of personal robberies was about the same as robberies of commercial premises. Of the latter category, banks attracted the highest number of offences, with petrol stations, shops and building societies also attracting a significantly high proportion of cases. Cash seemed to be by far

[10]suicide, accident or murder

[11]Mukherjee, S.K. et al., *The Size of the Crime Problem*, 2nd Edition, forthcoming, Australian Institute of Criminology, Canberra.

[12]Hogg, R., Kramer, H. and Drake, (1986) *Robbery Study: First Interim Report, Police Reports of Robberies in NSW*, NSW Bureau of Crime Statistics and Research, Attorney General Dept., Sydney., p. 11–13.

Table 2.2:
Robberies Reported to Police
Rate per 100,000 Population
1977–78 to 1987–88

Year	N.S.W.	Vic.	Qld	W.A.	S.A.	Tas.	N.T.	A.C.T.	Aus.
1977–78	**31.57**	30.04	14.18	12.65	16.48	6.29	21.52	7.91	24.35
1978–79	**28.61**	32.18	12.42	9.90	25.35	12.21	12.08	12.14	24.33
1979–80	**38.16**	32.98	13.26	11.15	38.03	9.93	15.66	10.59	29.17
1980–81	**45.08**	31.54	13.69	14.69	29.42	10.53	26.10	8.35	30.83
1981–82	**54.22**	30.37	16.12	9.57	29.20	16.75	30.13	7.76	33.77
1982–83	**70.85**	39.53	17.88	20.74	26.09	12.02	20.91	24.09	42.96
1983–84	**67.79**	39.96	23.14	21.33	31.08	11.56	11.95	23.25	43.07
1984–85	**68.72**	39.11	21.70	19.59	28.73	9.60	33.14	26.18	42.88
1985–86	**61.30**	40.44	20.26	23.83	40.33	7.90	45.11	21.88	41.71
1986–87	**70.45**	50.23	24.73	31.46	52.44	8.74	37.56	20.08	49.75
1987–88	**75.03**	42.51	25.63	24.55	48.22	10.70	27.61	16.83	48.30

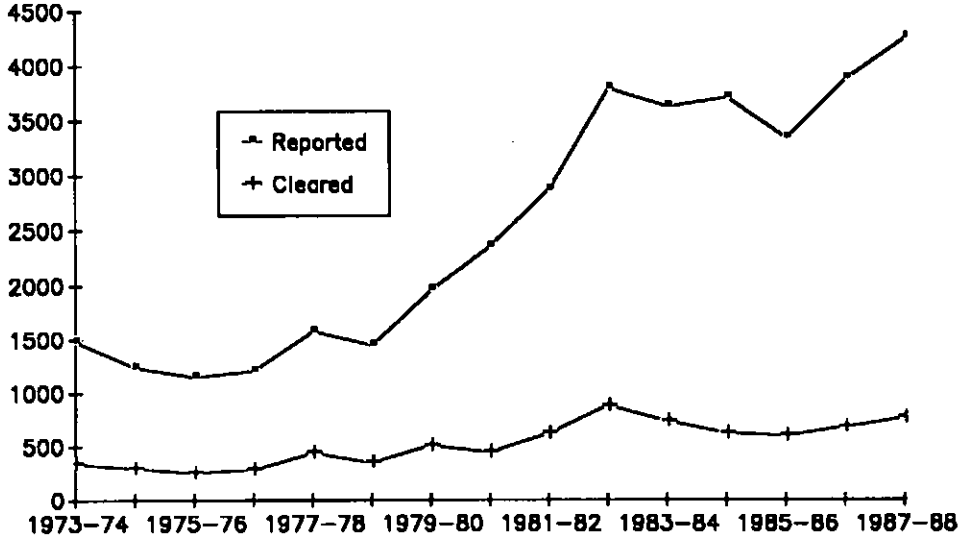
Source: Mukherjee, S.K. et al., *The Size of the Crime Problem in Australia*, 2nd Edition, forthcoming, A.I.C., Canberra

the most sought after commodity, and a break-down of the value of property stolen, also revealed that banks and building societies lost the most. The median value of property stolen from banks ($3,924) was followed by building societies ($2,282) and then hotels and bottle shops ($1,005) as the next most lucrative targets, according to the Bureau's study. There was a considerable gap then to amounts take from petrol stations ($315), shops ($190) and personal robberies ($83).[13]

Curiously, the study shows that while the majority of commercial robberies in the sample were committed by lone offenders (62 per cent), the majority of personal robberies involved more than one offender (56 per cent). Banks and building societies were robbed mainly by lone offenders (72 per cent and 81 per cent respectively), and so suggests that of the Bureau's study predominantly these offences were not committed by professional gangs.[14] In drawing these and other conclusions the authors note that these data are based on number of offenders known to police and so present the minimum number of participants believed to be involved in these offences. In other words, many offences categorised as perpetrated by lone offenders may in fact have involved more than one participant.

[13]ibid at pp. 15–19.
[14]ibid at p. 22.

Figure 2.2:
Robberies Reported to Police and Cleared
New South Wales
plotfile a:rob-2-2.hp



Source: Mukherjee, S.K. et al., *The Size of the Crime Problem in Australia*, 2nd Edition, forthcoming, A.I.C., Canberra

2.2.3 Weapon Use

The study also examined use of weapons and commented on the difficulty of measuring this dimension. Distinctions could not always be drawn between actual and assumed weapons, between replicas or toys and real firearms, between loaded and unloaded weapons, between what constitutes a weapon and what does not. They concluded, in round figures, that about half of all commercial robberies involved actual firearms (with a further 15 per cent assumed to involve guns) while about 80 per cent of personal robberies involved no weapon at all. Where weapons were used, guns were by far the most popular, followed by knives. Further, while there was a high incidence of firearm use in bank and building society hold-ups, these also involved a high incidence of use of simulated or assumed weapons (32 per cent in the case of banks and 54 per cent for building societies).[15]

Another interesting finding was that in 71 per cent of commercial robberies no direct physical contact (i.e. batteries) took place. Physical assaults were low for bank robberies (8 per cent), building societies (4 per cent), petrol stations (12 per cent) and pharmacies (12.5 per cent).[16]

[15]ibid at pp. 27–28.
[16]ibid at p. 32.

The study does not attempt to measure psychological injuries sustained as a result of robberies. However in 60 per cent of offences there were negligible or no physical injuries. In a further 32 per cent there were injuries of a minor nature, in 6 per cent of offences physical injuries were sufficiently serious to warrant medical attention, and in one per cent of offences injuries sustained required hospitalisation. Amongst the robbery sample were three cases of persons who were sexually assaulted, one person had been charged with murder, two people were shot and five others received fractures.[17] Guns were discharged six times and in only half of these events physical injury to some person was occasioned. The authors conclude that in commercial robberies the risk of physical harm to victims is low.[18]

Some further statistics relating to firearm use were recently published by the Australian Institute of Criminology.[19] Table 2.3 provides some national statistics on the kinds of weapons used in bank robberies, and Table 2.4 presents police statistics from New South Wales and Victoria indicating the proportion of firearm, other weapon and no weapon use, in robbery offences.

Table 2.3:
Weapons used in bank hold-ups
Australia
April 1985 to September 1987

Weapon	No.	%
Shotgun	240	26.3
Sawn-off Shotgun	166	18.2
Rifle	114	12.5
Sawn-off Rifle	79	8.7
Knife	16	1.7
Pistol	287	31.4
Bomb	11	1.2
Total	913	100.0

Source: Australian Bankers' Association.

[17]ibid at p. 33.
[18]ibid at p. 35.
[19]Chappell, D et al, *Firearms and Violence in Australia*, 1988, Trends and Issues No. 10, Australian Institute of Criminology, Canberra.

Table 2.4:
Robberies reported to police in New South Wales and Victoria by weapon used

	New South Wales				Victoria			
	1987–88		1988–89		1987–88		1988–89	
Weapon	No.	%	No.	%	No.	%	No.	%
Firearms	1006	23.4	939	21.2	452	25.0	397	21.8
Other Weapon	1102	25.6	1124	25.4	389	21.5	449	24.7
No Weapon	2190	51.0	2368	53.4	970	53.5	972	53.5
Totals	4298	100.0	4431	100.0	1811	100.0	1818	100.0

Source: Annual Reports of Police Departments of New South Wales and Victoria, 1988–89.

2.2.4 Appellate Review and Sentencing Statistics

As this book is concerned with an analysis of sentencing decisions reviewed by the New South Wales Court of Criminal Appeal, both robbery and armed robbery cases considered herein present only a small yet significant proportion of all the sentencing judgments dealt with by the criminal courts of New South Wales .

Generally speaking, only those offenders who believe that they have been harshly dealt with, or feel that they have some prospects for having their sentences reduced, will appeal. Offenders who have received lenient sentences are less likely to complain. This means that sentences challenged tend to be on the upper end of the acceptable sentencing scale. Thus it could be argued that an evaluation of the Court of Criminal Appeal decisions alone may give a distorted picture of the tariff unless the majority of such decisions is seen as describing the most serious cases and therefore tending to refer to cases falling on the high side of the sentencing range.

Also to be taken into account is the rarely exercised power of Crown appeals, appeals which challenge directly the leniency of sentences. These cases may provide some balance by identifying unacceptably low sentences. In this way a general appreciation of the range of acceptable sentences may be obtained from studying appeal decisions.

The jurisdiction to review lenient sentences is given in s.5D of the *Criminal Appeal Act* 1912 (NSW) and the distinction between this power and that of appellate

review of excessively severe sentences [20] has been elucidated by Jacobs J. the High Court in *Griffiths*.[21] At page 326 of *Griffiths* his Honour said:

> Under s.5D the Court has a wide discretion whether or not to interfere, even though it may reach the conclusion that another sentence should have been passed. In this respect s.5D gives a wider discretion than s.6(3) where the Court is bound to interfere once it reaches the conclusion that the sentence was not both warranted in law and one that should have been passed. The incorrectness of the sentence must be manifest: see *House* v. *R* (1936) 55 CLR 499 at 505. But if it does so conclude it must interfere in the case of a defendant's appeal; it may in its discretion interfere in the case of an appeal under s.5D.

Before the Court of Criminal Appeal will interfere with a sentence of a lower court it must be satisfied that the sentencing judge has erred in the exercise of his or her sentencing discretion. It will not interfere on the basis merely that the Court of Criminal Appeal would have imposed a different sentence. Further the Court of Criminal Appeal will accept a fair degree of latitude before it will correct any sentence imposed by the sentencing judge.

In the result appeal court decisions may not be sufficiently fine-tuned to provide the sentencer, the Crown or the prisoner's legal representative, an adequate appreciation of whether a particular sentence is appropriate. It is here that court statistics are of considerable assistance, because they do provide a collective picture of the range and frequency of sentences imposed previously. They provide an overview of the high, medium and low ranges within which the relevant category of offences fall. Of course statistics themselves make little sense unless they are considered in conjunction with the circumstances of the offence, the background of the offender and the reasons given in the sentencing decisions themselves.

The sentencing decisions usually spell out the facts that go to determine how seriously the cases are to be regarded. When matched against official statistics they serve to show whether the sentences imposed by the sentencing judge are fair and reasonable. Accordingly both sources of information are necessary in order to provide an adequate appreciation and guide to sentencing practice. A third source of information is, of course, the penalty prescribed by statute, but this is a less reliable guide than a consideration of sentences imposed in similar cases and the principles which support them.

In *Zakaria*,[22] a decision of the Victorian Court of Criminal Appeal, Crocket J. referred to the recent increase in that State of the maximum penalty for armed robbery. The penalty had been raised to 25 years imprisonment. His Honour said that the statistical evidence available suggested that the courts had refrained from responding in any perceptible degree to the statutory invitation to increase penalties because of 'an ingrained curial repugnance to the imposition of a crushing sentence'. There had to be very special circumstances to justify imposing long sentences, such

[20] under s.5(1) and s.6(3) of the same Act
[21] (1977) 137 CLR 293
[22] (1984) 12 A Crim R 386

as where the crime 'arouses deep public revulsion or disgust', or where the offender is shown to be 'a persistent and unrepentant criminal' or where the offender was being dealt with at one time 'for multiple crimes of considerable gravity'. Fox and Freiberg claim that in recent times, 14 years appeared to be the longest sentence imposed for a single offence of armed robbery in Victoria, although they also point out that on two occasions, the full Court had refused to affirm sentences of imprisonment of 15 years.[23]

Indeed, this assertion is supported by Victorian court statistics which show, for example, that during 1985, 12 years was the maximum sentence imposed for a single armed robbery offence.[24]

Fox and Freiberg also comment that in the case of multiple offences, long sentences sometimes in excess of 20 years are imposed. They say:

> Sentences at the top of the range (9 to 14 years) are imposed where there are multiple crimes, where the offender can be described as a professional criminal or is addicted to drugs, where a firearm has been used or discharged or where the offence was committed whilst the offender was on parole. Frequently these features appear in combination.[25]

They also say that prison sentences in the four to eight years range form the bulk of sentences imposed and, while these cases cannot be classified as professional, they share many of the features although of a less serious form, found in cases falling into the upper range sentencing brackets.[26] A similar general pattern emerges from an analysis of New South Wales sentencing decisions, although what appears to count as the top of the range in Victoria is more like the upper end of the middle range bracket of armed robbery sentences in New South Wales — particularly in the case of the multiple offender where sentences well in excess of 14 years are commonly found (see Chapter 6). These sentences translate into 'truth in sentencing' terms of half this figure. Certainly total sentences under the *Sentencing Act* 1989, of seven years or more should be regarded as very long indeed.

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[23]Fox, R. and Freiberg, A. *Sentencing State and Federal Law in Victoria*, Oxford University Press, Melbourne, 1985 at p. 536. D.A. Thomas, in *Principles of Sentencing* (2nd Ed) cites the unreported decision of *Spalding & King* (1971) as authority for the proposition that in England sentences of 15 years or more are reserved for the "ultimate in criminality" cases where large groups and large sums are involved. In *Leonie*, reference in *MacDonald, Carroll & Rattenbury*, Qld CCA 12 March 1984, 18 years imprisonment for armed robbery offences, is cited as the longest term for a Queensland armed robber. See also *Aston* Qld CCA 27 October 1989.

[24]Attorney-General's Department of Victoria, 1986

[25]ibid

[26]ibid

2.2.5 New South Wales Higher Court Statistics

While Higher Court Statistics had been published annually by both the Australian Bureau of Statistics (NSW Office) and the New South Wales Bureau of Crime Statistics and Research, no statistics were produced between the years 1984 and 1987. However statistics for 1988 were recently published by the NSW Bureau of Crime Statistics and Research. These will be considered shortly. However to obtain a more detailed picture it is necessary to examine some earlier statistics. The first set of data to be presented relate to the year 1983, and are presented in two categories 'Robbery with Major Assault' and 'Robbery with Minor Assault'. The latter category includes unspecified assaults, so that where the gravity of the assault is uncertain or not known, it has been classified in the 'Robbery with Minor Assault' category.

A 'major assault' is defined as any assault involving the use of a weapon or committed in company with another person, and any assault causing, or which might reasonably have caused, serious physical or mental injury.

Initially, two tables are presented showing sentencing data for 1983. Table 2.5 refers to the head sentence imposed by the higher criminal courts for robbery with minor assault and robbery with major assault and Table 2.6 provides a breakdown of non-parole periods in respect of these categories of offences. Next, Figures 2.3 and 2.4 show in bar graph form, the average dispositions over a five year period 1978 to 1982 inclusive, of sentences and non-parole periods imposed for robbery with minor assault (Figure 2.3) and robbery with major assault (Figure 2.4).[27]

Interpretation of these data needs to be approached with extreme care. It should be noted, for example that the head sentences which are subject to statistical tabulation relate only to the most serious offence in respect of which each individual offender has been sentenced. This means that where an offender has pleaded guilty, or has been found guilty, of committing a number of offences, the sentence that is shown in the statistics relates only to the most severe single sentence imposed. This is so irrespective of whether for example, a term of imprisonment is made to run cumulatively or concurrently with any other sentence. It is clear that a significant proportion, if not the majority, of robbers are sentenced in respect of more than one charge and so the aggregate sentence, howsoever derived, inevitably leads to some distortion in the statistics.

For example, a person convicted on two counts of armed robbery may have been sentenced to four years imprisonment upon the first count, and four years imprisonment on the second count, aggregating to eight years. This would mean that for statistical purposes the sentence would be counted as imprisonment for four years. Equally, the sentencing judge might have imposed two concurrent terms of eight years imprisonment in which case the sentence for statistical purposes would count as imprisonment for eight years. Viewed in isolation, a sentence of four years for a single offence of armed robbery might be taken as unduly lenient whereas

[27]The non-parole periods illustrated in these figures were not subject to reduction by reason of remissions and so may be of considerable interest to those who seek assistance with the determination of minimum terms under the *Sentencing Act* 1989.

Table 2.5:
Higher Court Statistics 1983
Sentence

Sentence	Robbery with Major Assault No.	%	Robbery with Minor Assault¶ No.	%
Non-Custodial				
Placed on bond †	38	11.0	27	21.0
Community Service Orders	12	3.5	11	8.5
Semi-Custodial				
Periodic Detention	6	1.7	3	2.3
Juvenile Detention	4	1.2	1	0.8
Imprisonment				
Under 1 year	1	0.3	5	4.0
1 and under 2 years	5	1.4	7	5.5
2 and under 3 years	16	4.6	20	15.6
3 and under 4 years	37	10.7	19	15.0
4 and under 5 years	42	12.1	10	8.0
5 and under 10 years	134	38.6	22	17.1
10 years or more	51	14.7	3	2.3
Life	–	–	–	–
Total	334‡	100.0	128	100.0

¶ Including unspecified assault
† with or without probation or fine
‡ Included in the total figure is 1 person who was fined only.

Source: *Annual Statistics of Higher Criminal Courts*,Australian Bureau of Statistics, New South Wales Office

Table 2.6:
Higher Court Statistics 1983
Non-Parole Period

Non-Parole Period	Robbery with Major Assault No.	%	Robbery with Minor Assault† No.	%
6 months and under 9 months	33	11.8	15	18.7
9 months and under 1 year	23	8.2	11	13.8
1 and under 2 years	85	30.4	32	40.0
2 and under 3 years	57	20.4	16	20.0
3 and under 4 years	36	12.9	4	5.0
4 and under 5 years	21	7.5	2	2.5
5 years or more	25	8.9	–	–
Total	280	100.0	80	100.0

Cases for which the non-parole period was not specified either because the offender was not imprisoned or because the court declined to set a non-parole period, are not included. These represent 19.3 per cent of all cases of robbery with major assault and 37.5 per cent of all cases of robbery with minor assault.

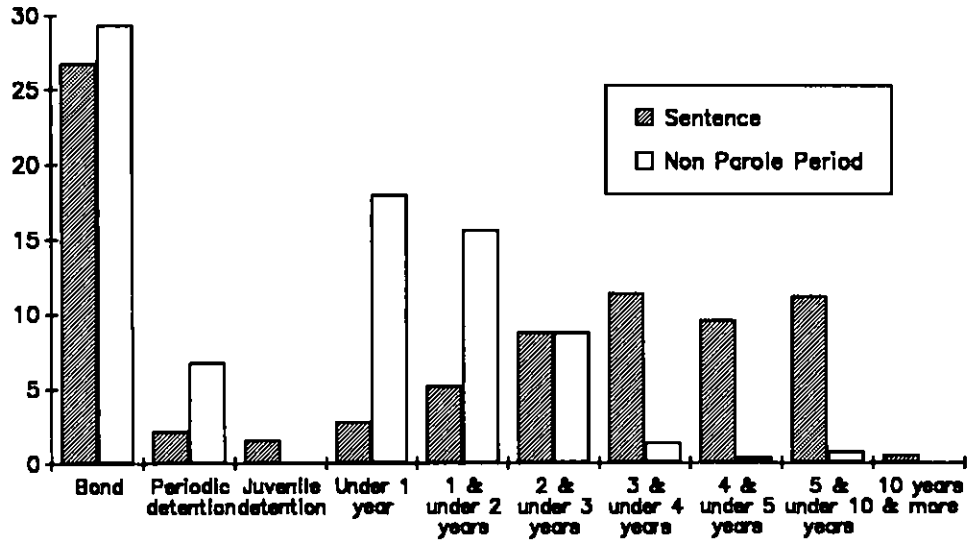
† Including unspecified assault

Source: *Annual Statistics of Higher Criminal Courts*, Australian Bureau of Statistics, Opt[l] New South Wales Office

a sentence of eight years' imprisonment for a single offence might be viewed as excessively severe. Thus these sentences may only appear appropriate when the whole of the facts and all of the offences before the court are taken into account.

There are of course an infinite number of possible combinations in the sentencing of offenders convicted on multiple counts, but in the end the aggregate sentence must be within acceptable limits. In this regard the 'totality principle' which is so carefully described elsewhere in this work is fundamental to an appreciation of the sentencing system. At best then, statistical data must be approached with an appreciation of their limitations.

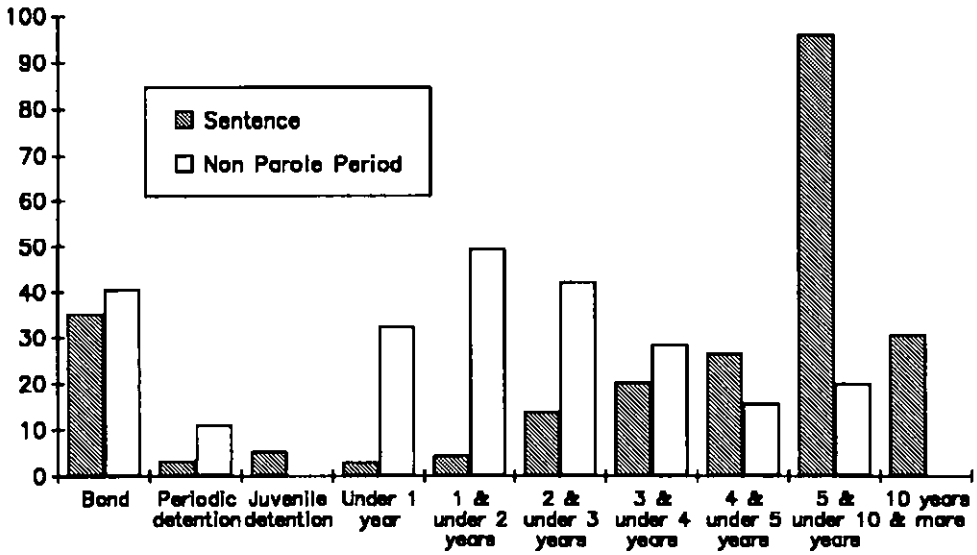
Figure 2.3:
Higher Court Statistics 1978–1982
Robbery with Minor Assault
plotfile a:rob-2-3.hp



While gross statistics therefore cannot provide a precise, nor even an adequate guide to a system of just sentencing, the more detailed the statistics the greater assistance they may afford.[28] For example, if it were found that a term of six years of imprisonment is the median sentence for armed robbery generally, this cannot greatly assist the determination of a particular armed robbery of a bank, involving gratuitous physical violence against an innocent victim. We can say this because analyses of robbery cases show that bank robberies generally carry sentences of above average severity. If however, all cases of bank robberies are examined, and then all cases of such robberies involving gratuitous violence against innocent victims are also evaluated, then the statistics may be of greater assistance.

[28]The eventual introduction of the *Sentencing Information System* being developed by the New South Wales Judicial Commission promises greatly to improve the value of sentencing statistics in the future.

Figure 2.4:
Higher Court Statistics 1978–1982
Robbery with Major Assault
plotfile a:rob-2-4.hp



Unfortunately when cases are segregated into very fine categories, or where exceptional circumstances present themselves there may be too few cases to provide adequate guidance. Once again statistics may not be of great assistance. Yet dissimilar cases or cases containing exceptional or unusual circumstances, do provide some assistance. This is because common law sentencing principles often enable decisions to be made as to whether the presence of special or unusual circumstances should operate so as to justify a reduction or an increase in the norm or 'going rate' of sentences. Once a reliable benchmark has been created it is then possible to make decisions as to where particular sentences should lie. If bank robbers are sentenced consistently to terms of imprisonment in the range of six to 12 years penal servitude, remembering always that we are considering sentences imposed prior to the commencement of the *Sentencing Act* 1989, then sentences below this level may be viewed as lenient in such cases. On the other hand, in the case of armed robberies, where victims are not threatened with substantial physical violence, or where the proceeds are likely to be small, or where there is little planning or premeditation, or where the offender's subjective factors are favourable, penalties below the going rate may be anticipated — assuming always that the going rate is not distorted by a high frequency of less serious cases. In these circumstances sentences of less than six years may be more appropriate.

What is clear is that most official statistics are insufficiently detailed to provide precise guidance, and mathematical averages of sentences for past offences may not accurately describe the past, nor provide a hard and fast rule as to what should be

done in the future.[29]

Statistics relating to non-parole periods may be a more reliable guide to what the courts do because these are specified in the form of a single term, regardless of whether the offender has been sentenced to one or more terms of imprisonment. They are imposed in respect of the aggregate sentence. Again data presented must be viewed with caution, because in late 1983 the law applying to probation and parole was altered by the introduction of the *Probation and Parole Act* 1983 (N.S.W.). Thereafter it was no longer possible for courts to specify non-parole periods for head sentences of less than three years (although the courts could set non-probation periods). Under the old legislation non-parole periods would not attract remissions. Under the 1983 Act remissions were introduced in order to significantly reduce the actual minimum term (the non-parole period) that the prisoner was likely to serve in gaol. While the courts quickly declared that it was not permissible to increase sentences in order to compensate for the operations of the remission system [30], it soon became apparent that non-parole periods, when measured as a proportion of head sentences, were creeping upwards. Furthermore, as we have seen in chapter 1 from 1 January 1988 judges were required, as a matter of course, to set minimum terms at three quarters of the head sentence. Finally, the *Sentencing Act* 1989 abolished remissions altogether. Thus the specified non-parole periods referred to in the following statistics and in the case studies to follow, need to be evaluated in the knowledge that the legislation and the practice have changed quite radically in the last decade.

With the preceding warnings and qualifications in mind, it is now convenient to examine the statistics. In round figures, the data in Table 2.5 show that during 1983 approximately 15 per cent of offenders sentenced in the category of robbery with major assault avoided imprisonment altogether. This means that about 85 per cent of offenders sentenced in this category were incarcerated.

Predictably, the proportion of offenders who in 1983 avoided imprisonment for the less serious category of robbery with minor assault was considerably higher: approximately 30 per cent. An examination of Figures 3 and 4 which provide an averaging of sentencing statistics over the five year period 1978 to 1982 inclusive, tends to confirm that the 1983 data are not atypical. Whereas seven persons out of 20 avoided imprisonment for robbery with minor assault, only three persons out of 20 avoided imprisonment in the more serious robbery category.

A pattern not greatly divergent from this also appears from an examination of the more detailed 1988 statistics (Tables 2.7 and 2.8). In particular Table 2.8 shows that about three persons in ten (30.8%) sentenced for a section 94 offence as their principal offence, received a non-custodial disposition whereas just under one person in five sentenced for one of the more serious robbery offences managed to avoid gaol.[31]

In 1983 the most common sentence for robbery with major assault was found in

[29] see also the warning given in *Oliver*, and cited in *Visconti*, discussed at p. 44.

[30] see *O'Brien* [1984] 2 NSWLR 449 at p. 453.

[31] Caution should be exercised in making inferences from the data relating to section 98 offences in Tables 2.7 and 2.8, because of the small number of cases.

Table 2.7:

Higher Court Statistics 1988
Sentence for Robbery

Persons convicted

Sentence	Crimes Act 1900 (NSW) s.94	s.95	s.96	s.97	s.98	Total
Non-Custodial						
Placed on bond†	23	6	2	21	–	52
Community Service Orders	9	–	1	12	–	22
Semi-Custodial						
Periodic Detention	6	1	–	5	–	12
Juvenile Detention	2	1	1	2	–	6
Imprisonment						
Under 1 year	1	–	–	1	–	2
1 and under 2 years	5	–	1	1	–	7
2 and under 3 years	9	–	–	9	–	18
3 and under 4 years	16	1	1	23	–	41
4 and under 5 years	8	–	1	16	1	26
5 and under 6 years	8	5	1	26	1	41
6 and under 7 years	3	1	1	15	1	21
7 and under 8 years	2	3	–	10	–	15
8 and under 9 years	2	1	1	19	–	23
9 and under 10 years	1	–	–	7	1	9
10 years or more	9	1	2	26	1	39
Total	104	20	12	193	5	334‡
Distribution (%)	31.1	6.0	3.6	57.8	1.5	100.0

This table excludes 13 cases of attempted robbery, and 37 cases of accessory before and after the fact to robbery, aiding and abetting robbery and conspiracy to commit robbery. Otherwise the term 'robbery' should be taken as including all offences contained in sections 94 to 98 inclusive.

† i.e. recognizance with and without supervision

‡ Not included in the total are one case of rising of the Court (s.97) and two cases of no conviction recorded (s. 94 and s.97)

Source: New South Wales Bureau of Crime Statistics and Research

Table 2.8:

Higher Court Statistics 1988
Sentence for Robbery

Distribution of Dispositions

Sentence	Crimes Act 1900 (NSW) s.94 %	s.95 %	s.96 %	s.97 %	s.98 %	Total %
Non-Custodial						
Placed on bond†	22.1	30.0	16.7	10.9	–	15.6
Community Service Orders	8.7	–	8.3	6.2	–	6.6
Semi-Custodial						
Periodic Detention	5.8	5.0	–	2.6	–	3.6
Juvenile Detention	1.9	5.0	8.3	1.0	–	1.8
Imprisonment						
Under 1 year	1.0	–	–	0.5	–	0.6
1 and under 2 years	4.8	–	8.3	0.5	–	2.1
2 and under 3 years	8.7	–	–	4.7	–	5.4
3 and under 4 years	15.4	5.0	8.3	11.9	–	12.3
4 and under 5 years	7.7	–	8.3	8.3	20.0	7.8
5 and under 6 years	7.7	25.0	8.3	13.5	20.0	12.3
6 and under 7 years	2.9	5.0	8.3	7.8	20.0	6.3
7 and under 8 years	1.9	15.0	–	5.2	–	4.5
8 and under 9 years	1.9	5.0	8.3	9.8	–	6.9
9 and under 10 years	1.0	–	–	3.6	20.0	2.7
10 years or more	8.7	5.0	16.7	13.5	20.0	11.7
Total	100.0	100.0	100.0	100.0	100.0	100.0

Percentages are calculated on the number of persons convicted in accordance with the data contained in table 2.7.

Source: New South Wales Bureau of Crime Statistics and Research

the imprisonment range of five to ten years (about 40 per cent of all cases) whereas for robbery with minor assault the penalties were fairly evenly spread across the two to five year imprisonment ranges. While in 1983 sentences in excess of ten years were quite unusual for robbery with minor assault offences, robbery with major assault cases did attract a significant proportion of sentences in the category of ten years or more (about 15 per cent of cases). There were no cases of life sentences recorded where robbery was counted as the most serious offence.

Table 2.9:

Higher Court Statistics 1988
Non-Parole Period

Persons convicted

Non-Parole Period	Crimes Act 1900 (NSW) s.94	s.95	s.96	s.97	s.98	Total
Under 1 year	7	–	–	10	–	17
1 and under 2 years	22	1	2	26	–	51
2 and under 3 years	9	3	2	25	1	40
3 and under 4 years	12	5	–	20	1	38
4 and under 5 years	2	1	2	22	2	29
5 and under 6 years	1	–	–	15	–	16
6 and under 7 years	6	1	–	7	1	15
7 and under 8 years	1	–	–	12	–	13
8 and under 9 years	2	–	1	5	–	8
9 and under 10 years	1	–	–	–	–	1
10 years and more	–	–	–	7	–	7
Total	63	11	7	149	5	235

Source: New South Wales Bureau of Crime Statistics and Research

In 1983, where non-parole periods were specified, 63.7 per cent of robbery with major assault cases attracted terms of between one and four years, 7.5 per cent of cases attracted minimum periods of four but less than five years, and 8.9 per cent of cases attracted terms of five years or more. In the case of robbery with minor assault where non-parole periods were specified, terms of less than three years were commonly found, with some 40 per cent of cases in 1983 being in the one and under two years imprisonment category. A common minimum term was found in the range

of six to nine months, and about one third of all non-parole period for robbery with minor assault resulted in periods of less than one year.

Table 2.10:

Higher Court Statistics 1988
Non-Parole Period

Distribution of Non-Parole Period

Non-Parole Period	Crimes Act 1900 (NSW) s.94 %	s.95 %	s.96 %	s.97 %	s.98 %	Total %
Under 1 year	11.1	–	–	6.7	–	7.2
1 and under 2 years	34.9	9.1	28.6	17.4	–	21.7
2 and under 3 years	14.3	27.3	28.6	16.8	20.0	17.0
3 and under 4 years	19.0	45.5	–	13.4	20.0	16.2
4 and under 5 years	3.2	9.1	28.6	14.8	40.0	12.3
5 and under 6 years	1.6	–	–	10.1	–	6.8
6 and under 7 years	9.5	9.1	–	4.7	20.0	6.4
7 and under 8 years	1.6	–	–	8.1	–	5.5
8 and under 9 years	3.2	–	14.3	3.4	–	3.4
9 and under 10 years	1.6	–	–	–	–	0.4
10 years and more	–	–	–	4.7	–	3.0
Total	100.0	100.0	100.0	100.0	100.0	100.0

Percentages are calculated on the number of persons convicted in accordance with the data contained in table 2.9.

Source: New South Wales Bureau of Crime Statistics and Research

When the 1988 non-parole periods in Table 2.10 are examined and compared with the 1983 data (Table 2.6), it is clear that substantial increases have taken place. In 1988 the distribution of non-parole periods imposed in respect of section 97 offences (where the majority of robbery with major assault cases lie) reveals that 48 per cent (rather than 63.7 per cent in 1983) of all cases were found in the range of one and under four years. In the four and under five year range the figure is 14.8 per cent, rather than 7.5 per cent in 1983. However the most dramatic difference relates to non-parole periods of five years or more. Whereas the 1983 data indicated

that 7.2 per cent of robbers with non-parole periods for robbery with major assault received non-parole periods of five years or more, the 1988 data place 31 per cent of offenders in this category. Much of this increase is illusionary because of the impact of remission rules applying to non-parole periods after the commencement of the *Probation and Parole Act* 1983. Even allowing for this however, there has been some increase in the real time some offenders must serve before being eligible for consideration for release on parole.

When reducing these figures into terms which are consistent with the provisions of the *Sentencing Act* 1989, it is submitted that sentences of nine years or over with minimum terms of six to seven years or more should be regarded as being in the high sentencing bracket for armed robbery offences, the more usual minimum terms being in the range of two to four years imprisonment. With regard to robbery with minor assault or section 94 cases, a significant proportion will attract short fixed term sentences with only the very exceptional, more serious examples of their kind, attracting sentences of over four years, with minimum terms of three years or more.

2.2.6 Prison Statistics

A further appreciation of sentences commonly imposed on robbers may be gleaned from an analysis of prison statistics. On 30 June 1987 the Australian Institute of Criminology conducted a national prison census and, when these statistics are examined, it becomes apparent that convicted robbers make up a substantial proportion of the prison population in New South Wales.[32] In round figures about one person in six (or 576 of 3,883 persons) who was serving a sentence of imprisonment on the evening of 30 June 1987 in New South Wales, was incarcerated for a robbery offence — where robbery is counted as the most serious offence.[33] This is seen in Figure 2.5, which also shows that robbers constitute the second single largest category of offenders in gaol.

Figure 2.6 analyses the proportion of offenders serving sentences of ten years or more, and here it is clearly seen that robbers constitute nearly two out of five long term prisoners.

Table 2.11 shows that nearly 36 per cent of the robbery population in prison on 30 June 1987 were serving aggregate sentences of ten years or more. However when consideration is taken of earlier release on account of non-parole periods and applicable remissions, an actual expected sentence may be calculated.

Figure 2.7 reveals the expected sentence of confinement of the same population of imprisoned robbers.[34] It shows that the majority of robbers (about seven out of ten) are expected to be released after serving between one and less than five years of imprisonment, while only about two robbers in 100 are expected to serve more than ten years in gaol. This information should be kept in mind when considering sentences under the *Sentencing Act* 1989 and the aim of ensuring that sentences imposed after September 1989 do not lead to an increase in the prevailing length of

[32]Debaecker, F., 1989, *Australian Prisoners 1987*, Australian Institute of Criminology, Canberra.
[33]ibid. at p. 76.
[34]ibid. at p. 82.

custodial terms.

Table 2.11:
Robbery
Number of prisoners
Aggregate and Actual expected Sentence
New South Wales

Sentence Length	Aggregate Sentence		Actual Expected Sentence	
	No.	%	No.	%
Periodic detention	8	1.4	8	1.4
Under 3 months	1	0.2	2	0.4
3 & under 6 months	2	0.4	9	1.6
6 & under 12 months	3	0.5	27	4.7
1 & under 2 years	6	1.0	119	20.6
2 & under 5 years	78	13.5	298	51.7
5 & under 10 years	272	47.2	100	17.3
10 years & more	205	35.6	12	2.1
Life	1	0.2	1	0.2
Total	576	100.0	576	100.0

Source: Debaecker, F., 1989, *Australian Prisoners 1987*, Australian Institute of Criminology, Canberra.

Figure 2.5:
Aggregate Sentence
Total Population
plotfile a:rob-2-5.hp

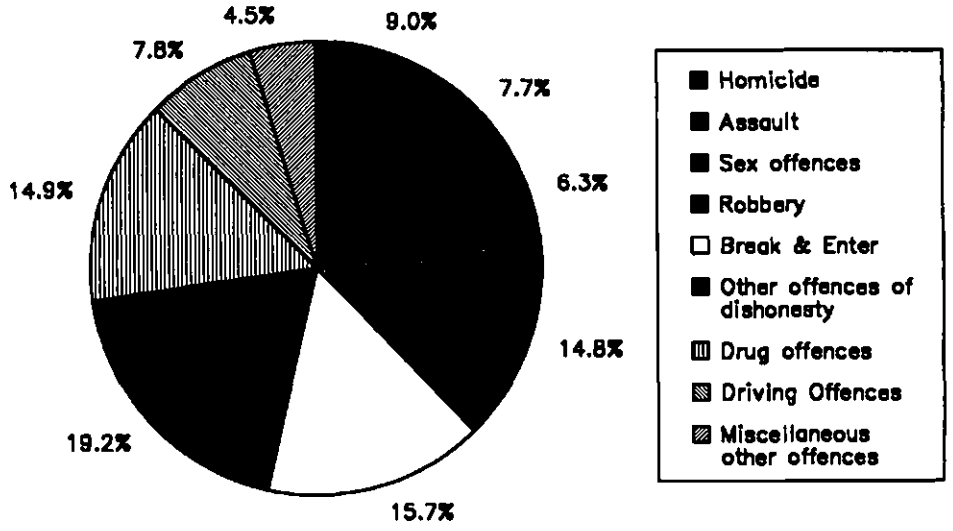


Figure 2.6:
Aggregate Sentence
10 years & over
plotfile a:rob-2-6.hp

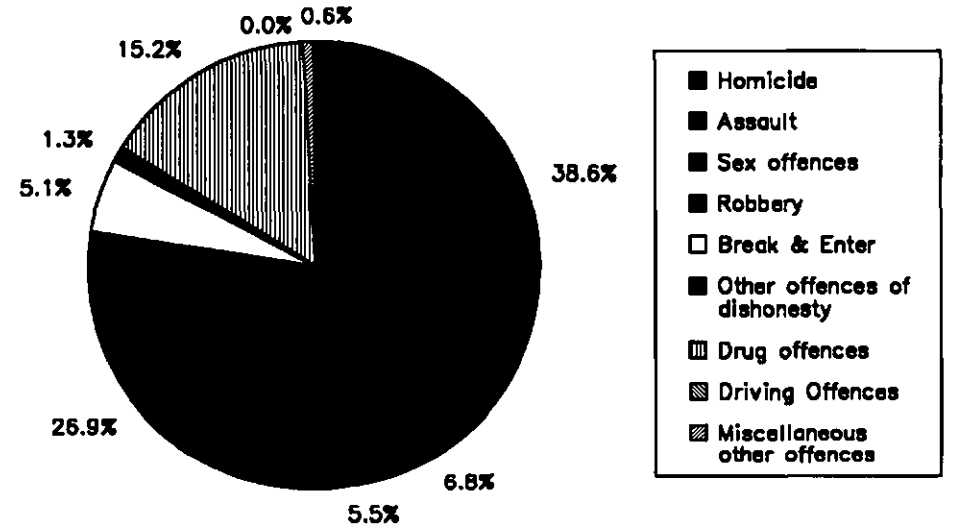
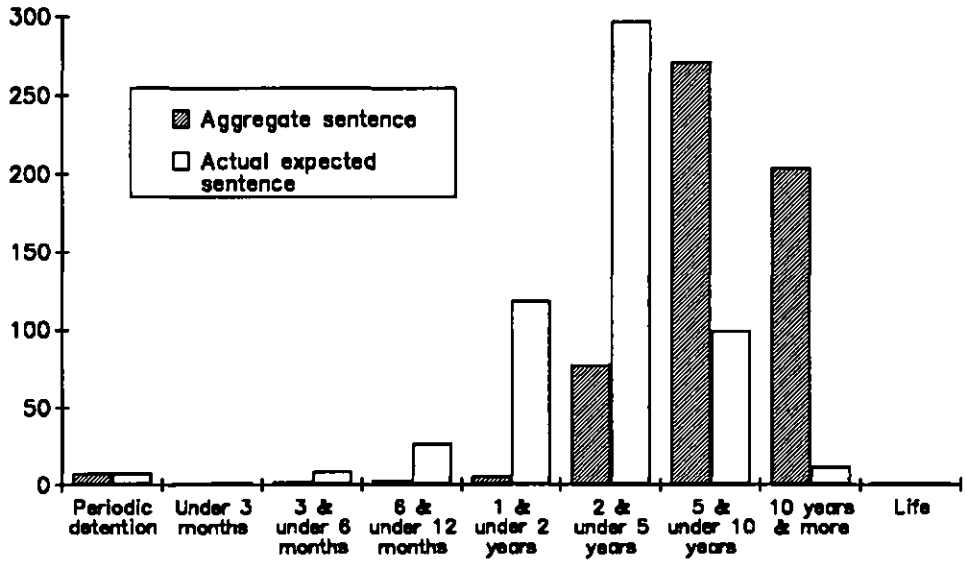


Figure 2.7:
Robbery
Number of Prisoners
Aggregate and Actual Expected Sentence
plotfile a:rob-2-7.hp



Chapter 3

The Role of the Sentencing Judge

What then is the role of the sentencing judge? The following case provides some valuable insights.

In *Lorenzo & Royal*, 8 November 1984, the Crown appealed against the leniency of sentences of seven years penal servitude[1] upon each respondent with non-parole periods of one year for Lorenzo and two years for Royal respectively, following their convictions for a particularly bad case of armed robbery.

They had held up the proprietor of a jewellery shop and her husband at Paddington and absconded with jewellery to the wholesale value of about $50,000. Lorenzo who was armed with a sawn-off single barrel shotgun struck the husband a blow to the face and forehead with the gun, causing some bleeding and leaving him dazed. The two victims were then taken to the lounge room of the residence and their hands and feet were bound with cord. They were threatened that 'their brains would be blown out' if they did not co-operate with them and indicate where their safe was located. The proprietor was released only so that she could unlock the safe.

The respondents eventually decamped taking with them the jewellery (which they subsequently sold for $4,000), some business records (which they later destroyed), and some $700 in cash. No money or possessions from the robbery were recovered, and the proprietor was uninsured, and as a consequence was forced out of business.

The subjective features of this case are instructive. The respondent Lorenzo, aged 28, was on probation following some five charges of break and enter with intent. He had difficulty in obtaining skilled employment, and had become addicted to gambling. He claimed he owed gambling debts in excess of $7,000 and had committed the present offence in order to meet his creditors. In further mitigation he claimed that the gun was not in working order (which was true), that he was very intoxicated at the time of the offence, and that he was sorry for what he had done.

The respondent Royal, aged 27, had some twelve entries on his record for offences of violence and dishonesty in New Zealand (between 1972 and 1980). In Australia he had been fined for possessing heroin and using an uninsured vehicle. In New Zealand he had been addicted to heroin, but at the time of the present offence he

[1] not including three weeks and seven and a half months pre-sentence custody

was described as a 'user'. He claimed he became involved in the offence because he was heavily in debt.

The sentencing judge, Judge Foord, found it difficult to distinguish between the respective roles of the two offenders, and so found slightly in favour of the respondent Lorenzo, because he had been significantly intoxicated at the time of the offence. His Honour's sentence was intended to leave the respondents on parole for a long time after the expiration of their custodial terms.

In its submission on the inadequacies of sentence the Crown argued that this was 'a serious example of the major crime of armed robbery'. It was premeditated, and carried through with 'a degree of planning, determination and competence ... that gives the lie to [the respondents'] claims of diminished responsibility' (per Street C.J.). His Honour had failed to take into account that Lorenzo was in breach of a good behaviour bond and that Royal had a lengthy criminal record. Thus the Crown submitted that the trial Judge's approach was erroneous and that the sentences and non-parole periods imposed were manifestly inadequate.

3.1 In Pursuit of Evenhandedness

As a result, the Court of Criminal Appeal made some general observations 'in the interests of the orderly and regular administration of criminal justice'. After pointing out that the sentencing task is not an easy one and that a considerable degree of discretionary latitude must be accorded to the sentencing judge, the Court said that

> there is a duty to recognise the significance of the combined wisdom of other sentencing judges in the pursuit of the ideal of evenhandedness.

The Chief Justice then drew attention to the following passage from *Oliver*, quoted in *Visconti*:[2]

> The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing. Full weight is to be given to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature. That collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognized judicially as relevant to the case in hand. This is not to suggest that sentences are to be arbitrarily dictated by mathematical application of statistics. There is an enormous difference between recognizing and giving weight to the general pattern as a manifestation of the collective wisdom of sentencing judges on the one hand and, on the other hand, forcing sentencing into a strait jacket of computerization. There is, moreover, always a danger, as is recognized on the civil side in the assessment of general damages, of seeking to use a factual assessment

[2][1982] 2 NSWLR 104 at p. 107

in one case as a legal precedent or authority to govern the decision in another.

The Chief Justice continued thus:

> Elsewhere in the judgment in *R. v. Visconti* there was reference to authority in other courts to the effect that:
>
> > disparity of sentencing standards is a very serious deficiency in a system of criminal justice
>
> and that
>
> > it is an important supervisory function of this Court to ensure, within reasonable limits, the evenhanded administration of justice throughout the community. (pp. 107 and 108).

3.2 The Application of Sentencing Principles

The approach to be taken by a sentencing judge was summarised in *Rushby*:[3]

> Inevitably a sentencing judge will be influenced by subjective considerations. There is the ever-present human situation of a man or woman standing before the court to suffer the solemn pronouncement of criminal judgment. But a judge is not cast adrift on an uncharted sea involving his bearing unaided a personal burden of attempting to achieve abstract justice. The judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions. The philosophy of the Common Law requires adherence to established doctrines and principles that have over years, and in multiple instances, been found to be best calculated to serve the ends of justice. The adjudicative process, if it is to be consistent and ordered, must observe and apply these doctrines and principles, and thus must necessarily be attended by a requisite disengagement and detachment. It is cool reason, not passion or generosity, that must characterize sentencing, as all other acts of judgment. Although the discretion left to the judge is wide, the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.

In the same case the Court recognised the 'powerful emotional attraction of seeking the reformation and rehabilitation of the criminal', but, as was there pointed out, this factor must not be permitted to predominate when a court is in the process of arriving at the sentencing decision.

[3][1977] 1 NSWLR 594 at p. 597

The Chief Justice then turned to consider the merits of the present appeal and held that in the interests of general deterrence the respondents should be compelled to undergo a period of imprisonment matching the seriousness of the criminality involved. The whole approach to sentencing had miscarried and accordingly the Court substituted sentences of ten years penal servitude upon each respondent, and non-parole periods of an effective six years in the case of Lorenzo, and seven years in the case of Royal, were substituted.

Yeldham J., who agreed with the reasons and orders of the Chief Justice cited from a passage in *Radich*,[4] quoted in *Rushby*[5] which he regarded as applying with considerable force in the present case. The often cited passage is as follows:

> ...one of the main purposes of punishment, ...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. **If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.**[6] On the other hand, justice and humanity both require that the previous character and conduct, and probably future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine that appropriate amount of punishment.

Here then, in a single judgment is found both the philosophy and the approach that should be taken by sentencers in their endeavours to administer justice even-handedly.

3.3 The Limiting Principle

The High Court has recently re-affirmed the principle that the penalty should be commensurate with the seriousness of the offence (the principle of proportionality) and it is now clearly established that it is impermissible to increase a sentence beyond that which is proportionate to the crime in order merely to extend the period

[4](1954) NZLR 86 at p. 87
[5][1977] 1 NSWLR 594
[6]The emphasis is that of Yeldham, J.

of protection to society from the risk of recidivism of the offender.[7] In *Ennis*, 29 July 1988, Kirby P. with whose judgment Enderby and Carruthers J.S. agreed, criticised the observations made by the sentencing judge when, in sentencing the appellant upon several counts of robbery and related offences, he had expressed the view that he must endeavour to give the public some relief from the appellant's activities. Kirby P. said that if by this statement the sentencing judge was indicating a form of preventive detention, then his honour was in error. 'We do not have preventive detention even for repeat offenders.' Kirby P. added:

> It may be that all his Honour was saying was that it was not within his power to effect by his sentence the rehabilitation or reform of an offender, with a record such as the applicant's, but at least the effect of his sentence would be to give the community relief from the kind of activities which had been described in this case. Whatever may have been his intention, I consider that it is erroneous to express it in the terms that his Honour did. Notions of preventive detention as punishment are so alien to our system of criminal justice that care must be taken to avoid any appearance that they have influenced the exercise of the sentencing discretion.

3.4 Disparity & the Sense of Grievance

The need for evenhandedness is often most noticeable when co-offenders engaged in the same enterprise are sentenced. With respect to this issue the majority of the High Court in *Lowe*,[8] a Queensland robbery case, held that mere disparity between sentences imposed on co-offenders was not of itself a ground upon which an appellate court should intervene. The difference between sentences had to be manifestly excessive and appeal courts should interfere:

- either where the disparity engenders a justifiable sense of grievance upon the offender with the heavier sentence,
- or where the disparity gives the appearance that justice has not been done.

Mason, J. (as he then was) said:

> Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and

[7] *Veen* [No 2] (1988) 62 ALJR 224; (1988) 33 A Crim R 230; see also *Chester* (1988) 36 A Crim R 383; *Tunaj* [1984] WAR 48; *Veen* [No 1] (1979) 143 CLR 458

[8] (1984) 154 CLR 606

> elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.[9]

A recent example where the Court has intervened in order to correct an obvious disparity is *Anastasio*, 21 November 1986. In that case the appellant had received a significantly more severe sentence than a co-offender even though the appellant had played a relatively minor role in the armed hold-up of a mixed business. The offence had been planned by a man named Halligan, who was addicted to drugs, and the appellant had agreed to participate in order to obtain money for petrol. While the appellant waited in the vehicle, Halligan and another co-offender named Smith entered the premises. Smith carried a .44 calibre rifle containing a bullet, and after terrorising the female shop assistant, the two offenders obtained $274 before returning to the vehicle and driving off. The appellant's share of the proceeds was $18.

The appellant and Smith who appeared before the same judge, pleaded guilty and were each sentenced to five years penal servitude coupled with non-parole periods of two and a half years. The appellant had a record of some minor traffic offences before the Children's Courts and was sentenced to six months for car stealing in 1982. However a pre-sentence report indicated that he had good prospects for rehabilitation. Smith's background was described as similar to that of the appellant, but he had no record of convictions. Accordingly the sentencing judge had treated the two men equally even though it was clear that Smith's role in the affair reflected a greater degree of criminality.

The third man, Halligan, was dealt with some four months later. He appeared before a different judge, initially pleading not guilty but subsequently changing his plea. He was sentenced to three and a half years with a non-parole period of fifteen months.

The appellant's counsel relied on the following passage from *Lowe*:

> ...what is the correct principle to be applied in cases of discrepancy? It is that a court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate.[10]

The Court of Criminal Appeal concluded that upon the facts of the present case there existed a justification for holding that the appellant suffered from a sense of grievance. Both Halligan and Smith had played a more significant part in the offence than did the appellant yet Halligan had obtained a more lenient sentence. Accordingly the Court decided to reduce the appellant's sentence and non-parole period to that of Halligan's (i.e. three and a half years with a non-parole period of 15 months). In doing so it commented that while this sentence could be regarded

[9]ibid at 610–611

[10]Per Mason, J., (1984) 154 CLR 606 at pp. 613–614

objectively as inadequate, this was preferable to that of allowing to stand 'a pattern of sentences which contains an inherent injustice'.

Smith subsequently appealed against his sentence (*Smith*, 5 December 1986) and also succeeded in having his sentence reduced from five years penal servitude with a non-parole period of two and a half years, to four years penal servitude and a non-parole period of two and a half years.

In *Antoun*, 16 April 1987, a case in which a submission of unfair disparity was put to the Court, Street C.J., said

> The concept of the existence of a **justifiable** sense of grievance must always be well to the fore when evaluating a challenge based on disparity. It is not merely that the offender who has received a longer sentence feels a sense of grievance — of course, that is to be expected. what must be established is that his sense of grievance is **justifiable**; or as both the Chief Justice and Dawson J. put it [in *Lowe*], "that it may give the appearance that justice has not been done." Necessarily an objective element underlies the examination of the sense of grievance or injustice.

The issue of whether disparity is justified or unjustified becomes even more difficult to determine when co-offenders involved in multiple crimes, (not necessarily all the same crimes) are sentenced. In these circumstances there may be an unexplained appearance of disparity, particularly when individual sentences are isolated and compared, such that it may be difficult to explain to an offender that any sense of grievance he or she may have is a justifiable one. However, as Hunt J pointed out in *Hoole*, 17 March 1989, the Court must always look at the substance of the disparity, not merely at its unexplained appearance and in *Lynott*, 10 August 1989, Finlay J recognised that even in the case of co-offenders, there may be too many individual features present to permit an argument which is based on the parity principle in *Lowe*.

Care should also be taken to ensure that proper weight is given to the nature of the offence in respect of which the offender is charged.

In *Parmenter*, 7 September 1988, the Court of Criminal Appeal said that in sentencing an offender one cannot properly take into account aggravating circumstances which, if present, would convert the offence into a more serious one than that which was charged or take into account circumstances relating to an offence in respect of which the offender was acquitted. In *Palmer*, 3 November 1988, the Court held that the sentencing judge had erred when he failed to differentiate markedly between the role of the appellant, who had been charged with being an accessory after the fact to robbery and those involved as principals. Roden J, with whom Gove and Mathews JJ agreed, said:

> 'It seems to me that the appropriate approach in this case to the applicant's culpability as an accessory after the fact, is to treat him, as he was, as a person who happened to be sitting at the wheel of a motor car, to which the principal offenders ran after committing the offence, and as a person who with knowledge then that that offence had been

> committed, assisted them by driving them away. On the basis of those facts it is, of course, quite wrong to treat him in the same way as those who actually committed the robbery.'

While it may be over-ambitious to expect to eliminate unjustifiable discrepancies in the administration of sentencing justice — given as it is and for good reason, based on discretionary judgment — the accumulation and analysis of like cases will assist in reducing the incidence of such discrepancies.

3.5 Reluctance of the Court of Criminal Appeal to Overrule Sentencing Decisions

In *Burke*, 17 November 1978, the Court of Criminal Appeal expressed the following view upon its exercise of review powers in matters of sentencing:

> It is not the function of this Court to review sentences or non-parole periods and to substitute different periods merely because members of this Court might take a different view of the subjective or the objective circumstances. This Court's power is limited to correcting error on the part of a sentencing Judge. In the matter of a sentence and in the matter of a non-parole period, a wide discretion necessarily is available to the sentencing Judge. He has the benefit of having seen the person being sentenced. He has had the whole of the evidence developed before him. Ordinarily this Court is slow to overrule a discretionary decision made by a sentencing Judge on the length of a sentence or the length of a non-parole period.

In the case of a successful Crown appeal, the Court is even more hesitant in its approach. Here the Court is called upon to impose a more severe sentence than that which the trial judge fixed, thus subjecting the appellant to a form of double jeopardy in punishment. For this reason the Court is likely to substitute a sentence that is more severe than the one imposed by the sentencing judge, but less severe than one which might otherwise be appropriate had the matter been properly dealt with by the sentencing judge. In *Boon & Boon*, 17 November 1983, for example, the Court raised the aggregate sentence of six years penal servitude coupled with an effective non-parole period of one year and nine and one half months (imposed in respect of six armed robberies and a number of other offences), to ten years penal servitude with a non-parole period of four years and six months. In so doing Street C.J. said:

> there is an element of double jeopardy involved in the sentencing of this respondent by this Court after a successful Crown appeal. He has already undergone one sentencing process, and there is an observed and established tendency for the element of double jeopardy in a successful

Crown appeal leading to a lesser sentence than might be appropriate if the matter were being considered at first instance.[11]

[11]See also page 55, where a similar statement is set out.

Chapter 4

Crown Appeals

Thus far it has been pointed out that the courts pursue the goal of evenhandedness in their sentencing decisions. The sentencing decisions themselves reflect the collective wisdom of the sentencing judges and, in the majority of cases, their decisions stand. The Court of Criminal Appeal does of course have an important role to play in correcting decisions that fall outside the legitimate bounds of discretionary judgment, and through its judgments both the principles and the policy of sentencing offenders are enunciated and applied by the lower courts. In the case of offenders who consider they have been harshly dealt with the law allows them to make application for leave to appeal against the sentences imposed by the sentencing judge and have their decisions reviewed and if necessary, corrected by the Court of Criminal Appeal. Self-interest ensures that offenders who suffer a sense of grievance will seek to have their sentences modified. Crown prosecutors, on the other hand, are not motivated by self-interest but, as ministers of justice, are driven by the desire of promoting evenhandedness in the administration of justice. Accordingly they may appeal when in their view a particular offender has received a sentence which appears to be manifestly inadequate, having regard to the circumstances of the offence and to their appreciation of sentences imposed in similar cases.

Section 5D of the *Criminal Appeal Act* 1912 (NSW) provides that:

> The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

However, as Barwick C.J. pointed out in *Griffiths*,[1] an appeal by the Crown should be 'a rarity', brought only –

> to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons.

[1](1977) 137 CLR 293 at p. 310

An analysis of appeals by the Crown against the leniency of sentences imposed upon convicted robbers reveals that the majority of such appeals are successful. This is explained in part by the Crown's careful selection of cases — cases which strongly suggest that the sentencing judge has imposed sentences that are significantly out of line with the sentencing patterns manifested by other judgments in similar cases.

It is not surprising therefore that the Court of Criminal Appeal substituted quite substantial prison terms in place of bonds in *McNamara*, 26 November 1982, and *Richardson*, 28 September 1984.

In the former case the respondent had remained in the car while his two companions held up a T.A.B. agency with a sawn-off rifle. The respondent had a particularly bad earlier record, including a sentence of seven years penal servitude for stealing with violence and making threats, while armed with an offensive weapon. An accomplice who had played a leading role in the offence had received a sentence of five years penal servitude with a non-parole period of two years and five months and, although the Court accepted that the respondent had played a less significant role, it nevertheless regarded that a similar sentence to that imposed upon the co-offender should be imposed.

In *Richardson* the respondent had received a deferred sentence in respect of two counts of armed robbery laid under s.97 of the *Crimes Act*. Again the Court held that there was no basis for differentiating between the respondent and his co-offender, and an aggregate sentence of six years penal servitude, with a non-parole period of two years was substituted.[2]

In an even more recent case, that of *Castles*, 23 April 1986, the Court of Criminal Appeal substituted a term of penal servitude of seven years five months, with a non-parole period of five years five months, upon the respondent after he had already completed 200 hours of a 300 hour community service order which had been imposed by the sentencing judge. His offences involved two armed robberies (in company) of banks.

In *Murray*, 11 September 1986, however, the Court declined to quash a non-custodial sentence imposed upon the respondent in respect of two counts of robbery (s.94) and one count of armed robbery (s.97).[3] In this appeal there was evidence before the Court as to the offender's actual rehabilitation since the offences were committed. Lee J., who delivered the principal judgment of the Court said that while robbery offences were to be regarded 'in virtually all circumstances as an offence of the utmost gravity, which must carry a custodial sentence' and while he was satisfied that the sentencing judge had erred in the sentences which he imposed, the Court was not required to impose a custodial sentence. Lee J. said:

> This is a Crown appeal and merely because the sentencing Judge has fallen into error and imposed a sentence which is inadequate does not of itself mean that the Court is required to impose a custodial sentence. This matter is one of discretion and the discretion is a wide discretion.[4]

[2] For further details of this case see page 178 dealing with the robbery of taxi drivers.

[3] A more detailed analysis of *Murray* appears at p. 80 below.

[4] *Holder & Johnston* [1983] 3 NSWLR 245 at p. 255.

A further important feature of the exercise of the Court's discretion should be noted.

Where, in the exercise of its discretion the Court believes a more severe sentence should be substituted, and it decides that justice is best served by so doing, it will impose a less severe sentence than otherwise appropriate because of what it calls 'double jeopardy' in sentencing. Reference to this policy has already been made at page 50 above, where *Boon & Boon*, 17 November 1983 is discussed. Here the following passage from *Tleige*, 19 November 1982, expresses with crystal clarity the Court's views on this issue:

> In determining what the quantum of sentence should be we have, as not infrequently occurs in the case of Crown appeals, borne in mind that the respondent has been twice in jeopardy in the matter of sentence. It will be distressing in the extreme for him to suffer the sentence passed on him some time ago being increased. This leads us to determine a sentence which is more lenient than would properly be appropriate if the matter were coming forward for sentence for the first time.

An analysis of the cases listed at the end of this chapter reveals that only a minority of Crown appeals fail. In a number of cases the respondents suffered substantial increases in their sentences — in many cases the terms of their custodial sentences were doubled and in some cases, more than doubled.

In *Imisides*, 6 April 1989, for example, the Court increased the respondent's sentence from an effective six years penal servitude with two years non-parole, to twelve years penal servitude and a non-parole period of nine years. The respondent had pleaded guilty to fourteen counts of armed robbery with a further four similar counts taken into account on a Ninth Schedule. The respondent was motivated by his needs for drugs and had been armed either with a knife or both with knife and replica pistol when committing offences which were directed against small business premises. He obtained some $5,000 in proceeds from these offences and little was recovered. The Court in substituting the more severe sentence (admittedly lower than that which the Court regarded should have been imposed in the District Court), criticised the original verdict as being weakly merciful and failing to reflect any element of deterrence. The Court also criticised the sentencing judge in failing to refer to the fact that the respondent was in breach of a recognizance to be of good behaviour when he committed these multiple offences.

In *Mumby & Bell*, 26 April 1989, however the Court declined to upset effective sentences of ten years and eight years penal servitude, coupled with non-parole periods of five and four years, respectively. The respondents had pleaded guilty to a spate of robbery offences including one offence where a person suffered a ruptured eardrum and superficial facial cuts following the discharge of a sawn-off shotgun. The Court agreed that the sentences were lenient to a significant degree but having regard to psychological reports and rehabilitation prospects of the respondents, decided that the appeal should be dismissed.

A substantial proportion of the following list of cases involves the commission of multiple armed robbery offences and a favourite or frequently imposed aggregate

sentence selected by the Court of Criminal Appeal was found to be ten years penal servitude. This can be translated, under the provisions of the *Sentencing Act* 1989, to minimum terms of about five years although, as always, each case must be determined on its own facts.

Case References — Crown Appeals

Bainbridge, 29 March 1985
Boon H.D. & Boon L.M., 17 November 1983
Cardwell, 17 December 1984
Caridi, 3 December 1987
Collins, Whiting & Whiting, 17 July 1987
Connolly, 12 June 1986
Dicker, 3 July 1980
Green & Reilly, 31 August 1983
Griffiths, 23 March 1989
Gysin & Sheargold, 24 September 1982
Homsi, 11 November 1988
Imisides, 6 April 1989
Lorenzo & Royal, 8 November 1984
McNamara, 26 November 1982
Middleton, 21 September 1978
Millard & Graham, 11 March 1981
Miro, 7 June 1989
Moran, 7 July 1983
Mulligan, 30 October 1980
Mumby, 26 April 1989
Murray, 11 September 1986
O'Connor, 19 September 1986
Porter, 23 August 1985
Regan, 12 February 1986
Richardson, 28 September 1984
Rix, 24 September 1982
Roach, 30 October 1986
Stewart, 23 November 1984
Taylor, 3 March 1978
Vougdis & Rossides, 19 April 1989
Wells, 19 April 1989
Williams, 11 September 1986

Chapter 5

Principles of General Application

Before embarking upon a detailed analysis of the sentences imposed within the various categories of robbery, it is instructive to identify those factors which are consistently taken into account during the sentencing process.

The courts clearly indicate that their first concern is for the protection of the public and accordingly priority is given to the principles of deterrence (both general and specific) and retribution, rather than rehabilitation or reformation of the offender. This policy is reflected in the imposition of heavy sentences and the fairly consistent rejection of submissions calling for non-custodial dispositions or short prison sentences even where offenders are motivated by addiction to drugs or have hitherto been of good character. Non-custodial sentences, particularly for armed robbery offences are imposed in exceptional circumstances only, and the courts often refer to:

(a) the heavy statutory maximum penalties as indicating the legislature's intention that severe penalties are to be imposed;

(b) the prevalence of armed hold-ups; and

(c) the perceived public outcry against such violent behaviour.

These then are the general justifications given by the courts for the imposition of condign punishment for those who commit armed robbery offences.

A close analysis of the cases also reveals that the courts are guided first and foremost by the degree of criminality (culpability) exhibited by the offender in the commission of the offence. As a general rule the more serious the offence the higher the penalty. This is sometimes described as imposing a sentence that is commensurate with the seriousness of the crime, and courts which fail to impose sentences of sufficient severity sometimes are described pejoratively as being 'weakly merciful'. Inevitably, the maximum penalty is reserved for the worst kind of cases.[1]

However courts stop short of imposing 'crushing' sentences on offenders even though they may have committed multiple crimes, and therefore what is regarded as an appropriate sentence is one which fits somewhere between the penalty that

[1] For example, see *Woods* (1987) 34 A Crim R 208, a case of armed robbery, sexual assault, arson and wounding with intent to murder.

is commensurate with the seriousness of the total criminality of the offender and the penalty that might fairly be described as being so lenient as to warrant the description of being a 'weakly merciful' sentence.

5.1 The Objective Factors

In determining the seriousness of the offence and the culpability of the offender courts have regard, first and foremost, to the circumstances of the offence. In this regard the following features are particularly significant:

Nature and Degree of Violence

This includes a consideration of the extent of the physical threat and degree of violence directed at victims; the extent of injury both mental and physical occasioned to them; and also the type or types of weapons used by the offenders.

Typically the courts will link violence, seriousness and the concept of general deterrence in their pronouncements upon what they believe the community expects them to do, when sentencing robbers. For example in *Lorenzo & Royal*, 8 November 1984, the Court of Criminal Appeal said:

> These were crimes of violence and the community rightly expects that persons who commit such crimes should, in the interests of general deterrence, be compelled to undergo a period of imprisonment that will be of sufficient length to match the seriousness of the criminality involved.

In *Coombe*, 13 March 1986, the Court of Criminal Appeal had this to say in relation to a case involving two armed hold-ups:

> In both instances the robberies were of a particularly serious character in that they were carried through, not just with a firearm, not just with a loaded firearm, but in a context of that firearm or those firearms being actually discharged. It has frequently been emphasised that this elevates the seriousness of the crime of armed robbery into one of the most serious categories, resulting in heavy sentences being passed upon those who involve themselves in them.

Again, in *Safwan*, 28 February 1986, the Court simply pointed out that armed robbers who intentionally shoot and wound must expect to receive heavy sentences.

The location of the offence may also be significant, as the cases consistently show that armed hold-ups of banks for example, attract higher penalties than other commercial, non-commercial or person to person robberies, such as those involving the theft of handbags or wallets. However once injuries are occasioned to victims, the extent of those injuries will often govern the severity of the sentences imposed, regardless of where the offences occur. Thus in *Hampson*, 23 July 1987, the appellant, with another, had burst into the residence of a hotel manager after midnight.

They wore overalls and balaclavas and were armed. The appellant carried a shotgun and this was poked into the chest of the manager as he slept. The manager was then struck across the face, the kneecap and face again, before the offenders decamped with $1,500 in a getaway car driven by a third man. The Court dismissed the appeal against the sentence of 15 years penal servitude coupled with a non-parole period of ten years.

In *Kyriakou, D'Agosto & Lombardo*,[2] the manager of a coffee lounge was robbed of $880. During the robbery two of the appellants entered the premises wearing overalls and balaclavas, and one of the appellants shot the manager in the leg when the latter asked what they wanted. One offender had his conviction and sentence quashed, but the sentences imposed upon the other two, (11 years penal servitude with a non-parole period of six years, and 13 years, nine months with a non-parole period of nine years, nine months, respectively) were upheld.

Degree of Premeditation

Armed robberies sometimes require considerable aforethought and planning. They may involve a conspiracy to commit the offence with other co-offenders. Location and time of offence are selected in advance, both in an attempt to strike at a time when maximum gains are to be made, and as a means of maximising the prospects of avoiding detection. Disguises are often worn and escape routes considered. Courts often refer to the degree of pre-meditation as an aggravating factor. This may be contrasted with the approach taken by the courts when the offence is not planned in advance, but committed spontaneously. In these circumstances the courts tend to impose less severe sentences.

Committed in Company

The legislature singles out armed robbery committed in company as warranting a higher penalty than robbery committed by a lone offender (all other things being equal). This may be because two or more offenders acting in concert may appear to present a greater threat to their victims. It may also be because, in this kind of offence, two or more offenders are more likely to have deliberated about the enterprise prior to the commission of the offence. Certainly where multiple offenders are involved the courts will consider whether one offender should be treated more harshly than another. Here the question of the role played by each participant is considered so that the instigators or leaders in the offence are likely to receive heavier penalties than those who may play a secondary role. At the same time however, courts are attracted towards treating co-offenders equally. Even those who play a less vital part in carrying out the offence, such as the lookout and driver of the getaway car may be treated quite severely.

[2](1987) 29 A Crim R 50

Prevalence of Similar Offences

As indicated above, the prevalence of robbery and related offences is taken as an indicator that deterrent sentences are warranted. The object then is to impose sentences that are severe enough to discourage the recipient of the sentence and other like-minded persons from committing these offences. Ultimately this sentencing policy is intended to reduce or contain the incidence of violent offences of this type, and in this way protect the community and its institutions from the harmful effects of such behaviour.

In *Broxam*, 3 April 1986, Carruthers J., with whom Slattery C.J. at CL and Reynolds J. agreed, said:

> The prevalence of the offence in respect of which the applicant was sentenced is a matter of grave social concern. Indeed, there was specific evidence before the learned sentencing judge that in the Newtown area armed robberies or attempted armed robberies of service stations, chemist shops, TAB agencies and the like are prevalent offences. It is now well-recognised that the victims of such armed robberies or attempted armed robberies may suffer devastating psychological damage consequent upon the trauma necessarily involved with the commission of such offences. In these circumstances sentencing judges would be recreant to the trust which the community places in them, if they were not to impose sentences consistent with the seriousness and prevalence of such offences.

The Amount of Money/Value of Property Involved in the Offence

The courts place greater importance on the violent aspects of robbery offences than they do on the acquisitive aspects. Thus the fact that in many cases the amount of money or value of property is small seldom serves to reduce the penalty that would otherwise be imposed. The amount of money obtained in a robbery may often be a matter of chance, as in the case of an unpremeditated armed robbery of a small business committed shortly after the proceeds for the day have been banked. Accordingly the mere fact that small sums are obtained are seldom a justification for mitigating the sentence.

Where very large sums of money are involved however, penalties may indeed be in the higher brackets. This is because such offences also share many of the aggravating features of the more serious armed robbery offences, i.e. premeditation, use of excessive violence, offences committed in company, offences directed at institutions or agencies that perform a public service and so on. In addition, the denunciatory aspect of sentencing, although rarely articulated by the courts, may also play a part in leading sentencers to impose harsher penalties in large sum robberies. Where the proceeds of a robbery are not recovered, the courts often appear to view this as an aggravating factor. Perhaps underlying these considerations also

may be an attempt by the courts to indicate, through their sentencing policy, that this kind of crime simply does not pay.

Positions of Trust

Persons in positions of trust, such as employees or former employees, who by virtue of their position have inside knowledge — and this is used in order to plan and or participate in the carrying out of robberies — may expect to be treated severely. This is in keeping with the general principle that the sentence imposed should be commensurate with the degree of culpability of the offender as evidenced in the commission of the crime.

For example, in *Dawes & Mannix*, 6 December 1984, the Court of Criminal Appeal approved of the sentencing judge's reasons, when he said:

> ... of great significance is the fact that the two prisoners used their knowledge and experience gained as Security Guards to carry out the robbery. It must be made clear to persons who are employed in such positions of trust as Security Guards and who gain specialised knowledge that if they use that knowledge for their own gain and in particular to the detriment of those for whose benefit that knowledge was acquired then the punishment must be severe indeed.

In *Vougdis & Rossides*, 19 April 1989, the Court regarded as "contemptible" a case where the offender had used his business relationship with others (he had a fruit juice delivery run) to provide his associates with information relating to suitable armed robbery targets.

5.2 The Subjective Factors

A further dimension in the task of determining the appropriate sentence relates to features personal to the offender — often referred to as the 'subjective circumstances'. Weight placed on favourable criteria subsumed under this broad heading seems to be inversely related to the gravity of the offence. Where the offence is very serious, or where the offender has committed a number of armed robbery offences, his or her prospects of obtaining a significant reduction in the sentence imposed by the sentencing judge are not good. The subjective circumstances include: the prior criminal history as well as the age, mental condition and social background of the offender. Pleading guilty, genuine remorse, and cooperation with authorities may also have an effect upon sentence.

The Criminal Record of the Offender

Here the Court is concerned to see whether the offender has a record which discloses prior crimes of violence or dishonesty. Prior offences which do not fall into these categories are often ignored, other than perhaps to negative the claim that

the offender is a person of good character. Of particular significance is the issue of whether the offender has been convicted of robbery or a like offence on a prior occasion. A person with a relevant criminal history is generally disentitled to the kind of leniency that may be afforded to a first offender. As will be seen, the circumstance that the offender has been on bail, or on a bond, or was on parole or released on licence at the time of committing the offence is of considerable significance. Amongst other things, such factors operate to significantly reduce the chances of the offender obtaining clemency from the sentencing court and indeed, of obtaining a favourable result in any application to the Court of Criminal Appeal to review the sentence. In *Wells*, 19 April 1989, for example, Yeldham J said:

> The respondent was on parole for a number of similar offences [armed robberies] at the time and this court has stated time and again, and often in relation to this particular Judge, that sentences which are weakly merciful must not be passed in the case of serious crime, especially where those involved have previously been convicted of such crimes.

Absence of prior convictions, while always relevant to sentencing, does not have the force that it would have where there has been a consistent course of conduct over a considerable period of time, involving separate, although linked, acts of criminality.[3]

While a significant proportion of robbers sentenced in 1988 had no prior criminal record, it is interesting to observe that many had prior property convictions or committed offences against the person. As can be deduced from Table 5.1, about 40 per cent of robbers sentenced in 1988 had prior drug convictions as their most serious offence in their criminal records.

The relevance of criminal history has recently been considered by the High Court in *Veen* [No 2][4], where the following passage appears:

> There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: ... The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need

[3] See for example, *Vougdis & Rossides*, 19 April 1989, per Campbell J

[4] (1988) 164 CLR 465 at p. 477

> to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.[5]

After type and seriousness of offence (or offences) the criminal antecedents of the offender appears to be the most influential aggravating factor in the sentence decision-making process. Accordingly at the conclusion of this chapter references to recent cases where prior criminal record has been a factor in sentencing are listed.

In exceptional circumstance a court may be lenient even though the offender may have a quite serious criminal record. This was recognized in *Caridi*, 3 December 1987, where the Court of Criminal Appeal held that the respondent, a thirty-two year old man, had reached a stage where a grant of leniency might just be sufficient to turn him from continued involvement in crime. This critical rehabilitative age is said to be when the offender is in the vicinity of 30 years of age.

Table 5.1:

Higher Court Statistics 1988
Prior Record of Sentenced Robbers
in the High Criminal Courts in 1988

Principal Offence	No Prior Convictions %	Prior Convictions	
		No Imprisonment %	Imprisonment %
Drug Offences	60.2	25.6	14.2
Sex Offences	93.3	3.9	2.8
Fraud/Dishonesty	74.4	14.5	11.1
Property Offences†	31.8	30.7	37.5
Offences against the person†	53.0	25.6	21.4
Driving Offences	54.8	34.6	10.6

These percentages are based on 387 persons sentenced in 1988.

† Prior robbery offences are included in either property offences or offences against the person.

Source: New South Wales Bureau of Crime Statistics and Research

[5]This passage was quoted with approval and applied by Gleeson CJ in *Keeble*, 26 April 1989, a case of a recidivist robber who was sentenced to a term of twelves years, with a non-parole period of nine years for a single offence of assault and robbery under s.94)

The Age, Mental Condition, and Social Background of the Offender

This heading is intended to encapsulate any special considerations peculiar to the offender which the courts traditionally select when justifying of leniency in sentencing. Of these the most problematic is the sentencing of those who are driven by the need to obtain drugs to feed their own addiction. While the courts espouse the policy that drug addiction (like alcoholism or even gambling) provides an explanation rather than an excuse for the commission of offences, occasionally courts exercise some clemency (in the past often reflected in the minimum non-parole period rather than the head-sentence) in reaching their sentencing decisions. Those whose rehabilitation prospects are good may receive favourable consideration. At other times the courts are adamant that drug addicts should not be extended leniency. Addicts who have merely dipped their toes into a life of crime are most likely to benefit from the exercise of the court's discretion, but even this may depend upon the gravity of the actual circumstances of the particular offence or offences under consideration and their prospects for rehabilitation.

In *Walker & Mills*, 9 June 1989, Gleeson CJ noted that the appellant Mills had suffered from schizophrenia for years. He was still suffering from schizophrenia and was heavily affected by drugs used to control the illness. These circumstances lessened his culpability for the series of armed robberies in respect of which he pleaded guilty, because he would have had "a diminished capacity to make a decision as to whether or not to become involved in an escapade such as this." The fact that he was easily led (as a consequence of his mental condition) was a factor which was properly taken into account in mitigation of penalty.

Youth has often been a weighty consideration in the decision to extend leniency to offenders.[6] However when the gravity or callousness of the offence is coupled with perceptions as to the prevalence of such offences, the approach in *Radich*[7] appears to take prominence. Thus in *Collins, Whiting & Whiting*, 17 July 1987, the Court of Criminal Appeal set aside orders for community service and substituted prison terms upon three young offenders who, in a brutal and cowardly fashion, assaulted an 86 year old woman, knocked her to the ground and kicked her in order to obtain the contents of her hand bag. In that case Yeldham J. said:

> This type of crime has become far too prevalent and, indeed, as Judge Herron remarked at the time he passed sentence it was prevalent and it is undoubted that at that time it was on the increase. I think it is appropriate for courts, and it was appropriate in 1986 when sentence was passed for courts, including this court and all other courts, to serve clear notice upon those who, whatever their ages, are minded to attack defenceless people, especially women, and to rob them, whether of their

[6] See also *Thompson* (1988) 36 A Crim R 223, where a sentence for assault with intent to rob a taxi driver was reduced on account of the appellant's youth, intellectual condition and general immaturity

[7] at p. 46

> handbags or of anything else, that they will not be weakly merciful and that such persons will inevitably, notwithstanding their ages, go to gaol.

In *Wood*, 7 April 1989, however, Lee CJ at CL expressed the view that young persons (to 20 or 21 years of age) ought to be treated differently to adults if the facts permit it, and custodied sentences should be avoided if their rehabilitation is discernible.

Plea of Guilty and Co-operation with the Police

An offender who has pleaded guilty (when this plea is accepted as a manifestation of contrition)[8] or equally, an offender who has openly co-operated with the investigating police in order to bring the matter before the court to effect a speedy resolution, is entitled to obtain a degree of leniency from the sentencing court.[9]

In *Blewett, Browne & Moorhouse*, 3 December 1987, Lee J. said:

> The reason why a plea of guilty attracts leniency is because in appropriate circumstances it may evidence remorse and contrition by the appellant: in other words, an acceptance by him that he has done wrong, that he like all other citizens must obey the law and that he must submit to such punishment as the court considers appropriate to mete out.

The Court of Criminal Appeal is reluctant to indicate the extent of any sentencing discount which may flow from co-operation generally with authorities (but see *Cartwright* below), and therefore each case is decided on its own merits. Certainly the Court has held that assistance given to authorities which results in the identification of co-offenders should attract a substantial discount.[10] In any event the Court may not give the elements of co-operation or remorse great weight if it considers that the trial judge has already taken them properly into account.

Further the Court is unlikely to give much weight to guilty pleas where the offender is caught red-handed. In *Antoce, Lefter & Maniku*, 5 February 1987, for example, Maxwell J., responding to a submission that insufficient weight had been given to guilty pleas on the part of the appellants, said:

> It is somewhat difficult to understand how they could have pleaded not guilty when the very attempt [of bank robbery] was foiled by the activation of the security devices.

The appellants had been pinned to the bank's counter until police had arrived on the scene.

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[8] *Heard & Summers*, [1987] 11 NSWLR 46 at p. 50; (1987) 34 A Crim R 320; *Jabaltjari* CCA(NT) 3 November 1989

[9] *Perez-Vargas*, [1986] 8 NSWLR 559. For the position of an informer who seeks to have his sentence reduced because he has become a police informer after being sentenced see: *Prideaux* (1988) 36 A Crim R 114

[10] *Heard & Summers* [1987] 11 NSWLR 46; (1987) 34 A Crim R 320

In *Cartwright*, 15 September 1989, a decision concerning a large scale drug conspiracy case, the Court of Criminal Appeal reviewed the leading cases on the relevance to sentence of the element of cooperation with the authorities. The appellant had been given a discount of one-third of the otherwise appropriate sentence. However in view of the appellant's cooperation with police, and also in recognition of the fact that the sentence was to be far more restrictive than was contemplated at the time of sentencing (his life was under threat and he was under special protection in gaol), it was held that the discount should have been at least one half of the otherwise appropriate sentence.[11]

5.3 The Totality Principle

The totality principle requires that the sentencer should not merely impose an appropriate sentence in respect of each and every offence committed by a multiple offender, and then simply add these up for the purposes of determining the final sentence. Rather the sentencer should consider the arithmetic total of these sentences and ask whether, looking at the totality of the criminal behaviour, the punishment so derived is appropriate. If the penalty is unreasonably severe, the sentencer must impose concurrent or partly concurrent terms of imprisonment, or alternatively, provide substantial discounts for at least some of the offences under consideration. In considering the appropriateness of the final sentence the sentencer should ensure that the ultimate disposition is not a 'crushing' one and that the sentence bears some reasonable proportion to the imposition of a single instance of a more serious offence, such as murder. Further the sentencer should recognise that the degree of the offender's culpability and hence the final sentence should be somewhat higher than for an offender who has committed either a single offence or substantially fewer offences, of a similar kind.

One guide for determining the appropriate aggregate or 'total' sentence is to see what sentences are commonly imposed upon other multiple offenders. Sentences should not normally be imposed concurrently unless they arise out of the same set of circumstances.

The general approach which has been taken by the courts may be summarised as follows: Sentences for offences committed on separate and distinct occasions should normally attract cumulative sentences, unless such aggregation of individual sentences would lead to a disproportionately high penalty when viewed against:

(a) the totality of criminal behaviour;

(b) the penalties imposed in similar cases;

(c) the penalties imposed in cases where more offences of a similar kind have been committed; and

[11] Of course, prior good character and dubious expressions of remorse may not mitigate sentence where the offence is a serious one: *Hermann* (1988) 37 A Crim R 440.

(d) the penalties imposed in cases where more serious offences of a different kind (e.g. murder), have been committed.

Perhaps the totality principle is best described in the following passage from the judgment of Street C.J. in *Holder & Johnston*[12] — a passage cited with the approval by the Court of Criminal Appeal in *Peters*, 22 July 1988, and more recently in *Heatley*, 10 March 1989:

> The principal of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences. The effect of this practical consideration is always to produce an ultimate aggregate which is less that that which would be arrived at by straightforward adding up of the terms appropriate for the offences if each were viewed alone. In carrying out this process of adjustment, it is both inevitable as well as proper that the ultimate decision be arrived at in the light of the totality of the criminality involved in all of the offences. As has been said more than once in this Court, where the principle of totality comes into effect, it is more often that not of little importance how the ultimate aggregate is made up (that is to say, whether by a series of aggregate terms or by a series of concurrent terms, or by partly one and partly the other). The important factor is the practical significance of the sentencing order.

The principle of totality applies even though offences which are closely related in time and nature, have been committed in more than one state or territory.[13] In *Mill*[14] the Court said:

> In our opinion the proper approach which his Honour should have taken was to ask what would be likely to have been the effect of the head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time.

This principle applies to the fixing of the non-parole period, as well as the head sentence[15] and it has even been declared to apply where the offences are not closely

[12][1983] 3 NSWLR 245 at 260. See also *Mill* (1989) 83 ALR 1 at p. 3; *Faulkner* (1972) 56 Cr App R 594

[13] *Todd* [1982] 2 NSWLR 517, *Mill* (1988) 63 ALJR 117

[14](1988) 63 ALJR 117 at p.120

[15]ibid

related in time or have involved successive sentences being imposed by different courts at different times. In *Larsen*, 8 September 1989, Badgery-Parker J said that the principle of totality "must always inform the sentencing process when a prisoner comes to be sentenced for an offence at a time when he is already serving another sentence."

Of significance also is what may be described as the test in *Faulkner* [16] where Parker LCJ said:

> At the end of the day, as one always must, one looks at the totality and asks whether it is too much.[17]

In *Hoole*, 17 March 1989, Hunt J said that it is sometimes appropriate to telescope individual terms so that the total when added together does not exceed the appropriate figure. Furthermore, Hunt J added, when two or more offenders are sentenced, (whether by the same or different judges) in relation to some but not all of the multiple offences which they have committed

> There is little if any value in attempting to compare the individual sentences imposed upon different offenders in relation to the same offence.

Under the *Sentencing Act* 1989, considerable care will be required in determining how the sentences should be imposed in order to derive a "fair" result for those who commit multiple offences. As explained previously, the commencing date, as well as the order in which sentences are imposed will need to be given careful thought.[18] However, there can be no question that penalties in respect of multiple offences are discounted. Sentencing practice acknowledges that, penalties for offences are 'cheaper by the dozen', and this may appear to be unfair. As Ashworth notes

> multiple offenders are under-sentenced, strictly speaking, in as much as they receive little or no sentence for their n'th offence. For instance, there will be hardly any element in the sentence for an offender who admits 12 offences to distinguish it from the sentence he would have received for admitting 11 offences. In a sense therefore, the courts are passing sentences upon offenders rather than sentencing for offences: a separate and consecutive offence for each offence might impose a crushing burden on the offender. Even this view is linked, however, to the concept of proportionality which stems from the relative gravity of this type of offence, no matter how many have been committed.[19]

Where, it may be asked, is the deterrent for the multiple offender who may notch up concurrent rather than cumulative sentences for subsequent offences? The answer is that the real deterrent lies in the increased probability that offenders

[16](1972) 56 Cr App R 594

[17]ibid, at p. 596

[18]See p. 14 above

[19]Ashworth, A., (1983), *Sentencing and Penal Policy*, Weidenfeld and Nicholson London, at pp. 270, 271.

will be caught and brought to justice as they continue the risky occupation of committing crimes. Any plea for leniency in such circumstances is likely to go unheeded and offenders must know that, by the time a point is reached beyond which the courts are not prepared to add substantially, if at all, to the likely length of any sentence they would otherwise impose, this can only be because already the aggregate sentence itself is likely to be very long indeed.

Perhaps the judicial reluctance to impose 'crushing' sentences can best be illustrated by reference to the Victorian approach to armed robbery offences. In 1977 in that State the statutory maximum penalty was increased to 25 years imprisonment. This was done on the bases that armed robbery was becoming increasingly prevalent in the community, that harsh penalties were called for in order to deter others, and further that harsh penalties were justified, or deserved for those who committed this offence. Yet despite this obvious legislative directive, the courts have been reluctant to impose the kind of sentences envisaged by the legislation. In *Zakaria*[20], Crocket J. said:

> ... there would appear to be little statistical evidence to suggest that the courts have responded to any perceptible degree to the statutory invitation. Doubtless, this is due to an ingrained curial repugnance to the imposition of a crushing sentence unless very special circumstances appear to make such a sentence unavoidable. Those circumstances could be expected to include a crime that arouses a deep public revulsion or disquiet, an offence committed by an offender shown to be a persistent and unrepentant criminal or an offender being dealt with at the one time for multiple crimes of considerable gravity.[21]

Fox and Freiberg point out that the most severe sentence imposed for any one offence of armed robbery in that jurisdiction is 14 years, and that the Full Court has declined to affirm sentences of 15 years on two occasions.[22]

As will be seen, in New South Wales sentences in the top bracket (15 to 20 years penal servitude or broadly equivalent to minimum terms of between six and ten years for those sentenced after 25 September 1989) are generally imposed on offenders who commit multiple offences, and only in very exceptional cases are sentences in excess of this found.

Certainly in exceptional cases 'ultra' high sentences are recorded. When these are analysed it is usually found that long aggregate sentences have been ordered to run cumulatively upon prior unserved sentences. See for example, *Beacroft & Gladman*, 15 July 1983, where aggregate sentences of 17 years and 19 years respectively were imposed and ordered to run from the expiration of sentences each were serving. This meant that their effective sentences totalled 22 years and 24 years respectively.

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[20](1984) 12 A Crim R 386

[21]Fox and Freiberg, (1985), *Sentencing: State and Federal in Victoria*, Oxford University Press, Melbourne, at p.535.

[22]ibid at p. 536

In *Heuston*, 2 May 1984, the Court dismissed an appeal by an appellant who challenged the severity of an aggregate sentence of 35 years penal servitude, coupled with a non-parole period of 17 years. The circumstances were unusual in that the appellant had been serving a sentence of twelve years for armed robbery, imposed in 1974, when he escaped and committed a further seven armed robberies and some less serious offences. For these offences he was sentenced, inter alia, to a cumulative ten year period for the first armed robbery and five years cumulative for the second armed robbery offence. In the result his prior and present sentences aggregated to a term of 28 years. The appellant then escaped again and committed two further armed robberies and, together with the sentence for escape, he received a further aggregate sentence of seven years, which was added to his pre-existing sentence. Thus he had acquired a continuing period of custody of 35 years — dating from 1974. A non-parole period of 17 years, also dating from 1974, was imposed.

The appellant sought to challenge this extraordinarily long sentence, on the basis that he had not inflicted any physical injury or taken the life of any person. However the Court of Criminal Appeal rejected the appeal stating that the criminal courts had little alternative but to accumulate the sentences. To order that they be served concurrently would have meant that 'there would be no effective penal consequence for an ongoing repudiation' of the criminal law. A submission by the appellant, that he would have received a substantially shorter maximum penalty if he had come forward for sentencing on one occasion, was accepted by the Court. However Street C.J. said:

> But the plain fact is that he did not come forward on one occasion. He kept returning to serious crime. The criminal courts have no alternative but to visit on him cumulative sentences for his renewed ventures into serious crime.

Examples of long aggregate sentences are found in the cases listed below. These references should be consulted for illustrations of the sentencing patterns applicable to offenders who have committed at least three counts of armed robbery and have had their sentences reviewed by the Court of Criminal Appeal since 1984. More detailed accounts of the sentencing of multiple offenders and the application of the totality principle to specific cases are contained in the section dealing with bank robbery offences.

Case References

Three or More Armed Robbery Offences (since 1984)

Allen, 2 August 1984
Bainbridge, 29 March 1985
Bayley & Coleman, 3 February 1984
Cahill, 13 July 1984
Cardwell, 17 December 1984
Connolly, 12 June 1986
Couper, 13 December 1985
Fenner, 2 May 1984
Fotoudis, 23 February 1984
Gillis, 26 September 1985
Goodman, 4 July 1984
Gregory & Robson, 1 March 1985
Heuston, 2 May 1984
Holden, 29 August 1985
Ildes, 21 September 1984
Ireland, 25 May 1984
McGarvey, 11 May 1984
Marshall, 19 April 1984
Melvin, 1 May 1985
Montgomery, 6 February 1985
Murray, 11 September 1986
O'Connor, 19 September 1986
Regan, 12 February 1986
Roberts, 15 March 1985
Safwan, 28 February 1986
Stewart, 23 November 1984
Such, 4 April 1985
Tam, 2 May 1985
Treloar, 8 November 1985

Previous criminal record (since 1986)

Akeljic, 5 August 1987
Antoce, Lefter & Maniku, 5 February 1987
Bain, 7 September 1989
Bargashoun & Ceissman, 12 April 1989
Bortolus, 5 April 1989
Broadhurst, 6 April 1988
Caridi, 3 December 1987
Castles, 23 April 1986
Collins, Whiting & Whiting, 17 July 1987
Elmeligi, 4 August 1988
Grant, 25 August 1989
Green, 22 August 1986
Guider, 20 August 1987
Hampson, 23 July 1987
Hampton, 2 September 1988
Hawkins, 29 May 1986
Heatley, 10 March 1989
Hickey, 17 December 1986
Hoole, 26 April 1989
Keeble, 26 April 1989
Larsen, 8 September 1989
Lynott, 8 September 1989
Marshall, 8 May 1986
Miro, 7 June 1989
Muir, 20 August 1987
Parmenter, 7 September 1988
Perrett, 17 June 1988
Peters, 22 July 1988
Pottinger, 9 May 1986
Robinson, 4 February 1988
Shorten, 29 October 1987
Simon, 3 August 1988
Talbot, 23 April 1986
Vidler, 10 April 1986
Walker & Mills, 9 June 1989
Wells, 19 April 1989
Wood, 17 April 1989
Zeater, 22 April 1988
Zsolnai, 22 March 1989

Chapter 6

The Extreme Sentences

An appreciation of the range of sentences imposed for robbery cases prior to the 1989 legislative reforms may be obtained by looking at those cases which have attracted sentences of imprisonment of five years or less (the less serious category) and also those cases which have attracted sentences of 14 years or more (the more serious category). In terms of sentencing decisions made **after** the commencement of the *Sentencing Act* 1989 the "extreme sentences" equivalent may be regarded as falling outside the range of approximately three to eight years penal servitude.

In this section therefore **two separate lists of cases references are set out.** This facilitates the making of comparisons of cases falling either side of the more usual range of sentences frequently meted out by the courts. Caution needs to be taken in thinking of sentences imposed for robbery offences as constituting a simple tariff. As an analysis of legislative provisions suggests, robbery covers a very broad spectrum of behaviours — from unarmed robbery, attracting maximum penalties of up to 14 years (s.94 cases), to armed robbery, resulting in wounding or grievous bodily harm, attracting penalties of up to life imprisonment (ss.96 and 98 cases). Thus the mere fact that a case falls in either category of the 'extremes' does not thereby imply that the cases are exceptional or that they have been dealt with inappropriately. Rather the differences are generally explicable in terms of the factual circumstances of the cases themselves.

There are some obvious differences between the two categories of cases. One of the outstanding features of the cases in the more serious category is that they usually involve offenders who commit multiple offences. Further, offences in the more serious category often involve the use of excessive violence. Long sentences are also commonly imposed upon offenders who have bad criminal records, have been convicted previously of a robbery and/or have breached parole or some other form of conditional release when they committed their most recent offences.

Offences falling in the higher sentencing ranges tend also to be better planned and executed, and are generally directed at more lucrative targets, such as banks or other financial institutions.

The less serious category is often characterized by impulsive personal robberies committed by young offenders who are considered to have good prospects for rehabilitation.

The more serious category of robberies is fairly well described throughout this work[1] and therefore, prior to the presentation of the two lists of cases referenced, the analysis that follows will focus on a small selection of the less serious offences.

In *Cerella*, 12 July 1978, the appellant, who had been in company with three other men, had been sentenced for what was described as a course of 'hoodlum behaviour on a railway station and in trains in the southern suburbs of Sydney'. At Tempe Station the young victim, who was sitting on a seat, was asked for a cigarette. He was then assaulted by the group, his wallet taken and $3 dollars was removed. It was not clear who actually took the money. In two other incidents, a second assault and robbery and a common assault were committed by the appellant and his companions against innocent offenders. Street C.J. said:

> persons who travel on trains, whether in the suburbs of Sydney or in the country districts, and persons on railway stations, are all too frequently subjected to offensive conduct on the part of hoodlums and at times, as here, to the actual perpetration of violence upon them.

The appellant was described as 'of a somewhat unsavoury character', being part of 'the hoodlum and sharpie element' of the St. George area. However, in his favour the pre-sentence report indicated that Cerella was avoiding places and associates that had led him into trouble in the past, and for this reason, the Court was prepared to reduce his non-parole period so that it corresponded with that imposed upon his associates. In the result he was sentenced to three and a half years with a (reduced) non-parole period of twelve months.

In *Heaydon*, 12 July 1978, the appellant had been sentenced to five years penal servitude, coupled with a non-parole period of two years in consequence of his pleading guilty to a charge of armed robbery. A little before 7 p.m., armed with a kitchen knife with a four inch blade, he went to the premises of a mixed business and presented the knife to a man behind the counter. He demanded the contents of the till. The shopkeeper replied 'you're joking?' to which the appellant responded 'no I'm not, I have done this before'. The till was then opened and the appellant decamped with $150 worth of notes. The same night the appellant picked up his girlfriend, drove to Kings Cross and spent the money on food and on his being tattooed.

The subjective circumstances raised on the appellant's behalf indicated that he had no prior record of criminal offences and was not associated with criminals. He was 18 years of age, came from a stable family and had the benefit of strengthening moral support. In addition he had a strong relationship with the young woman who stood by him during his period of trouble. He had left school at the age of 15, had worked well since leaving school, and his employer was prepared to hold a position open for him. Indeed he was described by his employer to be 'reliable, honest and reputable'. When asked why he committed the offence he could find no explanation but admitted that it was a foolish thing to do.

[1] see for example sections dealing with the totality principle, bank robbery, robbery by parolee

While it was argued that this was not the type of armed robbery that normally attracted severe punishment, the court was nevertheless constrained to hold that the offence was sufficiently serious to warrant a custodial sentence. Street C.J. said:

> to hold up a shopkeeper with a knife and to compel him to open the till is in itself a serious crime no matter how premeditated it may have been. The prevalence of offences of this nature, escalating admittedly from offences such as this up to the armed and masked bank robber, are notorious in the community and the Courts have consistently issued warnings to persons who engage in such criminal activities that a serious view will be taken when it comes to determining sentence.

In the result the Court was not prepared to interfere with the sentencing or the non-parole period despite other information suggesting that the offender was under the influence of alcohol and was a little slow-witted and hence may not have appreciated fully the seriousness of his actions.

Lee J. agreed with the Chief Justice and the trial Judge. His Honour added that the following statement from the transcript of the trial was entirely correct, namely:

> the presentation of a knife to a shopkeeper, with a demand for money and a threat is one of the most serious crimes in our Statute Book and must be treated accordingly.

Nagle J. disagreed with the other members of the Court and felt that there was scope for the reduction of the non-parole period, but in the end was not disposed to dissent from the majority opinion.

Judge, 9 November 1978, is interesting in relation to the way in which the Court dealt with the question of disparity. It demonstrates that the Court is prepared to reduce an otherwise appropriate sentence if a co-offender without sufficient justification has been treated more leniently than the appellant. The appellant had been sentenced upon one charge of robbery in company and a second charge of larceny of a motor vehicle. He was sentenced to five years penal servitude on the first charge and one year cumulative on the second. In respect of the aggregate sentence of six years, a non-parole period of two years was specified.

His co-offender, a man named Morris, was sentenced on the same day by the same judge. At the relevant time Morris was serving a sentence of ten years penal servitude for rape and was due for release by way of remissions on 24 July 1982. His earlier non-parole period was due to expire on 30 June 1979. Morris was sentenced to two years penal servitude for the robbery in company and this was ordered to commence at the expiration of the existing sentence for the rape. He was sentenced to a further year cumulative for the larceny of a motor vehicle offence. This amounted to an extension of three years to Morris' pre-existing sentence and a fresh non-parole period was specified that was to expire on 28 February 1980. The effect was to extend his earlier non-parole period by eight months.

The question of disparity then related to the fact that the appellant, Judge, had received a sentence of five years, whereas Morris had received two years in respect of

the robbery in company offence. Similarly, the appellant had received a non-parole period of two years in comparison with eight months extension in the case of Morris. Street C.J. said that:

> mere disparity does not ordinarily operate so as to attract the intervention of this court if the sentence is in all other respects appropriate and free from legitimate challenge.

It was suggested that the trial judge was seeking to avoid imposing 'a crushingly heavily ultimate aggregation of sentence upon Morris' and hence the shorter sentence. The Chief Justice went on to say that this line of argument was not a sufficient justification for the sentencing disparity if the two men were not 'relatively distinguishable in respect of their criminality and their antecedent'.

The circumstances of the offence were as follows: — Judge, Morris and a third man had absconded from Mount Penang Boys' Home. Shortly afterwards they decided to break and enter a dwelling house in order to change their clothes and thereby avoid detection. Morris knocked on the front door which was answered by a 76 year old man. Morris asked for a fictitious person and then returned to his companions, advising them that the occupant was old and that it would be easy to enter the house, assault and rob him. While the third man remained outside to keep watch, Morris and Judge entered the house and found the old man sitting in a chair with his back towards them. Morris then threw a blanket over the old man's head while Judge held his wrists behind him. The third man then entered the house and with Morris searched for property to steal.

They absconded with some clothing, a kitchen knife and some 40 cents in cash. The old man had received some abrasions to his head and the doctor had reported a marked deterioration in his condition since the assault.

Later on that night they broke into a garage and stole a vehicle. All property was eventually recovered. The Chief Justice concluded that the criminality in respect of both offenders was similar.

In the judgment of the Court of Criminal Appeal, Street C.J. meticulously compared the antecedents of the two offenders and found little basis justifying a conclusion that Judge should be treated more severely than Morris. While the Chief Justice found that Morris' criminal record was far worse than the criminal record of the appellant, there were no circumstances in the records which would justify Morris having been dealt with more leniently.

In conclusion the Chief Justice said:

> I find it difficult to avoid the conclusion that Judge is justified in feeling that he has been too severely dealt with when his sentences and non-parole period are placed beside those of Morris. I have well in mind the general approach that I have mentioned at the outset regarding the difficulty of relying on mere disparity as basis for procuring the intervention of this Court in a sentence appeal. But in the case the extent of the disparity and the demonstrable absence of any reason to justify it brings about a situation in which I consider that in the interests

> of orderly administration of justice Judge should have the benefit of his sentences being brought back into direct relationship with that of Morris. I am conscious that in so doing there will not only be a disregard of the general approach I have mentioned earlier but also the result will be that Judge will be too leniently dealt with when regard is had to the general pattern of sentencing for a crime such as this. The case is unusual inasmuch as I am disposed to feel that Judge was properly dealt with if he be viewed in isolation, but there is a significant element of injustice in leaving him in a position in which his co-offender is getting off so much more lightly than he. It is, perhaps, from Judge's point of view a remarkably fortunate circumstance that Morris was dealt with in such a surprising lenient manner, that, this having taken place, I cannot but feel the Judge is justifiably aggrieved at the disparity that has been introduced as between himself and his co-offender.

The Chief Justice added that the case was not intended to be treated as a precedent, either in relation to the question of disparity or to the appropriateness of the sentence for cases of robbery in company. The appellant's sentence of five years was reduced to two years and his non-parole period was reduced to an effective 15 months.

Another decision which stands out as being on the lighter side of offences of robbery or armed robbery offences is *Edwards*, 7 September 1979, a case of a married woman with two children and a difficult life, who presented a written threat to a bank teller, in which she demanded money and indicated she had a gun. She obtained some $3,000 in cash and used half this amount to purchase pre-ordered travellers cheques before boarding a plane for Singapore. When apprehended she made a full confession. She was a first offender, and while the trial judge was 'as sympathetic as he thought the circumstances would permit', Reynolds J.A., with whom the other members of the Court agreed, said that the sentence (of three years imprisonment with a non-parole period of six months) was 'very near to the minimum sentence which should be imposed for the crime of bank robbery' and accordingly declined to interfere with the order of the trial judge.

Sometimes relatively short sentences are imposed upon offenders who are already serving long sentences. In *Hayes*, 15 November 1979, the appellant, who was already serving eight years for striking and robbing a taxi driver, was sentenced to a further four years of imprisonment, with an extended non-parole period of 18 months, for robbing a prison officer of his keys. At the relevant time the appellant had been armed with a piece of sharpened metal of about six inches in length which he held at the prison officer's throat. The keys were used to gain access to the drug cupboard where he obtained narcotics. He injected the drug into his veins in such a quantity that it almost led to his death. The trial judge had said that he had reduced the period that he felt to be necessary to the absolute minimum because it was against his inclinations to send a young man back for a further lengthy period in gaol (Per Street C.J.). The appeal against severity was dismissed.

6.1 Relevance of Medical Condition

Will the Court interfere with a sentence where the appellant has a medical condition which would cause him considerable hardship in prison?

In *Vachalec*, 5 October 1979, the appellant sought to challenge the severity of a prison sentence of three and a half years with a non-parole period of 15 months in consequence of his being convicted of charges of robbery in company and stealing from a dwelling house at Surrey Hills. These offences were committed against members of a rival motor cycle gang, and involved the theft of some electrical goods, some money and personal property belonging to two occupants of the dwelling house.

The appellant had no criminal record of significance. He was not at the forefront of the planning or implementation of the offences and was sentenced on the basis that he was liable to oesophageal obstruction that necessitated a special diet in order to avoid this condition. His two companions were sentenced to five years in aggregate and received longer non-parole periods.

The principal ground of the present appeal was that the appellant's medical condition justified the Court's intervention, and more particularly, that the appellant was not receiving the treatment that he claimed he needed.

After pointing out that the Court of Criminal Appeal was primarily concerned to ascertain whether the decision of judges of first instance were in error, and if so, in what way these should be corrected, Street C.J. said:

> as an Appeal Court, it is not the function, nor is it equipped, to fulfil a continuing supervisory role over the effect of imprisonment upon an individual. Such a matter involves essentially administrative considerations and remedial action involves essentially an exercise of administrative power that this Court does not possess. This Court exercises judicial power, it has no power or authority to give administrative directions regarding the treatment of prisoners. Nor has it power or authority by administrative order to change the character or concomitants of sentences or to bring about total or qualified release of persons in custody. that power and authority resides in the hands of the Executive Government.

The Chief Justice pointed out that there could be cases where significant miscarriages were 'so plainly foreseeable at the time of sentence' as to warrant a finding of error on the part of the sentencing judge, but such cases would be rare, and the present case was not an example of these. The Chief Justice continued:

> The responsibility to provide adequate and proper medical treatment for prisoners rests squarely on the shoulders of the prison authorities. In *R. v. Danhach*[2] we said:

[2]C.C.A. 12 August 1977, unreported

> His Honour, in a supplementary report to this court, expressed his concern at the need for the provision of appropriate medical treatment for persons in prison. Clearly enough they are not free to seek medical advice of their own choosing or at their own will. This imports upon the prison authorities the obligation of ensuring that adequate medical advice and treatment is made available. Proper care of the health of inmates in the prison system is a significant part of the responsibilities of the prison authorities.
>
> The Corrective Services Department, as the Crown's administrative body, has a clear obligation to ensure that adequate and proper medical and dental treatment is provided for persons in custody, equally as it has a clear obligation to provide food, clothing and shelter. These are basic human needs, and the Government must ensure that they are available. As we pointed out in *R. v. Danhach* (*supra*), a person deprived of his liberty is, in consequence, deprived of the ability to look after himself; this confers on him an entitlement to have his basic human needs met by the prison authorities.

The Chief Justice further explained that the sentencing judge already considered the appellant's need for medical treatment and the particular hardship he would undergo whilst imprisoned. Accordingly if the appellant's reasonable needs were not being met, then it was a matter for the authorities to remedy. The Chief Justice added:

> ... If they cannot be remedied and the appellant's need is sufficiently grave, then release on licence or some other similar administrative step would have to be considered by the relevant authorities.

As the Court held that neither the sentence nor the non-parole period were excessive, it dismissed the appeal.

Cooper, 9 November 1988, although not a case which falls into the extreme category as described in this chapter, nevertheless shows that the Court of Criminal Appeal may be disposed to interfere with a sentence on account of the offender's medical condition. In that case, the appellant had been convicted of a series of robbery and armed robbery offences and sentenced to a total effective sentence of 13 years with a non-parole period of six years. However *since* the date of sentence the appellant had discovered that he was infected with the AIDS virus, and had been so infected at the time of sentencing. The Court was satisfied that the appellant would suffer special hardship because of his state of health, and that imprisonment for him would be "far more burdensome than would otherwise be the case." In the result it allowed the extension of time for leave to appeal, allowed the appeal and reduced the non-parole period by one year.

In *Heatley*, 4 February 1988, however, the Court declined to interfere in sentences aggregating to 23 years with a non-parole period of 15 years, upon the submission that the prisoner had a genuine fear that he was likely to contract AIDS whilst

serving his sentence and die in prison. The Court said that it could not guard against that risk and that the Corrective Services authorities were continually attempting to meet the human rights entitlements of prisoners. This included the provision of proper health care both preventive and therapeutic. The criminal courts were simply "not equipped to enter directly upon this particular field."

6.2 Rehabilitation v. Custodial Punishment

Good character and rehabilitation prospects are often elements that are taken into account in determining whether any leniency ought to be extended to an accused convicted of armed robbery offences. Thus in *Murray*, 11 September 1986, the Crown appealed against the leniency of non-custodial sentences (community service order, bond and fines totaling $4,000) imposed in respect of two counts of robbery (s.94) and one count of armed robbery (s.97).

At first the respondent had been dealt with under the latter charge, ordered to perform 200 hours of community service work and placed under the care of the probation and parole service. The other charges were stood over for about 6 months, and in the meantime the respondent had been placed on bail with conditions that he remain in W.H.O.S. and report to police. He was subsequently dealt with on the outstanding charge and released on a recognizance in the sum of $1,000 to be of good behaviour for five years. Conditions of the recognizance included that he complete the W.H.O.S. course which he had commenced, remain there until he obtained permanent employment and a stable residence, place himself under the directions of the Probation and Parole Service, and pay fines in two instalments of $2,000 each.

The offences themselves were serious. On 23 October 1984 the respondent walked into a beautician's shop at Miranda, nudged the manageress with a shopping bag containing either a rolled up newspaper (his version) or 'a rod of some kind' (her version) and absconded with $180. He committed a second offence of a similar kind on 6 November and escaped with $200. On 16 January he menaced a female shop owner with a six inch bladed fishing knife and escaped with $300. On 18 January he menaced another female shop assistant with the knife but fled when disturbed. It was this latter offence which attracted the community service order, and this sentence was not challenged by the Crown. All the offences were inspired by his addiction to drugs.

The sentencing judge heard evidence of the respondent's endeavours to rehabilitate himself, particularly since August 1985 when he first appeared before the court. At that time the learned sentencing judge had stood the proceedings over in order to evaluate the respondents prospects for rehabilitation. He said:

> You are progressing well and there appears to be some reason to hope that you are overcoming your addiction to drugs. If you continue to progress ... some alternative to a custodial sentence can be considered. I do not want you to get the impression, however, I have made any decision in that respect now, ... I say those things to hold out some

> hope to you in the future and to give you some encouragement in the course that you are undertaking.

In April 1986 the sentencing judge had also before him some positive subjective attributes that were to contribute to his decision not to impose a custodial sentence. The respondent was a married man, separated from his wife and six year old daughter and a resident of the Drug Rehabilitation Centre (W.H.O.S.) since 14 February 1985. He had but one prior matter on his criminal record, that of using and possessing heroin (November 1984) and was in fact on bail for that offence when he committed the offences in January 1985. However the Court found that this was 'during the high point of his addiction' and otherwise 'he had led a worthwhile life and free from any convictions'. He had an impressive employment record and employers spoke of his dedication to his work, his honesty and his good character. He had been a ground engineer for Qantas and had continued to work without prior involvement in crime despite his long history of drug addiction. A detective sergeant of police who had known the respondents family for a long time provided a wholly favourable and impressive reference for the respondent.

The Crown submitted that his Honour had erred in not imposing a custodial sentence, and in this submission the Court of Criminal Appeal acquiesced. Lee J., with whom Reynolds and Campbell JJ., agreed said:

> There can be no doubt that it has been the policy of this Court to pay little regard, in cases of serious crime, to the fact that the person committing it is addicted to heroin, to pay little regard in the sense that it does not in any way deprive the crime of any of its seriousness, nor enable other than custodial sentences to be imposed when the seriousness of the crime so demands. This Court has also made plain that robbery, whether as such or with arms, will be regarded in virtually all circumstances as an offence of the utmost gravity, which must carry a custodial sentence.[3]

His Honour considered that, notwithstanding the impressive subjective material put before the sentencing judge, the offence of 16 January 1985 had demonstrated 'the extent to which the respondent's mind had acquiesced in conduct involved in the commission of serious crime' and so stood out as passing 'beyond the point at which other than a non-custodial sentence could be imposed'.

Having thus concluded that the sentencing judge had been in error the Court noted its wide discretion[4] and decided that it would not substitute a custodial sentence in this particular case. The Court had before it additional evidence indicating that the respondent had complied admirably with all conditions of his bond and that he now worked as a youth worker with adolescent offenders. Thus Lee J. said:

[3] While there is a need for general deterrence and offences of armed robbery normally call for condign punishment, the Victorian Court of Criminal Appeal has held that the position has not yet been attained in Victoria where these offences must invariably be visited with unconditional sentences of imprisonment for several years: see *Voegeler* (1988) 36 A Crim R 174.

[4] see *Holder & Johnston* [1983] 3 NSWLR 245 at 255

> The case is one ... in which the Court is faced with evidence of a very unusual kind; namely, evidence not suggesting that the respondent may be rehabilitated but rather that he has overcome the problems which beset him and has now turned to the life which his innate character would otherwise have permitted him to lead ...

Lee J. added that if a custodial sentence were now to be imposed this would merely impede the respondent's worthwhile progress and that to do so was not now in the public interest. There would be 'an element of real unfairness to him if the Court were now to require him to be imprisoned'. The respondent had 'played the game' and even though the trial judge had 'erroneously failed to carry out the policy of the law' the respondent had nevertheless been punished. In *Melina*[5], the Federal Court had pointed out that a prolonged and rigorous drug rehabilitation program, followed by a period of supervision by the probation and parole service with the ever present threat of imprisonment for any breach of his bond, is an alternative form of punishment.

As for the practice of dealing with one charge and standing over others, Lee J. made it quite clear that he was not assenting to the course followed by the sentencing judge, and that the judgment itself should not be regarded as a precedent but simply limited to the facts of the instant case. Accordingly the appeal was dismissed.

It is one thing to say that ordinarily armed robbery offences should carry custodial sentences as the appropriate penalty, it is quite another to suggest that prior good character should not count in mitigation of sentence. Thus in *Spiteri & Young*, 3 October 1985, the appellant Young succeeded in having a sentence for armed robbery in company, together with twelve break enter and steal matters listed on the Ninth Schedule, reduced from seven years penal servitude to four years (although she was ultimately sentenced to an aggregate seven years in respect of that and a number of other property offences).

This offence involved entering premises of a victim who was personally acquainted with the appellant Young, and then threatening the occupants with a knife until they handed over some cash. Both appellants were drug addicts and they embarked upon what was described as 'a criminal escapade of considerable magnitude' between 24 September and 11 October 1984. The proceeds of their crimes were used to feed their drug habits and both had recently been inmates at W.H.O.S. at Goulburn.

At first Young engaged in prostitution, but because this caused feelings of guilt and displeasure to the male appellant, they embarked upon the course of criminal conduct which led ultimately to criminal proceedings. Young, who was aged 22 years, was described as a person of good character, had not previously served a term of imprisonment, and indeed the armed robbery offence was held to be amateurish and 'vastly different from that which is usually encountered and is to be regarded ... at the lowest level of the scale of criminality for such an offence'.

Accordingly the Court reduced the sentence in respect of that offence from seven to three years penal servitude, thereby reducing the aggregate sentence from ten to

[5](1984) 2 FCR 508 at 512

seven years. A non-parole period of three and a half years, rather than five years, was also substituted.

Case References
Sentences of 5 Years or Less

Adam, 30 June 1983
Anastasio, 21 November 1986
Bargashoun, 22 November 1985
Blackburne, Davies & Amvrazis, 18 December 1981
Bradley, 28 September 1978
Brewin, 27 November 1980
Brown, 6 June 1985
Bush & Cougan, 20 June 1986
Caridi, 3 December 1987
Cerella, 12 July 1978
Chatfield, 26 September 1985
Collins, Whiting & Whiting, 17 July 1987
David, 1 March 1984
Davies, 18 May 1984
Dobson & Watkins, 18 March 1982
Domatas, 30 May 1985
Doust, 20 February 1981
Duck, 18 March 1983
Dugan, 15 March 1984
Edwards, 7 September 1979
Faure, 18 February 1983
Garside, 2 July 1982
Gavazovski, 16 November 1984
Goedeny, 14 August 1981
Green, 22 August 1986
Hayes, 15 November 1979
Heaydon, 12 July 1978
Judge, 9 November 1978
Keenan & Saw, 13 August 1981
Lewis, 3 May 1984
Lodding, 7 December 1978
McCarthy & Martin, 29 June 1984
McGarvey, 13 May 1983
McKenzie, 13 June 1985
McNamara, 26 November 1982
Merhab & Salloum, 8 February 1984
Middleton, 31 March 1983
Mulligan, 30 October 1980
Murray, 11 September 1986
Nash, 17 November 1983
Nepia, 21 February 1986
Ognenovski, 31 March 1978
Organ, 9 March 1978
Puta, 15 April 1983
Quinn, 10 August 1979
Raybould, Adams, 9 August 1979
Richards, 11 February 1981
Rowland, 25 September 1981
Ryan, 25 September 1981
Scott, 6 June 1980
Smith, 5 December 1986
Stephens, 26 March 1987
Stevens, 28 September 1978
Stewart, 31 May 1985
Sutton, 6 March 1981
Taylor, 5 July 1979
Terek, 20 March 1981
Thomas, 6 December 1984
Wlash, 7 April 1989
Weeks, 8 October 1982
Vachalec, 5 October 1979
Verkroost, 21 September 1979
Webster, 19 December 1980
Wiley, 27 September 1979
Williams, 11 September 1986
Yates, 11 April 1985

Sentences of Fourteen Years or More

Prior to the presentation of the list of cases involving sentences of 14 years or more, it should be noted that many of the cases so listed have been discussed more fully elsewhere in this work. Accordingly, additional reference may be made to those cases as follows:

Case	Subject	Page
Beacroft & Gladman 15 July 1983	The Totality Principle The Top End of the Range	101 100
Buoy 1 December 1978	Concurrent or Cumulative Sentences	111
Connolly 12 June 1986	Concurrent or Cumulative Sentences	113
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Case References
Sentences of 14 Years or More

Alexander, 2 July 1987
Allen, 2 August 1984
Bargashoun & Ceisman,
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Bayley & Coleman, 3 February 1984
Beacroft & Gladman, 15 July 1983
Blewitt, Browne & Moorhouse,
3 December 1987
Brown, Hatton & Baxter
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Buoy, 1 December 1978
Burke, 7 October 1983
Cahill, 13 July 1984
Cardwell, 17 December 1984
Carson, 7 June 1979
Chamberlain, 7 July 1982
Coates, 2 July 1982
Connolly, 12 June 1986
Costin & Costin, 12 July 1989
Dawes & Mannix, 6 December 1984
Dubavs, 17 February 1978
Fenner, 2 May 1984
Foster, 25 May 1989
Gibson, 2 April 1981
Gibson, Green & Jenkyns,
5 June 1981
Gillis, 26 September 1985
Goodman, 4 July 1984
Gregory & Robson, 1 March 1985
Guider, 20 August 1987
Haggart, 17 December 1982
Hampson, 23 July 1987
Heatley, 4 February 1988
Heatley, 10 March 1989
Heuston, 2 May 1984
Hogan, 21 September 1979
Hoole, 17 March 1989
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Law, Greer & Morris,
19 February 1982
Maresch, 7 June 1979
Markham & Hewitt,
16 February 1979
Marshall, 19 April 1984
Matier & Ramage, 6 April 1979
Montgomery, 6 February 1985
Moran, 7 July 1983
Muir, 20 August 1987
Palmer, 27 March 1981
Peters, 22 July 1988
Ralph, 31 March 1983
Renata & Johnstone,
24 & 25 November 1983
Reynolds, 21 September 1978
Roach, 30 October 1986
Roberts, 15 March 1985
Robinson, 20 August 1981
Robinson, 4 February 1988
Ronalds, 14 July 1983
Safwan, 28 February 1986
Santos, 24 June 1983
Smith, 13 May 1982
Smith, 7 October 1982
Stalder, 4 June 1982
Steain, 16 May 1980
Such, 4 April 1985
Trindall, 1 July 1983
Vougdis & Rossides, 19 April 1989
Walker & Mills, 9 June 1989
Whitely, 13 May 1982
Wilson, 3 February 1984

Chapter 7

In Breach of Conditional Release

Where offenders are on bail, subject to a bond, on parole or released on licence and then commit armed robbery offences, they cannot anticipate sympathy from the courts.

7.1 Bail

In *Begnell*, 28 March 1985, the appellant committed an armed robbery of a credit union while he was free on bail awaiting a hearing of an earlier armed robbery offence. The Court said:

> The significance of this abuse of freedom on bail in order to commit further offences has many times been emphasised. A substantial accumulation can be expected. This approach is an essential concomitant to liberalised administration of the granting of bail.

Similarly, in *Hughes*, 6 April 1984, the Court said emphatically that offences committed whilst on bail must be visited with heavy sentences. This was 'an essential protective factor' by reason of the implementation of new laws in making bail more readily available.

In *Melvin*, 1 May 1985, the Court observed that abuse of bail was particularly serious where the offences were of a similar character to that of the original charge. Indeed the Court regarded an aggregate sentence of thirteen years in conjunction with a non-parole period of six years as lenient, given that the appellant had been arrested, released on bail, committing some twenty-one offences of forging and uttering, then again arrested and released on bail only to commit another six assault and robs and one demanding money with menaces. Similarly see *Todd*, 5 July 1984.

In *Milson*, 22 June 1984, the Court said that those who abuse their freedom on bail to commit further offences must expect to receive salutary sentences especially where they commit a major offence of armed robbery. Thus a sentence of seven years with a non-parole period of three years and three months was described as 'far from excessive'. Similarly in *Smith*, 6 March 1985, the Court refused to interfere with a sentence of eight years coupled with a non-parole period of four years for the

appellant who was on bail at the relevant time. An argument by the appellant's counsel, that the sentence imposed was out of line with sentences currently imposed was rejected on the basis that it did not 'stand up against the attitude of the criminal courts when sentencing for offences whilst on bail'.

In *Zullo*, 26 April 1984, the Court commented that the appellant was fortunate that the sentencing judge did not impose a cumulative sentence for the offence of break enter and steal which the appellant had committed whilst on bail. The fact that the appellant was a drug addict was some explanation for his behaviour, but the contextual circumstances of these offences (he was on a good behaviour bond when he committed them) pointed strongly against any degree of leniency being extended to him. The Court stated that 'ordinarily a significant sentence is called for when an offence is committed on bail'.

Further it seems that mitigating factors may have less significance if the offender has breached bail. Thus it has been held that rehabilitation of a bail absconder is given less significance than if rehabilitation had taken place otherwise.[1]

7.2 Breach of Parole or Licence

Where offenders commit serious offences, such as armed robbery while they are subject to any form of conditional release their prospects of being dealt with leniently are not good. In *Brownlowe*, 5 September 1985, the Court said:

> It is a difficult sentencing exercise which confronts a Court when it has before it a person who, when released on parole, commits other serious offences. The purpose of parole is to enable a person to go free and to live within the law, and when the freedom given by parole is used merely as a means of taking up the criminal life which was led before, it is very hard for the Court to look with leniency upon the matter. Indeed, if the parole system is to have efficacy there must inevitably arise in the Court's mind the question of deterrence both to the individual who abuses parole in that fashion and to others who are released on parole. In the present case, bearing in mind the appellant's appalling record of serious crime since 1973 and his willingness to resort to crime so early after release on parole, I am unable to conclude that a sentence of eleven and a half years was in any way excessive or that the non-parole period [of five years] was too long.

In *De Boer*, 6 September 1985, the Court said:

> It has been said over and over again in this court that those who commit serious crimes whilst on parole cannot expect much leniency and to commit an armed robbery within a few months of being released from prison in respect of sentences imposed for similar offences is to place the court in a position where leniency becomes virtually impossible.

[1] *Thomson* (1988) 37 A Crim R 97.

And in *Kushkarian*[2], the Court said:

> ... but he comes forward as a man who committed these offences whilst he was on parole — indeed within a few months after his release on parole — from an earlier, lengthy sentence for two robberies and armed robbery. There is simply no justifiable basis for contending that the aggregate of fifteen and a half years, seven of which would run concurrently with his pre-existing sentence, is excessive. Likewise, the non-parole period of an effective six years ... falls well within the discretionary field open to the sentencing Judge.[3]

In *Stevens*, 22 February 1985, counsel for the appellant submitted that an eight year non-parole period, against an aggregate sentence of fourteen years was excessive in the circumstances. The Court of Criminal Appeal did not agree. It said:

> Where conditional liberty is granted, as it was here, by licence from an offence such as armed robbery and that conditional liberty is abused by returning to exactly that type of offence, then there is much to be said for the view that perhaps the specification of a non-parole period may serve little purpose. Irrespective of that, however, the question for this Court is whether the eight year period is excessive in relation to the fourteen years. Considered in the light of the totality of the criminality reflected in that fourteen year aggregate, we do not consider that the period is disproportionately lengthy.

In *Montgomery*, 6 February 1985, the Court set itself the task of setting a non-parole period after the trial judge had erroneously declined to do so. An aggregate head-sentence of 14 years had been imposed for one charge of possessing a shortened firearm and nine charges of armed robbery. The appellant had committed these offences while on licence from sentences imposed for another armed robbery, as well as other violent and non-violent offences. The appellant was a heroin user, had held up banks and obtained some $42,000 in all. It was said that the offences were carried out in order to enable the appellant to purchase drugs to feed his addiction.

In determining that a nine year non-parole period should be specified, the Court observed that it was necessary to have regard to the appellant's earlier record and to the circumstance that the present series of offences was committed while the appellant was subject to a licence from the earlier sentences. Finally, the Court also found that the commission of nine armed robbery of banks rather than one, offences which 'have consistently been condemned by courts as involving grave criminality', was of particular significance.

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[2](1984) 16 A Crim R 416

[3]ibid at p. 422

Chapter 8

Robbery by Parolee

By definition, a parolee is a person who has a serious criminal record. Accordingly those parolees who commit armed hold-ups or other forms of robbery cannot expect, and do not obtain, lenient treatment by the courts. As a result in the majority of cases sentences imposed upon parolees (or for that matter licensees) are ordered to run from the date of expiration of sentences previously imposed.[1] However, the courts are also aware of the need to modify their sentencing practices so as to avoid imposing 'crushing' sentences. This has already been discussed in Chapter 5[2] and is shortly to be discussed again under the general heading 'The Totality Principle' in the chapter on bank robbery.[3]

Here it may be sufficient to repeat the Court of Criminal Appeal's observation in *Brownlowe*, 5 September 1985, as it crystallises the Court's thinking upon the problem of sentencing parolees:

> It is a difficult sentencing exercise which confronts a Court when it has before it a person who, when released on parole, commits other serious offences. The purpose of parole is to enable a person to go free and to live within the law, and when the freedom given by parole is used merely as a means of taking up the criminal life which was led before, it is very hard for the Court to look with leniency upon the matter. Indeed, if the parole system is to have efficacy there must inevitably arise in the Court's mind the question of deterrence both to the individual who abuses parole in that fashion and to others who are released on parole.

It is true that the concept of a non-parole period has now been supplanted by the minimum term under the *Sentencing Act* 1989, and the parole period itself, now limited by the additional term, is likely to be shorter than in the past, but there is no reason to believe that the courts will alter this general approach to the sentencing of those who commit fresh offences while released on parole.

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[1] Now see Sentencing Act 1989 s.9, discussed at p. 14 above

[2] at page 66ff

[3] See at page 101ff.

Case References

Alexander, 2 July 1987
Antoun, 16 April 1987
Baartman & Robinson, 15 April 1983
Bakhos, 24 February 1989
Bargashoun & Ceissman, 12 April 1989
Beacroft & Gladman, 15 July 1983
Brownlowe, 5 September 1985
Burke, 17 November 1978
Chatfield, 26 September 1985
De Boer, 6 September 1985
Duck, 18 March 1983
Elmeligi, 4 August 1988
Fotoudis, 23 February 1984
Hampton, 2 September 1988
Hawkins, 29 May, 1986
Heatley, 10 March 1989
Hickey, 17 December 1986
Hines, 29 April 1983
Holden, 29 August 1985
Hunt, 3 July, 1986
Hyndman, 30 August 1985
Imisides, 6 April 1989
Ireland, 25 May 1984
James, 21 December 1979
Keeble, 26 April 1989
Keenan & Saw, 13 August 1981
Kushkarian, 4 July 1984
Lynott, 10 August 1989
Miro, 7 June 1989
Moran, 7 July 1983
Muir, 20 August 1987
Mumby, 26 April 1989
Palmer, 27 March 1981
Perrett, 17 June 1988
Reynolds, 21 September 1978
Robinson, 20 August 1981
Smelcher, 19 July 1989
Stewart, 23 November 1984
Talbot, 23 April 1986
Treloar, 8 November 1985
Trindall, 1 July 1983
Walsh, 7 April 1989
Weeks, 8 October 1982
Wells, 19 April 1989
Wood, 7 April 1989
Woollett, 2 May 1986
Zsolnai, 22 March 1989

Chapter 9

Robbery by Escapee

Escapees who commit armed robberies while at large are sentenced severely. Prior to 25 September 1989 for the offence of escaping offenders generally received cumulative sentences of around two years but sometimes as much as five years imprisonment commencing from the expiration of the sentences which they were serving when they escaped. Often this left little scope for imposing the full measure of punishment for other offences, particularly robberies because of the courts reluctance to impose crushing sentences.[1] Sometimes the courts could not avoid imposing very long sentences,[2] sometimes they declined to specify a non-parole period because of the bad prior criminal history of the offender,[3] and sometimes they moderated their sentences by extending any non-parole period previously imposed by a relatively short period of time.[4]

In *Coleman*, 14 May 1982, it was submitted on the appellant's behalf that it is not competent for a court to accumulate a second sentence for an escape or attempted escape on to a previous sentence for escape where both were passed while the appellant was serving the same sentence. Street C.J. said:

> In the present case, the sentence for the attempted escape is postponed into the future in that it is ordered to commence at the expiration of the two years for escape.
>
> Section 34 of the Prisons Act reads:
>
> > 34. Any person who, being a prisoner in lawful custody, escapes or attempts to escape from such custody shall be guilty of a felony and shall be liable to penal servitude for a term not exceeding seven years, to be served after the expiration of any term of imprisonment, penal servitude or detention to which the prisoner was subject at the time of his escape or attempt to escape.

[1] see pp. 66f and 101f discussing the totality principle

[2] see particularly *Heuston*, 2 May 1984 discussed at page 70 above

[3] see *Safwan*, 28 February 1986; *McLaughlin*, 29 April 1983

[4] New sentences must now be accumulated from the end of the existing minimum term, *Sentencing Act* 1989, s.9 see above at p. 1.7

> The argument advanced by Mr Blanch is that the requirement that a sentence for escape be served 'after the expiration' of the term of imprisonment to which the prisoner was subject at the time of the escape is to be construed as meaning upon and after. The contention is that it is not open, in the face of that section, to a sentencing judge to direct that a sentence under that section should commence at a date after the expiration of his then current sentence. This contention was advanced before Judge Thorley. He rejected it. He referred to a similar view having been adopted by Judge Ward in a matter of *R. v. Lynch*. We agree with Judge Thorley, and likewise with Judge Ward, in their interpretation of the section.
>
> The purpose of the relevant portion of the section is to preclude a sentence for escape being made concurrent with the pre-existing sentence. It was to require an extension of the pre-existing period of custody which the legislature carried into effect by the terms that it has used. The section does not preclude further postponement of a sentence for escaping or attempting to escape so as to require it to commence on a date beyond and subsequent to the end of the pre-existing sentence.

In *Safwan*, 28 February 1986, the Court declined to interfere with a cumulative sentence of two years for escape, even though the appellant had been sentenced to an aggregate of 29 years penal servitude. Street, C.J. simply observed:

> The two years for escape is within the legitimate bounds of discretion for an offence carrying as this does a statutory maximum of seven years. It is neither excessive in itself considered in the established pattern nor is there any error in his Honour not having discounted it in the context of the totality of the aggregate towards which it contributes.

In *Wilson*, 3 February 1984, the Court declined to interfere with sentences aggregating to 27 years imposed upon the appellant in consequence of his criminal activities. Samuels, J.A. inter alia said:

> The escape was a carefully orchestrated one. The applicant, as I have said, was accompanied by a fellow prisoner, one Wakefield, with whom he was subsequently associated in the armed robberies. They sawed through bars and lowered themselves to the ground by means of some electrical flex and were assisted by a female accomplice who had left a borrowed car outside the gaol for them to use in their escape. This plan had apparently been agreed upon between Wakefield and the woman during a visit made a few days before the escape took place. It was in no sense an unpremeditated act. It was not, so far as the evidence goes, stimulated in any way by some hardship of family or other kind, to the pressures of which the escaper succumbed.
>
> It seems to me that in those circumstances the sentence of three years was well within the learned Judge's discretion and was, as I have

said, required to be added to the sentence which was being served when the escape took place.

As to the sentences imposed for the two armed robberies, I find it difficult to see how any successful challenge can be made to them. But Mr Shields' submission is based in this way. He points to the fact, which is undoubtedly correct, that the result of the sentences is that the applicant is now facing a total period of imprisonment of some twenty seven years which it is estimated will expire by remissions on 6 June, 1999 and of course by parole, if parole is granted at the end of the non-parole period, on 14 March, 1990. The argument is that this lengthy period - and it is undoubtedly a lengthy period, as the learned Judge expressly recognised - in some way runs counter to principles which are to be gleaned from cases such as *Regina v. Visconti*, (Court of Criminal Appeal — unreported — 20 June, 1980); *Regina v. Watson* (Court of Criminal Appeal — unreported — 23 April, 1981) and other cases of a somewhat similar kind amongst which it is necessary only to make particular mention of *Regina v. Sullivan* (Court of Criminal Appeal — unreported — 10 December, 1980). However, counsel concedes he is unable to point to any case which includes the feature salient to the instant one, that is to say the circumstance that an escaped prisoner, who has been serving a lengthy sentence, then embarks upon further crimes of a grave kind for which he receives sentences which are appropriate to the degree of criminality involved in them. I do not consider that it is possible to obtain from the cases I have mentioned any principle which requires the court in circumstances such as those with which we are now dealing to look adversely upon an aggregate period of imprisonment in excess of twenty years. This case is, in my view, considerably different from that where an accused is sentenced in respect of a series of crimes carried out within a comparatively short period, where the sentencing Judge will no doubt have regard to the time confines which surrounded the commission of the crimes, and the total criminality which is involved, having regard to that consideration. This case however, where the further crimes were committed while the prisoner was still serving a period of imprisonment earlier imposed, exhibits quite a different character. I do not consider that the sentences imposed for the armed robberies committed after the escape are open to any successful challenge, and I do not think that in this case the fact that those sentences, when added to the existing sentence, represent a lengthy period requires us or entitles us to intervene.

Case References

Bates, 15 March 1985
Bennett, 7 February 1985
Coates, 22 July 1982
Coleman, 14 May 1982
Cornel Costin, 12 July 1989
Dixon, 26 October 1979
Dubavs, 17 February 1978
Grant, 25 August 1989
Heuston, 2 May 1984
Hoole, 17 March 1989
Khoury, 16 September 1983
Kollarick, 29 April 1983
Lambert, 22 October 1981
Maxwell, 6 December 1979
McLaughlin, 29 April 1983
Milson, 15 May 1981
Reed, 23 February 1979
Safwan, 28 February 1986
Sealey, 22 February 1985
Smith, Shoesmith, 4 April 1986
Stratton, 1 November 1979
Wilson, 3 February 1984

Chapter 10

Bank Robbery

In general there are two features of bank robberies that stand out from most other robbery offences. The first is that they often involve larger sums of money. The second is that bank robbery offences consistently attract sentences in the higher ranges.

The first observation is clearly illustrated in Figure 10.1, where the median value of property stolen, as revealed by an analysis of one in eight robberies reported to police in 1983, is set out. The high penalties however can best be seen by reference to the cases shortly to be discussed, and by noting the frequency with which bank robbers sentenced prior to 25 September 1989, received sentences in the order of ten or more years penal servitude.

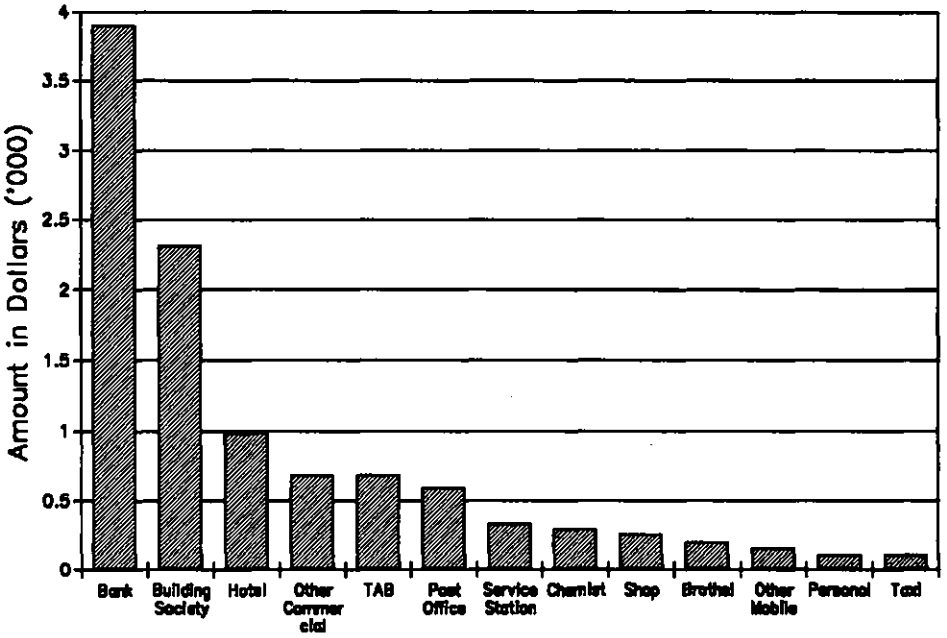
10.1 The Bottom End of the Range

For pre September 1989 cases, bank robbers sentenced to less than nine years penal servitude were often regarded by the courts as having good prospects for rehabilitation. In addition the offender may have committed a single offence (or a single series of offences) which in turn was often characterised as amateurish. Where more than one person was involved, the offender with the lighter sentence was likely to have assumed a minor role, such as driven the getaway car.[1] A factor governing the severity of the sentence may be the degree of violence threatened or employed. Where, for example, an offender pretends to have a firearm he is likely to be treated relatively leniently, particularly if he is also a first offender.[2] Excluding exceptional cases, sentences at the bottom end of the range of bank robbery offences would appear to be in the order of five to eight years penal servitude (equal to three to five years for those sentenced after 25 September 1989) with non-parole periods of about two to four years (broadly equivalent to minimum terms under the *Sentencing Act* of between 18 months and three years).

However for some pre September 1989 cases, sentences in the order of seven or eight years penal servitude were imposed, even though the offender may have had

[1] see for example, *Saw*, (sub nom, *Keenan & Saw*, 13 August 1981)
[2] e.g. see *Edwards*, 7 September 1979; *Garside*, 2 July 1982)

Figure 10.1:
Median Value of Property Stolen
plotfile a:rob-10-1.hp



Source: *Robbery Final Report*, 1987, NSW Bureau of Crime Statistics and Research

a prior record of violence, and in fact may have committed a particularly serious bank robbery while subject to parole. A careful examination of these cases reveals that many of these sentences were ordered to commence at the expiration of a prior existing sentence[3] or alternatively, cumulative sentences were imposed in respect of other offences. This apparent leniency could therefore be explained through the application of the totality principle.

10.2 The Middle of the Range

Offenders sentenced in the middle range of severity (between nine years and 14 years penal servitude or post 1989 sentencing range equivalent of about four to eight years) are sometimes found to have committed more than one offence.[4] Where there is only one count of bank robbery, offenders sentenced in this range may have been charged with other offences and may also have possessed a criminal record of some

[3] e.g. see *De Boer*, 6 September 1985

[4] e.g. *Delaney*, 21 September 1979, sentenced to twelve years penal servitude in respect of two counts of armed robbery

seriousness.[5] It is not unusual to find that persons sentenced in this range were subject to licence or parole conditions at the time of their offences. Sometimes offenders who committed several armed robberies received aggregate sentences in the vicinity of eleven or twelve years penal servitude (post 1989 sentence equivalent of about five to seven years).

While at first blush such sentences may seem lenient when measured against similar sentences imposed upon offenders convicted of only one or two counts, the disparity can often be explained by a reference to the commencing date of the sentences.[6] As explained previously, aggregate sentences may be contained or kept relatively short where they are ordered to run from a date in the future.

Some typical examples of sentences upheld by the New South Wales Court of Criminal Appeal may assist in providing an appreciation of those cases which fall in the middle range of sentencing severity.

Thus, in *Willis & Field*, 28 August 1981, the Court rejected appeals against the severity of sentences imposed upon the appellants in respect of an armed bank robbery on 15 May 1980. Both were drug addicts with earlier records. Each was sentenced to ten years penal servitude — the appellant Willis, receiving a non-parole period of four years and seven months and the appellant Field, a non-parole period of four years and eight months.

In *Williams*, 26 June 1981, the Court declined to interfere with sentences aggregating to twelve years penal servitude, coupled with an effective non-parole period of five years and six months for three armed robberies of banks. The offences were committed in company by two armed men over a period of two months, and a submission that the Court should intervene because of the appellant's subjective circumstances and on grounds of disparity, were rejected by the Court.

In *Palmer*[7], sentences aggregating to 14 years penal servitude, with a non-parole period of six and a half years were upheld. The appellant had been sentenced in respect of two pairs of charges — that of stealing a motor vehicle, then committing a bank robbery — and was serving a sentence when he committed these offences.

Patterson & Taylor, 5 April 1979, involved sentences aggregating to twelve and a half years and eleven years respectively, with non-parole periods in each case of six years for the armed hold-up of a bank and associated offences. The additional 18 months of Patterson's sentence was for a prior offence of larceny of a motor vehicle for which he had received a bond that he subsequently breached by committing the present offences. In refusing the appeal against the severity of the sentences, the Court in characteristic fashion said:

> We have said times without number in this Court, and Judges sitting at first instance have said times without number, that for the crime of armed robbery heavy sentences will be almost inevitable. These are heavy sentences. They are designedly so, and they are properly so. We

[5] e.g. *Dizon*, 26 October 1979, sentenced to twelve years penal servitude for armed robbery and escape

[6] see for example *Fotoudis*, 23 February 1984, and also *Holden*, 29 August 1985)

[7] (1980) 1 A Crim R 458

can find no basis to justify this Court interfering with the course taken by His Honour.

10.3 The Top End of the Range

Long sentences in the order of 15 to 20 years penal servitude were most commonly found where offenders committed several, and sometimes in excess of a dozen, armed robbery and associated offences. This range translates into post 1989 sentences of between eight and twelve years. Often also sentences in this range were imposed upon those with long records, those in breach of parole or licence conditions and those who were prepared to shoot at anyone who stood in their path. In *Beacroft & Gladman*, 15 July 1983, for example, sentences of 17 years and 19 years penal servitude were imposed, commencing to run from the date of expiration of sentences each were serving (making an effective 22 years and 24 years term of imprisonment, respectively) in consequence of their having committed a spate of offences that culminated in a shoot-out with police.

While it is possible to predict that multiple armed robbers will receive long sentences, there is no mathematical equation connecting the number of counts and length of the aggregate sentence. Thus, for example, *Loveday*, 20 November 1980, sentenced, inter alia, for five armed robberies, received 16 years penal servitude, *Buoy*, 1 December 1978, sentenced in respect of four bank robberies, received 18 years penal servitude and *Goodman*, 4 July 1984, committed 24 armed robberies and received an aggregate sentence of 16 years penal servitude.

10.4 The Non-Parole Period

Those who received sentences at the top of the range for bank robberies were often given non-parole periods of between ten and 13 years — a post 1989 minimum term of between six and ten years. Those who were sentenced in the middle range commonly attracted non-parole periods of between four and seven years — a post 1989 equivalent minimum term of between three and five years. Those who receive sentences at the bottom end of the sentencing scale commonly received non-parole periods of around two to three years — a post 1989 minimum terms equivalent of no more than two years. Occasionally however the disparity between the head-sentence and the non-parole period was wide (e.g. *Coates*, 22 July 1982, sentenced to 18 years penal servitude with a specified non-parole period of six years), but this kind of disparity became less evident and virtually disappeared as non-parole periods began to occupy a larger proportion of the head-sentence — a trend that commenced with the 1983 parole reforms.

10.5 The Totality Principle

Earlier in this work there was a general discussion concerning the problems and the principles of sentencing offenders who commit multiple offences.[8] The analysis of cases that follows demonstrates that the courts are reluctant to impose aggregate sentences in excess of 20 years penal servitude (post 1989 equivalent of about 14 years or more), even in circumstances where a large number of armed robbery or other associated offences have been committed. It seems that once the offender has committed more than four or five offences, there is often a flattening out of the likely sentence at the top end of the sentencing range. As previously stated, there is no clear mathematical relationship between the number of counts and the aggregate head-sentence, and in cases of multiple armed robberies dealt with prior to 25 September 1989, terms in the 15 to 20 years imprisonment range quite frequently are found.

Beacroft & Gladman, 15 July 1983.

It is important to appreciate that those who commit multiple armed robberies often also commit other serious crimes for which they are dealt with simultaneously.

Beacroft & Gladman, 15 July 1983, illustrates the impact on sentence of the accumulation of other offences committed both before and after the commission of two armed robberies. In fact the appellant Beacroft had pleaded guilty to a total of seven charges and the man Gladman was convicted on eleven charges of various offences. In respect of the armed robbery offences, each received sentences of seven years penal servitude.

Both appellants had been released from prison in respect of other armed robbery offences committed in 1979. However although they had met in prison their prior offences were not committed together. They joined forces upon their early release — Beacroft was on licence and Gladman on parole — in September 1982. All offences were committed in October, only a month after their release from prison.

Each robbery involved the separate theft of firearms and ammunition. One weapon was shortened by cutting off the barrel and butt, and in each robbery separate stolen vehicles were used.

The first robbery was committed on 17 October when the appellants drove to a service station at St Mary's. Beacroft drove the vehicle and waited in the driveway while Gladman used the sawn-off .22 calibre rifle and threatened the person robbed. They obtained $294 and shared the proceeds.

The following day, Monday 18 October, they went to the Commercial Banking Company of Sydney at Urunga, where they held up staff at gunpoint. Both men wore balaclavas, and both were armed with loaded weapons. They obtained $10,690 in cash, drove to the State Forest, placed their clothing in the stolen vehicle and set fire to it so as to destroy the clothing and any finger prints. The stolen .22 calibre rifle was thrown into a creek, two loaded shotguns and the stolen money were retained.

[8] see page 66

Police set up road blocks and when the appellants reached one of these a high speed pursuit followed. At one stage Gladman fired his shotgun through the back window of the vehicle in order to be able to see. At another stage, they stopped some fifty metres away from police and fired eight shotgun rounds in the direction of police vehicles and a police Sergeant as he was alighting from one of the vehicles. While some shots struck the vehicle they missed the Sergeant.

The two men managed to escape because of damage caused to the police vehicle, but on the following day the police received a phone call from a woman who said her husband was being held at gunpoint at their farm property. Five police vehicles arrived on the scene. Gladman then shot in the direction of the police vehicles and finally surrendered when he ran out of ammunition. Beacroft was not with him at this stage and tracker dogs were used to find him. He had with him a loaded 12 gauge shotgun and had been hiding in the bush with his wife and child. Prior to this they had broken into a nearby house unoccupied at the time, where they had obtained food and clothing. When police located him, he did not attempt to fire his weapon, and was arrested.

The Court said that while it was proper to regard the offences as connected in the sense that one followed the other, and while it was proper to look at the overall conduct of the appellants, many of the offences were separate incidents committed in furtherance of an earlier offence or to avoid the consequences of an earlier offence.

The Court declined to draw fine distinctions between the two offenders by isolating their conduct, but agreed that Gladman's use of the weapon to prevent his apprehension warranted the two years difference in their overall sentences.

The Court was invited to look at the totality of the sentences and find that the terms of imprisonment of 17 years for Beacroft and 19 years for Gladman were excessively long sentences. It was submitted that these terms were long having regard to the obligation of each appellant to serve the balance of earlier sentences, effectively resulting in a head-sentence for Beacroft of 22 years and for Gladman of 24 years.

Moffitt, P who delivered the judgment of the Court said:

> The great problem that arises in this case is the conflict between the concern of the Court not to impose a sentence of great length such as sentences in the vicinity of twenty years and the problem that is presented where persons commit serious crimes and having committed such crimes, then go on firing off weapons endeavouring to prevent their arrest in the way that happened in this case.
>
> First if one were to disregard or substantially disregard the earlier periods not served, it would seem to me to undermine the whole principle of letting a person out on licence or parole if when they commit very serious crimes, in effect little is added in respect of the incomplete sentences, so they are virtually disregarded. The same problem is presented where persons commit serious crime warranting heavy sentences and then it is agreed that not too much should be added to other serious crimes added by shooting to avoid arrest lest the overall sentence is too great. Each case must be looked at in its own circumstance. In this case

> I think the significant matter is serious crimes were committed early in the license or parole period and there were added other serious crimes in circumstances where, though nobody was actually injured, many people were at hazard of receiving injury or being killed. The appellants were criminals determined to escape at all costs and shoot it out with the police regardless of the consequences.
>
> After giving most anxious consideration to the consequences that flow from such long sentences and after giving consideration to the subjective matters which, as happens in so many of these cases, involve an unfortunate early background, but having in mind very little can be said in favour of either appellant in respect of the past because of his record — that of Beacroft worse than Gladman but that of Gladman very serious in the end — in my view no ground has been made out to interfere with the conclusion arrived at by the learned sentencing judge.

[The non-parole period imposed in this case was of the order of nine years, both appellants being eligible for consideration for release on the same day — that is on 25 February 1992].

McCulloch, 6 March 1980.

This case also **illustrates the seriousness with which the Court regards the discharge of firearms** during the course of a robbery. While the offender committed only two armed hold-ups, the other offences associated with them ensured that an aggregate sentence of the highest order was imposed.

In *McCulloch*, 6 March 1980, the appellant appealed against the severity of sentences aggregating to 19 years penal servitude, with a specified non-parole period of twelve years and eight months (from date of sentence) in respect to his pleading guilty to seven charges. These offences included two of armed robbery (for which he received concurrent terms of twelve years penal servitude) and one of maliciously shooting to prevent apprehension(for which he received a cumulative term of seven years penal servitude).

The appellant was aged 29 years at the date of the appeal and had previously been sentenced to 15 years for two armed robberies and associated offences committed in 1972, and was paroled on 30 March 1978. In the period of eight months that followed he not only committed the present seven offences, but another three offences — including another armed robbery and another maliciously discharging a loaded firearm with intent to prevent apprehension. For these three offences he had been sentenced to an aggregate of 15 years penal servitude.

In the present armed robberies, weapons were discharged. The first occurred when the appellant and a co-offender had obtained $2,395, the proceeds of their first bank robbery and attempted to make their get-away. As they left the bank they found their car had rolled across the road. When they attempted to move it, a member of the public attempted to block their path. The appellant's co-offender then fired a shot at this person, narrowly missing his head. A fragment of the bullet

lodged in the victim's finger and he also suffered some minor cuts from broken glass. A further shot was fired from the car driven by the escaping offenders.

About three weeks later the second robbery took place. In the course of the robbery the appellant's companion discharged his weapon in the vicinity of a member of the bank staff who had queried the two offenders. Another member of the staff was also menaced by the rifle being pointed at him.

Street C.J., in rejecting the appeal, said:

> In this context, the appellant must face a serious view being taken by a criminal court of the crimes for which he came forward for sentence. The carrying of a loaded weapon by one or more of a party who engage in a bank robbery inevitably aggravates the seriousness of the bank robbery. But when there is associated with the bank robbery, not merely the carrying of a loaded weapon, but its actual discharge, as took place on the second occasion whilst in the bank premises, then the seriousness is aggravated. The discharging of the firearm at the member of the public who attempted to prevent the men escaping on the first occasion was an entirely separate act of criminality, and it clearly enough justified a cumulative sentence being passed in respect of it.

Holden, 29 August 1985.

In this case **the totality principle** is demonstrated with the imposition of relatively short sentences for seven individual armed robbery offences. This offender had an unfortunate childhood. He had not been diagnosed as dyslexic until late in life, and as a consequence had developed **behavioural problems**. Further **his offences were motivated by drug addiction and he was on parole** at the time he committed the offences. Once again the Court emphasises its belief that **deterrent sentences** must be imposed on armed robbers.

In *Holden*, 29 August 1985, the appellant appealed against sentences imposed on him for seven charges of armed robbery (all of banks) and one charge of possessing a shortened firearm. For each armed robbery he was sentenced to five years penal servitude, the first of which was to commence at the expiration of a sentence of seven years and two months (he was on parole at the time of these offences) and the others were to run concurrently. For the possess shortened firearm charge he was sentenced to a concurrent term of twelve months imprisonment and he was also sentenced to a concurrent term of twelve months for a breach of recognizance in respect to a conviction for break enter and steal charge committed in 1982. In all the appellant was required to serve an aggregate 17 years and seven months (from October 3, 1984) and a non-parole period of ten years and six months, dating from 18 March 1985.

The robbery offences were typical armed holdups, involving the brandishing of weapons before tellers behind counters. On one occasion he used a loaded pistol. The appellant was often in an agitated and disturbed state, and the offences were motivated by his craving for drugs. On each occasion he escaped with several thousand dollars amounting to $35,733 in total.

The appellant sought to challenge the severity of the non-parole period by reference to a number of subjective matters, including the appellant's unfortunate childhood and adolescence. Apparently, the appellant could not learn to read and write and had not been diagnosed as dyslexic until he was 14. As a result he was often punished at school and criticised by his father, and inevitably developed behavioural problems. Even so, he managed to remain employed until about 1980, as an apprentice jockey and was regarded as a reliable, honest and competent worker. From thereafter he commenced a downward slide into more and more serious crime, when at about 22 years of age he began to use drugs.

With respect to the present offences he had pleaded guilty and cooperated with police. He had expressed remorse and regret, and had demonstrated to his probation and parole officer a mature recognition of his problems and was willing to undergo treatment. In rejecting the appeal, Lee J, who delivered the judgment of the Court, said:

> His Honour was faced with the situation, all too common these days, of a young man who on three occasions has been granted parole and has immediately, virtually, resorted to criminal behaviour. It is no doubt apparent that, if the parole system and philosophy is to have any significance at all, a person who engages in that conduct cannot, having been given two trials, seriously expect a court to take the view that a third will be any the more successful. No doubt one would hope that it would but the basis for leniency in any real way is gone.

Lee J then continued by expressing the view that salutary sentences will be imposed for armed robberies, particularly when that kind of activity is persisted in:

> His Honour was also faced with the fact that armed robbery is a common crime today; so common that, as he pointed out, it is treated in a most matter of fact way and is no longer of significant public interest, not even being reported in the press in any highlighting fashion. That is the fact. But because that is the fact does not mean that the Court should abandon its responsibility to the community and impose other than salutary sentences in the case, particularly where this type of criminal activity is persisted in over a period of time, as occurred here.

And then Lee J had something to say on the issue of prevalence and deterrence:

> The Court also must be mindful of the fact that the prevalence of the crime inevitably requires that the aspect of deterrence be given weight in determining what is a proper period of sentence and a proper non-parole period. It is the Court's duty, as far as it can by its sentences, to demonstrate to those law abiding men and women, young or old, who do their work each day in banks and building societies and other such places where money is readily available, that when armed robbery does occur the Courts will do their utmost to ensure that the sentences meted out are appropriate as deterrents to others so minded.

Goodman, 4 July 1984.

An offender who commits **dozens of armed robberies** is not necessarily sentenced to longer terms than other multiple offenders who commit substantially fewer offences. Even so **a distinction may be made where one offender commits more offences than an accomplice.** In the following case issues of **disparity, drug motivated behaviour and the use of a loaded and cocked firearm** are considered by the Court.

In *Goodman*, 4 July 1984, the appellant had been sentenced on 24 counts of armed robbery, three larcenies of motor vehicle and one count of escape. The robberies were carried out on banks, liquor stores and credit unions, and the appellant sought to challenge the severity of the non-parole period that had been fixed in his case. He had been sentenced to 16 years penal servitude with a minimum term of ten years, while an accomplice received twelve years' penal servitude with a non-parole period of six years. It was argued that this element of disparity justified the Court's intervention.

In response the Court said that his co-accused had been involved in only seven of the robberies, and received only one-third of the proceeds. Further while the appellant committed the robberies in consequence of his need to obtain funds to sustain his drug addiction, there were, equally, matters in the earlier history of the co-accused to explain (although not excuse) the latter's participation in criminal activity. Accordingly the Court found no basis for interfering with the non-parole period, and dismissed the appeal.

In this case, the offences were described as being in the upper category of seriousness for armed robbery. The weapon, a sawn-off single barrelled shotgun, was carried by the appellant, and, while it was accepted by the Court that the safety catch was on, 'this did little to diminish the aggravating factor of the weapon being loaded and cocked'.

Gregory & Robson, 1 March 1985.

In comparison to *Goodman* (*supra*), **where multiple offenders are seen to be equal participants** in twelve armed robberies and eight larcenies of motor vehicles, **the Court will tend to treat them equally.** Once again the **motivation** for the commission of these crimes is to obtain *money for drugs*, and the Court rejects this as a basis for extending leniency. Further while the Court accepted the submission that **contrition and co-operation with police** were matters that attract a degree of leniency in sentencing, it found no basis for interfering with the sentence imposed by the sentencing judge.

In *Gregory & Robson*, 1 March 1985, the appellants were each sentenced to 16 years' penal servitude with a non-parole period of ten years in respect of twelve charges of armed robbery and eight charges of larceny of a motor vehicle. The offences were carried out in commercial premises, banks, post offices, building societies and the like. The appellants carried a sawn-off weapon and terrorised staff in the usual fashion. Both had prior criminal histories (and Gregory had prior robbery offences to his discredit) and both were drug addicts who were motivated to commit

their offences to obtain money for drugs.

It was submitted that the appellants were entitled to a degree of leniency, particularly in relation to their minimum terms, because they had manifested remorse. The Court observed that:

> He [i.e. Counsel for the appellants] justifiably, places weight on the pleas of guilty, it being well recognised that a plea of guilty will result in some degree of leniency, it being recognised as a manifestation of contrition. He emphasises, also, their co-operation with the investigating police. This again is a well recognised basis for attracting a degree of leniency.

In addition Counsel for the appellants submitted that the circumstance that they needed money to sustain their addiction for drugs, met with the kind of response that has been illustrated previously. The Court said:

> It has been consistently said in the criminal courts that those who commit serious — or indeed any — crime for the purpose of obtaining drugs cannot expect to receive leniency on that account.

And as to whether the sentencing judge had erred in treating the two appellants equally, the Court replied:

> We do not consider that any such error is disclosed. This series of twelve major crimes carried out by the appellants on a basis of equal participation overshadows whatever differentiation there otherwise might have been from their subjective circumstances and earlier records.

The Court could find no basis for criticising the sentences and non-parole periods, and accordingly dismissed the appeal.

Loveday, 20 November 1980.

Where the sentencing judge imposes sentences aggregating to well beyond 20 years, and where that aggregate sentence is ordered to commence at the expiration of another long sentence, **the Court will apply the totality principle and reduce what would otherwise amount to a crushing sentence or a sentence of preventive detention.** The Court also comments upon the *disparity* between **an excessive aggregate head-sentence and a lenient non-parole period.**

In *Loveday*, 20 November 1980, the appellant applied for an extension of time in which to seek leave to appeal against the severity of sentences aggregating to 25 years penal servitude to commence at the expiration of sentences to which he was subject at the time he escaped from custody. In addition a non-parole period expiring on 8 March 1990 was imposed. The sentence of 25 years was made up as follows:

Date	Offence	Sentence of Imprisonment
16 August 1978	escape from custody	five years (from expiration of previous sentence)
13 October 1978	armed robbery of bank	ten years (from expiration of five years term for escape)
15 October 1978	two armed robberies at a hotel	ten years and one year, (to be served concurrently with bank robbery)
19 October 1978	armed robbery of a payroll at commercial premises	ten years (to be served cumulatively with previous sentence of ten years)
19 October 1978	Larceny of a motor vehicle	one year (to be served concurrently with pay-roll robbery)
24 November 1978	armed robbery of a bank	ten years (to be served concurrently with armed pay-roll robbery)

At the time of the escape the appellant was serving an aggregate sentence of 16 years imprisonment passed in 19 December 1975. These included the following offences, all committed on the one day:

rape	16 years penal servitude
robbery in company	10 years penal servitude
kidnapping	10 years penal servitude
robbery in company	10 years penal servitude

A non-parole period in respect of the aggregate sentence of 16 years had been specified to expire on 12 October 1985.

At the time of the appeal the appellant was aged 27, and the effect of the 25 year term imposed on top of the balance of about 14 years for the previous sentence, meant that the total period would, in the words of Street C.J. 'virtually exhaust the greater part of his natural life'.

The new non-parole period extended the previous term by (only) four years and five months.

The Court accepted the submission that owing to the very exceptional character of the aggregation of head-sentences the granting of an extension of time to appeal was justified.

The Court noted that during the course of the bank robbery on 13 October 1978, the appellant carried a loaded shotgun which he discharged into the ceiling in order to terrorise the occupants of the banking chamber. The takings for the various robberies were respectively $10,000; $10,176; $5; $28,974, and $29,000.

Street C.J. said:

> Some of the considerations referable to the passing of an extremely lengthy sentence were discussed in *R. v. Steain* (16 May 1980, unreported). The present case does not raise a major matter of principle. The case is in my view to be determined by the appraisal of what is just in the case in hand, bearing in mind the interests of the public and the community at large, and bearing in mind also the interests of the person convicted. It is the protection of the public interest which, as has so often been said, predominates, but it is not legitimate for a sentencing court to attempt to achieve the protection of the public interest by imposing what amounts to preventive detention.

The Chief Justice then elaborated:

> In the present case it seems to me that the effect of this aggregation of the further 25 years is excessive to a significant degree. The District Court Judge was clearly entitled to pass a cumulative term — and a substantial cumulative term at that — but in my view in selecting periods to aggregate 25 years His Honour exceeded what was properly open to him. It is to be noted that he extended the non- parole period by a comparatively short period of four years and five months in conjunction with extending the nominal head-sentence by 25 years. It should be said that His Honour displayed a remarkable degree of leniency to the appellant in measuring the extension of the minimum period he would have to serve as lightly as four years and five months in relation to crimes of such seriousness as to justify in His Honour's view an aggregation of 25 years on to the head sentence. The fact is, however, that the appellant has received a non-parole period of four years and five months, and this is a factor which necessarily lends force to Mr Purnell's argument that the 25 years is, in the present exceptional context, a disproportionately excessive term. I most certainly would not regard the non-parole period as excessive.

In allowing the appeal, the Court reduced the aggregate sentence from 25 years to 16 years. This was achieved essentially by not accumulating sentences upon the sentence for escape, and by increasing the sentence for one of the bank robberies to 16 years penal servitude, and by ordering that this sentence also should date from the same day as the sentence for escape.

Nagle, C.J. at C.L. agreed with both the orders proposed by the Chief Justice, and with his reasons. Begg J also agreed but with hesitation. His Honour said that the present sentences would expire some 30 years after the sentences originally

imposed upon the appellant, and added that, in his view no particular principle was applied in this case. His Honour added:

> I would emphasise, because I think it is very important, that what a sentencing judge has to do in circumstances of a case such as this is to do the difficult job of looking prospectively a number of years into the future and seeing what he should add on to the existing sentences. Here the Court is saying the proper term to be added on to an existing sentence of 14 years is 16 years.
>
> These new individual sentences are by no means to be regarded as a measuring stick for any other cases that come before the Court unless they are the same type of cases as this, where the appellant was facing existing confinement of some 14 years at the time of the second sentences.

Matier & Ramage, 6 April 1979.

Very long sentences are imposed upon armed robbers who have horrifying criminal records and who commit sustained and repeated crimes of considerable gravity.

In *Matier & Ramage*, 6 April 1979, it was submitted on behalf of the appellants that non-parole periods of twelve years and 13 years respectively were such as to leave little room for hope as to their being able to build a useful life.

The appellant Matier was charged with five armed robberies committed between 12 December and 5 January 1978, and asked that a further schedule of offences, including three further armed robberies and some property offences, be taken into account. He also pleaded guilty to having escaped from Glen Innes Institution on 3 September 1977.

The sentencing judge imposed a sentence of penal servitude of 20 years on one of the armed robbery charges, which also involved taking into account the matters listed on the schedule. On the four other armed robbery charges two concurrent terms of ten years and two concurrent terms of twelve years were imposed. The aggregate sentence of 20 years was directed to commence from the expiration of a two year sentence for escape, and the latter sentence was directed to commence at the expiration of the sentence being served when he escaped. Nominally he would remain in custody until 6 September 2004. The non-parole period of 13 years was fixed to expire in 1991.

The appellant Ramage was also sentenced for the same five armed robberies (committed in company with Matier) and in respect to one of these, a further six armed robberies were listed on a schedule. He also received an aggregate sentence of 20 years penal servitude for these offences, and his nominal date of release was 16 July 2000. The non-parole period of twelve years would expire on 8 December 1990.

The first armed robbery was of a post office, and the weapon used was a screwdriver. In the second offence a knife was used. The next three offences involving a Totalisator Agency Board office and a bank were carried out with the use of a pistol.

The appellants were both aged 21 years at the time of the appeal and had what the Court described as 'horrifying' criminal records stretching back to the Children's Courts. Ramage was a drug addict and used this explanation as his motive for the crimes. Matier simply wanted the money for his own personal expenses.

In rejecting the appeal, Street C.J. said:

> The personal backgrounds of both men indicate that they have been exposed to most unfortunate circumstances and it is not difficult to understand the influence upon them which led them into crime. But whilst understanding these influences, the inescapable fact is that since their earliest years each of these two appellants has lived a life which is a total repudiation of acceptance of the need to abide by the requirements of a peaceable community. The escalation of their earlier crimes of dishonesty to involvement in armed hold-ups has led them to the pass that they faced in the District Court and that they now face in this Court.

and later the Chief Justice said:

> These are indeed lengthy sentences and lengthy non-parole periods. But the sustained nature of this series of armed robberies charged against them, and the additional crimes on their respective schedules, left virtually no option for the District Court but to impose sentences such as Judge Ward determined in this case. There is nothing which could excuse in either case this series of major criminality on the part of each man.

10.6 Concurrent or Cumulative Sentences

When determining the aggregate sentence, courts have recognised that there are more ways than one of skinning the sentencing cat. As has already been seen and as the following cases further illustrate, the aggregate sentence may be reached by the imposition of concurrent sentences by consecutive (or cumulative) sentences or by a mixture of concurrent and consecutive sentences.

Buoy, 1 December 1978.

This case illustrates a number of ways at arriving at the aggregate sentence.

In *Buoy*, 1 December 1978, the Court of Criminal Appeal dismissed an appeal against the severity of an aggregate sentence of 18 years penal servitude coupled with a non-parole period of 10 years after the appellant had pleaded guilty to four bank robberies. These robberies were committed in company while armed with sawn-off weapons. The offences took place on three separate dates during March 1978, and a total amount of $60,055 was taken.

On the appellant's behalf it was argued that the sentencing judge fell into error by selecting 18 years as an appropriate sentence for the totality of criminality involved, and then sentencing him to four concurrent terms of 18 years.

The Chief Justice who delivered the judgment of the Court observed that if cumulative sentences would have been imposed the appellant could have finished with a significantly longer aggregate sentence. The Chief Justice added that in absolute principle:

> there is no defect in this course being followed provided it does not result in lengthening what otherwise would have been a shorter aggregate term made up of appropriate individual sentences. In the present case some Judges might have achieved the 18 year aggregate by sentencing the appellant to cumulative terms. Others might have achieved that aggregate with four concurrent terms of increasing length up to 18 years. Judge Thorley chose yet another course. Whichever method were chosen a recognition of the ultimate aggregate involved in the sentences would always be a relevant consideration. Judge Thorley proceeded directly to the ultimate aggregate and, unless that were seen to exceed the total term which would have resulted from permissible individual and separate cumulative sentences, there is no occasion for this Court to intervene upon the basis of any procedural error such as is suggested by [counsel for the appellant].

Todd, 5 July 1984.

Where the sentencing judge is dealing with **the same kind of offence, committed on separate occasions**, and does not wish to (or cannot) distinguish between the relative gravity of each, **he may choose to impose sentences of equal duration**. Where relatively short terms are selected the imposition of cumulative terms are likely to be employed. Where long terms are selected for similar offences, concurrent terms are most often used.[9] **Where the offender commits an armed robbery while on bail, once again cumulative sentences are generally chosen. Whenever there are several counts to be dealt with it is most often found that a mix of both concurrent and consecutive sentences are used.**

In *Todd*, 5 July 1984 the appellant pleaded guilty to two counts of armed robbery and was sentenced to five years' penal servitude on each count. In association with 10 years penal servitude a non-parole period of four years was specified.

The first offence was committed on 24 December 1982. The appellant drove the getaway car while her companion entered a building society with a sawn-off shotgun and took $1,395.

Shortly thereafter the pair were apprehended, arrested and charged. The appellant was then released on bail, and during this time she teamed up with two other

[9] see for example *Smith*, 13 May 1982, where concurrent sentences of 15 years penal servitude were imposed in respect of 16 counts of armed robbery

persons and then committed an armed robbery of a bank at Gladesville. They obtained $7,975 and none of the money was recovered.

There was evidence to the effect that the appellant was too easily persuaded to participate in the first offence, and that the second offence was carried out in order to obtain financial assistance for her son, who was serving a period in custody for a sexual offence.

The Court declined to interfere with the sentences, pointing out that the aggregate sentence of 10 years, coupled with a non-parole period of four years, was far from excessive.

The Court also said:

> a cumulative five years for the second [armed robbery], being committed as it was, whilst on bail, was plainly within the recognised policy of the criminal courts. Those who abuse their liberty on bail pending trial for an offence must expect, if the manner of abuse is the committing of a further offence, particularly one of a similar character, to receive some significant sentence in consequence thereof.

Connolly, 12 June 1986.

Another method for deriving the aggregate sentence is demonstrated in what may be described as the 'ever increasing' sentencing method — each subsequent sentence attracting a heavier concurrent penalty.

In *Connolly*, 12 June 1986, the appellant had been sentenced to an aggregate term of 15 years penal servitude in consequence of his having robbed the same bank on three separate occasions (19 April 1984; 3 July 1984 and 17 August 1984). In each instance a car was stolen and used as a get-away vehicle. For the latter offences he was sentenced to concurrent terms of three years' imprisonment commencing from his date of apprehension (20 August 1984). On the first and second armed robbery counts, the appellant was the only robber, on the third count he was accompanied by his brother. The robberies themselves were of the common type. The appellant was disguised with a head covering. He produced a bag and demanded it be filled with money, and made his escape in stolen vehicles. He was sentenced as follows:

First armed robbery	8	years penal servitude
Second armed robbery	12	years penal servitude
Third armed robbery	15	years penal servitude

Porter, 23 August 1985.

As a general rule, offences that are committed on separate occasions are dealt with by the imposition of cumulative rather than concurrent sentences. The courts do not apply this rule systematically because, where a significant number of offences are committed, **the aggregation of a large number of sentences would offend against the totality principle.** Thus whenever offences of a different type are committed, or offences of a similar type are committed

arising out of the same, or out of a different, set of circumstances, the courts will be faced with the decision as to whether they should impose cumulative or concurrent sentences, or both. This decision will depend on a number of factors including the length of sentence imposed for the most serious offence under consideration. **In the case that follows the Court held that a cumulative sentence was warranted where an offender, already subject to a licence and on bail in respect of one offence, commits a bank robbery.** As Lee J points out, where there are two (or more) offences which are unassociated with one another, **the task of the sentencing judge is to fix a head sentence which reflects the overall criminality of all the offences.**

In *Porter*, 23 August 1985, the Crown appealed against the inadequacy of sentence imposed upon the respondent in respect of the following:

armed robbery	8 years penal servitude
possess shortened firearm	3 years penal servitude
malicious wounding (committed first)	5 years penal servitude
larceny of a motor vehicle	4 years penal servitude

As all sentences were directed to be served concurrently, the aggregate sentence was eight years penal servitude with a non-parole period of three and a half years.

The offence of malicious wounding occurred when the victim flicked a cigarette out of his car window. It hit the front windscreen of the Jaguar car being driven by the respondent. When both vehicles stopped at red traffic lights, the respondent got out of his car and fired a single .32 calibre bullet at the victim causing an injury to his hand. The respondent claimed that he thought he recognised the victim from a scuffle involving bikies earlier that night.

At the time of that offence the respondent had been released on licence in respect of other sentences, imposed in 1982, including one of armed robbery.

The other offences included an armed robbery at the Commonwealth Bank at Ashfield on 24 August 1984. The respondent committed these offences in company. They were armed with a shortened single barrelled shotgun, which was loaded and used to terrorise both staff and customers of the bank. They decamped with $12,819 but this was recovered when the police caught them a short distance away.

The respondent explained that he robbed the bank because he was short of money at the time.

He was on bail in respect of the malicious wounding charge when the robbery was committed. In short the Court summarised the situation by saying that while subject to a licence, the respondent committed in public an act of malicious wounding and then, while on bail in respect of that charge, he committed an armed robbery.

The respondent was a 23 year old part Aboriginal person who, since the age of 19 years, had spent most of his time in prison. The Court could find nothing in his record or background which merited any great measure of leniency. Indeed the Court concluded that the sentencing judge had failed to give proper weight to the gravity of the crimes. Lee J, who delivered the judgment of the Court said that the sentencing judge should not have treated the sentence of malicious wounding as one which should run concurrently with the charge of armed robbery. His Honour continued:

> The two matters were quite unassociated with each other. Each was a very serious crime and his Honour's task was to fix a head sentence which would reflect the overall criminality involved in all the offences.

A novel submission was made on behalf of the respondent concerning his earlier release. Prior to being released on licence the respondent had requested that he should be sent to Cessnock, so that after two years in maximum security he could 'unwind'. Instead it was admitted, he was released prematurely, on licence. To this Lee J said:

> It is not too often that such an explanation is put to the Court, and it certainly is an honest acknowledgement by the respondent of his own assessment of his criminal propensities. This is not a case of a young man who has been addicted to drugs but a case of a young man who is, apparently, prone to some violence, is aware of it and who was quite happy, quite agreeable, to stay on in prison if the authorities had decided to keep him there. The offences are offences essentially of an 'unprofessional nature', the first indicating a violent disposition, the second being inspired by nothing more than the desire to get some money because he was out of money. That, of course, does not in any way reduce the gravity of the offences but it does put the offender in the proper light before the Court.

In allowing the appeal, the Court increased the sentence and non-parole period to twelve years and six years respectively.

Such, 4 April 1985.

The aggregate sentence imposed in this case is at the top of the middle range of sentences imposed in robbery cases. It contains many of the characteristics found in the most serious cases — **the commission of a large number of offences** by a person with a **prior criminal record.** The offences themselves were committed while the offender was on **bail.** They were **committed in company,** were **drug motivated** and involved the application of **physical violence.**

In *Such*, 4 April 1985, the appellant sought leave to appeal against sentences aggregating to 14 years penal servitude with a non-parole period of six years, in respect of nine charges, including one of robbery with striking and three of armed robbery. (With respect to the robbery charges he was sentenced to twelve years penal servitude).

The most serious charge related to the robbery which took place at a hotel. The appellant's companion threw sulphuric acid into the publican's face before escaping with the money the publican was carrying. The appellant drove the getaway car when this offence was committed.

The appellant had an earlier criminal record and was on bail for a breach of recognizance at the time of these offences. He was a heroin user and claimed to have committed these offences in order to obtain money for drugs.

The court declined to interfere with the sentence and non-parole period in this case. Street C.J. said:

> It is not necessary to emphasise the abhorrence of the community for those who throw acid. That abhorrence will inevitably be reflected in the measure of sentence passed by criminal courts upon those who stoop to behaviour of such seriousness. The twelve year terms for these four armed robberies, even accepting ... that the two committed at Haberfield were really but a single incident, is by no means excessive. The accumulation of the two years for the earlier offence of attempting to steal a car cannot be challenged. It was an entirely separate venture. The earlier leniency extended to the appellant was abused by him and again this was well within the scope of [the sentencing judge's] discretionary jurisdiction.

Logan, 20 June 1985.

A relatively short sentence, or a sentence of moderate duration may be imposed upon an offender who commits an armed robbery of a bank in circumstances **where the offender is already subject to a substantial term of imprisonment** and the new sentence is ordered to run from the date of expiration of the previous sentence. **This, in effect, is a variation of the totality principle, in that the Court is concerned with attempting to avoid imposing crushing sentences.** This is achieved not only by reference to the offences before the court, but also by reference to the proposed commencement date of any sentence that is to be imposed. In short **the selection of the commencement date of the sentence has a bearing upon the chosen length of sentence.** The length of the non-parole period is also determined by reference to an appropriate commencing date.

Logan, 20 June 1985, was an unsuccessful appeal against conviction only, and the issue related to the identification of the appellant as the person who held up two bank tellers in the West Gosford branch of the Commonwealth Trading Bank on 30 May 1984. The appellant had previously been sentenced on 20 October 1978 for an offence of armed robbery, to a term of six years, with a cumulative term of three years for demanding money with menaces. A four year non-parole period had been set in respect of those offences. For the present offence he was again sentenced to penal servitude for six years but this sentence was to be served cumulatively upon his previous aggregate sentence. Further the sentencing judge imposed a new non-parole period of eleven years, which was ordered to commence from 20 October 1978, the date of sentencing for his previous offences. This would mean that the appellant's new non-parole period would expire on 19 October 1989. In practical terms, of course, the appellant would look forward to release before this time by virtue of the application of statutory remissions.

Santos, 24 June 1983.

Another variation of the totality principle relates to the problem of whether out of a single transaction but involving two distinct charges, the offender should be sentenced to concurrent or cumulative sentences. This case is also of interest for its observations relating to the use of an imitation hand gun.

In *Santos*, 24 June 1983, the Court declined to interfere with an aggregate sentence of 14 years coupled with an effective non-parole period of seven years imposed in respect of two charges — one of armed robbery of a bank (nine years), and the other of kidnapping (cumulative five years).

The appellant, in company with another man went disguised and armed with a replica hand gun and held up the teller at the National Bank at Brighton-le-Sands. They obtained some $2,500 and then forced the manager to go to the rear of the premises to open the safe. This activated police alarms and the police arrived at the front of the premises. In order to make good their escape the two offenders placed a pistol against the head of a female person and told police that if they interfered they would shoot her. She was taken out of the bank, and some distance away she was forced to the ground and left there with the bag of money.

It was submitted on behalf of the appellant that these offences ought to have been treated as one episode and offence, and therefore the aggregate sentence was excessive. Begg J, who delivered the judgment of the Court said:

> Whatever may be the position about that, there were two charges levelled against the appellant and he pleaded guilty to both of them and his Honour saw fit to sentence on both of them as distinct acts. We are unable to see that he erred in that approach. No doubt in doing so he would balance up the sentence he had in mind against the other and deal with them as crimes taking place in one time rather than completely dissimilar offences 'taking place at different times'.

The Court also referred to the circumstance that the weapon used was a toy. Begg J said:

> It is said that the hand gun used was in fact a toy one, but be that as it may it was obviously a very effective one. We have seen the photographs which were tendered as exhibits taken by the automatic cameras — certainly a gun from that point of view looks like a real one. It was obviously regarded as such by all the occupants and indeed was of such a nature that the police officers on seeing the girl being taken away with a gun at her head made the passage to allow them to proceed at that stage.
>
> It is true that loaded lethal weapons fit into a different category to the case where an unloaded weapon is taken, and that is often reflected in the sentence passed. However, taking all the facts in this case into account, we are unable to see the head sentence exceeds what would be appropriate in all the circumstances and that it was well within the discretionary powers of the sentencing judge.

Dixon, 26 October 1979.

Offenders who escape from custody often commit armed robberies. When they are brought to account, they may receive either cumulative or concurrent sentences. Again this may depend upon the duration of the sentence imposed for the most serious offence.

Dixon, 26 October 1979, illustrates that the Court will impose long sentences upon those who commit an armed robbery after escaping from custody. In this case the appellant had escaped while serving a total of 18 months imprisonment for break enter and steal. With two companions he held up a bank. He carried a rifle, and customers and staff were held up and terrorised before money was handed over. The appellant had a long criminal history in the Children's Court that deprived him of any leniency. There was some uncertainty as to the commencement date of the head sentence, but in the end the Court held that the sentence for escape (two years) should be served concurrently with the sentence of twelve years penal servitude for robbery, and that this sentence should commence to run from the expiration of the sentence he was currently serving. A non-parole period of approximately six years (an extension of five years and two months from his previous non-parole period) was not interfered with.

Stalder, 4 June 1982.

In the following case the Court considers the application of remissions to a long aggregate sentence which is being served concurrently with a life sentence.

In *Stalder*, 4 June 1982, the Court declined to interfere with an aggregate sentence of 20 years penal servitude imposed upon the appellant in consequence of his pleading guilty to a charge of being armed, assault with intent to rob and wounding a person, and also a charge of armed robbery. No non-parole period was specified because the appellant had been sentenced to penal servitude for life for murder in 1980.

The appellant had been released from custody on 28 April 1979, after completing a sentence for armed robbery. On 10 May 1979, he presented himself at a service station in Newtown. He was armed with a sawn-off shotgun, and in the course of attempting to rob the attendant, wounded him when the firearm was discharged. He escaped without obtaining money.

The second offence involved a bank. The appellant made an appointment to see the bank manager on 15 May 1979. In his briefcase he carried a sawn-off shotgun. He then placed the weapon on the manager's table, pointing it at him and threatening that 32 sticks of gelignite contained in the briefcase would be detonated by remote control if police were alerted. He obtained $2,730 before leaving.

The appellant who appeared in person did not challenge the length of the sentences imposed, but directed his complaint to the circumstance that the aggregate sentence of 20 years would deprive him of remissions to which he would otherwise be entitled.

The Court held that this submission was not a valid one because the appellant would be entitled to remissions for that offence. The remission release date was calculated as 13 July 1994 being some five and a half years prior to the expiration of the nominal term. Further, so far as the life sentence was concerned the Crown informed the Court that the Parole Board would review the prisoner's position at intervals of 18 months, three years, four and a half years and ten years. Ordinarily a life sentenced prisoner would have an expectation of being released on licence after ten years. The Court continued:

> The fact that this prisoner is simultaneously serving a sentence for twenty years will not necessarily redound to his disadvantage and he certainly would have a prospect of being considered by the Parole Board after ten years. The only other complaint that the applicant makes is that in the administration of the prisons, he will not be eligible for certain treatment. It has to be emphasised that this is a matter which in no way concerns this Court.

10.7 Disparity and the Role of the Offender

As discussed in the early part of this work, the Court of Criminal Appeal sees one of its most important supervisory functions as promoting, so far as it can, the **even-handed administration of justice** throughout the community. In attempting to achieve justice the Court must not only ensure that like cases should be decided alike (and unlike cases should be decided differently) but also that **co-offenders should be sentenced, first in accordance with their role in the criminal enterprise and second, in accordance with their subjective circumstances.** The task is not a simple one and the fact that trial judges have a broad discretion and are afforded the opportunity of hearing the evidence and seeing the witnesses, places them in a favourable position in determining the sentence or sentences which they are duty bound to impose. For this reason the Court of Criminal Appeal is reluctant to interfere unless it can discover error on the part of the sentencing judge.

In many armed robbery cases offences are committed in company, and **courts must strive to determine how to sentence each participant in such a way as to avoid engendering in them a justifiable sense of grievance.**

In the **'classic case'** one person remains outside the bank as lookout and driver of the getaway vehicle while two offenders, usually masked and armed, enter the premises, hold up the occupants by threatening them with their lives and demand that a bag which they carry should be filled with money. Once the money is handed over they decamp as quickly as possible. **The cases reveal an infinite number of combinations and permutations of this classic type of armed robbery, and the courts invariably examine the respective part played by each offender in order to assess the degree of criminality, and ultimately the sentence that should be imposed.**

Bates, 9 October 1981.

Where the appellant is the ring-leader, the Court is unlikely to reduce the sentence in order to achieve sentencing parity.

In *Bates*, 9 October 1981, the Court declined to interfere with the appellant's more severe sentence because there were marked differences between the culpability, the criminality and the criminal records of the two offenders. The Court said:

> it was the applicant who was the prime mover in this criminal enterprise. It was he who...purchased a gun, who cut it down, and it was he who went into the bank; furthermore, his record did not attract any leniency; whereas the record of Kirkwood did, because he had absolutely no convictions of any kind.

In the same case Cross J made the following observations in the course of his judgment:

> Where an appealed-from sentence is appropriate and that passed on the co-offender inappropriate the Court of Criminal Appeal should not, for insubstantial reasons, reduce the appropriate sentence because of the disparity and thus have not one but two inappropriate sentences. [See *R. v. Stroud* (1977) 65 Cr. App. R. 150 at 152, per Roskill, L.J.; *R. v. Tisalandis* (1979) 1 A. Crim. R. 7 (N.S.W. Court of Criminal Appeal)].

Of course, a gross disparity of sentence can have the undesirable result of (a) causing a lack of public confidence in the administration of justice and (b) an undesirable sense of injustice rankling in the offender who receives the heavier sentence. But, as has been said, the disparity of sentence must be gross[10].

Further, the seeming disparity may arise from, and be justified by, not only a different degree of involvement in the crime — as in the present case — but also by differences in the subjective features such as background, record, contrition, health and family responsibilities.

Treloar, 8 November 1985.

Similarly, where the appellant plays a leading role in armed robbery offences and where the antecedents of his accomplices are more favourable, the Court will not interfere with disparate sentences favouring the appellant's companions.

In *Treloar*, 8 November 1985, the Court refused to reduce an aggregate sentence of eleven years penal servitude, coupled with a non-parole period of five years and six months, imposed upon the appellant in consequence of his pleading guilty to three charges of armed robbery, three charges of larceny of motor vehicles, one charge of possessing shortened firearm, and a further charge of being armed to commit an

[10]see *Ruane* (1979) 1 A. Crim. R. (W.A. Court of Criminal Appeal)

indictable offence. Co-offenders had been sentenced to eight years penal servitude with non-parole periods of three years.

In this case the appellant carried the offensive weapon produced it and threatened the tellers with it and made the demands for money. The appellant had also recently been released on parole and had a worse record than his co-offenders.

Austin, 22 May 1981.

What is the approach of the Court **where the appellant is not the ring-leader but has received a non-parole period comparable with that of the leader?** The following case indicates that **the Court will intervene** in order to make the necessary adjustments.

In *Austin*, 22nd May 1981, the Court declined to interfere with a head sentence of seven years imprisonment, but reduced the non-parole period of two years two and a half months to one year and ten months because his workmate, the acknowledged leader of the bank hold-up (using plastic revolvers) had received a non-parole period of two years and seven months when he had been sentenced by a different judge.

The 19 year old appellant had no prior criminal record and had led a satisfactory life style prior to this offence. His accomplice had repeated the offence, this time alone, three weeks later, yet had not received a substantially different sentence. Accordingly the Court said:

> The inescapable fact is that, as between himself and his co-offender, the appellant entertains a justifiable sense of grievance in that the co-offender, the ring-leader in this robbery and the sole participant in a second robbery, has received exactly the same head sentence and only a marginally longer non-parole period.
>
> In these circumstances we feel constrained, in the interests of subjective justice to the present appellant to interfere, but only to a very minor extent. We do this with reluctance because, as has been said, we regard the sentence and non-parole period determined by Judge Coats as appropriate. In order to meet the particular circumstances that have been brought about in consequence of the later proceedings we shall make an order which will give to the appellant the benefit of an element of leniency which, on its face, the offence does not justify.

McGarvey, 11 May 1984.

The appellant sought to challenge the severity of a sentence on the ground that a **co-offender who came before a different judge, had received more lenient treatment.** However in this case only two offences were committed in common.

In *McGarvey*, 11 May 1984, the Court declined to interfere with sentences aggregating to ten years penal servitude with a non-parole period of three and a half years. The offences including two armed robberies and three demanding money with menaces, were committed against banks between February and May 1983.

The appellant was a drug addict with some stealing offences recorded against him. He was subject to a bond at the time of these offences. Two of the armed robberies were committed with a co-offender who came before a different judge and received a lighter sentence. This co-offender was also charged with some other offences which did not involve the appellant.

On behalf of the appellant it was submitted that the sentence and non parole period were disparately lengthy having regard to the sentence of eight years and non-parole period of two years imposed upon the co-offender. In rejecting this submission, the Court said that the sentencing judge was anxiously aware of the relevance of the sentence and non parole period determined in the other case, and the need to avoid unjustifiable disparities.

> At the same time His Honour had clearly in mind the sentencing policy that was exemplified by the decision in this Court in *Regina v. Moran* on 7th July 1983. The conclusion that His Honour reached after evaluating such material as was before him in connection with the other case was that he should disregard it. His reasons included the factor that there were only two offences common to the two men, indicating that they were by no means to be regarded as on a common footing throughout. A second reason His Honour stated was that he was confident that the result in the other case must have been due to some very special circumstances.

The Chief Justice held that the sentence imposed in the present case was by no means out of line with current sentencing patterns, nor was the non-parole period, given that it was imposed prior to the commencement of the 1983 legislative reforms.

Johnson, 23 June 1978.

In this carefully planned and executed robbery, **the Court distinguishes the respective roles of the co-offenders in order to determine whether the sentence imposed on the appellant was appropriate and in balance with the sentences imposed upon the other offenders.**

In *Johnson*, 23 June 1978, the appellant was convicted by a jury and sentenced to eleven years penal servitude on a charge of armed robbery, and a further two years (concurrent) on a charge of larceny of a motor vehicle. In addition he was sentenced upon two charges of uttering forged cheques (one in the sum of $25,000, the other in the sum of $47,500) to concurrent terms of two years each, but cumulatively upon the sentence for the armed robbery. In association with the aggregate sentence of thirteen years, a non-parole period of six years and six months was specified.

The armed robbery was carried out in company with three other men. The four men entered a branch of the Bank of New South Wales. Each was armed and wore headgear to conceal their identity. The appellant carried a pistol and ammunition was available. In the robbery $89,345 and one bank revolver was obtained. The appellant's share of the proceeds was $16,000, of which only $1,200 was recovered.

The Court described this robbery as carefully planned and executed and so was regarded as a major crime within the category of serious criminality. The question of sentence was to be seen in that light.

The appellant was 45 years of age and had a clear record until the age of 34, when he was fined for stealing. The last entry on his record involved a charge of conspiracy to cheat and defraud, and for this he was sentenced to five years imprisonment with a non-parole period of three years. So far as his personal life was concerned, there was nothing unusual in it. He had been gainfully employed in a number of occupations and although he had divorced his wife, maintained contact with his two adult or near adult children.

The appellant's co-offenders were sentenced as follows:

	Penal Servitude	Non-Parole Period
Stojic	14 years	8 years
Pattern	8 years	2 years
Western	died before trial	

The deceased Western had been the principal architect of the bank robbery, with Stojic sharing the leadership to some extent. Pattern played a minor role in the offence.

While it was accepted that the appellant had played a lesser role in the robbery than the man Stojic, the Court felt that the appellant's sentence of eleven years penal servitude was not out of balance with the 14 year term imposed upon Stojic. Their records were not markedly disparate, and the sentences reflected Stojic's greater part in the robbery. Accordingly the appeal was dismissed.

Maris, 5 June 1981.

Where there is little to differentiate between the roles and the subjective circumstances of co-accused, their sentences and non-parole periods should be the same.

In *Maris*, 5 June 1981, the appellant succeeded in having his non-parole period adjusted so as to accord with that imposed upon his co-accused.

The circumstances were that the appellant in company with a man named Maggs stole a motor cycle over 3 March 1980 and used it as a getaway vehicle for a bank robbery which they carried out the same day. Both wore motor-cycle helmets in order to disguise themselves. Maggs was armed with a hand gun and the appellant carried a sawn-off shotgun. Maggs' firearm was discharged, but it was not aimed at anybody. They escaped on the motor-cycle with $4,000, and they subsequently shared the proceeds. A substantial proportion of the money however, was destroyed by the Scorpion device which had been placed in the bag containing the money.

Although initially both Maggs and the appellant were brought forward for sentencing together on 17 September 1980, Maggs obtained an adjournment of the proceedings. Ultimately both were dealt with on the same day, but at different

times. The appellant who had been represented at earlier sentencing hearings represented himself when sentence was imposed.

The Court found little to differentiate between the two men, so far as their subjective circumstances were concerned, other than to note that the appellant aged 20, was the younger man.

Both the appellant and Maggs were sentenced to 10 years penal servitude for the armed robbery, and each also received a sentence of one year for the larceny of the motor cycle. However, Maggs had received a non-parole period expiring on 21 December 1984, a period of four years four months and 13 days whereas the appellant had received a sentence of approximately four years and eight months. Thus the Court said:

> There is every reason to conclude that the learned trial Judge would have dealt with the present appellant no more seriously than he dealt with Maggs. Maggs was an older man. Maggs carried the weapon which was in fact discharged during the course of the robbery. The evidence before the District Court suggested that Maggs had played the more significant part. It comes through as an almost inescapable inference that His Honour was seeking to equate precisely the position of the two men and that erroneous dates had been put before him in connection with their respective periods of pre-sentence custody. As the precise date has now been put before this Court, we consider that the case is one justifying the intervention of this Court, not by any way which would differ from the substantive conclusion arrived at by Judge Sinclair in his discretion and decision, but merely for the purpose of achieving that degree of equality between the two men which we are confident His Honour intended and would have brought about had he had before him the dates that we now have. We shall accordingly reduce the appellant's non-parole period to a term equal to that which was specified in the case of Maggs.

Fotoudis, 23 February 1984.

The driver of a getaway car may not always be treated more leniently than a co-offender who actually carries out the offences with the aid of a sawn-off rifle. The offences were joint ventures. The appellant in this case was a **drug addict** who was on **parole** when the offences were committed.

In *Fotoudis*, 23 February 1984, Counsel for the appellant sought to obtain a reduction in the sentences imposed in respect of two armed and one unarmed bank robberies on the ground that the appellant's role was that of driver, and that his companion held up the employees and carried a sawn-off rifle. However, Street C.J. said that these offences were common ventures and so there was no merit in distinguishing the relative criminality of each participant. Indeed, in relation to one of the armed robberies, the weapon had been supplied by the appellant.

A further submission, that a degree of leniency ought to have been extended to the appellant because of his addiction to drugs, was not greeted with sympathy by

the Court. Street C.J. said:

> The circumstances that the appellant was a drug addict and that the four matters which were charged against him had been committed to obtain money to feed this addiction may provide some explanation. But as has often been said in the criminal courts, it provides no excuse for committing crimes of the degree of seriousness of those that are presently under consideration.

The Court also noted that the appellant had been on parole and also subject to the constraints of a three year good behaviour bond for supplying heroin, and these had to be weighed against the subjective claims made on the appellant's behalf.

In the result the Court declined to interfere with sentences of nine years (concurrent) for each of the robberies and a further sentence of one year imprisonment for a charge of false pretences, and another years' imprisonment for breach of a bond (aggregating to eleven years) to commence from the expiration of a pre-existing sentence.

Milson, 15 May 1981.

This is a further illustration of a sentence imposed upon the driver of a getaway car. A particularly aggravating feature was that the appellant was an escapee who was already serving a sentence for armed robbery. The offence was described as a professional bank hold-up, and the Court also referred to the circumstance that the appellant had demonstrated contrition for her offence.

In *Milson*, 15 May 1981, the Court declined to interfere with sentences aggregating to 9 years penal servitude (including a cumulative sentence of one year for escape) for her part in a bank robbery. An extended non-parole period of three years and eight months was imposed.

The appellant had previously been serving a sentence for an armed robbery, with associated offences, when she escaped from custody. She teamed up with her mother and two other men. Her role was driving the getaway car. The two men, equipped with firearms and ammunition entered the bank with the appellant's mother. They terrorised the staff and obtained a substantial amount of money. All participants had prior experience of armed robbery and this offence was described as in every sense a professional bank hold-up.

Given that the appellant's prior record had involved an armed robbery, the Court said there was little that could be relied on in the appellant's past life that could justify any particular leniency.

A submission that the Court could take into account the fact that the appellant had pleaded guilty, and so demonstrated contrition, met with the following response by the Chief Justice:

> It is undoubtedly a valid principle of sentencing that the demonstration of contrition, if the sentencing Judge finds it to be manifested by a plea of guilty, can be counted in favour of the accused person...there is nothing

> to suggest that His Honour did not weigh this in favour of the appellant in determining upon the eight year period for the head sentence.

The Chief Justice held that the sentence imposed in the present case was by no means out of line with current sentencing patterns, nor was the non-parole period out of line, given that it was imposed prior to the commencement of the new legislation.

Regan, 12 February 1986.

In this Crown appeal, the Court substantially increased the sentence and the non-parole period imposed on the respondent. **The latter's role in six of eight armed robberies (only one of which related to a bank) was that of driver of the getaway vehicle.** The Court accepted that the **offender's contrition and his plea of guilty** were to be taken into account in his favour, but nevertheless emphasised the gravity of the offences. Further the Court indicated its **reluctance to impose the full measure of deserved punishment because of the crushing effect this may have on the appellant.**

In *Regan*, 12 February 1986, the Crown appealed successfully against the inadequacy of an aggregate sentence of three years coupled with a non-parole probation period of two years, following the respondent's conviction on eight armed robberies, involving two post offices, three housing commission offices, a credit union, a bank and a real estate office. The respondent drove the get-away car in six of these robberies, and had joined a companion in entering premises in the other two. In all cases a sawn-off firearm was used, except in one case, where knives were employed. The total amount taken was $29,756, none of which was recovered.

The respondent who was aged 22 years had a criminal record, but had not been sentenced previously to a custodial sentence.

The respondent had admitted the offences to police and had maintained an attitude of contrition throughout the proceedings. Curiously, counsel for the respondent conceded to the Crown's submission that the sentence was manifestly inadequate, and in turn the Court accepted that the element of contrition and the plea of guilty were to be weighed in the appellant's favour.

The Court noted that the respondent came from an emotionally supportive home. He had been employed after leaving school but a weakness for drugs eventually meant he was unable to retain his employment. He was particularly subject to the influence of his peers, and together with his extensive use of drugs he was drawn into bad company and crime.

Against this the Court pointed to the gravity of the offences, including in one case the use of actual physical violence. Street C.J. said:

> To pass them off as simply a series of eight armed robberies has a tendency to overlook the gravity of the conduct of which the respondent was guilty in participating, as he did, as driver in six and as a joint invader of the premises in two, in terrorising the victims by the menace of a weapon. Conduct of this nature has been consistently described by this

> Court and other criminal courts as calling for substantial sentences. It is notorious within the community that the prevalence of armed robberies of commercial premises is encumbering the ordinary peaceful conduct of business in our society and the criminal courts have, accordingly, recognised the obligation in the public interest of passing significant sentences on those who take part in such armed robberies.

With regard to the power to impose a heavier sentence than originally fixed by the sentencing judge, the Court had this to say:

> having already been sentenced [the respondent] now faces the second jeopardy of standing for sentence again. This has quite frequently been recognised in Crown appeals as a factor which results in a lower sentence being passed than would have been the case if the matter were before a first instance court. The disappointment, indeed the crushing effect, of having had a lenient sentence passed and then some months later being faced with a significant increase in that sentence is an element that this Court has recognised as leading to lower sentences being passed here than would have been appropriate at first instance.

In the result the Court increased the sentence to ten years penal servitude, and specified a non-parole period of six years.

Keenan & Saw, 13 August 1981.

This case indicates that **the Court will take into account the lesser role of an accomplice, and substitute an appropriate sentence.** Here the appellant who drove the **getaway car** was sentenced on the basis that she was not a party to the planning of the robbery and had **no prior knowledge of its commission.** An additional aspect of this case relates to the mistaken belief on the part of the sentencing judge that the appellant Saw was charged with two rather than one offences.

In *Keenan & Saw*, 13 August 1981, the Court declined to interfere with an aggregate sentence of eleven years penal servitude and a non-parole period of six years imposed upon the appellant Keenan for his part in three armed robberies, which were committed in company with another man. The appellant Saw was charged with being an accessory to the first armed robbery, and was sentenced to five years penal servitude with a non-parole period of 20 months. She was not involved with the second and third robberies, which were typical bank robberies, the circumstances of which will be recited first.

The second robbery was committed on 11 September 1980. The appellant Keenan, armed with a shortened firearm, together with an accomplice also armed, entered the premises of the Bank of New South Wales at Beverley Hills. Both wore masks, and during the robbery the appellant's weapon was discharged accidentally into the floor. They escaped with $12,000.

On 3 October 1980, a similar offence was committed, this time at the Commercial Bank at Mortdale. The appellant claimed that on this occasion he carried the same weapon, but unloaded. They escaped with $9,388.

The first offence took place on 18 October 1979. On this occasion the appellant Saw, drove the appellant Keenan, and another man to the vicinity of the Westfield Shopping Centre, ostensibly (according to Saw) to go shopping. Instead the two men held up two employees of Nock and Kirby Ltd, while they were taking a sum of $5,000 to the bank. Keenan was equipped with a toy pistol and his companion had a knife. They obtained the money, returned to the car and were driven away by Saw.

With regard to the appellant Keenan, the Court found little in his favour. He had a serious criminal record including a sentence of 10 years with a non-parole period of four years imposed in 1975, for an offence of being armed, assault with intent to rob with wounding. He was released in March 1979 and was on parole at the time he committed the present offences. The Court could find no basis for upsetting the sentence imposed by the trial judge and dismissed the appeal of this appellant.

However, in the case of the appellant Shaw, the Court noted an anomaly in the proceedings. It appeared that the charge was not properly read out with the result that it seemed that the appellant had been charged on two counts rather than one. The Court cited the following passage from the sentencing judge's remarks:

> ... you have pleaded guilty to two offences listed on the committal document and you have confirmed that plea before me. In summary, the offences are that of being an accessory after the fact in an offence of armed robbery and, secondly, harbouring and sheltering a person who committed the robbery, knowing that that had occurred.

Shortly thereafter the sentencing judge said that the appellant Saw, then gave the two men refuge. This led to the second charge of harbouring, and His Honour said:

> you proceeded to live with the robber, Keenan, presumably on the proceeds of his share of the robbery.

Later the sentencing judge imposed the sentence in the following terms:

> In relation to the offence of being an accessory and that of harbouring, you will be sentenced to five years' penal servitude in each case. The sentences are to commence from this day and I prescribe a non-parole period to expire on 20th December, 1982. The sentences are to be served concurrently.

Accordingly, the Court of Criminal Appeal concluded that as the appellant Saw was charged with the first offence only, she should have been sentenced on that basis alone. The Court also observed that while it was possible to be sceptical about the

extent to which the appellant had been involved in the robbery, she was to be sentenced on the basis that she was not a party to the planning of the robbery and that she had no knowledge that it was about to be carried out. The Court continued:

> In those circumstances the offence comes down to one of the appellant having found herself placed in a position in which her two male companions — one of whom was apparently at the time her de facto husband — had committed this serious offence of armed robbery; they returned to her car and she effectively made good for them their escape; she later participated with them in the removal of the money to a flat, the dividing of the money up — although she herself received nothing of it — and then in departing with Keenan to commence to disburse the proceeds of the armed robbery, firstly, in the night at the motel and subsequently in living expenses in the months that followed. It seems more probable than not that the greater part of the proceeds were disposed of in the purchase of drugs, to which apparently both were addicted at that time.

While the appellant Saw did have a minor criminal record involving drugs, and had on one occasion been convicted of harbouring a male friend escapee after she had been requested by him to do so, her pre-sentence and probation report were favourable. Accordingly the Court allowed the appeal and substituted a sentence of two years imprisonment with a non-parole period of nine months.

Broadhurst, 6 April 1988.

This case may be compared with the previous one. **Although the appellant drove the getaway vehicles, he also played a role in investigating the layout of the banks before the robberies took place, and took an active part in other aspects of the offences.**

The appellant sought to challenge an aggregate sentence of eleven years penal servitude, coupled with a non-parole period of seven years imposed in respect of seven counts of armed robbery, one assault with intent to rob whilst armed, one of conspiracy to commit armed robbery, and six counts of larceny of motor vehicles.

The appellant did not physically enter the banks at the time of the robberies, but on each occasion drove the change-over getaway cars which he had hired in his own name for that specific purpose. In addition he admitted that the various robberies were jointly conceived and executed by two and sometimes three men, and that on five occasions he entered the target banks on the pretext of obtaining withdrawal forms or changing money in order to report to his co-offenders, the layout of the premises. He was also personally involved in the theft of other vehicles used in the holdups, and was aware of the disguises and weapons used by the co-offenders in the robberies. On a number of occasions the spoils of the robberies were divided equally at the appellant's home. None of the $73,000, the proceeds of the robberies, was recovered. The appellant's share was $18,000.

The appellant, who was 40 years of age had a prior criminal history involving imprisonment.

In the result the court concluded that the appellant was fortunate that the sentences were not more severe, and dismissed the application for leave to appeal.

Hicks, 2 May 1980.

In this case the Court of Criminal Appeal declined to treat the appellant more leniently than his companion, even though the appellant argued that it was his companion who struck the victim.

Hicks, 2 May 1980, is not strictly speaking a bank robbery case. The offence occurred after the managing director of a company, and a female employee of that company left a Bank of New South Wales in the Kogarah area, with a bag containing $5,184 in cash, earmarked to pay company wages. As they approached their car they were accosted by a man who demanded money. A struggle ensued in the course of which the assailant struck the man on the back of the head. The assailant's companion waited nearby, ready to assist if necessary. In the result the bag of money was taken and the two offenders made good their escape. They later pleaded guilty to a charge of robbery in company, and each was sentenced to six years' penal servitude with a non-parole period of two years.

At the trial there was some doubt as to who was the aggressor. The appellant blamed the co-offender for the assault and the co-offender blamed the appellant. The appellant sought to have his non-parole period reduced by one year to mark the difference in his role in the affair. However, the Court regarded that the approach taken by the sentencing judge was correct when His Honour had stated that this was a joint enterprise:

> Neither Hicks nor Boylan admits to striking the blow at Mr Erling, but it is clear that he was struck by one or other in an obvious joint enterprise.

This approach was vindicated by an examination of the part of the appellant's record of interview, which stated as follows:

> So me and Mick Boylan agreed to go to Kogarah and wait on the corner up the road from the bank and to pick someone carrying a bag containing money out of the bank, and to snatch the money. We talked about this the night before we did the job and there was me, Mick Boylan and Nick Doncas. We asked Nick that night if we could borrow his Charger to do the job in and he said we could have it and we decided to get Tony Boylan to pick the car up because he was going to Kogarah the next morning anyway to pick up his methadone.

And in another part of the record the appellant said:

> I waited on the corner of Derby Street and Railway Parade and then I saw an old bloke and some sheila walk up the street and I seen the bank

> bag under his arm and then I signalled to Mick and then they walked up Derby Street and I followed them. Then the sheila got in a car and Boylan just pounced on him and I went to grab the bag but Mick beat me to it, and then we ran to our car and drove off.

Accordingly the Court was not prepared to interfere with the decision to treat each offender identically, and dismissed the appeal.

While the Court was not prepared to interfere with the present sentence it also made the following observations upon the matter of parity in sentencing:

> There are differences between the two accused and, indeed, there are similarities between them, but it must be remembered that the sentencing process is not locked in by a slavish adherence to parity of sentence. As was stated in the headnote to a case *R v. Bavdaz* (1967) 1 NSWR 3:
>
> > ... whilst marked disparity of sentences is undesirable where men sentenced for complicity in the same offence are in substantially the same situation, the general rule must give way to the appropriate circumstances of each individual case.
>
> Particularly is this so when argument is sought to be put to a Court that because the sentences are not disparate there should be an alteration in favour of one of them. More so than ever in a case such as this one must look at the individual case and determine what is proper for that offender. It may be, to give an illustration, that the co-accused whom we are informed has abandoned his appeal was not given a sufficiently severe sentence.

10.8 First Offenders

Without a doubt first offenders are treated more leniently than those with significant criminal records. Even so the sentences imposed can range across a fairly broad spectrum indeed. The robbery statistics presented earlier in this work suggests that at least some armed robberies attract non-custodial dispositions. Yet in all the bank robbery appeal decisions considered here, no non-custodial sentences were found. This should not be taken as indicating that those involved in bank robbery offences are always sentenced to terms of imprisonment. Certainly the cases considered here do not touch upon decisions that are not brought to the attention of the Court of Criminal Appeal. There are no doubt some very exceptional cases, and some where the offender has played such a minor role that a non-custodial sentence is truly appropriate. However, in the main, it seems that custodial sentences, and quite severe ones at that, are consistently imposed upon bank robbers, even if they are first offenders. To a degree, the severity of penalties imposed are often contingent upon the number of offences committed and if the offence is an isolated one which is committed by a first offender, the sentence is likely to be found in the bottom end of the sentencing range for armed bank robberies. If there are a

small number of offences and the appellant has good antecedents, the penalty is likely to be found in the middle range of severity. However in such circumstances the specified non-parole period may reflect a degree of leniency that distinguishes these cases from those where offenders have less favourable antecedents. Other aspects that impact upon the severity of sentence are the degree of premeditation and professionalism employed, the nature of the weapon used and the offender's prospects for rehabilitation.

Catignani, 2 April 1982.

This is an example of a severe sentence on a first offender who used a loaded firearm in a bank robbery.

In *Catignani*, 2 April 1982, the 26 year old appellant who had no prior criminal convictions, was not an associate of criminals and who had hitherto led a peaceful and satisfactory life, appealed against a sentence of nine years with a non-parole period of four years and nine months. The offence had taken place on the morning of 14 August 1981, when the appellant, armed with a sawn-off .22 rifle, with a number of rounds in the magazine and a bullet in the breech, entered the A.N.Z. bank at Petersham. He went to the manager's office and passed over a note demanding money. A bank clerk filled the plastic bag which the appellant carried, with money, and obtained approximately $13,776 before decamping. The appellant claimed that he wanted the money so that he could return to his homeland and subscribe funds to an Italian organisation to which he belonged.

The Court refused to interfere with the sentence and non-parole period imposed by the sentencing judge because the offence was described as 'being in the more serious character of bank robberies, in that the appellant was armed with a loaded weapon'. While he may have had the safety catch on, this was to prevent accidental discharge and it still left the weapon in a position where the appellant could discharge it if those concerned did not co-operate with him.

Tez, 29 November 1984.

In this case **the Court reduced a sentence on a charge of armed assault with intent to rob on the ground that the sentencing judge was unaware of the offender's disturbed mental condition when he imposed the sentence.** The Court also indicates that the offender was entitled to have taken into account in his favour the fact that he had **no prior convictions of dishonesty or violence.**

In *Tez*, 29 November 1984, the Court found that at the time the appellant was tried (June 1984) he was suffering from a comparatively extreme condition of schizophrenia, and there had been no mention made of this during his trial. He in fact killed a man on 8 March 1984, and in September 1984 was convicted of manslaughter on the ground of diminished responsibility.

This additional information relating to the appellant's mental illness, highlighted by the murder trial led the court to accept a reduction in the aggregate sentence and non-parole period imposed by the sentencing judge. An eight year sentence for

the offence of armed assault with intent to rob was reduced to six years. The Court said:

> The situation then is one of a man of a state of mind in which his thinking capacity was disturbed having, on instantaneous impulse, responded to a request from a friend and driven the friend to a bank to carry out an armed robbery. It is one in which the appellant had no prior offences of dishonesty or violence. It is one in which the appellant had nothing in his background which would operate against him on the part of criminal courts when determining the measure of sentence which was appropriate. I consider that the appellant should have the benefit of these matters weighed in his favour. At the same time it is not permissible to pass off his conduct on that day as not having very serious implications in the community at large. The important factor of general deterrence cannot be allowed to pass unnoticed.

As to the non-parole period, the Court said:

> The general seriousness of armed robberies must again be given some weight. On the other hand, the appellant's own condition is to be taken into account in his favour. It is apparent that treatment is available for his condition within the custodial system where he has been in the Psychiatric Unit at Malabar. It may well be that that treatment would assist towards, if not a complete recovery, at least a state in which his psychiatric condition is under control. The case is not one in which the custodial resources are unequal to coping with the present situation.
>
> After evaluating the whole of the material, both objective and subjective, we have formed the view that an appropriate non-parole period would be one of five years.

(Note: The appellant actually received an aggregate head sentence of seven and one half years because he received a cumulative sentence of 18 months for an offence of supplying a drug of addiction).

Edwards, 7 September 1979.

The sentence imposed in this case is described as being very near to the minimum for bank robbery.

In *Edwards*, 7 September 1979, the appellant, a married woman with two young children, appealed against a sentence of three years with a non-parole period of 6 months in consequence of her conviction for a robbery of $3,000, from the Commonwealth Bank. The appellant had what was described as a 'difficult life'. She demanded money by presenting a note to a female teller indicating that she had a gun. She had arranged to meet her husband at the International Airport at Mascot, but before doing so she purchased some clothing and changed the clothes that she had used in the robbery. She purchased travellers cheques, to the value of $1,500

and the balance she hid in a box with a nightgown she had also just purchased. She gave the box to her mother-in-law to hold for her while she and her husband boarded an aircraft bound for Singapore. It was at that point that she was apprehended and charged with the offence.

Reynolds J.A. who delivered the judgment of the Court expressed the view that the sentencing judge was as sympathetic as he thought the circumstances would permit, and imposed what was 'very near to the minimum which should be imposed for the crime of bank robbery', and 'was as lenient as the circumstances permitted'.

Garside, 2 July 1982.

This case illustrates the **Court's preparedness to reduce a sentence on a first offender** who committed an **amateurish offence** and had **co-operated with the authorities.** The circumstance that the offender **did not use a weapon** also operated in his favour.[11]

In *Garside*, 2 July 1982 the appellant was charged under s.94 of the Crimes Act and subsequently sentenced to seven years penal servitude with a non-parole period of three years. He pleaded guilty to threatening a bank teller by placing his hands in his jacket pocket and pretending he had a weapon. He left the bank with $1,433, but was photographed by the bank's security camera and was eventually apprehended. Street C.J. said:

> The circumstance that he took no step to disguise himself is eloquent of what might be described as the amateurish nature of what he embarked upon on this particular day. When apprehended by the police he displayed no hesitation in admitting his guilt and he expressed immediate contrition, an attitude which he maintained thereafter and which was confirmed by his plea of guilty in the District Court. He apparently needed the money to meet some obligations that he had incurred to his sister and to some of his friends.

As this appeal resulted in a penalty which is on the lighter side of sentences for bank robberies, some further details relating to his background and character are instructive. The appellant was aged 24 years at the time of the offence and had not previously been in gaol. He possessed only a minor record which the Court regarded as of no relevance to the present offence. Since leaving school he had been employed in a number of different fields and was not an associate of 'undesirable elements'. Further he was said to come from a supportive domestic background which was thought likely to play a part in enabling him to live within the confines of the law as a useful member of society. The Chief Justice also noted that:

> There was evidence of the appellant's satisfactory reputation and the investigating police officer confirmed in his evidence that the appellant had been co-operative. In general the tenor of the investigating police

[11] In *Peters*, 22 July 1988, the Court distinguished *Garside* on the basis that the offence before it was not amateurish and accordingly did not warrant the intervention of the Court.

> officer's evidence was favourable to the appellant on aspects other than those of the actual offence itself.

The Court did give weight to the circumstance that the appellant did not use a weapon, and further that he was charged under s.94 which carries a significantly shorter maximum penalty than for armed robbery.

For these reasons the Court allowed the appeal and reduced both the head-sentence and the non-parole period to five and two years respectively.

Garside, 11 October 1985.

The same offender graduates to commit further offences and is given a sentence in the middle range for armed robbery.

Thus in *Garside*, 11 October 1985, it is seen that the appellant was not deterred from committing a further more serious offence. Shortly after he had been released on license, it was alleged that at Seaforth on 19 April 1984, being then armed with a pistol, he did assault two tellers employed at the Seaforth branch of the Commonwealth Bank and rob them of $5,500 in cash. On this occasion his face was covered with a balaclava. He was subsequently tried, convicted and sentenced to eight years penal servitude, dating from 27 March 1984 (the date he was taken into custody) and a non-parole period of three years and nine months from the same date, was specified. The Court found no basis for interfering with this sentence, and dismissed the appeal.

Delaney, 21 September 1979.

In this case, described by the Court as one involving **unusual circumstances**, the offender with **no prior criminal record**, had been **strongly influenced by others** when he committed a number of crimes, including two bank robberies. The Court was not prepared to upset the head-sentence of twelve years but did **reduce the non-parole period.**

In *Delaney*, 21 September 1979, the appellant appealed against the severity of sentences aggregating to twelve years penal servitude with a non-parole period of four years in consequence of his pleading guilty to two charges of armed robbery (sentenced to twelve years on each count) and to some lesser charges related to these robberies i.e. two larcenies of motor vehicles, one — break enter and steal, two — shortening of a firearm so as to convert it to a pistol; for each of which he was sentenced to concurrent terms of imprisonment of three years.

The appellant was 19 years of age and had no prior criminal record. The first robbery was committed in company with another man whom the appellant declined to name for fear of serious retribution. The proceeds of the first armed robbery, a bank at East Hills, netted $12,000, and the appellant received instead of the agreed half, $3,000 of the proceeds — the balance going to the other man.

That armed robbery stemmed from an unfortunate association that the appellant had become involved in with a young woman with whom he had been living and from whom he had a child. Street C.J. explained thus:

> The sister of the young woman and her mother, particularly the mother, had marked criminal tendencies, and each of them was charged and sentenced with the appellant upon associated charges of the same or comparable seriousness. It is apparent from the material in the papers that, having become part of a household in which there was the element of criminality, the appellant fell into a disregard of the obligations of citizenship and embarked on the first armed robbery in company with another man (being the man whom he refused to name) who was the de facto husband of the sister of the appellant's de facto wife. The records of interview do not disclose any details of the identity of this other man, but they do make it plain that the appellant was literally terrified of the threats that this other unnamed man made against him and his de facto wife. Arising out of this relationship the appellant came inevitably under the domination of this other man, and it was this that led to his embarking on the second armed robbery in consequence of the other man demanding money from him.

The Chief Justice explained that the Court had the benefit of an amplification of the unusual circumstances that had been placed before the sentencing judge, and while there was no basis for interfering with the head-sentence of twelve years for the armed robberies, the Court held that the non-parole period should be reduced.

In so doing, the Chief Justice said:

> This present appeal should not under any circumstances be regarded as in any way a precedent, and we have hesitated long before reaching the conclusion that we should interfere by reducing the period of four years by one year to a three year period. This, in our view, marks an appropriate recognition of the unusual circumstances but at the same time it reflects a period that the appellant must, notwithstanding all of the particular circumstances, be called upon to serve before being eligible to be considered for parole.

Maresch, 7 June 1979.

In the present case **the Court was not prepared to upset a mid-range aggregate sentence and a substantial non-parole period, even though the offender had no prior convictions.** Here the offender carried a **loaded shotgun** and was involved in two armed hold-ups. On one occasion the **weapon accidentally discharged.** The Court warns that the **absence of earlier criminality has less effect on sentencing than in the case of less serious crime.**

In *Maresch*, 7 June 1979, the appellant had pleaded guilty to two pairs of offences — stealing a car and then carrying out an armed bank robbery. He was sentenced for the first pair of offences to three years for the larceny of a motor vehicle, and twelve years for the bank robbery, and three years and fourteen years respectively for the second pair of offences. The sentences were all concurrent, and ordered to

commence from the date upon which the appellant was taken into custody. A non-parole period of seven years was also specified. The appellant sought to challenge the severity of these sentences.

The offences were committed jointly with the appellant's wife. They stole the cars a day or two before the robberies. They had surveyed their targets prior to each robbery offence and they were equipped with firearms, wigs and sunglasses. There were eight months between the robberies, and on each occasion they escaped with a sum of money ($4,337 and $5,569).

The appellant, a 28 year old German illegal immigrant, had not been eligible for social service payments, and while he had obtained casual employment from time to time, he was in a condition of financial stringency when he committed the offences. In response to this as a justification for imposing a less severe sentence, the Chief Justice said:

> There is little weight which can be given to a submission of this character. The appellant had apparently been able to survive perfectly adequately from 1973 onwards without becoming involved in crime, and the enormity of these two crimes is far too great to be justified merely upon the basis that has been put forward on his behalf.

The Court also noted the following circumstances of the case which were not in the appellant's favour:

> It is not without significance that the shotgun which he carried was not only loaded, but in the course of making his escape after the second robbery, it discharged accidentally near the car, but fortunately the charge was dissipated into the ground. When he was apprehended in the yacht in Mackay, the sawn-off shotgun and wigs were found in the boat, and His Honour gave some weight to this circumstance as negativing the appellant's claims that he was contrite in respect of his past criminality and he had resolved not to be further involved in major crime of this character.

As for the submission that the appellant had no prior criminal record, Street C.J. said:

> The appellant has no prior criminal record, and this also has been relied upon by Mr Purnell. It has been said, however, more than once in this Court that for the major crime of armed bank robbery, particularly where loaded weapons are involved, the absence of earlier criminality will not have that same powerful significance which it normally has in crimes of lesser seriousness.

The Chief Justice also made the following observation about the appropriateness of the sentence:

> This is amongst the more serious categories of crimes. Bearing in mind the entirely separate character of each of these two crimes of bank robbery, each of which carries a statutory maximum of 20 years, we do not consider that an aggregate term of 14 years can be said to exceed the scope of the sentences open to His Honour. The evaluation of the appellant's attitude and the assessment of the finer elements of each of these crimes were essentially matters for the sentencing judge, and it cannot be seen that he reached an erroneous conclusion.

10.9 Prior Criminal Record

One of the key aggravating factors — a factor which tends to reduce the impact of any mitigating circumstances that may be present rather than lead to an increase in the otherwise appropriate sentence — **is the prior criminal record of the offender**. Those who have committed similar offences in the past, those on bail, released on parole or licence at the time they commit their offences are seldom able to obtain leniency from the courts.

De Boer, 6 September 1985.

In addition to commenting on the fact that the appellant was on **parole** the Court observed that **the offender had been sentenced previously for an armed robbery** offence. Another consideration in this case was the Court's response to a submission that **the offender had been led to believe that the trial judge would be lenient towards him if he pleaded guilty**. While the sentence of eight years may be regarded as a sentence of moderate duration, it should be noted that it was ordered to run from the expiration of an unexpired previous sentence.

In *De Boer*, 6 September 1985, the Court refused to upset a sentence of eight years penal servitude, to commence from the expiration of the sentence he was serving (he had committed the offence but a few months after release on parole) with a non-parole period expiring on 27 October 1991. The offence was committed on 10 April 1984, when the appellant, armed with a sawn-off .22 rifle, entered the State Bank at the corner of Bathurst and Castlereagh Streets and demanded money from the tellers. He stuffed some $8867 into a bag he was carrying and decamped. However, he was quickly identified and arrested and all money was recovered.

The significant features in this case were not only that the appellant was on parole, but that his prior offence, committed on 20 August 1982 included one count of armed robbery, for which he was sentenced to seven years penal servitude. That offence involved robbery with a knife and a short non-parole period had been set, partly because the appellant had had a serious injury.

The Court's view in relation to this is set out in the passage cited on page 88 of this work.

The appellant also submitted that no one was injured in the present case and that the money had been recovered. The Court replied that even so, this was a

serious crime carried out with a gun and that the offence could not be looked upon in any other way.

Finally the appellant asserted that his barrister had led him to believe that the Court would take a lenient view of his case if he were to plead guilty (which he did). To this Lee J, who delivered the principal judgment of the Court said:

> Without in any way making any decision as to the credibility to be given to that statement, it is to be noted that the Crown would undoubtedly have been able to mount an overwhelming case against him and I do not consider that this court can treat the matter that the appellant alleges as a mitigating factor or a factor justifying interference in the present case.

Kushkarian, (1984) 16 A Crim R 238.

Once again this case illustrates **the approach of the Court of Criminal Appeal to a parolee who has previously committed armed robberies.**

In *Kushkarian*, 4 July 1984, the Court rejected an appeal against an aggregate sentence of 15 and a half years coupled with a non-parole period of six years, imposed in respect of two armed robberies and two charges of possess shortened firearm.

The appellant had previously been sentenced to eleven years penal servitude, in 1979, on two charges of robbery in company and an armed robbery and was released on parole on 19 February 1982. The parole order was revoked on 15 April 1983, and there remained a balance of seven years to serve in respect of the earlier offences.

The present aggregate sentence was made up of two concurrent terms of 13 years penal servitude, and the possess shortened firearm offences added a further two and a half years to those sentences. The aggregate sentence of 15 and a half years was to be served concurrently with the outstanding seven year term for the previous offences.

After reviewing the appellant's background, the Court said:

> The appellant not only comes forward as a man with an earlier record thus disentitling him to any particular leniency such as a first offender might hope for, but he comes forward as a man who committed these offences whilst he was on parole — indeed, within a few months after his release on parole — from an earlier, lengthy sentence for two robberies and armed robbery. There is simply no justifiable basis for contending that the aggregate of fifteen and a half years, seven of which would run concurrently with his pre-existing sentence, is excessive. Likewise, the non-parole period of an effective six years in respect of all of these offences falls well within the discretionary field open to the sentencing Judge.

Stevens, 22 February 1985.

The case illustrates the Court's attitude to the sentencing of a licensee with a record of pre-existing armed robbery offences.

In *Stevens*, 22 February 1985, the Court declined to interfere with a sentence of eight years penal servitude commencing at the expiration of a pre-existing sentence making an effective period of 14 years from the date of commencement of the first sentence. The appellant had been released on licence for an armed robbery offence at the time of the present offence. A sentence of six years for the earlier offence was imposed in 1982, and he had been released on licence after serving only twelve months of that sentence. In the present bank robbery, a non-parole period of eight years was imposed.

In the robbery a pipe was used to give the appearance of a gun and the appellant escaped with $2,070. The appellant was aged 29, and had been a heroin addict during the currency of the pre-existing sentence for armed robbery. Although he had used Indian hemp since about age 18 the appellant claimed that his addiction to heroin and his consequent need for cash was due to his previous period of imprisonment. The Court said:

> The fact that he needed money for his heroin addiction is not a matter which can weigh in diminution in the determination of the proper sentence.

And as to the relevance of the parole period the Court found no justifiable criticism of the sentence and non-parole period imposed. The Court said:

> Where conditional liberty is granted, as it was here, by licence from an offence such as armed robbery and that conditional liberty is abused by returning to exactly that type of offence, then there is much to be said for the view that perhaps the specification of a non-parole period may serve little purpose. Irrespective of that, however, the question for this Court is whether the eight year period is excessive in relation to the fourteen years. Considered in the light of the totality of the criminality reflected in that fourteen year aggregate, we do not consider that the period is disproportionately lengthy.

Montgomery, 6 February 1985.

In this case the Court of Criminal Appeal found that the **sentencing judge erred in not specifying a non-parole period.** The case concerns an offender who **while subject to a licence, committed multiple bank robberies in order to obtain money for drugs.**

In *Montgomery*, 6 February 1985, the appellant was also described as a heroin user who carried out bank robberies to obtain money for drugs. He was subject to a licence from a series of earlier offences, and was sentenced on one count of possess shortened firearm and nine counts of armed robbery to an aggregate term of 14 years penal servitude. However, the sentencing judge refused to specify a non-parole period. The appellant sought to challenge the failure of the sentencing judge to specify a non-parole period.

The sentencing judge had declined to specify a minimum term because of the difficulty of calculating an appropriate period when having regard to s.24(2) of the *Probation and Parole Act*. The sentencing judge had said:

> I have been told by the Gaol Recorder that your prison sentence has been, in effect, a continuous sentence since 1977. As I understand the operation of the *Probation and Parole Act*, any non-parole period that I would specify would commence or would be deemed to have commenced at that date in 1977.
>
> In my view, you should be considered for parole on 8th March 1990, and if it had been possible for me to do so, I would have specified a non-parole period which, with remissions and reductions appropriate under the Act, would have provided for your consideration for parole on that date. I have refused to specify a non-parole period because, as I have said, of the difficulties of achieving that result.

Street C.J., with whom Lee, J. and McHugh J.A. agreed, said:

> It has been submitted that His Honour in this approach to the specification of a non-parole period overlooked the decision of this Court in the matter of *Regina v. O'Brien*, which was decided on 3rd May 1984. The effect of that decision is to render irrelevant and inadmissible in ordinary circumstances any exercise such as His Honour had, apparently, contemplated carrying out involving the calculation of the actual expiry date of a non-parole period after allowing for remissions. The submission, in my opinion, is well-founded. The reason that led His Honour to withholding specifying a non-parole period, as I see the approach His Honour made, is inconsistent with the law as laid down in *Regina v. O'Brien* (*supra*).

Accordingly the Chief Justice accepted the submission made on behalf of the appellant, that a non-parole period should have been fixed. Section 24(2) had been amended in December 1984 so that the non-parole period could commence from the same date as the 14 year term — that is from 8 March 1984. Thus after noting the appellant's earlier record, the fact that he was subject to a licence at the time of these offences, and that he had committed not one but nine offences of a kind consistently condemned by the courts, a non-parole period of nine years was specified.

10.10 Drugs

While perhaps a decade or two ago alcohol featured significantly in factors advanced in mitigation of penalty it seems that drugs (usually heroin) have been employed as the primary mitigating or explanatory factor in the commission of many of these offences. Indeed a recent study undertaken by the New South Wales Bureau of Crime Statistics and Research found that two out of three commercial robbery

offenders were illicit drug users, and that heroin dependency was particularly high amongst multiple robbery offenders.[12]

It is impossible to gauge the significance of the role played by drugs and its impact on sentence without acknowledging that it is but one factor amongst many which are weighed in the balance. As will be seen, the courts generally regard the circumstance that offenders committed their offences in order to obtain the necessary financial resources to feed their addiction as an explanation rather than as an excuse for the commission of the offence. In these circumstances the Court of Criminal Appeal is generally viewed as taking a hard line and there is no evidence of discounting the otherwise appropriate sentence solely because drugs are implicated. Indeed sometimes the Court seems to treat the motive to obtain drugs as an aggravating factor which operates so as to reduce in significance other subjective factors which might otherwise be regarded as mitigating. At other times the Court simply observes that the offender is a drug addict and does not then indicate whether the offence was motivated by the offender's need to obtain money for drugs. Either way, in the majority of cases courts will not impose lenient sentences just because drugs are implicated.[13] Occasionally, the Court of Criminal Appeal may impose a more lenient sentence on a drug addict where there is real evidence of rehabilitation, and particularly where between the time of the offence and sentencing, the offender has entered a drug rehabilitation centre and has made significant strides towards his rehabilitation.[14] Such an approach is more likely to be taken by the Court where the offence is an isolated one, and not one which features particularly aggravating circumstances.

The following cases then, provide some further illustrations of the approach taken by the Court of Criminal Appeal to drug addicts, or persons who otherwise commit bank robberies in order to finance their need for drugs.

Duncan, 7 December 1978.

The following case relates to a person on parole and under the influence of drugs at the time of the offence.

In *Duncan*, 7 December 1978, the Court declined to interfere with a sentence of 10 years penal servitude (dating from his pre-sentence custody) and a specified non-parole period of three years and eight months after the appellant had pleaded guilty to an armed robbery which had netted him $660. Although only 22 years old at the time, the appellant had a long criminal record before the children's court and had been sentenced to four years of imprisonment for break enter and steal in the adult's court. He was on parole from the latter sentence when he committed the robbery.

In mitigation, it was argued that no firearm had been presented to the teller and that the appellant was affected by drugs. Upon these submissions Street C.J. said:

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[12] *Robbery, Final Report*, 1987 at p.88

[13] see for example *Gregory & Robson*, 1 March 1985, discussed at p. 106

[14] e.g. *Allen*, 3 July 1985)

> The bank teller, who no doubt was terrified by the threat made to her, did not know that he did not have a gun, and it was in her state of fear that she handed over this sum of money. It has been said that the appellant was affected by drugs to which he was addicted at the time, and that this presents not only a reason for his needing money but an explanation for his having committed such a serious crime without having fully appreciated its gravity. This may be an explanation, but it is no excuse — drug addicts must face the same consequences for being involved in criminal conduct as persons who are not drug addicts.

The Court concluded that it was impossible to find error on the part of the sentencing judge. In its view, the non-parole period, which was effectively an extension of two years on the minimum term that the appellant was required to serve was indicative of an extremely lenient view on the part of the judge when passing sentence for a bank robbery.

Allen, 3 July 1985.

In this case the offender had entered a drug rehabilitation centre and had made significant progress toward rehabilitation prior to sentencing. Note that the sentence itself is towards the bottom end of the sentencing range for armed bank robbery offences.

In *Allen*, 3 July 1985, the Court declined to interfere with a sentence of six years with a non-parole period of three years upon the appellant. He had carried out a robbery, and intended to carry out another, by using a knife and a threatening note, and presenting these to a teller. The appellant, aged 25 years at the time had used drugs since the age of 13 years, had an unstable background, but could not be classified as a major offender against the criminal law.

In his favour was the fact that following his arrest and as part of his bail conditions, he had entered a drug and alcohol rehabilitation centre, and had made significant progress towards his rehabilitation. Even so, the Court found that his offences involved a degree of premeditation. He had successfully obtained $1,500 from his first bank robbery and was preparing to commit a similar crime again. The Court held that the sentence and non-parole period imposed were well within the discretion of the sentencing judge.

Cernik, 3 December 1980.

The following demonstrates the Court's attitude to armed robbery committed by a drug addict who is a first offender.

In *Cernik*, 3 December 1980, the Court refused to interfere with an aggregate sentence of ten years and a non-parole period of four years in consequence of his pleading guilty to an armed robbery, (for which he received eight years imprisonment) and the theft of a colour television set from his neighbour's home (for which he received two years imprisonment). The armed robbery was committed in company with two others who received sentences of 13 years and nine years imprisonment

for their respective parts in the escapade. The appellant held up two company employees who were intending to deposit a substantial sum of money in the bank. The employees were menaced with a replica pistol, then taken to a nearby empty house and threatened with a sawn-off .22 calibre rifle.

The appellant had a minor criminal record but had remained law abiding for some nine years prior to these offences. In 1974 he became addicted to drugs and the robbery was motivated by his need for money to feed his addiction. Street C.J. who delivered the judgment of the Court said:

> This Court has said many times that even first offenders who commit the serious crime of armed robbery must expect to face substantial terms of imprisonment being imposed upon them. The fact that the robbery in question may have been carried out by a drug addict to obtain money with which to buy drugs plays little significance in justifying any particular leniency being extended to the man or woman involved. Armed robbery is a serious offence and heavy sentences are customarily passed for it.

Bartley, 23 August 1985.

This relatively recent case **demonstrates the consistency of the Court's hard attitude to drug addicted bank robbers with deprived backgrounds.** The non-parole period of seven years does reflect a fairly severe minimum term in the circumstances of the case, although of course the application of remissions would tend to reduce the period likely to be served to one comparable with pre-1983 cases.

In *Bartley*, 23 August 1985, the appellant sought to challenge the severity of an aggregate head-sentence of twelve years imprisonment, coupled with a non-parole period of seven years, imposed upon him in consequence of his pleading guilty to a number of housebreaking charges, and one count of armed robbery of a bank at Milson's Point. The offences were drug inspired and the appellant used a loaded, double barrelled cut-down shotgun and wore a full-face motor cycle helmet in the armed robbery offence. The submission put on behalf of the appellant was that the head sentence and non-parole period were excessive, having regard to his most deprived background, to his addiction to drugs, to his severe personality disorder, and to the fact that he had pleaded guilty and expressed regret for what he had done.

Lee J, with whom the other members of the Court agreed, dismissed the appeal, observing as he did so, that:

> these were drug inspired offences and drugs take their toll both amongst those who have had deprived upbringings as well as those who have been more fortunate and this Court has frequently stated that leniency will not be given to persons who commit serious crime for the purpose of satisfying a craving for drugs. The fact that a person has had a deprived upbringing can, in such circumstances be given little, if any, weight.

Ireland, 28 November 1980.

In the present case, **the offender sought to have his sentence reduced on the ground that he was attempting to break his heroin habit and had been in a state of 'clouded consciousness' or emotional turmoil at the time he committed the offence.** The sentence itself being at the bottom end of the range of sentences imposed for bank robbery offences suggests the trial judge had already taken this matter into account.

Ireland, 28 November 1980, is just another illustration of an offender brought to commit an armed robbery of a bank as a consequence of his need for money to feed his addiction for drugs.

The appellant sought to challenge the severity of a sentence of seven years penal servitude with a non-parole period of two years. He had a prior record of drug offences and of offences of dishonesty and had served some prison sentences previously.

The offence was committed whilst the appellant was under medication in association with withdrawal symptoms from heroin. He was endeavouring to break his heroin habit but the trial judge had concluded as a matter of fact that the appellant had not carried out the robbery while in a state of clouded consciousness or in a state of emotional turmoil.

Accordingly the Court was not disposed to interfere with the exercise of the sentencing judge's direction, and dismissed the appeal.

Mackay, 18 July 1980.

This case illustrates the Court's view that **a non-parole period of four years is not excessive in the case of an offender who has committed four drug related bank robberies.** Note that in this case the Court has accepted that the appellant's case possesses **strong subjective factors.**

In *Mackay*, 18 July 1980, the Court declined to upset an aggregate sentence of nine years with a non-parole period of four years, imposed upon the respondent in consequence of his pleading guilty to four armed robberies of banks (committed within a period of four weeks) and three charges of larceny of motor vehicles. The submission on the part of the appellant was directed at the non-parole period. The appellant who was born in 1954 had a criminal record, going back to 1966 in the Children's Court. His first major offences involved drugs. Street C.J. said:

> The appellant apparently left school at the age of 15. Until he commenced using heroin, in 1976, he had a satisfactory work history.
>
> As one sees all to tragically, he commenced using marihuana, progressed from that to LSD and in 1976 became addicted to heroin. In 1979 he became a bank robber and in 1980 he was sentenced to a lengthy term of penal servitude. The pattern is common — progression from drug use to addiction to crime to prison.

On the positive side it was said that the appellant's marriage in 1976 was successful. He had two children and a wife who had stuck by him, and apart from his

weakness for drugs, he was found to be a person of otherwise good character.

Even so, the Court was not prepared to reduce the non-parole period. The Chief Justice said:

> In the context of these conflicting considerations of serious crime on the one hand and strong subjective circumstances on the other, His Honour determined that the case called for a head-sentence of nine years. This has not, I repeat, been challenged, nor, indeed could it be. Notwithstanding the matters urged on behalf of the appellant, I consider that four years was not an inappropriate minimum period to be served before this appellant might hope to be considered for release on parole, with a view to being free in the community in an attempt to remake his life. I can see no basis differing from the view formed by His Honour. The crimes were of major gravity and they call for a significant period of custody as a minimum to be served in recognition of the seriousness of the appellant's criminal conduct. I would accordingly propose that the appeal be dismissed and the appellant have the benefit of the whole of the time he has served.

Kelessy, 22 October 1981.

This case illustrates the sentence imposed in respect of a single charge of armed robbery of a bank together with an escape from custody charge by a drug addict. Of interest is the reluctance of the Court to accept evidence of the offender's prospects for rehabilitation where he has failed to take advantage of a previous opportunity to rehabilitate himself.

In *Kelessy*, 22 October 1981, the appellant had been sentenced to eight years penal servitude for armed robbery of a bank, and a sentence of imprisonment for one year was imposed cumulatively upon the eight year term, for the offence of escape from lawful custody. A non-parole period of four years was fixed.

The appellant, inter alia, sought to have the aggregate sentence reduced, or alternatively, sought to have the sentence served concurrently with the eight year term.

The brief facts were that the appellant had a number of convictions for break enter and steal, and had been released on parole in 1981. On 21 May 1981, he robbed a bank armed with an unloaded shotgun. He was masked, wore a beanie and absconded with approximately $1,691. After his arrest on the robbery charge he escaped from Redfern Police Station but was recaptured soon thereafter. On 17 June 1981, he was sentenced three months imprisonment for using heroin.

On the issue of drugs, Hope J.A. who delivered the judgment of the Court said:

> The applicant is twenty-three years of age and is a single man. He had a traumatic childhood, as appears from the probation report; and he is a heroin addict. It has been said, and evidence has been presented here, that it may be that he could rid himself of that addiction. It must be said, however, he has had the opportunity to do so in the past and has

> not availed himself of it. As has been said by this court before, drug addiction may explain crime, but provides no justification for it. None of the money which he stole from the bank has been recovered. He said that he had spent some $200 on hiring a hotel room, and the rest on the purchase of heroin.

The Court also said that the appropriateness of eight years imprisonment for the armed hold-up could not be challenged. If the sentence for the escape were to be imposed concurrently, then there would be no sanction for that offence. Accordingly it dismissed the appeal.

A similar sentence and non-parole was imposed in *Lambert*, 22 October 1981. The appellant was given a concurrent sentence of twelve months upon a possess shortened firearm offence, and a sentence of two years imprisonment for escape was imposed cumulatively upon an eight year term for armed robbery. In this case the appellant had entered into a written undertaking not to escape from the Newness Afforestation Camp.

Sneddon, 1 March 1979.

The Court's approach to those who **obtain money to feed their addiction to drugs** is well illustrated in this case. It relates to a man who, **in company**, committed a **single offence of bank robbery**. Note also that this offender had **no significant criminal record** and had a **less than stable family background.**

In *Sneddon*, 1 March 1979, the Court dismissed an appeal against the severity of a sentence of twelve years penal servitude coupled with a non-parole period of six years after the appellant had pleaded guilty to armed robbery.

The offence was committed on 10 August 1978. The appellant and a co-offender had taken sick leave from Goulburn hospital where they were employed on the nursing staff. They drove the co-offender's car to Liverpool, inspected various banks, and on the following day entered the Bank of New South Wales. Each was armed with a sawn-off shotgun that was loaded. Both wore balaclavas, and they escaped with $22,492.

The appellant had an unfortunate family background in that his father was an alcoholic and schizophrenic. This placed considerable strain on his mother and on his whole life. At the age of 16 he began using marihuana and in turn he started taking hard drugs. He admitted to spending $120 a day to buy heroin. He had a prior criminal record of no significance, and the circumstance that he had no record of dishonesty or violence, counted in his favour.

This case however is interesting from the point of view of indicating the Courts attitude to drugs. Street C.J., Begg J and Cross J each had something to say before the Court finally dismissed the appeal against the severity of sentence.

Street, C.J. said:

> The explanation has been offered on his part that it was his need for money to meet present financial commitments of himself and his mother that led him to become involved in this bank robbery.

It can be recognised that those who become addicted firstly to marihuana and then, as a common pattern of events establishes, graduate to the hard drugs, need very substantial amounts of money to enable their addiction to be satisfied. This need for substantial funds frequently results in drug addicts resorting to crime. But, whilst this ghastly evolution can be recognised, it is impossible for the courts in administering the criminal law to modify the approach to be taken in the matter of sentencing, merely because the crime is committed to meet financial stringencies that are consequent upon drug addiction. Some reference was made to this attitude of the criminal courts in an earlier decision of this Court in *R. v. Reynolds* (21st September 1978).

Begg, J said:

I agree with the remarks the Chief Justice has made. I wish to add a few additional matters. Sitting in this Court of Criminal Appeal, and presiding from time to time in criminal trials, one gets a pretty broad spectrum of the major causes of crime in this community today; and it has become increasingly apparent that addiction to heroin is in a high percentage of cases the basic cause of serious crime in this community.

The present appellant has stated before the sentencing Judge that at one stage he was spending $120 a day to buy heroin — some $800 a week. It is inevitable that persons who become addicted (unless they happen to be millionaires) have got to resort to crime to feed their addiction. Some of them turn into professional traffickers; some of them turn into prostitutes; a greater number of them turn into thieves; many of them graduate to armed robberies, and then, as an incident of that, murder and manslaughter take place; and as I say, one sees this at all levels in crime in this community today.

Persons who join the procession of drug-taking should realise that sooner or later they will probably be involved in crime, in the ordinary run of events. In these circumstances, it is hard to ask for leniency in this Court in appeals like the present one. People who indulge in drug-taking must know, almost inevitably, they will appear in the criminal dock sooner or later.

Cross, J did not advert specifically to drugs, but said:

A reading of that material shows, I think conclusively, that a sentence of at least that imposed by [the sentencing judge] was not only merited but inevitable.

The approach of this Court to the question of sentence for armed robbery has been consistently firm. Examples (there are many) are *R. v. Haining & Barratt* (3rd January, 1975) and *R. v. Heigs* (14th November, 1975). May I also cite the remarks of Taylor C.J. at C.L., presiding in this Court in *R. v. Houston* (14th March, 1975):

> It is true it was a sentence of twelve years; it is true that it was his first offence for armed robbery, and it is true that there were no aggravating features about the crime other than it was an armed robbery. By that I mean there was no striking, no guns were fired and nobody was ill-treated. But those who commit this offence of armed robbery, for which the legislature has recently increased the maximum penalty to twenty years, cannot expect to receive a sentence in most cases of less than twelve years. Indeed, in some cases they inevitably will be more.

Jacobs, 25 August 1983.

This case illustrates **the desirability of the courts to specify a shorter non-parole period rather than rely upon the Executive to release the offender on licence at an earlier date.** This is so, particularly where the trial judge considers that an earlier release date may be appropriate in order to enable the offender to attend a full time **drug rehabilitation centre.**

In *Jacobs*, 25 August 1983, the appellant was sentenced upon a charge of armed robbery, to eight years penal servitude, and upon a further charge of demanding money with menaces to a consecutive sentence of three years imprisonment. In association with the aggregate sentence of eleven years, a non-parole period of four and a half years was specified.

The armed robbery offence committed on 19 November 1983 involved the use of a replica revolver and was directed at a female clerk of a building society. She was told that her head would be blown off if she didn't co-operate with the appellant. The second offence, committed on 30 December 1982, was at a bank. This time the appellant did not produce a weapon but merely informed the teller that he had a gun and required her to place money in a bag.

Prior to these offences the appellant had been in stable employment and he had a stable relationship with a young woman. When that relationship terminated the appellant's life fell apart. He lost his job and commenced using heroin. Indeed the present offences were committed to enable the appellant to obtain money to pay the person who had supplied heroin to him, he having been subjected to a threat of retaliation by his heroin supplier if the debt remained unpaid.

The Court noted that the offences were committed in company, but failed to regard the imposition of a cumulative sentence, or the aggregate sentence of eleven years, as excessive for these two wholly separate offences.

However, in the sentencing judge's reasons for sentence, there were indications that the prisoner might be considered for release on licence prior to the date of expiry of the specified non-parole if, for example, the appellant expressed a wish to attend a full time drug rehabilitation centre. This, the Court felt, might be best achieved by specifying a shorter minimum term 'rather than a suggestion of consideration for release on licence', and accordingly the Court allowed the appeal to the extent of reducing the non-parole period to three and a half years.

Ildes, 21 September 1984.

This case demonstrates the Court's reluctance to reduce penalties on account of the offender's addiction to drugs. The case presents many of the aggravating features — **multiple armed robberies, offender on licence at time of offences, professionalism** — that are typically found in the top end of the range of sentences imposed on bank robbers.

In *Ildes*, 21 September 1984, the appellant was sentenced to an aggregate 20 years penal servitude with a non-parole period of nine years and nine months in respect of his pleading guilty to nine armed robbery charges, two armed assaults with intent to rob and one car stealing, together with a Ninth Schedule listing 15 armed robberies or attempted armed robberies and ten car stealings.

These robberies were carried out on banks, the appellant working alone, with a stocking-mask over his head, and carrying a firearm. In relation to the firearm Street C.J. said:

> It is said the firearm was either not loaded or on some occasions, inoperable. As can plainly be seen, however, from the photographic exhibits, any observer would have concluded that it was a lethal weapon that the appellant used to terrorise those in the banking chambers into handing over money and offering no resistance.

Of particular significance was that the appellant had been sentenced to five years penal servitude in June 1981 for armed robbery and had been released on licence in August 1982. A significant proportion of the matters listed on the Schedule had in fact related to offences committed prior to his sentence upon that earlier charge of armed robbery. In all some $100,000 was obtained by the appellant.

On behalf of the appellant it was submitted that the aggregate sentence of 20 years exceeded the permissible sentencing range of the sentencing judge. In response to this, Street C.J. said that this submission overlooked the fact that some three years and two months overlapped the unserved balance of the five year sentence imposed in 1981. In any event, said the Chief Justice:

> the sentence, heavy though it undoubtedly was, was one in the opinion of this Court which was designedly and properly lengthy. It was plainly open to Judge Goran to take a most serious view of the nature of these armed robberies. The photographic exhibits, to which reference has already been made, disclose the degree of professionalism that the appellant brought to bear. Indeed that perhaps is best borne out by the number of armed robberies and the substantial amount that the appellant obtained through perpetrating them.

In rejecting the appeal Street C.J. also said:

> The seriousness of armed robberies has many times been emphasised in this Court and in first instance criminal courts. Likewise it has been repeatedly said that the circumstances that crimes of this nature are

carried out by drug addicts in order to obtain money with which to feed their addictions provides no justifiable basis for regarding the criminality involved as diminished so as to lead to more lenient sentences being passed than would otherwise be proper.

Smith, 13 May 1982.

This case illustrates an **aggregate sentence imposed towards the bottom end of the top bracket of sentences for armed robbery**, where the offender has committed **multiple offences** in order to obtain **money to buy drugs.**

In *Smith*, 13 May 1982, the Court of Criminal Appeal dismissed an appeal against the severity to an aggregate sentence of 16 years penal servitude, dating from when his last pre-sentence custody had commenced. The sentence was made up of 16 concurrent sentences of 15 years penal servitude each, imposed in respect of 16 charges of armed robbery of banks and building societies. A cumulative sentence of twelve months was also imposed in respect of the larceny of a motor vehicle. A non-parole period of eight years was also specified.

The offences themselves were spread evenly over a period of two and a half months. The appellant employed a variety of weapons — mainly a sawn-off .22 rifle, but on other occasions the following weapons were used: a sawn-off double barrelled shotgun, a replica pistol and a length of pipe wrapped in a towel. Most offences were carried out in company with a co-offender.

The appellant was aged 28 at the date of the appeal. He had a history of drug and property offences but had not previously been sentenced to imprisonment. It was after completing his school at School Certificate level that he came into contact with drugs.

For a short period he lived in a hippy commune, and the Court accepted that the appellant committed the present offences in order to obtain money to feed his addiction.

Counsel for the appellant submitted that the appellant's past record was not such as to justify such a long sentence. Attention was also drawn to what was described as the 'ameliorating subjective circumstance of the moral weakness which flows from the heroin addiction'. However, the Court pointed out that for a sustained period of criminality involving such serious offences, the sentences and the non-parole period imposed by the trial judge could not be regarded as excessive.

Robbery by Drug Addicts Where Banks are not the Target

An examination of cases other than bank robberies where offenders are motivated by their addiction to drugs indicates that the courts take a similarly hard line to that reflected in bank robbery cases. The sentencing decisions, involving the sentencing of robbers who claim to be motivated by or addicted to drugs, are set out later in the work.[15]

[15]see generally under 'Robbery of Pharmacies' and 'Robbery by Drug Addicts'

10.11 Gambling

Occasionally offenders attempt to obtain a sympathetic ear from the courts by claiming that their offences were motivated by their weakness for gambling. It seems that the courts deal with this problem in much the same way as with drugs.

Gillis, 26 September 1985.

This case illustrates the Court of Criminal Appeal's attitude, not only to gambling, but also to the relevance of psychological injury due to war service. In addition there are some interesting observations relating to the significance of the use of a **replica hand gun.** The Court's **reluctance to give much weight to many of the subjective consideration** raised in this appeal appears to be explained, in part, by the circumstance that the appellant had committed a **large number of individual offences of considerable seriousness.**

In *Gillis*, 26 September 1985, the appellant was sentenced to an aggregate sentence of 17 years penal servitude with a non-parole period of eleven years consequent upon his pleading guilty to:

(1) three charges of demanding money with menaces (pursuant to section 99 of the *Crimes Act*) — five years penal servitude on each charge to be served concurrently

(2) seven charges of armed robbery (pursuant to section 97 of the *Crimes Act*) — twelve years penal servitude on each charge, to be served concurrently.

These offences were committed against banks, building societies and a credit union. Four of the armed robberies were committed in company with the appellant's de facto wife. In the result the Court declined to upset the sentence and non-parole period. However in seeking to challenge the severity of both the aggregate sentence and non-parole period (which the Court by majority acknowledged as being at the top of the range for such offences) a number of interesting submissions were raised on the appellant's behalf.

These included the circumstance that the appellant had been injured and suffered psychologically from his army experiences in Vietnam, that he had an addiction to gambling and to alcohol, that he had embarked upon a series of major crimes comparatively late in life (age 32) involving non-violent crime (mainly false pretences), that in all his criminal career he had not occasioned any physical injury to any of his victims, and that he used a replica pistol as opposed to a loaded weapon.

As for his war service (he had been injured and had seen a companion lose his legs in a mine explosion), Slattery C.J. said:

> War service of the type performed by the appellant must be given due weight but there must come a time when its importance wanes with the commission of offences...[However the present offences] involved the

> obtaining of a very large sum of money from ten establishments. The ten separate offences must be regarded as most serious requiring significant consequences.

As for the addiction to gambling Slattery C.J. at CL said:

> In my view the carrying out of serious crime to fund a gambling addiction does not provide any basis for extending leniency to an offender when determining the matter of sentence.

As for the contention that some distinction should be made in the sentencing process between the use of the real and loaded weapon as against one which is only a replica, Slattery C.J. at CL said:

> It is also necessary to keep in mind that in the establishments which were the subject of the offences the employees were the victims of serious crime. Maybe the tellers and other employees knew that the appellant held a replica gun but in all probability they did not. The court also has to take into account the preceding circumstances, namely, the appellant's manner of approach, his demands and conduct whilst in the establishments. In my view the distress which would be occasioned to the victims is a matter which must be considered when evaluating the overall criminality of the appellant.

Roden J, who agreed with the observations of Slattery C.J. at CL and with the order of the Court expressed a reservation as to whether the effective head-sentence and non-parole period specified by the sentencing judge in this case should properly be regarded as falling at the top of the appropriate range, or little beyond it. Roden J said:

> I note that no weapon capable of causing death or serious injury was used in any of the offences. I note that there was no actual violence to the person in any of the offences. I note that the appellant, now thirty-five years of age, has no prior offences of violence to the person.
>
> The reservation I have expressed, arises from doubt as to whether the level of sentence chosen here sufficiently distinguishes this case from others, in which those features, absent here, are present, and sufficiently recognises the desirability of seeking by sentencing policy to deter those bent on armed robbery from using loaded firearms and from carrying out their threats of actual physical violence.

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Allen, 3 July 1985
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Antoun, 16 April 1987
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Willis, Field, 28 August 1981
Wood, 16 May 1980

Chapter 11

Robbery of Financial Institutions Other Than Banks, and T.A.B.'s

Research shows that bank robberies net offenders more money than any other target.[1] However building societies, credit unions and Totaliser Agency Boards, like banks, also trade in large sums of money and therefore not surprisingly, attract armed robbers in much the same way as banks do.

The pattern of sentences imposed upon offenders who target these financial or money handling institutions does not appear to be quite as severe as sentences imposed on bank robbers except where multiple offences are committed, or excessive violence is used. There is some suggestion in some of the cases that where offenders use imitation weapons or otherwise merely pretend to carry weapons, their sentences are slightly less severe than when real and loaded weapons are presented in the course of committing offences. Further it is clear that a high proportion of offenders who attack credit unions or building societies also commit bank robberies, so that, so far as sentencing patterns for these cases are concerned, there is little to differentiate them from bank robberies. For example, in *Roach*, 30 October 1986, the Crown successfully appealed against an aggregate sentence of eight years with a non-parole period of four years in respect of 18 charges of armed robbery, spread over four months. The respondent's *modus operandi* was to enter a bank or building society carrying an unloaded sawn-off .22 rifle and demand money. He obtained some $77,000 most of it being spent on drugs. He was addicted to heroin and had a horrendous childhood involving violence, alcoholism and poverty. The Court substituted concurrent sentences of 16 years penal servitude and a non-parole period of nine years. Again it is seen in these cases that a significant number of offenders are drug addicts and/or have bad criminal antecedents.

For pre September 1989 cases of financial institutions robberies (other than banks), sentences for single offences appeared to be in the range of six to eight years penal servitude, and non-parole periods were generally found to be in the range of two to four years imprisonment.

No special considerations relating to the sentencing of offenders who hold up TAB offices can be identified. The few examples listed below suggest that, for pre

[1] see figure 10.1 page 98

September 1989 offences, 'double figure' sentences (i.e. ten years or more) were frequently imposed upon robbers who committed multiple TAB robberies.

Based on prior decisions, it would be anticipated that multiple financial institution or TAB robbers would commonly attract post September 1989 sentences of between four and eight years penal servitude (minimum terms of between three and six years). Cases falling outside this range would generally be accompanied by compelling aggravating or mitigating circumstances.

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Alexander, 2 July 1987
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Carrion, 6 March 1981
Cole, 11 September 1981
Dalton, 10 September 1987
Denman, 9 October 1981
Duck, 18 March 1983
Fenner, 2 May 1984
Gillis, 26 September 1985
Goodman, 4 July 1984
Gregory & Robson, 1 March 1985
Guilder, 20 August 1987
Gysin & Sheargold, 24 September 1982
Ireland, 25 May 1984
Jacobs, 25 August 1983
Jensen, 4 August 1978
Kearney, 3 July 1985
Keeble, 26 April 1989
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Smith, 13 May 1982
Todd, 5 July 1984
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Robbery of Totaliser Agency Boards (TABs)

Bailey, 30 April 1981
Coates, 2 July 1982
Didham, 3 August 1978
Law, Greer & Morris, 19 February 1982
Matier & Ramage, 6 April 1979
McNamara, 26 November 1982
Phillips & Micallef, 2 September 1982

Chapter 12

Robbery of Pharmacies

Since the increase of drug related crime, the robbery of pharmacies has become an all too frequent occurrence. A typical case is that of *French*, 10 October 1980, where the appellant, with a companion, held up a chemist shop in order to acquire the contents of the drug safe and some money. During the attack he held one arm around the neck of a young woman and threatened her with a knife. When he obtained what he demanded, he released her and fled. The appellant had a prior history of break enter and steal and drug convictions, and had been sentenced to periodic detention for twelve months, in 1979. He also was subject to a three year good behaviour bond when he committed the present offence.

In declining to interfere with the sentence of seven years penal servitude, coupled with a non-parole period of three years the Court simply said:

> It is not necessary to state yet again the seriousness with which the criminal courts view those who carry out armed robberies in circumstances such as the present. The appellant's drug addiction might provide a background context of the offence, but it furnishes nothing by way of excuse for involving himself in this serious crime.

A similar statement appears in *Marks*, 19 July 1984, where the Court dismissed an appeal against the severity of a sentence of ten years penal servitude, coupled with a non-parole period of ('a remarkably lenient') four years, imposed in respect of two robberies of chemist shops. The appellant was a 21 year old heroin addict who, at the time of the offences was also subject to a bond. The Court said:

> It has been said in this Court and other courts on many occasions that drug addiction, whilst it might explain the committing of a crime, does not provide an excuse which can result in any reduction in the sentence proposed to be passed for the crime in question. It has further been said that offences committed in chemists' shops should be seen as a particular affront to society. Chemists' shops are essential for the health and well being of the members of the community, and pleas for leniency for those who rob such shops must be weighed against the interests of the public in protecting this essential service.

And again in *Millard & Graham*, 11 March 1981, a successful Crown appeal leading to sentences of seven years and eight years penal servitude respectively, Street C.J. said:

> So far as concerns the armed hold up of the chemist's shop and the terrifying of the shop assistant with the scuba knife for the purpose of obtaining drugs, the attitude of this Court has been made clear on more than one earlier occasion. It is sufficient for present purposes to quote from the judgment in *Regina v. Sainsbury*, a judgment we gave on 27th July, 1979:
>
> > The availability of chemists' shops is essential for the health and safety of the community and those who conduct chemist shops are entitled to the full protection of the criminal law when they are seen to be, as they were in this case, subjected to repeated and sustained onslaught by men such as the appellant. The seriousness of this affront to the requirements of the community in my view overshadows the subjective circumstances and the personal tragedy of the appellant, ...
> >
> > So far as concerns the trafficking in heroin extending back for 18 to 20 months, the attitude of the criminal courts has been stated so often as not to need reiteration. The evil traffic in drugs destroys humanity at the ultimate end of the chain. The final users are those who are the ultimate victims. The courts have many times made it plain that those who fill intermediate roles in this vicious drug chain must expect, when called to account before a criminal court, to face a heavy sentence for their past conduct.

In *McKenzie*, 13 June 1985 the appellant had tricked a pharmacist into opening up his shop in the belief that urgent pharmaceutical services were required, and then held him up with a kitchen knife. The Court held that a sentence of three and a half years imprisonment, coupled with a non-parole period of two years was on the lenient side of sentences imposed for these kinds of offences.

In *Safwan*, 28 February 1986, the appellant described as a hopeless heroin addict, sought to challenge the severity of sentences aggregating to 29 years penal servitude in consequence of his having committed a large number of offences, including two armed robberies, involving shooting and wounding.

With regard to a group of ten armed robbery offences, the sentencing judge had imposed an aggregate sentence of twelve years penal servitude. This, the Court said, was by no means excessive, given that the offences were committed by an escapee who carried a firearm. Further, the Court said:

> The seriousness is enhanced by the fact that the list includes seven pharmacies. Pharmacies provide an essential public service upon which health and even life is dependent. Their availability to the public and

> the safety of those who work in them will be fiercely protected by the criminal courts. This has been emphasised in a number of judgments of this Court. The nine robberies and the attempted robbery, including as they did seven pharmacies, by an escaped prisoner, each carrying a maximum of twenty years, could well have brought a larger aggregate than twelve years. It is apparent that his Honour has allowed some discount in recognition of the principle of totality when computing the ultimate aggregate.

While the latter decision provides an example of an exceptionally high sentence, and cannot be regarded as a typical case, the majority of pharmacy robberies seemed to have attracted pre September 1989 sentences of between six and ten years penal servitude. Where multiple offences are committed, or where considerable violence is employed, sentences sometimes went beyond this level. Specified non-parole periods often fell between the imprisonment range of two and five years — a post 1989 minimum term equivalent range of between 16 months and three years four months.[1]

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Romano, 8 May 1980
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[1] For an analysis of the policy and the sentencing patterns for armed robbery of chemist shops in South Australia, see *King* (1988) 34 A Crim R 413

Chapter 13

Robbery by Drug Addicts

Drug related bank robberies[1] and robberies committed in pharmacies[2] have now been discussed in some detail. In order to complete the picture, robberies committed by drug addicts where the offences are not directed specifically at banks or other financial institutions, should also be considered. A list of such cases follows this brief introduction.

Owing to the variety of offences in this category, no special principles or range of sentences can be discerned. In practice the seriousness of the offences and the criminal antecedents of the offender appear to have far greater significance in the sentencing decision than the circumstance either that the offence was committed in order to obtain money for drugs, or that the offender was under the influence of drugs at the time of the offence.

Typically a statement such as that found in *Vidler*, 10 April 1986, appears:

> It has been said that drug addiction, with the consequently generated cash need due to crime, may explain criminal activities but it cannot excuse them so as to result in diminution in sentences proper to be passed for the offences under consideration.[3]

Similarly in *Akeljic*, 5 August 1987, the Court said:

> This case is one of the many cases which come to this court involving young men who have taken to drugs and who then terrorise the community in order to get money to feed their addiction. The crimes are very serious crimes and the fact that there are six charges in my view is not to be brushed to one side and treated as being one criminal episode so as to bring about a situation of artificial leniency. It can only be looked at as the kind of conduct against which the community is entitled to have the courts protect it, to the extent that the court can protect the community. Such conduct cannot be tolerated in a civilised society. Only stern measures are adequate to deal with the crimes as serious as these.[4]

[1] Chapter 10 at p. 141
[2] Chapter 12
[3] per Street C.J.
[4] per Lee J.

This was a case involving six armed robberies, principally of mixed businesses, by a heroin addict aged 26 years, with a criminal record since he was 11 years of age. It resulted in an aggregate sentence of twelve years penal servitude coupled with a non-parole period of nine years.

Case References

Ahomiro, 11 March 1982
Akeljic, 5 August 1987
Alexander, 2 July 1987
Armstrong, 9 November 1984
Antoun, 16 April 1987
Bain, 7 September 1989
Bainbridge, 29 March 1985
Bartley, 23 August 1985
Begnell, 28 March 1985
Betteridge, 16 October 1987
Boon & Boon, 17 November 1983
Burke, 7 October 1983
Cain, 6 November 1980
Cardwell, 17 December 1984
Coates, 2 July 1982
Cole, 11 September 1981
Davies, 18 May 1984
Denman, 9 October 1981
Domatas, 30 May 1985
Duck, 18 March 1983
Grant, 25 August 1989
Green & Reilly, 31 August 1983
Gysin & Sheargold, 24 September 1982
Haggart, 17 December 1982
Hawkins, 29 May 1986
Hodson, 2 December 1981
Hoole, 17 March 1989
Horwell, 31 July 1985
Imisides, 6 April 1989
Ireland, 25 May 1984
Jensen, 4 August 1978
Kearney, 3 July 1985
Kollarick & Langley, 8 May 1980
Kollarick, 29 April 1983
Larsen, 8 September 1989
Leven, 15 February 1980
Lynott, 10 August 1989
Marshall, 8 May 1986
Micallef, 18 March 1983
Milson, 16 December 1985
Mitchell, 12 April 1985
Moran, 7 July 1983
Murray, 11 September 1986
O'Connor, 19 September 1986
Parmenter, 7 Septemnber 1988
Phillips & Micallef, 2 September 1982
Ralph, 31 March 1983
Richards, 11 February 1981
Rix, 24 September 1982
Roach, 30 October 1986
Sheldrick, 12 November 1981
Smith, 20 June 1985
Spiteri & Young, 3 October 1985
Stewart, 31 May 1985
Svolos, 4 November 1981
Vidler, 10 April 1986
Watts, 11 July 1979
Whitney, 16 September 1983
Yates, 11 April 1985
Zullo, 26 April 1984

Chapter 14

Robbery of Petrol Stations, Take-Aways, Bottle Shops

Based on cases determined prior to 25 September 1989 those who committed armed hold-ups of petrol stations, bottle shops or other take-away food outlets, often appear to be sentenced, in the case of single offence, in the range five to eight years penal servitude. For example, in *Murray*, 5 November 1986, the offender was sentenced to five years and six months, with a non-parole period of two years and nine months when he went to the office of a service station and ordered the female attendant who was counting money to sit still while he collected some of it.

In *Zsolnai*, 22 March 1989, the appellant, while on bail for an offence of larceny as a servant for taking $40 from the till of the Queanbeyan Hotel, went with another man to the Esso Service Station at Queanbeyan and held up the sole attendant with a sharp knife. Both offenders wore full face motor cycle helmets and forced the attendant to hand over some $1,973 in cash and $462.93 in cheques and credit card vouchers.

The appellant, unemployed and 25 years of age, claimed that he did not intend to hurt the victim and, in fact, the victim was not hurt. He was, at the relevant time, at large on licence for a number of burglary and break enter and steal offences after serving part of a four year sentence imposed by the Supreme Court of the Australian Capital Territory. He was a confirmed heroin addict and while on bail pending the hearing of the present charges, had absconded from Odyssey House following an undertaking that he would accept treatment.

The Court of Criminal Appeal declined to interfere with an aggregate sentence of eight years penal servitude, coupled with a non-parole period of three and a half years. The Court also declined to upset an order, made under s.21A of the *Probation and Parole Act* 1983, that there be no remissions upon the non-parole period.

Sentences in excess of this, to about ten years penal servitude, were quite common where, in addition to the armed hold-up of a service station other offences of less seriousness were committed (e.g. break, enter and steal or theft of a motor vehicle).

Offenders who committed a small number of robberies where no serious injury was occasioned to victims, received, in terms of pre September 1989 cases, aggregate

sentences of up to 14 years penal servitude. However for offenders who committed more than three armed robberies and often this meant robbing other commercial premises in addition to petrol stations, bottle shops or take-away food stores, sentences of 15 years or more were sometimes found.

Thus *Vidler*, 10 April 1986, may be regarded as a relatively lenient sentence. In that case the Court dismissed an appeal against the severity of sentences totalling eight years penal servitude for eight robberies involving post offices and service stations committed by the appellant between 20 and 27 June 1985. The appellant had been disguised, and had concealed his hands in his clothing as if he were armed. He was aged 32 years, with a debased lifestyle and a criminal record since he was 17 years of age. A non-parole period of five years was specified.

Case References

Adler, Navin & Leonard, 10 July 1980
Ahomiro, 11 March 1982
Bainbridge, 29 March 1985
Baxter, 9 June 1978
Beacroft & Gladman, 15 July 1983
Brown, Hatton & Baxter, 6 July 1978
Brunning, Smith & Thomas, 14 November 1980
Coombe, 13 March 1986
Coulcher, 7 December 1978
Coulstock, 10 December 1980
Dalton, 10 September 1987
David, 1 March 1984
Davies, 18 May 1984
Doust, 20 February 1981
Dubavs, 17 February 1978
Dugan, 15 March 1984
Ennis. 29 July 1988
Forsyth & Lecomber, 9 July 1981
Gibson, Green & Jenkyns, 5 June 1981
Goodman, 4 July 1984
Graham, 29 March 1985
Griffiths, 23 March 1989
Homsi, 11 November 1988
Hume, 17 July 1980
Hunt, 25 November 1982
Khoury, 16 September 1983
Murray, 5 November 1986
O'Connor, 19 September 1986
Plestici, 13 June 1985
Puta, 15 April 1983
Roberts, 15 March 1985
Safwan, 28 February 1986
Seaman, 23 July 1981
Stalder, 4 June 1982
Stephens, 26 March 1987
Thelan, 12 November 1981
Todd, 12 July 1979
Vidler, 10 April 1986
Warriner, 24 June 1983
Whymark & Davis, 5 June 1981
Williams, 22 July 1982
Zeater, 22 April 1988
Zsolnai, 22 March 1989

Chapter 15

Personal Robberies

Cases classified here as personal robberies or person-to-person robberies relate to offences involving a theft or attempted theft from a person by the direct application of force or threat of force. These personal robberies should be distinguished from cases which are directed at commercial premises, such as banks, other financial institutions, Totaliser Agency Boards, retail or take-away food shops, pharmacies and the like. Indeed, many of the cases considered here could be described by what the American's colloquially call 'muggings', or what is sometimes referred to as robbery in the street, but the first description is too narrow and the second not quite adequate to encompass all the decisions considered below.

Just as it is difficult to classify this category of offence in terms of a generic description, so too it is difficult to identify a tariff or penalty range. Perhaps the problem lies in the fact that some of the offences are prosecuted pursuant to section 94 of the *Crimes Act* 1900 and carry a maximum penalty of 14 years penal servitude, while others, particularly offences committed in company, carry penalties of 20 years penal servitude and in certain circumstances penal servitude for life.[1]

At best, it is seen that sentences of around four to five years penal servitude were commonly imposed upon offenders who rob and physically assault strangers (pedestrians, old ladies) with the intention of depriving them of whatever money they may have upon their person. See *Bush & Cougan*, 20 June 1986; *Dobson & Watkins*, 18 March 1982; *Faure*, 18 February 1983; *Organ*, 9 March 1978; *Richards*, 11 February 1981; *Stewart*, 31 May 1985; *Sutton*, 6 March 1981; *Verkroost*, 21 September 1979 and *Weeks*, 8 October 1982. Non-parole or non-probation periods for these cases ranged from between twelve months to two and a half years.

In *Smelcher*, 19 July 1989, the appellant, with a long disturbing criminal record and on parole at the relevant time, failed to have his sentence of six years penal servitude reduced. This sentence, imposed in 1984, was to commence from the expiration of a sentence of ten years penal servitude he was then serving in respect of six armed robberies, . His offence was committed in a car park at Randwick when he pushed the female victim from behind, grabbed her wallet and ran away.

Similarly in *Wood*, 7 April 1989, the offender was eventually sentenced to four years penal servitude coupled with a non-parole period of two and a half years in

[1] see chapter 2 where the legislation is set out

consequence of a charge of assault with intent to rob in company. He had, with an accomplice, attempted to grab the handbag of a sixty-five year old pensioner as she was walking down a street in Tweed Heads. She was dragged to the ground and pulled along the gravel as she hung onto her handbag. Initially the prisoner was released on a recognizance, but declined to pay a fine and was in breach of his bond in other respects. The sentence and non-parole period were not regarded as excessive in the circumstances.

Draper, 9 December 1988, is in an even more serious category of robbery. The appellant sought to challenge a sentence of ten years penal servitude coupled with a non-parole period of seven years imposed in consequence of his conviction for a charge of assaulting and robbing the victim and using corporal violence against him. The offence occurred as the victim was walking along a street in Cabramatta at 9.30 pm. First, the victim was attacked by the appellant who punched and knocked him to the ground. The appellant then twisted the victim's arm behind his back until it broke. Meanwhile he kept punching him and demanding his wallet. Eventually he obtained the wallet and the sum of $6.80.

In reducing the sentence and non-parole period to seven years and five years respectively, Lee CJ at CL delivering the principal judgment of the Court, noted that while the offence was a sadistic and cruel attack on an innocent man in a public street at night, the subjective circumstances of the appellant had not been given sufficient weight. The appellant was a person with low intellect, virtually illiterate, addicted to alcohol and prone to suffer blackouts. For the most part of his life he had been a good citizen and a good worker and had never been in trouble before.

As we have seen time and again, prior similar offences are a relevant consideration in sentencing and *Glasby*, 15 May 1986, provides another example. The appellant, who had already been sentenced to an aggregate term of eight years penal servitude for two armed robberies in 1982, was convicted of the armed robbery with wounding of a jeweller who was on his way home from work. The Court dismissed an appeal against a sentence of twelve years and six months penal servitude with a non-parole period of nine years.

Where offences are directed at persons believed to be carrying substantial sums of money, such as in *Cernik*, 3 December 1980, and in *Fernando*, 25 June 1981, where company employees on the way to the bank were held up, or in *Ogul*, 7 July 1983, where a man carrying a substantial sum of money belonging to a club was abducted and robbed, sentences in the order of eight or nine years with non-parole periods of about four years have been imposed. In *Ryan*, 8 June 1979, the Court declined to interfere with a head sentence of 15 years with a non-parole period of five years for a robbery with striking, and an armed robbery of employees going to the bank to deposit large sums of money. These offences were motivated by the appellant's drug addiction.

Not unexpectedly, at the bottom end of the sentencing scale for personal robberies were some sentences of two years or less, including one case (*Gardner*, 10 March 1982) in which the imposition of a non-custodial sentence was upheld by the Court of Criminal Appeal. In the latter case the appellant had been subject to stringent bail conditions for a considerable period of time prior to his being sen-

tenced to five years penal servitude, coupled with a non-parole period of two and a half years, and the Court held that although a custodial sentence was warranted, in view of the long delay (both at first instance and in processing transcripts for the appeal) the requirements of justice would be met by substituting a three year good behaviour bond.

Case References

Aziz, 16 July 1982
Bakhos, 24 February 1989
Bargashoun, 22 November 1985
Blackburne, Davies & Amvrazis, 18 December 1981
Cerella, 12 July 1978
Cernik, 3 December 1980
Chatfield, 26 September 1985
Clayton, 23 March 1978
Collins, Whiting & Whiting, 17 July 1987
Dobson & Watkins, 18 March 1982
Domatas, 30 May 1985
Donovan & Piper, 30 March 1979
Draper, 9 December 1988
Ennis, 29 July 1988
Faure, 18 February 1983
Fernando, 25 June 1981
Gardner, 10 March 1982
Glasby, 15 May 1986
Hampton, 2 September 1988
Hickey, 17 December 1986
Hicks, 2 May 1980
Hunt, 3 July 1986
Kluska, 16 July 1981
Martin, 9 August 1979
Middleton, 31 March 1983
Bush & Cougan, 20 June 1986
Mitchell, 12 April 1985
Ogul, 7 July 1983
Organ, 9 March 1978
Price, 13 July 1989
Richards, 11 February 1981
Ryan, 8 June 1979
Smelcher, 19 July 1989
Smith, 20 June 1985
Stewart, 31 May 1985
Sutton, 6 March 1981
Terek, 20 March 1981
Verkroost, 21 September 1979
Weeks, 8 October 1982
Wood, 7 April 1989
Zocchi, 11 NOvember 1988

Chapter 16

Private Homes

Prior to the commencement of the *Sentencing Act* 1989, sentences imposed on armed robbers who committed offences in private dwelling houses generally fell within the range of three to six years penal servitude. Sentences in excess of six years were found where excessive violence was used, particularly where considerable physical injury had been occasioned to the victim, where the offender had an earlier criminal record of some significance or where two or more similar or more serious offences had been committed.

In *Miro*, 7 June 1989, a sentence of five years penal servitude ordered to run cumulatively upon sentences the appellant was already serving, was held to be entirely appropriate in the case where the appellant, while armed with an unlicenced pistol, knocked on the door of a private dwelling, and menaced the female householder. Similarly in *Marshall*, 8 May 1986, the Court declined to interfere with a sentence of six years, coupled with a non-parole period of four and a half years, imposed upon a 21 year old heroin addict who had an unsatisfactory record. He committed a number of offences by entering the homes or rooms of elderly people, physically assaulting them and taking their money.

In *McIntosh*, 26 June 1986, the appellant, who had returned to the scene of a previous robbery at the victim's home, was wounded by a shot fired by a rifle owned by the victim. He was sentenced to seven years penal servitude coupled with a non-parole period of three and a half years in respect of two s.94 offences. The appellant was involved with heroin but had a favourable pre-sentence report.

A consideration of the more serious cases indicates that many of them could be categorised under other headings. In *Whitely*, 13 May 1982, for example, the Court refused to upset a sentence of 18 years penal servitude coupled with a non-parole period of eight years imposed upon the appellant for entering the victim's home, taking some money, and then abducting the victim for the purposes of demanding $500,000 ransom from her family. In that case the victim had been handcuffed to a tree and left exposed without food or water for a period of 32 hours. In *Fallon*, 12 November 1980, the appellant received a sentence of ten years penal servitude, coupled with a non-parole period of four and one half years, for entering the victim's home and bedroom, demanding money by threatening her with a knife, and finally raping her. In *Medina*, 12 October 1979, the appellant, in company, entered the

victim's house where he assaulted and robbed her. He then abducted her by taking her to another house where another victim was assaulted and robbed. In that case an aggregate sentence of twelve years, together with a non-parole period of five years, was upheld by the Court of Criminal Appeal. In *Robinson*, 20 August 1981, the Court refused to interfere with an aggregate sentence of 18 years penal servitude, coupled with a non-parole period of eight and a half years in consequence of his having committed, inter alia, two armed robberies in dwelling houses and one armed robbery of a bank. The appellant was on parole when he committed these offences.

In *Judge & McKinney*, 2 June 1989, the appellants and a third man had entered the house and bedroom of a woman and her two daughters while they were sleeping. They wore balaclavas and one carried a gun. They then woke and interrogated the woman at gunpoint with a view to obtaining money. When she denied any knowledge of any money they bound her hands with sticky tape and left the room. Shortly thereafter a gun was discharged resulting in a wound to the head of a man who had been sleeping on some cushions on the lounge room floor. When the woman went to investigate what had happened she found the injured man and called the police and ambulance. He had suffered severe brain damage as a result of being shot.

When apprehended each appellant was charged with a number of offences, the most serious relating to the wounding of the man, which carried a maximum sentence of life imprisonment. They were each sentenced to a term of 20 years with a non-parole period of 13 years but these were subsequently reduced by the Court to 16 years with non-parole periods of eleven years, because of three factors. First, neither appellant was treated as the person holding the gun. Second, the gun was discharged as a consequence of a reaction to a sudden movement rather than out of a desire to injure the person who was shot. Third, the sentencing judge had indicated that he did not wish to impose an entirely crushing sentence.

The latter case may be compared with *Vougdis & Rossides*, 19 April 1989, where an armed robbery in the home of the victim again did not turn out as the offenders had hoped. The respondent Vougdis had a fruit juice delivery business, and would provide information to one Angus about the suitability of robbery targets. Prior to the present offence Angus had carried out a number of robberies with various accomplices and then shared the proceeds with Vougdis and others. As a result of information provided by Vougdis, Angus and Rossides went to the home of the Vlahos family on the evening of 1 February 1987 with the expectation of robbing them of about $50,000. They carried a machete, a sawn-off shotgun and other equipment. They confronted Mr Vlahos who was asleep on the lounge and demanded money. At about this time children from inside the house and relatives from outside began to arrive on the scene. The two offenders then began backing towards the front door, Rossides first, followed by Angus who was still demanding money.

Mrs Vlahos, who apparently was screaming and shouting, pushed Angus with the result that the shotgun discharged and fatally wounded her. The appellants fled the scene but were later apprehended. The sentencing judge described the events of the night in the following terms:

> It is not just that a human life was wantonly sacrificed at the altar of greed and an innocent family needlessly subjected to the tragedy of that death, it all occurred in the course of a violent invasion of a private family home and a cowardly and contemptible attack on the householders by two heavily armed men.

Angus was convicted of murder and sentenced to penal servitude for life. Rossides pleaded guilty to manslaughter (with three s.97 offences taken into account on a Ninth Schedule) and also pleaded guilty to a charge of armed assault in company, and was sentenced to a total of 14 years penal servitude with a non-parole period of ten years.

Vougdis pleaded guilty to a charge of being an accessory after the fact to murder, to a charge of being an accessory before the fact to armed assault in company with intent to rob (with five offences under s.97 of the Crimes Act taken into account on a Ninth Schedule) and was sentenced to a total period of eleven and a half years with a non-parole period of seven and a half years.

The Crown appealed against the adequacy of these sentences, and in the course of the appeal particular attention was paid to the proper approach to be adopted when, for sentencing purposes, offences are taken into account on a Ninth Schedule pursuant to s.447B of the Crimes Act. Campbell J, who delivered the principal judgment of the Court, referred to *Murrell*[1] and approved of the views expressed by Fox J in that case, to the effect that usually the taking into account of additional offences adds little to the punishment that would otherwise be imposed, and that the Court must look at the whole situation in order to ensure that the total period of imprisonment selected best meets the situation. Campbell J also added that the reason that taking into account Ninth Schedule offences usually added little to the punishment was that it was unusual for courts to consider serious offences in Ninth Schedules. Indeed, according to Yeldham J, the serious charges, such as those under s.97 and 'which are not related to the events of the day in question, should normally be separately charged so that separate sentences may be imposed in respect of them'.

However Campbell J concluded that where matters are taken into account on a Ninth Schedule there is no limitation in principle or practice, placed upon the penalty, other than that provided by the section itself.

In the result the Court concluded that the sentencing judge had failed to make appropriate provision for the Ninth Schedule offences and, bearing in mind the principle of totality and the principle applicable to re-sentencing after a Crown appeal, it increased both the head sentences and non-parole periods in the case of Rossides, to 19 years and thirteen and a half years, and in the case of Vougdis, to 16 years and ten and a half years, respectively.

That the invasion of the victim's home is seen as an aggravating circumstance is clear from what the Court has said when considering sentences imposed in such cases. For example in *Bennett*, 7 February 1985, four offenders terrorised an elderly couple from 8.30 pm to 4.30 am. The victims were subjected to continuing threats

[1](1985) 15 A. Crim R. 303

and at one stage one of the offenders ran a knife across the neck of the man. The offenders had a loaded firearm and had tied up and rendered helpless the two elderly persons. The Court said:

> The seriousness of the criminality is, of course, enhanced by the circumstance that these people were in what ought to have been the safety of their own home and, understandably, Judge Ward was markedly concerned at the gravity of the conduct of the four co-offenders on the night in question. Those who choose to invade private homes in this way must expect to suffer the full weight of the criminal law when they are apprehended and brought forward for sentence in consequence of such offences.

In *Betteridge & Evans*, 16 October 1987, the Court declined to upset sentences of ten years penal servitude with non-parole terms of seven years imposed upon the offenders for their part in an armed raid (with a third person) upon a dwelling house for the purposes of obtaining drugs. They terrified the occupants (husband and wife) for one and a half hours. The victims were bound with masking tape and stockings. Shots were fired, threats to kill were made and dogs were thrown bait. Both appellants had previous convictions, but only Betteridge had served a sentence of imprisonment previously.

These serious category offences suggest that non-parole periods of five years or more were commonly imposed for robberies committed in private homes. The most common non-parole period fixed by the courts in respect of single offences where no significant physical injury has been occasioned to the victim, seemed to be in the order of two years, or in the range, one and a half to three years. Caution however needs to be exercised in adopting this range as the tariff and converting it into post September 1989 equivalent terms, as the number of cases considered here is small, relates only to appeal decisions, and it is not known to what extent non-custodial sentences, or periodic detention, could also have been imposed for robberies committed under this heading. However, a review of the following appeal decisions, can provide some further insights into the sentencing of offenders who commit robbery offences in private dwelling houses.

Case references

Atkinson & Warner, 28 June 1985
Bennett, 7 February 1985
Betteridge, 16 October 1987
Bradley, 28 September 1978
Couper, 13 December 1985
Davidson, Russell & Mayberry, 12 February 1981
Fallon, 12 November 1980
Gascoigne, 3 August 1978
Gordon, 31 March 1978
Haggart, 17 December 1982
Hampson, 23 July 1987
Howard, 16 October 1981
Ibbett, 24 July 1987
Judge, 9 November 1978
Judge & McKinney, 2 June 1989
King, 31 March 1978
Leven, 15 February 1980
Lodding, 7 December 1978
Marshall, 8 May, 1986
McGarvey, 13 May 1983
McIntosh, 26 June 1986
Middleton, 21 September 1978
Medina, 12 October 1979
Miro, 7 June 1989
Parmenter, 7 September 1988
Ralph, 31 March 1983
Robinson, 20 August 1981
Rowland, 25 September 1981
Shorten, 29 October 1987
Spiteri & Young, 3 October 1985
Stevens, 28 September 1978
Tam, 2 May 1985
Trindall, 1 July 1983
Vachalec, 5 October 1979
Vougdis & Rossides, 19 April 1989
Watts, 11 July 1979
Whitely, 13 May 1982
Williams, 11 September 1986
Yates, 11 April 1985

Chapter 17

Robbery of Taxi Drivers

The approach of the Court of Criminal Appeal upon attacks on taxi drivers is referred to in *Nash*, 17 November 1983. That case concerned the sentencing of a 15 year old first offender who produced a knife, held it against a taxi driver's throat and demanded money. Street C.J., who delivered the judgment of the Court, declined to interfere with a sentence of three and one half years coupled with a non-parole period of 10 months, saying as he did so, that the courts had gone to some lengths to emphasise the necessity of applying the full measure of the criminal law in an attempt to protect the taxi services for the benefit of the public. The Chief Justice also endorsed what was said by Lee J. in *Elliott & Hitchins*.[1] Lee J. had said:

> In *R. v. Henderson* (C.C.A., 18th December, 1975, unreported) Street C.J., delivering the judgment of the Court said:
>
> > Assaults on taxi drivers, be they serious or minor, will not be lightly tolerated by the Courts. The convenience of a taxi service to members of the public needs no emphasis and taxi drivers are entitled to the benefit of the full weight of the law in protecting their safety.
>
> To the same effect was an observation of the Chief Justice in *R. v. Young* (C.C.A., 1st October, 1976, unreported):
>
> > ... we have emphasized the necessity of ensuring that those who provide the public with taxi services will be afforded the full measure of the protection of the criminal law if they are exposed to armed hold-ups, such as took place here, or are otherwise subjected to criminal conduct calculated to cause them alarm or disquiet.
>
> These two observations are quoted in *R. v. Sullivan* (C.C.A., 14th October, 1977) (unreported). They clearly delineate the sentencing policy to be observed in [such cases].

The decision in *Brown*, 6 June 1985, like *Nash*, also shows that the Court will not shirk from upholding a custodial sentence, even when very young offenders are

[1] (1983) 9 A Crim R 238 at p. 266

implicated in the armed robbery of taxi drivers.[2] In *Brown*, the appellant was a 16 year old female, who together with a 15 year old female companion held up a taxi driver with a shortened shotgun and a six inch knife. A sentence of four years penal servitude was up-held, although the non-parole period was reduced from 18 months to twelve months in the light of the appellant's rehabilitation prospects. In this case the Court accepted that the appellant, who had a trouble free past and was acting under the influence of an older person, had an emotionally deprived background with no previous criminal record, had fallen into bad company, and had manifested immediate contrition and co-operated with police.

The sentences upheld in *Raybould & Adams*, 9 August 1979, also suggest that young offenders convicted of holding up taxi drivers with the aid of a knife, were likely to be sentenced to terms of between three and five years. In *Richardson*, 28 September 1984 the Crown succeeded in challenging the imposition of a recognizance upon the respondent imposed in respect of his having pleaded guilty to two counts of armed assault on taxi drivers. The respondent was 19 years of age at the relevant time, and had a prior criminal record.

The first count alleged that on 30 August 1983, at Alexandria, the respondent, while armed with a knife, assaulted a taxi driver and robbed him of $74 in money, and the second count alleged that at Redfern on 15 October 1983, the respondent, armed with the broken neck of a bottle, assaulted another taxi driver and robbed him of his wristwatch and $26 in money. The charges were laid under s.97 of the Crimes Act and accordingly carried a maximum penalty of 20 years.

These offences were committed in company, and the respondent's accomplice had been brought before a different court and had been sentenced to two concurrent terms of six years penal servitude, with a non-parole period of two years. Yeldham J., who criticised the decision to place the respondent on a recognizance in respect of these offences said:

> The offences to which the respondent pleaded guilty were of such seriousness that, in my opinion, any Judge acting responsibly must inevitably have committed the offender to gaol. In each case the respondent and his co-offender attacked innocent and helpless taxi drivers, threatened them with a weapon and stole their money and their watches, the latter being later pawned. To release such an offender upon a recognizance, even if it be assumed that he was at the time affected by alcohol, is, in my opinion, entirely to ignore the gravity of the offences and the elements of punishment and deterrence of others, which in such a case are of considerable importance. To so release him was, in my view, to deal with him in a way which was manifestly inadequate and denotes clear error.

Accordingly the Court upheld the appeal and substituted for the bond, a sentence of six years penal servitude and a non-parole period of two years.

[2] But see *Thompson* (1988) 36 A Crim R 223 where a sentence for assault with intent to rob a taxi driver was reduced on account of the appellant's youth, intellectual condition and general inmaturity.

The list of cases that follows also contains examples of more serious cases involving taxi drivers. Many of the sentences themselves consist of an aggregation of penalties imposed in respect of multiple offences, sometimes of considerable gravity and involving gratuitous physical violence, such that sentences of imprisonment of between 10 years and 14 years have been thought appropriate.

While it is dangerous to speak in terms of a tariff, given the small number of cases considered here, it is nevertheless possible to suggest that there are at least two levels of sentences imposed upon those who are sentenced for armed robbery of taxi drivers. The first relates to those who commit a single offence and do not appear to occasion excessive harm to their victims. Such offences are often committed by young persons with good rehabilitation prospects. In these circumstances and, based on sentences imposed prior to 25 September 1989, sentences of penal servitude of between three and six years, with specified non-parole periods of no more than two years, could have been anticipated. If the offender had a prior record of some significance then a slightly longer non-parole period was likely. The second level was in the 10 to 14 years imprisonment bracket. Here the offender was likely to have a prior criminal history and have engaged in particularly destructive behaviour. More often than not such offenders will have committed one or more other armed robberies, and may have caused or intended to cause physical injury to innocent persons.

Case References

Brown, 6 June 1985
Leatch, 21 November 1980
Nash, 17 November 1983
Raybould & Adams, 9 August 1979
Richardson, 28 September 1984
Roberts, 15 March 1985
Simon, 3 August 1988
Steain, 16 May 1980
Taylor, 3 March 1978

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Sentencing is a vitally important part of the administration of criminal justice in Australia. This work is a detailed analysis of the sentencing decisions of the New South Wales Court of Criminal Appeal between 1978 and 1989. It reviews robbery and armed robbery decisions coming to the notice of the Court and provides statistical data and other information. It is designed to assist those with the task of deciding sentence, or with the task of advising those at the receiving end of sentence what their penalty may be.

Sentencing Robbers in New South Wales, while written for the legal profession, will be of value to students and lay persons alike. It should be of particular interest to those who seek to understand the implication on past sentencing policy and practice of the so called 'truth in sentencing' reforms recently introduced into the law of New South Wales by the *Sentencing Act* of 1989.

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