R v RAGGETT, DOUGLAS and MILLER

Court of Criminal Appeal of the Northern Territory of Australia

Kearney, Martin and Angel JJ.

10, 11 and 28 September 1990, at Darwin

APPEAL - Crown appeal against inadequacy of sentence - principles applicable - meaning and effect of 'double jeopardy' principle

APPEAL - Crown appeal against inadequacy of sentence - criteria for determining whether sentence manifestly inadequate - relevance of 'general moral sense of the community.'

APPEAL - Crown appeal against inadequacy of sentence - role and function of Crown appeals - meaning of 'error in principle'.

SENTENCING - propriety of sentencing by determining the 'objective sentence' and allowing for mitigating factors

SENTENCING - nature of 'crushing' sentence

SENTENCING - non-parole periods - principles applicable.

Cases followed:

Davey (1980) 2 A Crim R 254
R v Ireland (1987) 49 NTR 10
R v Anzac (1987) 50 NTR 1
Hayes (1987) 29 A Crim R 452 (in part)
R v Tait & Bartley (1979) 24 ALR 473
R v Holder (1983) 3 NSWLR 245
R v Osenkowski (1982) 30 SASR 212
Vaitos (1981) 4 A Crim R 238

Cases applied:

Griffiths v The Queen (1976-77) 137 CLR 293
Cranssen v The King (1936) 55 CLR 509
House v The King (1936) 55 CLR 499
Bugmy v The Queen (1990) 92 ALR 552
Veen v The Queen (No.2) (1987-88) 164 CLR 465

Cases referred to:

Hogon (1987) 30 A Crim R 399
U.S. v Di Francesco 449 U.S.117; 66 L Ed 2nd 328 (1980)
Whittaker v The King (1928) 41 CLR 230
Griffiths v The Queen (1989) 167 CLR 372
Fortune v Parre (1983) 14 A Crim R 289

Taylor (1985) 18 A Crim R 14
McCarthy v Coldair Ltd (1951) 2 TLR 1226
R v Williscroft (1975) VR 292
R v Visconti (1982) 2 NSWLR 104
R v Wilton (1981) 28 SASR 362
Dowie (1989) 42 A Crim R 234
R v Hill (1982) 60 FLR 302
Macdonald v Wright (1987) 51 Cr. App. R. 359
R v Geddes (1936) 36 SR (NSW) 554
Treloar v Butler (1989) 43 A Crim R 75
R v Jabaltjari (1989) 64 NTR 1
R v Young, Dickensen and West (unreported, Court of Criminal Appeal (Vic.), 1 March 1990)
R v Dixon (1975) 22 ACTR 13

Cases distinguished:

Stach (1985) 15 A Crim R 101
Hayes (1987) 29 A Crim R 452 (in part)
R v Gilbert (unreported, Asche CJ, 9 February 1989)
R v Inkamala (unreported, Asche CJ, 13 February 1990)
Baumer v The Queen (1988) 83 ALR 8

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Solicitor for the respondents Douglas and Miller:	NAALAS, as Town Agents CAALAS

ORDERS OF THE COURT

1. The Crown appeal in relation to the effective sentence of 8 years imprisonment imposed on Raggett is allowed, the sentence is quashed, and an effective sentence of 10 years imprisonment substituted. The non-parole period is varied from 3 years to 5 years. The sentences now imposed on Raggett are as follows:

Raggett

Count 1. Unlawful assault upon Nadine Seeger with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) of the Criminal Code: 10 years imprisonment

Count 2. Unlawful assault upon Antje Denner with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) of the Criminal Code : 10 years imprisonment.

Count 3. Aiding Cedric Miller, who unlawfully assaulted Nadine Seeger with intent to have carnal knowledge of her, contrary to Section 192(1) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 4. Aiding Cedric Miller, who unlawfully assaulted Antje Denner with intent to have carnal knowledge of her, contrary to Section 192(1) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 5. Aiding Roy Douglas, who unlawfully assaulted Nadine Seeger with intent to have carnal knowledge of her, contrary to Section 192(1) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 6. Aiding Roy Douglas, who unlawfully assaulted Antje Denner with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) read with Section 12 of the Criminal Code : 5 years imprisonment.

The 6 sentences are directed to be served concurrently, with effect from 6 February 1989, to take account of time already spent in custody. The total effective sentence is 10 years imprisonment; a non-parole period of 5 years is fixed.

2. The Crown appeal in relation to the effective sentence of 5 years imprisonment imposed on Douglas is allowed, the sentences are quashed, and an effective sentence of 7 years imprisonment is substituted. The non-parole period of 2 years will remain as before. The sentences now imposed on Douglas are as follows:-

Douglas

Count 1. Aiding Bruce Raggett, who unlawfully assaulted Nadine Seeger with intent to have carnal knowledge and thereby had carnal knowledge, contrary to Section 192(1) and (4) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 2. Aiding Bruce Raggett, who unlawfully assaulted Antje Denner with intent to have carnal knowledge and thereby had carnal knowledge, contrary to

section 192(1) and (4) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 3. Aiding Cedric Miller, who unlawfully assaulted Nadine Seeger with intent to have carnal knowledge of her, contrary to Section 192(1) read with Section 12 of the Criminal Code : 4 years imprisonment.

Count 4. Aiding Cedric Miller who unlawfully assaulted Antje Denner with intent to have carnal knowledge of her, contrary to Section 192(1) read with Section 12 of the Criminal Code : 4 years imprisonment.

Count 5. Unlawful assault upon Nadine Seeger with intent to have carnal knowledge of her, contrary to Section 192(1) of the Criminal Code : 4 years imprisonment.

Count 6. Unlawful assault upon Antje Denner with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) of the Criminal Code : 7 years imprisonment.

The 6 sentences are directed to be served concurrently, with effect from 6 August 1989, to take account of time already spent in custody. The total effective sentence is 7 years imprisonment; a non-parole period of 2 years is fixed.

3. The Crown appeal in relation to the effective sentence of 4 years imprisonment imposed on Miller is allowed, the sentences are quashed, and an effective sentence of 5 years imprisonment substituted. The non-parole period of 1½ years will remain as before. The sentences now imposed on Miller are as follows:-

Miller

Count 1. Aiding Bruce Raggett, who unlawfully assaulted Nadine Seeger with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 2. Aiding Bruce Raggett, who unlawfully assaulted Antje Denner with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) read with Section 12 of the Criminal Code : 5 years imprisonment.

Count 3. Unlawful assault upon Nadine Seeger with intent to have carnal knowledge of her, contrary to Section 192(1) of the Criminal Code : 4 years imprisonment.

Count 4. Unlawful assault upon Antje Denner with intent to have carnal knowledge of her, contrary to Section 192(1) of the Criminal Code : 4 years imprisonment.

Count 5. Aiding Roy Douglas, who unlawfully assaulted Nadine Seeger with intent to have carnal knowledge of her, contrary to Section 192(1) read with Section 12 of the Criminal Code : 4 years imprisonment.

Count 6. Aiding Roy Douglas, who unlawfully assaulted Antje Denner with intent to have carnal knowledge and thereby had carnal knowledge of her, contrary to Section 192(1) and (4) read with Section 12 of the Criminal Code : 5 years imprisonment.

The 6 sentences are directed to be served concurrently, with effect from 6 October 1989, to take account of time already spent in custody. The total effective sentence is 5 years imprisonment; a non-parole period of 1½ years is fixed.

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IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

No. CA 3 of 1990
No. CA 4 of 1990
No. CA 5 of 1990

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA

SCC Nos. 32, 35 and 31 of 1989

BETWEEN:

THE QUEEN
Appellant

AND:

BRUCE RAGGETT, ROY DOUGLAS and CEDRIC MILLER
Respondents

CORAM: KEARNEY, MARTIN & ANGEL JJ

REASONS FOR JUDGMENT
(delivered 28 September 1990)

KEARNEY J

The sentences and the grounds of appeal

These three Crown appeals against sentence under Code s.414(1)(c) were by consent heard together on 10 and 11 September. The sentences in question were imposed on the respondents on 16 February 1990 for offences they committed on 24 March 1988. The 2 grounds of appeal relied on, identical in each case, are that the learned Judge erred -

1. in imposing head sentences which in all the circumstances were manifestly inadequate; and

2. in imposing in each case a non-parole period which in all the circumstances was manifestly inadequate.

The Crown seeks to have the head sentences and non-parole periods quashed, and sentences and non-parole periods substituted which in the opinion of this Court are warranted in law and should have been imposed. The details of the offences and sentences are set out below; it may be noted in that regard that s.12 of the Criminal Code provides that a person who aids another to commit an offence is deemed to have taken part in committing it.

[The six offences which each respondent had committed were then set out, with the respective sentences.]

The remarks on sentence

I approach his Honour's remarks on sentence bearing in mind the cautionary note sounded by Muirhead J in Davey (1980) 2 A Crim R 254 at p.261:-

> "A judge's remarks on sentence will seldom reveal all the matters he takes into consideration. Foremost should be his anxiety to protect the public, but judicial assessment of the prisoner, the prisoner's family and background, his opportunities, his demeanour, his remorse and the precipitating factors causing the offence, all play their part. Remarks on sentence should not be reviewed on appeal as though they are a reserved judgment. They are frequently made extempore and in conversational manner, but generally only after anxious thought." (emphasis mine)

[The learned trial Judge's account of the circumstances in which the offences were committed, and the mitigating factors applicable to each respondent were then set out].

The Crown case on the appeals

(a) The principles applicable

(i) General

It is fundamental that a trial Judge's exercise of his sentencing discretion is not to be disturbed on appeal, unless error in that exercise is shown; see Griffiths v The Queen (1976-77) 137 C.L.R. 293 at pp.308-9, per Barwick C.J. The presumption is that there is no error.

In R v Ireland (1987) 49 NTR 10, a Crown appeal against sentence on the ground of manifest inadequacy, Muirhead AJ restated the general principles at p.27:-

> "The principles to be applied in appeals relating to sentence, both as to severity or inadequacy are now well established: see R v Tait and Bartley (1979) 24 ALR 473 at 476. A Crown appeal against leniency requires most careful consideration because of what is sometimes referred to as the "double jeopardy principle". Crown appeals have been described as cutting across "time-honoured concepts of criminal administration": per Barwick CJ, Peel v R (1971) 125 CLR 447 at 452; [1972] ALR 231 at 233. A Crown appeal puts in jeopardy "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal" (per Isaacs J, Whittaker v R (1928) 41 CLR 230 at 248). "The freedom beyond the sentence imposed is, for the second time in jeopardy, as (sic) a Crown appeal against sentence. It was first in jeopardy before the sentencing court" (Tait & Bartley, (supra).
>
> It is also trite law that an appellate court will not increase a sentence merely because its members believe they would have imposed a more severe sentence. The judicial discretion upon sentence is a wide one and rightly so. What must be established, before an appeal based on inadequacy of sentence is allowed, is not that it is lower than average, or merciful, but plainly wrong upon established principles. In determining such an appeal an appellate court must, in the ordinary

> case, keep an eye on the statute, the circumstances of the offence, the prevalence of the offence, and the background and character of the offender. In assessing the last-mentioned consideration, the trial judge has a tremendous advantage, especially if he is considering conditional release as a prelude to rehabilitation.
>
> And there is another factor which stems from my experience. A prisoner who has been treated with leniency by a judge who he has seen and heard and before whom he has seen his case argued, will inevitably labour under a sense of grievance if conditional release is replaced by custody or postponed by order of a tribunal composed, as far as he is concerned, by faceless men. Such a grievance is understandable. From the prisoner's point of view, justice has not been seen to be done, although the community, of course, may have other views.
>
> In my opinion, and it is one I have always held, the true interests of justice require extreme care before sentences are increased; see R v Valentine and Garvie (1980) 2 A Crim R 179 at 174-5. In this Territory the Crown has an appeal as of right to this Court on a question of sentence (s.414(c) of the Criminal Code). The principles relating to such appeals have recently been enunciated by this court in R v Yates (unreported, 11 December 1986) when reference was made to the observations of Barwick CJ in Griffiths v R (1977) 137 CLR 293 at 310; 15 ALR 1 at 17, when he suggested they should be rare and utilised only "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."" (emphasis mine)

See also R v Anzac (1987) 50 NTR 6 at pp.11-12 on the principles applicable to Crown appeals in this jurisdiction; and the review of relevant authorities in Hogon (1987) 30 A Crim R 399 at pp.409-414, per Rice J.

(ii) The principle of 'double jeopardy'.

The somewhat restricted approach to Crown appeals mentioned by Muirhead AJ in R v Ireland (supra) is, as his Honour said, well-established in this jurisdiction,

though at some time reliance on the so-called "double jeopardy principle" as a basis for this restricted approach may need to be clarified; see the discussion of this principle in both the majority and minority opinions in U.S. v Di Francesco 449 U.S. 117; 66 L Ed. 2nd 328 (1980). One problem, of confusing nomenclature, should be cleared away. A Crown appeal against sentence does not infringe the principle of double jeopardy as that principle is known and applied in our legal system, because it does not involve punishing a person twice for the same offence or placing a person twice in peril of conviction. See generally M.L. Friedland "Double Jeopardy" (1969); and the observations of Kirby P in Hayes (1987) 29 A Crim R 452 at p.469, identifying as the relevant 'jeopardy' on a Crown appeal the fact that the prisoner has:

> "- - twice to face the prospect of sentencing and possible loss of liberty - - in a practical sense, there is a species of double jeopardy. The prisoner's liberty, pocket and reputation are put in jeopardy both before the sentencing judge and before the appellate court - - -."

In other words, what is in jeopardy for the prisoner on a Crown appeal is his "freedom beyond the sentence [originally] imposed": (R v Tait and Bartley (supra) at p.476). This is not what is comprehended by "double jeopardy" in the criminal law. It harks back, as Muirhead AJ noted in R v Ireland (supra), to the observation by Isaacs J in Whittaker v The King (supra) at p.248:-

> " - - still more should we respect the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal."

Although this jeopardy principle is now well accepted as one basis for a restricted approach to Crown appeals, it appears

to me that it may be little more than an argument with the existence of Crown appeals. The extent of "the freedom which is his" is controlled by the particular legal regime; in this case that regime includes a right in the Crown to appeal on sentence. The effect of the jeopardy consideration, in practice, is threefold. First, the appellate Court is more reluctant to increase a sentence than to reduce it; a "somewhat stronger case" is required, as Smith J put it in Fortune v Parre (1983) 14 A Crim R 289 at p.291. Second, as Deane J pointed out in Griffiths v The Queen (1989) 167 C.L.R. 372 at p.386, in considering the "aspect of double jeopardy", a sentence imposed by a Court of Criminal Appeal following a successful appeal by the Crown may be "less than would have been appropriate were it not for the fact that it was being imposed as an increased sentence by an appellate court." Third, it is relied on to warrant the residual discretion to dismiss a Crown appeal, even though manifest inadequacy is established: see R v Holder (1983) 3 NSWLR 245 at pp.255-6, per Street C.J. There are of course the other factors mentioned by Muirhead AJ in R v Ireland (supra) which point to a restricted approach to Crown appeals.

(iii) Manifest inadequacy of sentence

The Crown does not seek to point to any definite or specific sentencing errors of the learned Judge. It contends only that the sentences and non-parole periods imposed are manifestly inadequate when all the relevant circumstances are taken into account, and that it follows that the sentencing discretion must in some way have miscarried even though no specific error can be identified. The ground of manifest inadequacy is assigned where the contention is that the sentence is unreasonably low but it does not appear precisely how that error occurred.

As to the process of determining whether a sentence is manifestly inadequate, Young CJ said in Taylor (1985) 18 A Crim R 14 at p.17:-

> "I have often said that to describe a sentence as manifestly inadequate is something that is not capable of sustained argument. The inadequacy is either manifest or it is not - - - "

This appears to be akin to the test approved by Lord Denning when considering when an appellate court would review an award of damages: "Good gracious me, as high as that?" - see McCarthy v Coldair Ltd (1951) 2 T.L.R., 1226 at p.1229.

The learned Solicitor-General Mr Pauling Q.C. in his submissions generally adopted this approach, which contemplates an inadequacy so obvious that it can be readily identified. This approach is somewhat akin to the 'instinctive synthesis' approach to sentencing in Victoria referred to in R v Williscroft (1975) VR 292 at p.300 where Adam and Crockett JJ stated:-

> " - - such a conclusion [that the trial judge had 'undervalued the nature and circumstances and gravity' of the offences] rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate."

This is not to gainsay the difficulty of the task. In other jurisdictions whether a sentence is manifestly inadequate is assessed by more overtly measuring it against a standard. Thus in R v Holder (supra) at p.254 Street C.J. said:

> "The detection of error of principle, or misunderstanding or wrong assessment of some salient evidentiary feature, presents a comparatively straightforward appellate task.

When evaluating, however, whether the error is manifested by an excessive or inadequate sentence, the appellate task is more difficult. As was said in R v Visconti [1982] 2 NSWLR 104, at 108:

> "... the appellate jurisdiction extends to correcting a sentence which is out of line with the commonly accepted pattern."

As Jacobs J said in Griffiths v The Queen (at 326:)

> "Disparity of sentencing standards is a very serious deficiency in a system. ....It is the task of a court of criminal appeal to minimize disparities of sentencing standards yet still recognize that perfect uniformity cannot be attained and that a fair margin of discretion must be left to the sentencing judge."

> It can be acknowledged that the level of inviolability allowed in earlier times to the sentencing judge's discretion has tended to be lowered in modern times. - - - The lowering of the threshold barriers at which excess or inadequacy become manifest is an observed and established tendency which meets both community expectations as well as the requirements of justice. The appeal court evaluates the permissible range of sentence in the light of all of the admissible considerations affecting the case in hand, and drawing upon its own accumulated knowledge and experience. A sentence lying outside that range will (in the case of a convicted person's appeal), or may (in the case of a Crown appeal), be corrected. There is no warrant for applying a different approach in principle in detecting the threshold barrier between a convicted person's appeal and a Crown appeal." (emphasis mine)

A similar approach is taken in this jurisdiction; see R v Anzac (supra) at p.23 below. And of course in R v Williscroft (supra) at p.301 their Honours make it clear that the 'instinctive synthesis' approach to sentencing is based to some degree upon an assessment of "the commonly accepted pattern" referred to in Visconti (supra), when they say:-

> "- - a judgment as to what is appropriate by way of sentence must depend upon knowledge of sentences

> for the same or similar offences which is derived from personal experience or any other source."

See also the Report of the Victorian Sentencing Committee, Volume 1, (April, 1988) at pp.249-251.

A sentence shown to be manifestly inadequate establishes per se that the discretionary power of the sentencing judge somehow was unsoundly exercised. It is this miscarriage of sentencing discretion which attracts the jurisdiction of this Court to review the sentence. It is usual to state as the ground of appeal some identified reason for the miscarriage of the exercise of the discretionary power, viz:-

> "- - by reason of some relevant mistake of law or fact or by reason of the judge taking into account some extraneous factor or failing to give any or adequate consideration to a material factor" (R v Wilton (1981) 28 SASR 362 at p.363, per King C.J.)

A classic formulation of the basis of the appellate court's revising jurisdiction is in Cranssen v The King (1936) 55 CLR 509, an appeal against severity of sentence, at pp.519-520:-

> "- - the appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles - - There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error

should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases [1] where the sentence appears unreasonable, or [2] has not been fixed in the due and proper exercise of the court's authority." (emphasis mine)

In Cranssen (supra) at p.520 the High Court said that it was manifest that the sentence there in question "is out of all proportion to any view of the seriousness of the offence which could reasonably be taken." To similar effect are the observations of the majority in House v The King (1936) 55 CLR 499 at p.505, dealing with unidentifiable error in the exercise of the sentencing discretion:-

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." (emphasis mine)

In Whittaker v The King (supra), a case where the error relied on was identified, at p.249 Isaacs J considered that on a Crown appeal the Court ought not to interfere with a sentence unless:-

> " - - it is not merely inadequate, but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles or undervalued or overestimated some of the material features of the evidence."

The law on this aspect is summarized in the case which is the modern locus classicus in Australia, R v Tait and Bartley (supra), at p.476:-

> "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, Skinner v R (1913) 16 CLR 336 at 339-40; R v Withers (1925) 25 SR (NSW) 382 at 394; Whittaker v R (1928) 41 CLR 230 at 249; Griffiths v R (1977) 15 ALR 1 at 15-17). (emphasis mine)

See also the recent comprehensive review of New Zealand and Australian authorities by Underwood J in Dowie (1989) 42 A Crim R 234 at pp. 236-244.

In general, then, to establish the existence of the necessary (unidentified) error the Crown must show that the sentences are not just arguably inadequate but so very obviously inadequate that they are unreasonable or plainly unjust. In R v Anzac (supra) at p.11 the Crown's task in this regard is put this way:-

> "What the Attorney-General must show has been described in various ways: that the sentence was so inadequate to the occasion as to be unreasonable (adapting Cranssen supra at 520); or that the sentence was so disproportionate to the sentence which the circumstances required as to indicate an error in principle (R v Prindable (1979) 23 ALR 665 at 669). There must be a "striking disparity" (as Nader J put it in R v Ireland (1987) 49 NTR 10). If this court considers that the sentence grossly departs from what it perceives to be the range of permissible sentences for comparable cases - - -, drawing upon its own knowledge and experience, it will infer that some error has occurred which has

> vitiated the exercise of the sentencing discretion; and, to maintain consistency in the sentences imposed by the judges of this court, and a proper relativity in sentences being passed, it will re-exercise that discretion, form its own view of the appropriate sentence, and proceed accordingly."

(b) The function of Crown appeals

The learned Solicitor-General submitted that the Attorney-General brought this appeal before the Court seeking that it exercise its "supervisory jurisdiction" to correct sentences which lie outside the proper exercise of the sentencing discretion. That appears to contemplate a more extensive role for Crown appeals than merely "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons", as suggested by Barwick CJ in Griffiths (supra) at p.17. However, earlier on p.17 his Honour considered that a "gross departure" in sentencing might "be held to be error in point of principle." Further, as to the enlarged meaning of "error in principle" in this context, Lord Goddard in extra-judicial observations on "The working of the Court of Criminal Appeal" in (1952) 2 J.Soc.P.T.L. 1 at p.5 said:-

> "With respect to sentences, the Court does not interfere unless there has been an error in principle, at least that is always stated, and it is an elastic phrase which may be interpreted as meaning that they only interfere if some fact is brought to their knowledge which was not before the Court of first instance or unless the sentence is at least one-third longer than the Court thinks they would have given, or of course if there has been an error in law." (emphasis mine)

There are of course no Crown appeals against sentence in that jurisdiction. A right in the Crown to appeal against sentence may now be thought to be an essential element in any sentencing system which has fairness as its aim, in the

sense of the equal punishment of persons equally culpable. Crown appeals are not in fact rare in Australia.

The proper role and function of Crown appeals is, I think, best stated by King CJ in R v Osenkowski (1982) 30 S.A.S.R. 212 at pp.212-3:-

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is [1] to enable the courts to establish and maintain adequate standards of punishment for crime, [2] to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and [3] occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience." (emphasis mine)

It is apparently to achieve the first and third of these objectives that the present appeals are brought.

(c) Principles applicable in fixing non-parole periods

In Bugmy v The Queen (1990) 92 ALR 552, a non-parole period of 18½ years had been fixed in respect of a life sentence. The High Court said at pp.559-562:-

> "The practical effect of fixing a minimum term is that thereafter the Parole Board may, but of course need not, grant the prisoner parole: Corrections Act s.74(1). That is not to say that the minimum term should be seen as the shortest time required for a paroling authority to form a

proper view of the prisoner's prospects of rehabilitation. That approach was rejected in Power v R (1974) 131 CLR 623; 3 ALR 553. Referring to Power, this court said in Deakin v R (1984) 58 ALJR 367 at 367; 54 ALR 765 at 766:

> "The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence." (emphasis mine)

The views expressed in Power have been affirmed on other occasions in this court: see for instance Lowe v R (1984) 154 CLR 606 at 615; 54 ALR 193; R v Paivinen (1985) 158 CLR 489 at 495; 60 ALR 155; R v Watt (1988) 165 CLR 474 at 481; 82 ALR 221; Hunter v R (1988) 79 ALR 423; 62 ALJR 424; Griffiths v R (1989) 167 CLR 372 at 396; 87 ALR 392.

In Iddon & Crocker v R (1987) 32 A Crim R 315 at 325-6, the Court of Criminal Appeal of Victoria said of the legislation with which this appeal is concerned:

> "The scheme of the legislation is plain enough. The intention of the legislature is that a minimum term is a benefit to the prisoner ..."

That benefit lies in providing the prisoner a basis for hope of earlier release and in turn an incentive for rehabilitation; See Wardrope v R, referred to in Iddon & Crocker, at 327-8

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- - in the end the minimum term is to be fixed because all the circumstances of the offence require that the offender serve no less than that term, without the opportunity of parole; see generally King CJ in R v Robinson (1979) 22 SASR 367 at 370. There is no incongruity necessarily involved in this approach, as Jenkinson J noted in Attorney-General v Morgan and Morgan (1980) 7 A Crim R 146, when, as a member of the Victorian Court of Criminal Appeal, he said (at 154):

"The term of the sentence is the period which justice according to law prescribes, in the estimation of the sentencing judge, for the particular offence committed by the particular offender. The ... minimum term is the period before the expiration of which release of that offender would, in the estimation of the sentencing judge, be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify."" (emphasis mine)

In Power (supra) the High Court said at pp.628-629:-

"Confinement in a prison serves the same purposes whether before or after the expiration of a non-parole period and, throughout, it is punishment, but punishment directed towards reformation. The only difference between the two periods is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter he can. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.

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The sentence stands and during its term the prisoner is simply released upon conditional parole. Indeed, we think it is a misnomer to refer to a minimum sentence and a maximum sentence. In truth there is but one sentence, that imposed by the trial judge, which cannot be altered by the paroling authority.

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It may, of course, be readily granted that in fixing the non-parole period a judge will give weight to his estimate of the capacity of the prisoner for reformation. The Act leaves the fixing of the period to the judge and so long as he proceeds judicially his discretion is not subject to any predetermined limitation. If, in a particular case, the discretion miscarries it can, in accordance with well-established principles, be corrected upon appeal." (emphasis mine)

See also the observations on the principles applicable in R v Anzac (supra) at p.16.

[The submissions by the Crown were then discussed]

Mr Pauling had three specific submissions. First, that after giving due weight to all proper mitigating factors, the sentence of 8 years imprisonment imposed on Raggett was so inadequate in the circumstances as to "shock and outrage" a reasonable member of the public who was fully aware of the relevant facts, and should be revised upwards substantially. He submitted that the 'objective sentence' in Raggett's case was at least 12 years imprisonment, and making proper allowance for all mitigating factors, his appropriate sentence was at least 10 years imprisonment.

The use of an informed community response as the litmus test for inadequacy of sentence is dealt with by Jordan CJ in R v Geddes (1936) 36 SR (NSW) 554 at p.555:-

> "The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others." (emphasis mine)

See also to similar effect the observations by Adam and Crockett JJ in R v Williscroft (supra) at p.301:-

> "But it is not sufficient for a sentence to avoid subsequent review that it can be said of it that it is the product of what is admittedly a wide discretion conferred upon a judge who can be shown to have given some consideration to all relevant elements. There must be some recognition of and accord with "the moral sense of the community" in the selection of the appropriate penalty. No

> matter how ephemeral that phrase may be or how elusive the task of evaluation of such a concept may prove in a given case, the task must nevertheless be essayed. (emphasis mine) - - -

In Treloar v Butler (1989) 43 A Crim R 75 at p.78, Crockett J said:-

> "The court, in sentencing any prisoner, has an obligation to have regard to the public's expectation of what an appropriate punitive period of imprisonment should be, having regard to all the relevant circumstances."

Public confidence in the administration of justice, a vital matter, will flag if sentences imposed are not generally accepted.

[The other Crown submissions and those put by the respondent Raggett were then discussed; amongst these was the question of a 'crushing' sentence.]

Finally, Mr Stewart submitted that to increase Raggett's 8-year sentence would be "crushing". Raggett was young, and had a legitimate expectation that he would be released in some 17 months. The learned trial Judge had accepted that he had no relevant priors; his plea of guilty showed remorse; his background had been considered; and his prospects of rehabilitation had been recognised.

The concept of a "crushing" sentence was discussed in Vaitos (1981) 4 A Crim R 238, an appeal by a notorious multiple rapist whose effective sentence and non-parole period were 28 and 25 years respectively. At p.257 Young CJ said:-

> "Is the effective sentence to be regarded as crushing? This question can only be answered in relation to the facts of the case. The answer

cannot be arrived at mathematically by reference to the offender's age and the length of sentence to be served."

At p.301 O'Bryan J observed:-

"I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it."

I respectfully agree.

[His Honour then turned to the submissions by Douglas and Miller]

Mr Ross of senior counsel for Douglas and Miller dealt first with Mr Pauling's submission that Raggett's 'objective sentence' should be at least 12 years imprisonment, and that the proper sentence to be imposed upon him after all mitigating factors had been properly weighed and taken into account should be at least 10 years imprisonment. Mr Ross submitted that to approach sentencing in this way was incorrect; he relied on what was said by the High Court in Bugmy v The Queen (supra) and Baumer v The Queen (1988) 83 ALR 8.

In Bugmy (supra) the High Court said at p.559:-

"Counsel suggested that, since Veen (No.2), [(1988) 164 CLR 465] a method of sentencing, described as a two-step approach, has developed in the courts. This approach, it was said, involves first determining the outer limit of the sentence and then applying mitigating factors, if any, so as to arrive at an appropriate sentence. It was further suggested that had his Honour adopted such an approach he would have been less likely to fall into error. Such an approach was firmly rejected by the Victorian Court of Criminal Appeal in R v Young Dickensen and West (1 March 1990,

> unreported). In the view of that court, this court in Veen (No.2) "did not have in mind that a sentencer might, let alone should, proceed to arrive at the sentence to be imposed by a staged or structured approach" : at 11.
>
> Whatever the merits of this debate - - -"
> (emphasis mine)

I do not consider that the carefully non-committal observation "whatever the merits of this debate" amounts to an endorsement by the High Court of the condemnation of the staged approach to sentencing, contained in R v Young, Dickensen v West (unreported, Court of Criminal Appeal (Vic), 1 March 1990).

In Baumer (supra) the High Court was not dealing with this type of approach to sentencing; it held that a sentencer in this jurisdiction is not required to give separate consideration to the aggravating circumstances in s.154(4) of the Criminal Code. At p.13 the High Court emphasized:-

> "In applying a section like s.154, the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence."

As the High Court made clear in Veen v The Queen (No. 2) (supra) at p.473:-

> " - - the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime."

The approach to sentencing to which Mr Pauling referred - the fixing of an 'objective sentence' and then allowing for any proper mitigation - appears to me to be proper, and

well-accepted in this jurisdiction. It accords generally with the approach very clearly set out by Nader J in R v Ireland (supra) at pp.22-24 when considering:-

> " - - how deterrence and other factors material to sentencing should be weighed in the balance."

This approach to sentencing is commonly used when courts sentence in general accordance with "guideline" judgments. It was, for example, the approach adopted by both the trial judge and the judges of appeal in R v Jabaltjari (supra). I reject Mr Ross' submission that it is an incorrect approach, though I accept his submission that the aim of a sentencing judge is to arrive at the right sentence, bearing in mind all the relevant factors.

[The other submissions of the respondents were then discussed]

Conclusions

In R v Jabaltjari (supra) this Court declined to provide for a general increase in the level of sentencing for rape. The Solicitor-General did not seek to re-agitate that issue on this appeal. Severe prison sentences are imposed in this jurisdiction for rape offences, when the facts warrant it; however, it is necessary that the sentencing judge retain a flexible discretion sufficient to ensure that a punishment can be imposed which fits the particular crime. Barbarous sexual attack involving a disgraceful use of physical power and the wanton degradation of the victims' personality, as in the present case, warrants a condign punishment. The question is always as to the level of punishment properly required to protect the public interest. See generally the observations by Fox J in R v Dixon (1975) 22 ACTR 13 at pp.16-20.

Certain cases of rape have aggravating features. In the present case serious aggravating features are that the attack was carried out by a group of young men acting together, who with Raggett as prime mover very clearly lured the 2 women, total strangers whom they had specially targeted, to a remote locality by falsely assuring them that they would take them to their destination. Further, the attack was carried out on more than one woman. A stick was used and there was the general threatening presence of overwhelming force to frighten the women into submission. There were also the repeated rapes and the degree of sexual indignities to which the women were subjected in the separate incidents charged. The womens' sense of personal degradation and humiliation, and the terror engendered in them in the circumstances, is obvious. It is not a mitigating factor that the women acted imprudently in hitchhiking.

In sentencing for this offence, the aims of deterring the offenders and others, and of exacting retribution and denouncing the crime, must take priority over the aim of rehabilitating the offenders. That is to say, the punishment imposed must reflect the need to protect women, to match the gravity of the case, to emphasize the strong public condemnation of the offenders' behaviour, and serve as a warning to others as well as a punishment for the offenders. Previous good character of offenders is of only minor relevance. Their pleas of guilty should be given considerable weight except in the case of Raggett who clearly pleaded guilty at a late stage in circumstances where there was no likelihood of his acquittal. As to the youth of the offenders, it is always to be taken into account, but it is also necessary to deter young men who frequently constitute the groups in cases of pack rape. As to the significance of the background of the offenders, it is a fact that many young men convicted of crime have had

unfortunate backgrounds, which leaves them at a serious disadvantage in today's society.

In my opinion, this incident was a very bad case of rape, though not in the 'worst case' category. I approach the appeals bearing in mind the restricted approach to Crown appeals mentioned by Muirhead J in R v Ireland (supra) at pp.15-16 above.

In the case of Raggett, I consider that after all proper allowances for mitigating factors have been made, the effective sentence which he should have received as prime mover and for his behaviour should not have been less than 10 years imprisonment. The difference between 10 years and 8 years imprisonment is not such that it can be said that an informed member of the public would be shocked and outraged at the actual sentence of 8 years. I think in this case it was imposed because the aims of general deterrence and retribution - primary sentencing aims in this case - were under-valued by the learned sentencing Judge and the aim of rehabilitating the offender was correspondingly over-valued. This resulted in a sentence which in my opinion was manifestly inadequate for the nature circumstances and gravity of the crime. I would allow the appeal in the case of Raggett on the ground that the effective sentence of 8 years imprisonment was manifestly inadequate, quash that sentence, and substitute an effective sentence of 10 years imprisonment. I consider that the minimum time in prison which justice demands that he serve, having regard to all the circumstances of his case, is 5 years. Accordingly, I would set aside the order fixing the non-parole period at 3 years and substitute an order that the non-parole period be 5 years. [His Honour then set out the individual sentences proposed for Raggett]

In the cases of Douglas and Miller, after making all proper allowance for the stronger mitigating factors in their cases, I consider that the respective effective head sentences of 5 years and 4 years imposed on them are manifestly inadequate; they should be quashed, and sentences of 7 years and 5 years substituted. However the respective non-parole periods of 2 years and 1½ years, while very much at the lenient end of what is permissible, are not in my opinion in the circumstances of the case and of these offenders such as to be characterized as manifestly inadequate. They are not in the light of the matters placed before the learned sentencing Judge so unreasonable or plainly unjust as to constitute a violation of justice according to law. [His Honour then set out the sentences proposed for Douglas and Miller.

MARTIN J:

I have had the benefit of reading a draft of the opinion of Justice Kearney. I am in general agreement with his Honour as to the law to be applied. Criminal activity of this type committed in company with others and by assisting others calls for more severe punishment than would otherwise be the case, and I consider that the learned sentencing Judge must have failed to place sufficient weight on that factor or must have given far too much weight to mitigating circumstances and the prospects of rehabilitation of the respondents. I agree with the orders proposed by Justice Kearney.

ANGEL J:

I agree with the orders proposed by Kearney J.

Violent gang rape is pre-eminently a matter that requires the court to give greater emphasis to the punitive and deterrent principles of punishment rather than that of rehabilitation. In the present case I, with respect, think the learned sentencing Judge placed too much emphasis on the youth of the offenders and their prospects of rehabilitation, and paid insufficient regard to the gravity of these offences.

The respondent Raggett, quite rightly regarded by the learned sentencing Judge as the ring leader, and whose late plea of guilty followed an episode of seeking to exculpate himself by lying about the activities of his confederates, amply deserves a heavier sentence than the respondents Miller and Douglas. Miller and Douglas demonstrated genuine remorse for what they had done, were young and immature, and were frank in their admissions. I agree that in this matter the sentencing discretion miscarried and that heavier penalties should be imposed. I agree that the non-parole periods in relation to the respondents Miller and Douglas should not be increased - I think this befits their youth, contrite pleas and frankness.
