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# Sentencing Sex Offenders in New South Wales

## An Interim Report

**Ivan Potas**

Senior Legal Research Officer
Australian Institute of Criminology

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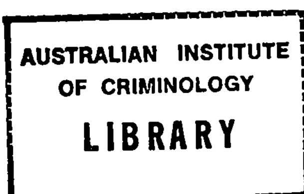


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## INTRODUCTION

Sentencing is often described as an art rather than a science. The reason for this becomes apparent when consideration is given to the multiplicity of factors that in any given case call for assessment by the trial Judge. Not only must consideration be given to the nature and gravity of the offence in the light of the prescribed statutory maxima but also to the personality and background of the offender. How these factors are weighed in connection with sex crimes is the subject matter of this Report.

This Report is part of a long-term study of the principles of sentencing as enunciated in the judgments of the New South Wales Court of Criminal Appeal. The majority of cases analyzed here are taken from recent unreported judgments of the Court and involve challenges made either to the severity or to the leniency of the sentences imposed at the trial. This Report aims to provide an insight into the sentencing process itself, to indicate the basic principles applicable in the determination of sentence and to illustrate how sentencing decisions are reached. A further aim is to provide some indication of what sentences are actually being imposed upon convicted sex offenders in the Higher Criminal Courts of New South Wales, and to this end some statistical information is also included. However, the decisions contained herein and the statistics quoted should only be viewed as an indication of the sentence which might be imposed in a future case. Ultimately each case is determined upon its own facts and care should be exercised

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lest too much is read into the cases or inferred from the statistics. Nevertheless an attempt has been made to pin-point the issues and discover the policy considerations to be applied in sentencing convicted sex offenders.

As this is an Interim Report only, the author would be grateful to receive any comments, corrections or suggestions for improvement in respect of its content or presentation. Meanwhile, it is hoped that this Report will be of practical assistance to all those who have an interest in the problem of sentencing offenders, and in particular to those who are actively involved in the sentencing process at the trial level.

## SEXUAL OFFENCES

In Part III of the *Crimes Act,* 1900, which deals with offences against the person, there are 14 subdivisions. Two of these subdivisions, which are contained in Sections 62 to 81B inclusive, are entitled "Rape and Similar Offences" and "Unnatural Offences." The cases considered in this Chapter involve appeals against sentences imposed in respect of offences within these two broad categories.

That the legislature views these sexual offences seriously is evidencedby the heavy penalties prescribed for each offence. Table I lists the statutory maximum penalties for some of the more common sex offences. A more comprehensive list is contained in Appendix A.

From this Table, apart from the general observation that certain offences carry the maximum penalty prescribed by law, it is clear that the legislature has seen fit to single out the youth of the female victim as warranting particular attention. Thus, in certain circumstances the type of offence charged, and in turn the maximum penalty for that offence, may depend upon the age of the female victim.

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TABLE I

STATUTORY LIMITS FOR SEXUAL OFFENCES
*Crimes Act*, 1900

| *Section* | *Offence* | *Max. Penalty* |
|---|---|---|
| 63 | Rape | P.S. Life |
| 65 | Attempts to commit, or assaults with intent to commit rape | P.S. 14 Yrs. |
| 78A | Incest | P.S. 7 Yrs. |
| 67 | Unlawful intercourse with female under 10 years | P.S. Life |
| 71 | Unlawful intercourse with female 10-15 years | P.S. 10 Yrs. |
| 76 | Indecent assault on female | Imp. 4 Yrs. |
| | Indecent assault on female under 16 years | P.S. 6 Yrs. |
| 79 | Buggery and bestiality | P.S. 14 Yrs. |
| 81 | Indecent assault on or act with male | P.S. 5 Yrs. |

*Statistics*

A large number of the less serious sexual offences are heard in the Courts of Petty Sessions. Many indecent assault, indecent act or carnal knowledge cases brought before the lower courts are either withdrawn, dismissed, or are determined by a finding of not guilty. For example, Statistical Report 6, Series 2 of the Court Statistics 1974[1] has shown that during 1974 about 56% of the cases brought before the lower courts were either withdrawn, dismissed or resulted in a finding of not guilty. Only 2.5% of offenders brought before the

[1] Statistical Report 6 Series 2 December 1974. Published by the Department of the Attorney General and of Justices of N.S.W. Bureau of Crime Statistics and Research. Court Statistics 1974 at p.50.

lower courts for sexual offences during 1974 were sentenced to imprisonment. The most common dispositions involved the imposition of bonds, often in combination with conditions of supervisory probation, and sometimes also in combination with fines. With respect to prostitution and related offences approximately 94% of those brought before the Courts of Petty Sessions in 1974 received fines but only 0.2% were sentenced to imprisonment.[2] These low imprisonment rates may be contrasted with those given by the Bureau of Crime Statistics and Research for sexual offenders brought before the higher courts during 1974. A breakdown showing the kind of dispositions imposed for the various offences is contained in the following Table.

TABLE 2

SEE TABLE NEXT PAGE

[2] *Op Cit.* p.51

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TABLE 2

## HIGHER COURT STATISTICS (1974)[3]

| *Sexual Offences* | *Rape* | *Attempt. Rape* | *Incest* | *Unlawful Inter.f. under 10* | *Unlawful Inter.f. 10.15 yrs.* | *Indecent assault f* | *Buggery & Bestiality* | *Indecent ass. or act on m.* |
|---|---|---|---|---|---|---|---|---|
| Total: | 16.2<br>70 | 2.6<br>11 | 1.9<br>8 | .2<br>1 | 39.7<br>171 | 24.4<br>105 | 4.2<br>18 | 10.9<br>47 |
| Acquitted | 15.7<br>11 | 9.1<br>1 | 37.5<br>3 | .0<br>0 | 5.8<br>10 | 5.7<br>6 | .0<br>0 | 6.4<br>3 |
| Rising of Court | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | 3.5<br>6 | 1.0<br>1 | .0<br>0 | .0<br>0 |
| Committed to Child Welfare Instit. | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 |
| Recog. (and/or prob. and/or fine | 2.9<br>2 | 27.3<br>3 | 37.5<br>3 | .0<br>0 | 83.0<br>142 | 62.9<br>66 | 22.2<br>4 | 63.8<br>30 |
| Fine only | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 |
| Governor's Pleasure | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 |
| Periodic Det. | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .6<br>1 | 1.0<br>1 | .0<br>0 | .0<br>0 |
| Imprisonment less than 6 months | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | 1.2<br>2 | 2.9<br>3 | .0<br>0 | 2.1<br>1 |
| Imprisonment 6 mths. up to 1 yr. | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | .6<br>1 | .0<br>0 | .0<br>0 | 6.4<br>3 |
| Imprisonment 1 yr. up to 2 years | .0<br>0 | .0<br>0 | .0<br>0 | .0<br>0 | 2.9<br>5 | 10.5<br>11 | 16.7<br>3 | 4.3<br>2 |
| Imprisonment 2 yrs. up to 5 yrs. | 14.3<br>10 | 27.3<br>3 | 12.5<br>1 | 100.0<br>1 | 1.2<br>2 | 15.2<br>16 | 27.8<br>5 | 17.0<br>8 |
| Imprisonment more than 5 yrs. | 67.1<br>47 | 36.4<br>4 | 12.5<br>1 | .0<br>0 | 1.2<br>2 | 1.0<br>1 | 33.3<br>6 | .0<br>0 |

[3] *Ibid.* p.69. Note: the numbers shown in decimals represent percentages; the other numbers represent number of offenders.



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From this Table it can be seen that the acquittal rate for offences in the higher courts are considerably lower than for those in the Court of Petty Sessions. Further, where the figure for the imposition of bonds etc., is low for a particular offence there is a correspondingly high figure for imprisonment.

## RAPE

That the legislature sees rape as a particularly serious offence is evidenced by the prescribed maximum penalty. Section 63 of the *Crimes Act* 1900 simply reads:

> "Whosoever commits the crime of rape shall be liable to penal servitude for life. The consent of the woman if obtained by threats or terror shall be no defence to a charge under this section."

Of the cases considered below, sentences for rape vary within a range of between 5 and 16 years' penal servitude. Where the offender received a head-sentence in excess of ten years it was usually because the crime was a particularly violent example of its type and was committed in circumstances which did not involve any element of provocation or invitation on the part of the victim. On the other hand where the offender had a number of subjective factors in his favour, and particularly where he had no prior criminal history of a violent nature, a relatively short-non-parole period was often specified. The non-parole period was found generally to lie somewhere between one-third and one-half of the head-sentence.

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*Data Analysis*

From Table 2 (*supra*) it can be seen that 67.1% of those who were tried for rape during 1974 received custodial sentences in excess of five years. If the number of persons who were acquitted of rape are excluded, then the percentage of persons sentenced to imprisonment of five years or more constituted approximately 80% of those convicted. Put another way only 20% of persons convicted of rape received sentences of less than five years' imprisonment. The bulk of the remainder received sentences of between 2 and 5 years' imprisonment. Only in exceptional cases will an offender receive a non-custodial sentence for the offence of rape. Data taken from the 1975 Court Statistics for rape and attempted rape are given below.

TABLE 3:

SEE TABLE NEXT PAGE

TABLE 3:

COURT STATISTICS 1975
RAPE AND ATTEMPTED RAPE*

| | RAPE | | ATTEMPTED RAPE | |
|---|---|---|---|---|
| | Number | % | Number | % |
| Acquitted | 15 | 21.7 | 3 | 13.0 |
| Rising of Court | 0 | 0 | 0 | 0 |
| Committed to Child Welfare Institution | 0 | 0 | 4 | 17.4 |
| Recog. (and/or probation and/or fine) | 3 | 4.3 | 4 | 17.4 |
| Fine only | 0 | 0 | 0 | 0 |
| Governor's Pleasure | 0 | 0 | 0 | 0 |
| Periodic Detention | 0 | 0 | 0 | 0 |
| Imprisonment Less than 6 months | 0 | 0 | 0 | 0 |
| Imprisonment 6 months up to 1 year | 0 | 0 | 0 | 0 |
| Imprisonment 1 year up to 2 years | 1 | 1.5 | 0 | 0 |
| Imprisonment 2 years up to 5 years | 17 | 24.6 | 7 | 30.4 |
| Imprisonment more than 5 years | 33 | 47.8 | 5 | 21.7 |
| TOTALS: | 69 | 100.0 | 23 | 100.0 |

* from Statistical Report 7 Series 2 at p.100.
Published by the Department of the Attorney General and of Justice NSW Bureau of Crime Statistics and Research.

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*Case Analysis*

Judicial dicta referring to the gravity of the offence are, as one might expect, commonplace. Thus, in *Wallis* (C.C.A. 25 June 1975) the Court of Criminal Appeal said:

> "It has many times been said, and we say again, that the courts will not tolerate violence in any form. Those who commit crimes of violence of any degree must expect to be severely dealt with. Rape ranks amongst the worst crimes of violence and heavy sentences will be meted out to criminals who prey upon women in this community."

Similarly in *Varner* (C.C.A. 2 August 1974):

> "[T]he appellant has on ... two occasions manifested a violent tendency towards women. As has been said many times, the community has a particular abhorrence of crimes of violence. A sentence of ten years on the rape charge is undoubtedly a heavy sentence, but it is the view of the Court that heavy sentences are justified where violence is manifested against the persons of other peaceable members of the community."

An example of a particularly serious offence is that of *Anthony* (C.C.A. 20 December 1974). In that case the appellant appealed against the severity of sentences of 16 years' penal servitude for raping one girl, and five years' penal servitude for attempting, unlawfully and carnally to know, another girl. The

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latter complainant was only 11 years of age at the time of the offence and was the niece of the appellant. The sentences imposed by the trial Judge were to run consecutively, and these in turn were to run concurrently with a sentence of penal servitude for life which had been imposed at a prior date for an unrelated offence referred to below. No non-parole period was fixed.

*The Circumstances of the Offence*

The first offence occurred when the complainant went with the appellant in his car and was eventually taken along a dirt track where she was raped. There was some disparity in the evidence as to the actual events prior to the rape although it appears that the complainant was terrified into submission by the presentation of a rifle to her. After the offence was committed she was to remain in the company of the appellant for a period of some 5 or 6 days at a very rough bush camp which was constructed by the complainant, the appellant and the other young girl at a location some distance from Nowra.

With respect to the second charge, the offender had by a subterfuge, abducted his young niece from her home in Sydney and taken her to his home in Wollongong. The offence was committed on the same night as the rape. The Court of Criminal Appeal narrated the circumstances of this offence as follows:

> "After telling the girl to divest herself of her pants, [he] took something that looked like an axe from the floor of the room and said, 'If you don't take your pants off I will hit

you with this.'"

Thereupon the girl removed her pants and he attempted to have sexual intercourse with her but desisted ostensibly on the ground that he didnot want to hurt her.

The Court then considered the background to these offences and described them as "both serious and bizarre." About sixteen days prior to the commission of these offences the appellant had drowned his wife in the bath. It was for this offence that he had been sentenced to penal servitude for life. Furthermore, according to the evidence, he had from time to time, tied up his wife and daughter in the matrimonial home. He also, from time to time, had had sexual intercourse with his daughter, who was then about 16 years of age.

During the period at the camp, where the appellant had detained the two complainants for about five or six days, further intercourse occurred between the appellant and the older girl and other attempts were made to carnally know the younger girl. At times the girls were tied up with chains, although at other times they appeared to have a great deal of freedom, and to have possessed and used an axe in the camp, gone shooting with the rifle and at one stage, in the company of the appellant, they even went shopping at a nearby store. Ultimately the girls were abandoned by the side of the road to make their own way back to Sydney. However, the Court noted that despite their ordeal at the bush camp they had suffered no serious injury.

On reviewing some of the material placed before the trial Judge the

Court extracted:

> " ... an account of a cool and deliberate person carrying out a series of offences, viciously cruel, against two innocent children and achieving his purpose by threats to use an axe, a knife and a rifle."

On the other hand the Court noted a number of considerations which could be weighed slightly in the appellant's favour. These included the fact that the complainants had, on many occasions, an opportunity to resist the appellant with his own weapons, and that there were opportunities for either or both of them to escape. Reference was also made to the time that the girls and the appellant went to the shop. Accordingly, it was argued that these circumstances did not establish "a rampage of sex on innocent children, terrorised by the use of weapons so that the appellant might have his will of them, leaving them permanently scarred in mind and body." However, the Court considered it necessary to bear in mind, on the question of sentence, the background relating to the recent murder of the appellant's wife.

The Court concluded that the appeal against the severity of the sentences of sixteen years' and five years' penal servitude should fail because it did not regard those sentences as excessive in the light of the seriousness of the offences. However, it pointed out that the two crimes were committed on the one day in a single escapade and accordingly directed that these sentences be served concurrently.

*The Fixing of a Non-Parole Period*

In addition, the Court gave careful consideration as to whether it should specify a non- parole period. It pointed out that Section 4(3) of the *Parole of Prisoners Act,* 1966 placed a specific obligation upon the Judge to give reasons in writing where he considered it undesirable to specify a non-parole period and that in the instant case the trial Judge had refrained from giving such reasons. The Court therefore drew attention to this requirement and indicated that the reasons should be formulated in writing and be available at the time the Judge's decision is stated in Court.

It then proceeded to determine whether a non-parole period should be specified. It considered that the minimum period of imprisonment called for by the crimes committed, evaluated in the light of the appellant's guilt in relation to the murder of his wife, as well as the enormity of his criminal conduct in relation to the two complainants did not warrant the specification of a non-parole period.

In the case of *Wallis (supra)* many of the considerations which guide the courts in determining the sentence to be imposed on convicted rapists are illustrated. As mentioned earlier, the case emphasizes the serious view taken by the courts of this form of crime and in particular it shows that where violence is manifested, the principles of retribution and deterrence operate at the expense of reformation or rehabilitation of the offender. This case also illustrates the way in which the Court will look at the circumstances surrounding the offence and the behaviour not only of the offender but also of the victim. The considerations which arise are common to

many of the cases considered below and include questions such as:

- did the victim somehow invite the offence?
- was the victim a stranger?
- did the offender take advantage of the victim's good nature?
- was the offender under the influence of alcohol and if so, of what relevance was this to the sentence?
- was the act premeditated or did the offender rape the victim on the spur of the moment?
- what was the offender's mental condition at the time of the offence?
- did the offender express remorse for his actions and/or co-operate with the police?
- did the offender have a record of prior convictions?
- was the offender of otherwise good character?

Accordingly, the facts of *Wallis*'s case are considered in some detail.

Wallis made an application to the Court of Criminal Appeal for leave to appeal against the severity of a sentence of 12 years' penal servitude passed upon him in consequence of his pleading guilty to a charge of rape. A non-parole period of approximately four years and nine months was fixed. Furthermore, although he was ordered to pay $4,000 in compensation to the victim for her injuries, no question was raised in the appeal with respect to this order.

*Circumstances of the Offence*

The victim of the attack was a 32-year-old divorcee, a mother of three

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young children. Whilst alone in her car in a suburban street of Newcastle she was waiting to see if an acquaintance she knew was in a nearby house. She saw the appellant leave the house, and although he was a complete stranger, she asked him to see whether her acquaintance would come out of the house. The appellant obliged by going back into the house but returned informing her that he was not there. When the complainant replied that she would wait for a little while, the appellant asked whether he could sit down. Thereupon she opened the back door of her car and allowed him to sit on the back seat. Some little time later the complainant again requested him to see whether her acquaintance had returned. The appellant complied with this request but finding the acquaintance still missing returned and again resumed his place on the back seat. Finally, when the complainant decided to wait no longer, she offered to give the appellant a lift home. Before leaving, however, the appellant obtained some canned beer from the house. Thereupon he returned to the back seat of the car and the complainant drove off.

*Provocation by Victim*

An important factor in rape cases is whether the behaviour of the victim provoked the aggressive behaviour of the offender. In the instant case the complainant did not drink with the appellant and the conversation was of a desultory character. There was no suggestion that she might respond to any advances he might make. Indeed, the Court of Criminal Appeal emphasized that her invitation that he should sit in the back seat, underlined the remoteness of what passed between them. Furthermore the Court considered that the fact that the complainant was doing him a good turn in driving him home was an aggravating circumstance.

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*Violence*

Fundamental to an assessment of the gravity of the offence and therefore the sentence to be imposed is a consideration of the violence used by the offender against the victim. When the appellant was nearing his destination, he directed the complainant to drive down a secluded street where he told her to stop. As she stopped the car, he put his arms across the back of the front seat and pulled a beer can across her throat. Furthermore, on climbing into the front seat, he forced her down on her back punching her about the face and body. Meanwhile, he held one hand around her throat. Eventually she lost consciousness and when she subsequently recovered there was blood coming out of her mouth. Her nose was bleeding and almost all her clothes had been torn off. At this time she realised that she had been raped.

*Remorse*

It is not unusual in rape cases for the offender to express remorse for his actions after the event. In the present case Wallis also expressed regret for what he had done. Repeatedly apologising, he offered the complainant his handkerchief and even offered to make some monetary payment to her. He drove off with the complainant and when she had sufficiently regained control of herself, she told him to get out of her car, which he did. She then drove to her mother's home and finally to the hospital.

*Injury to Victim*

As well as physical injuries, the long-term psychological disabilities are relevant to the court's view of the seriousness of the offence.

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The savageness of the attack caused the complainant to suffer extensive bruising, swelling and tissue damage about her eyes, face and throat, both externally and internally. Indeed, the Court adverted to the fact that perhaps it had been fortunate that the complainant had lapsed into unconsciousness prior to the actual rape. In addition to these physical injuries, the Court considered that the psychological scar caused by the events would persist for a fair period of time. The Court referred to a medical report which stated:

> "Anxiety, fear and depressed mood have been present since the assault, especially if she has to go out on her own at night time. She also has become fearful and apprehensive of men generally, and is finding it increasingly difficult to cope."

In the Court's view a residual psychological disability of this type was typical of what is suffered by most rape victims.

*Subjective Considerations*

The subjective elements of the crime may be considered in some respects to be in the appellant's favour. He was only 19 years of age and had no prior history of crimes of violence. In support of his appeal Wallis claimed that he had been emotionally disturbed in consequence of a relationship with a girl who had been living with him but whose parents had intervened to terminate the relationship. It was common ground that he had been affected by alcohol at the time of the offence and it was contended that the offence was out of character. Furthermore, he genuinely appeared remorseful for what he had done and said. When asked by the police why he committed the crime he simply replied "I just lost my head." It was also argued on his behalf that by

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pleading guilty he spared all concerned the unpleasantness of a contested jury trial and therefore some moderation in the matter of sentence should be extended to him.

*Protection of the Community*

On the question of the policy governing the sentencing of convicted prisoners, the Court emphasized that the major consideration was that which was referred to in the New Zealand case of *Radich* (1954) N.Z.L.R. 86, where it was said that:

> " ... 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 civilized 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. On the other hand, justice and humanity both require that the previous character and conduct, and probable 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 the appropriate amount of punishment."

Reference was also made to *Rushby* (C.C.A. 7 February 1975) and to the Victorian decision of *Kane* (1974) V.R. 759 where the same passage was quoted as correctly stating the approach to be adopted for the

sentencing of convicted offenders. In particular the Court stressed that general deterrence was the paramount consideration when considering the burden placed upon the sentencing courts. Reliance was placed on the decision in *Rushby* where it was said that:

> "It is cool reason, not passion or generosity, that must characterise sentencing, as all other acts of judgment ... the burden placed upon the Courts when sentencing ... is not a burden pleasantly undertaken. There is the powerful emotional attraction of seeking the reformation and rehabilitation of the criminal. But that must not, as has been pointed out in *R.* v *Radich*, be permitted to obscure, still less to predominate over, the consideration of general deterrence."

In short, the Court saw its duty as striving towards the protection of the community and that to this end the principle of deterrence, at the expense of reformation and rehabilitation, was the dominant role in the sentencing process. Accordingly it considered that all the elements that could be urged in the appellant's favour had been considered both as to the head-sentence of 12 years' penal servitude and to the non-parole period of 4½ years, and that with respect to the latter the trial Judge had in fact extended some leniency to the appellant. Therefore the appeal was dismissed.

*Slater* (C.C.A. 26 September 1975) is another example of the Court of Criminal Appeal's preference for severe punishment at the expense of a more lenient approach for convicted rapists. In this case the Attorney-General appealed on the ground of the inadequacy of five sentences passed on the respondent in consequence of his pleading guilty to the following charges:

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| | |
|---|---|
| rape | 7 years' penal servitude |
| larceny | 6 months' imprisonment |
| common assault | 12 months' imprisonment |
| break, enter and steal | 6 months' imprisonment |
| entering a building with intent to commit a felony | 12 months' imprisonment |

The sentences were directed to be served concurrently and a non-parole period of three years was fixed.

*Circumstances of the Offence*

The offences were related insofar as they were committed on the same night. Slater, who had been drinking at a hotel until about ten o'clock, had apparently, on his walk home, formed the intent "to have sexual relations with some woman who might fall prey to him" (per Street C.J.). The first attempt that he made was the subject of the assault charge. He removed a flyscreen from a bedroom window occupied by a mother and her adult daughter. Although the occupants attempted to secure the house against the respondent, they failed and the daughter ran from the home for help. She was chased, caught and forced to the ground. A nearby couple came to the rescue, and the respondent fled.

However, Slater then went to another house gaining entry by a bathroom window, still "looking for a girl." As the house was unoccupied he left with a radio set. He then broke into another house shortly after midnight and a girl, who was in bed, turned on

her light and called out. The respondent thereupon ran from the house.

Finally, the respondent broke into another house and there threatened a 13-year-old girl, who was in bed at the time, that he would cut her throat. This girl was not a complete stranger as he had conversed with her some time before. He told her to go outside with him. He gagged her with a piece of her clothing and holding the knife against her neck, forced her to walk to a nearby railway track where he raped her. The victim's submission was induced by the threatening use of the knife, "and at one stage when the respondent was in the course of raping the girl and she screamed, he dragged the knife across her neck." (per Street C.J.). Having left the railway track the victim was taken to another nearby location where she was raped again. Finally she was allowed to return home.

*Injury to Victim*

Although the complainant suffered no permanent or serious physical damage there was some minor swelling and rupturing in her genital organs and some other minor injuries.

*Sexual Experience and Provocation by the Victim*

The age, character and behaviour of the victim are often raised in an attempt by the offender to mitigate the apparent gravity of the offence. It appeared that the 13-year-old girl manifested some signs of early maturity. It was asserted that she had had previous sexual experience but the Court said:

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> "that factor cannot be weighed significantly in favour of the respondent in that there is no conceivable basis for suggesting that she in any way lured him on or excited him by any conduct on her part. It was purely fortuitous so far as the respondent was concerned whether she happened to be thirteen, sixteen or twenty. She was in bed in her home and he abducted her at the point of a knife for the purpose of raping her."

*Alcohol*

A factor which must be taken into account is where the offender suffers from a psychiatric condition of a dissociative state, induced in him by the consumption of alcohol, which leads to diminished control over his behaviour. However, in the circumstances of this case the Court said:

> "it must also be recognised that the respondent's consumption of alcohol on this night was such as in his own consciousness to leave him fully aware of what he was doing and of its implications in his conduct."

*Social Background*

Until shortly before the night of these crimes Slater had been living in an apparently stable relationship with his de facto wife. He had two children of this association and had also been caring for an earlier son of his de facto wife. According to psychiatric evidence, in his early years Slater had suffered some deprivation of parental and family support and had been left with some psychological scars, which could have accounted for his subsequent criminal behaviour. However, the police sergeant described Slater as a good worker, and as a man whose family were well-cared for. Apparently

he was not an associate of criminals or other "bad elements in the community."

*Criminal Antecedents*

Slater, aged 29, had a record dating back to 1965. In 1965 he was before the Court of Petty Sessions on two stealing charges; in May 1966 he was imprisoned for a short period on a charge of carnal knowledge. Thereafter, in 1967 and 1968, 1970 and 1971 there were offences of dishonesty, including break, enter and steal, illegally using a motor vehicle, receiving and stealing. He served gaol terms for some of these earlier crimes. In June, 1973 he was fined for behaving in an offensive manner, using unseemly words and resisting arrest. It is clear that the Court viewed the circumstances of the respondent's past record as a particularly aggravating factor and one which, in the circumstances, called for a substantial increase in the non-parole period.

*Leniency of Trial Judge*

The Court of Criminal Appeal pointed out that the trial Judge recognized that he had two alternatives: firstly to interpret the escapade of serious crime as calling for a heavy sentence or, secondly, to take a more tolerant and lenient view, due to the medical and psychiatric evidence tendered as well as the offender's general character as reflected in the domestic relationship with his wife and children, and by his work record. The trial Judge chose to take a lenient view which was reflected in the head sentence and in the non-parole period.

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However, the Court of Criminal Appeal considered that the trial Judge had taken the wrong course, particularly in the light of the seriousness of the offence which was carried out at knife point, and involved the breaking and entry into the peace and security of a residence and abduction from it of the rape victim. These, the Court considered, were aggravating circumstances which, despite the relevance of the other matters, called for a sentence in excess of that held to be appropriate by the trial Judge. Accordingly it substituted for the sentence of seven years' penal servitude a sentence of twelve years' penal servitude.

Further, in relation to the charge of common assault (involving the chase with the younger woman from her home with the intention to have sexual relations with her), the court considered the sentence of 12 months for this crime should be quashed and that the offender should be sentenced to two years' imprisonment. This sentence was directed to be served cumulatively to the 12 years referable to the rape because of the separate character and seriousness of the crime.[1]

With respect to the sentence for entering the building with intent to commit a felony (where the respondent ran from the house when the woman screamed) the sentence of 12 months concurrent was quashed and instead a sentence of 2 years' penal servitude to be served concurrently, was substituted. In the result the head sentences were increased to 14 years in all and the non-parole period was substantially increased, particularly due to the circumstances of the respondent's

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[1] Compare this with the decision in *Anthony (supra)* where the Court directed that the separate offences be served concurrently. Note, however, that in *Anthony* no non-parole period was specified and that he was to serve the sentences concurrently with a sentence of penal servitude for life.

past record, to 6½ years' penal servitude.

*Security of the Home*

As illustrated by *Slater (supra)* the Court will view the invasion of the security of a person's home, as an aggravating circumstance. In *Puckering* (C.C.A. 17 September 1976) the offender, who had been convicted of assault with intent to commit rape upon an 11-year-old girl, made application to appeal against a sentence of 11 years' penal servitude with a non-parole period of 5 years.

The circumstances of this case involved the abduction by the appellant of a sleeping girl from the tentannex of her parent's caravan. By threatening to use a knife which he carried, the offender attempted to have forcible sexual connection with the girl, but the attempts failed owing to her immature physical development. There followed some indecent acts until finally the appellant allowed the girl to return to the tent.

Although the offender was only 20 years of age, had pleaded guilty and saved the girl the ordeal of giving evidence a second time before a jury, was affected by alcohol at the time and had only two convictions arising out of "emotional involvement", the Court cited with approval the following words of the trial Judge:

> "The community, including the girl's parents, would regard such conduct as horrifying and would be shocked and appalled if stern retribution did not overtake a person guilty of such terrible conduct. To force an intrusion at night into the bedroom of children and

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> abduct a sleeping girl, to force her at knife point to undress and to abandon resistance, to attempt twice to have sexual connection with her and then to submit her to these indignities, is conduct which must, whatever the subjective features, call for a severe sentence. In such cases the community, including its children, is entitled to look to the courts for protection."
>
> .....
>
> "In cases such as these the courts have a duty to impose sentences which are not only merited by the individual circumstances revealed, but which bring forcibly home to any other person minded to abduct a child with intent to ravish her that he does so at his peril."

Although the appellant argued that 11 years was excessive in the light of the statutory maximum of 14 years for the offence, the Court of Criminal Appeal thought that both the head sentence and the non-parole period took into account the relevant factors. In *Fissentzidis* (C.C.A. 36 of 1974) the appellant gained access to the home of a married woman who was with her 5-week-old baby. The woman was intimidated with a pistol and was finally raped. During this time an associate of the appellant was stealing property from the home. The appellant had a long record of stealing and sex crimes. For this offence the Court of Criminal Appeal upheld a sentence of 14 years' penal servitude with a non-parole period of 8 years.

However, it is misleading to suppose that all rapes which involve the offender breaking into a home when the victim is asleep will necessarily attract penalties in the higher ranges. Thus in *Hiles* (C.C.A. 5 September 1975) the offender called at a country farmhouse in the middle of the night in the knowledge that the victim was asleep and her husband was working on night shift. He awoke the victim and with

threats terrified her into submitting to sexual intercourse. The Court of Criminal Appeal considered that this case fell in the less serious category of rape cases and, although affirming the head sentence of six years, reduced the non-parole period to 2 years.

The next case is an illustration of the successful application of mitigating factors where the prior good character of the offender is reflected in a relatively short non-parole period. In *Hosa* (21 November 1975) the offender appealed against the sentence of 8 years' penal servitude and a non-parole period of 3½ years for having raped the complainant, a married woman residing with her three young children but who was living apart from her husband. The rape was committed after 9 a.m. at the suburban house of the complainant. Although invited inside, the appellant forced her into the bedroom where the offence was committed. This crime was not accompanied by the use of any weapons but the physical size and strength of the appellant was sufficient to overbear the complainant with little difficulty.

The appellant, who had a clear record, was regarded by the community where he resided as "a man of integrity and compassion, always ready to help his less fortunate fellow man without thought of recompense." He had contributed to the public life of his community. He was a married man with a wife and five children and was hard working. Against this the Court pointed out that the crime had been committed in a suburban home where persons such as the complainant were "entitled to the full protection of the law from assault or rape. The safety

of women in their homes in the suburbs is to be protected by the full rigour of the law and criminals who invade a suburban home and rape a female cannot expect to be dealt with other than severely."

Although the Court considered that the sentence of 8 years was by no means disproportionate to a rape of this sort it placed some weight to the appellant's repute "and to his past record of contribution to community welfare activities." Accordingly the non-parole period was reduced to two years.

*Alcohol*

A high proportion of crimes involving violence occur when the offender is under the influence of alcohol. Rape is no exception. Although it is proper to put forward the fact that the offender was under the influence of alcohol at the time the offence was committed it is difficult to ascertain what weight is placed on this fact. Clearly, as with other factors, the weight to be given depends upon the circumstances of the whole case.

Alcohol has played some role in many of the cases already considered. For example in *Wallis (supra)* it will be recalled that the offender committed the offence whilst affected by alcohol and had even used a beer can as a weapon. In *Slater (supra)* the escapade of offences took place after the offender had been drinking at a hotel and it was argued in that case that the offender suffered from a psychiatric condition induced by the consumption of alcohol which lead to a

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diminished control over his behaviour.

In *Kirby* (C.C.A. 10 October 1975), a case which dealt with the rape of a 7-year-old girl, the Court indicated that it was reasonable, as an argument for the mitigation of sentence, to rely on the fact that the offender "is of limited intelligence and that his capacity for judgment is restricted to a marked degree by the consumption of alcohol," although this must be weighed against the circumstances of the crime. So far the cases have been concerned with the circumstance where the offender has been affected by alcohol. What of the case where the victim is under the influence of alcohol at the time of the offence? In *Lay, Butt & Carpena* (C.C.A. 16 December 1975) the complainant had voluntarily gone with a group of youths to a deserted house where she was plied with alcohol to such a point that she lost consciousness. Two of the offenders then had sexual intercourse with her whilst she was in this unconscious state. The third offender also had sexual intercourse with her, but only after she had recovered a degree of consciousness and had made an unsuccessful attempt to resist him. Meanwhile four or five other youths had come to the house and they also had intercourse with the complainant, but they had not been identified at the time of the appeal.

The judgment of the Court, delivered by Street C.J., stressed that the complainant's intoxication and lack of consciousness at the time of the acts of the first two offenders provided no satisfactory answer to the rape and that they, as well as the third youth, all stood to be considered for the crime. The Chief Justice said:

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> " ... these three youths were all parties to a violent assault upon this girl. The fact that the intoxication they had induced had rendered her insensitive when the first two had intercourse with her is little answer on their part. Bearing in mind the advantage His Honour had of evaluating the three youths comparatively, we feel difficulty to the point of impossibility in distinguishing between them so far as concerns the challenge to their sentences."

*Behaviour of the Victim*

Reference has already been made of the importance of looking at the behaviour of the victim in rape cases. It is usual for the courts to adopt a more lenient approach towards the offender where the victim has, by her conduct, provoked or invited the assault. This is clearly illustrated in *Lay, Butt & Carpena (supra)*, which was an appeal by the Attorney-General, on the ground of inadequacy of sentences imposed upon the three offenders of three and a half years each, with non-parole periods of six months each, in consequences of their conviction for rape.

Prior to the rape, the victim was acquainted with the three offenders and regarded one of them as her boyfriend. She was a frequent visitor to a pool room which was frequented by the three respondents. She had also visited, on a number of occasions, a deserted house, containing some furniture and bedding, which was situated near the pool room. There she had had some intimacies short of actual intercourse with the respondent Butt.

On the night of the offence the complainant went with the respondents to the deserted house where the offence described earlier took place.

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The trial Judge, when sentencing the offenders, made reference to the fact that the complainant had deliberately placed herself in a position of considerable risk by going to the deserted house with drink and then consuming such a quantity of liquor as to lose consciousness. She had deliberately and voluntarily exposed herself to what took place at night.

> "She apparently had both dressed and behaved in a provocative fashion ... she had been to the house on an earlier occasion at least once with Butt for the purpose of intimacies and her conduct had obviously been such as to render her highly likely to be the victim of some sexual attentions on this particular night." (per Street C.J.)

Other factors to have influenced the trial Judge in imposing a lenient sentence were: that the offences did not involve a concerted attack on a stranger, that the offenders came from the same sub-culture as the victim, that the victim was not injured, that a year had elapsed since their offences were committed, that the incidents would not have come to the notice of the police but for the intervention of a different group and finally that they were young and had an absence of earlier crimes of violence.

In the result, the Court considered that the trial Judge took a far too lenient course, and, after giving full weight to the considerations which influenced the trial Judge in imposing a lenient sentence, it substituted sentences of five years' penal servitude and a non-parole period of fifteen months, in each case.

Thus, although the sentences were increased in *Lay, Butt & Carpena,*

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it may be seen that the sentences were clearly in the lower ranges of those imposed for rape cases generally.

It is not unusual for the offence of rape to take place after the victim has accepted a lift in the offender's car. A typical case is that of *Catlin* (C.C.A. 18 December 1975) where the offender met the victim in a hotel. Although they were complete strangers, the victim accepted a lift in the offender's car. Finally the car was driven to a secluded spot where the victim was overpowered and raped. In the circumstances of this case the Court of Criminal Appeal dismissed the application for leave to appeal against the sentence of eight years' penal servitude with a non-parole period of three years.

In *Murphy* (C.C.A. 20 December 1974) the victim of the rape had hitch-hiked a ride in the appellant's car. She was subsequently threatened with a knife, assaulted about the breasts, forced to perform acts of gross indecency, tied to the steering wheel and finally raped. On the question of the relevance of the victim's behaviour in accepting the lift, McClemens, C.J. at C.L. said:

> "This foolish girl hitch-hiked a ride in a motor vehicle. I daresay that that perhaps these days can be regarded as an act of unutterable foolishness, but foolishness does not justify what happened to her subsequently."

The sentence imposed was eight years' penal servitude with a non-parole period of three years.

Similarly, in *Mills* (C.C.A. 20 December 1974) the victim had accepted

a lift with a stranger, and was subsequently threatened with a knife and raped. McClemens, C.J. at C.L. said:

> "Here, on the one hand, is the absolute foolishness of this girl getting into a motor car at night with a man. This is behaviour which cannot be too strongly reprehended. On the other hand ... there is the problem of the knife."

The offender was sentenced to three years' penal servitude with a non-parole period of 18 months.

In *Griffiths and Quon* (C.C.A. 31 October 1975) Street C.J., who delivered the judgment of the Court, said:

> "The appellants, together with two other young male companions, had offered the two girls who became the victims of the rapes a lift home from the city to Liverpool. The lift had been offered as the result apparently of a chance encounter in the city, there being no suggestion of any previous acquaintance between the persons concerned. In this respect it can be recognized in favour of the appellants that the two complainants, as they in due course became, were in some respects taking a risky course in getting into a car with four strange youths."

Notwithstanding some provocative behaviour during the journey by the girls and their foolishness in entering the car in the first place, the girls were lured into a house under false pretences where the offences took place. In view of the seriousness of the offences, the appeal against the severity of the head-sentences of eleven years' penal servitude was dismissed, although the non-parole period of six years was reduced to four years in each case in order to afford

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the appellants an adequate opportunity for rehabilitation during the parole period and also to give them an incentive to strive towards presenting a favourable case (if and) when they become eligible for parole.

From the above cases it may be concluded that although foolish or provocative behaviour by a rape victim may be taken into account in the offender's favour, such behaviour in no way excuses the behaviour of the offender, and heavy sentences will still be imposed where the circumstances warrant a serious view to be taken of the offence.

*The Relevance of Age*

Age is relevant in sentencing for rape offences in two respects. Firstly in relation to the youth of the offender, and secondly in relation to the age of the victim. Earlier, reference was made to the fact that the youth of the female victim may relate to the offence with which the offender may be charged and consequently, the penalty. As a general rule the younger the victim or the greater the disparity between the ages of the victim and the offender the more seriously will the offence be viewed.

In *Davy & Edwards* (1964-5) N.S.W.R. 40, the Court of Criminal Appeal considered the case of rape when committed by young men in company. In this case a sentence of ten years' penal servitude was imposed on both offenders. This case was described by the trial Judge as a "wolf pack" rape, accompanied by acts of lewdness and threats. In a written judgment by the Court of Criminal Appeal, consisting of

Herron, C.J. Maguire and Walsh, JJ. the following observation was made with respect to the relevance of age:

> "Despite the youth of the appellants, we think that His Honour's sentences must be sustained. After all, the large majority of crimes of this nature are committed by young men in company and age has ceased, in our view, to be a valid reason for inflicting light sentences." (*Ibid* at p.52)

This decision to negate the relevance of youth as a mitigating factor may be contrasted with the observations of the Court of Criminal Appeal in *Flaherty and Others* (1968) 89 W.N. (Pt. 1) (N.S.W.) 141, a case involving an appeal by nine offenders against severity of the sentences imposed in respect of a pack rape of a 15-years-old girl. The sentences imposed at the trial varied from 14 years' imprisonment down to 7½ years' imprisonment and in all cases certain non-parole periods were fixed. The ages of the offenders varied from between 16 years to 19 years of age.

However, in the Court of Criminal Appeal, Wallace A.C.J. said:

> "An important factor in the present case is the youth of the appellants. ... whilst they must be punished, and appropriately punished, it is universally acknowledged that a young age is an important factor for consideration when sentencing convicted persons." (*Ibid* at p.146)

Taylor J. also considered that the ages of the accused were not sufficiently taken into account (*Ibid* at p.160). On the other hand Asprey J.A. said:

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> "Whilst the youth of the accused should not be overlooked, neither the very young age of the girl, fifteen, should be forgotten nor the fact that she was subjected to a revolting pack attack which not only left her shocked and disturbed at the time but would, in all probability, cause her to carry with her, at any rate for some time, some psychological trauma."
> (*Ibid* at p.154)

In the result the appellant Flaherty, who was 19 years of age, and was the instigator of the offence, received the highest sentence of 10 years, with a non-parole period of 6 years. Kelly, who also played a leading role in the affair, but was aged 16 years, received a sentence of 8 years with a non-parole period of 4 years. Most of the other appellants received sentences of 6 years with a non-parole period of 3 years.

In *Kirby* (C.C.A. 10 October 1975), the appellant was aged 20. However, his victim was a girl of 7 who sufferered tearing in the perineal tissues and consequently infection of a non-venereal character requiring some hospital treatment. Street C.J., for the Court of Criminal Appeal, said:

> "A seven-year-old girl could do little to protect herself from what was undoubtedly a forceful onslaught upon her."

It is clear from the sentence of 11 years' penal servitude and a non-parole period of 5 years from the date of sentence that the age of the victim was a relevant consideration in this case.

In *Griffiths and Quon* (C.C.A. 31 October 1975), an argument was put on behalf of Quon that because he was a few days short of 17 years of

age at the time of the offence there was an element "of somewhat greater youth than his companion Griffiths" and this should be weighed in his favour in relation to the evaluation of his sentence and his non-parole period. Although the Court did in fact reduce the non-parole period of both offenders, the age difference between them was not reflected in the sentences.

In *Jones* (1971) 1 N.S.W.L.R. 613 the Court of Criminal Appeal in a joint judgment consisting of Manning J.A., O'Brien and Isaacs JJ., considered a case where the victim of the rape was considerably older than the offender. The victim was a 57-year-old widow whom the offender, with another person, met in a hotel. When, at closing time, she offered to drive the two accused, both of whom were young, to their destination, they took control of the vehicle and crashed the car. Then, the two men carried the woman quite a long distance along the street to a public place near a railway line where she was raped.

Jones was sentenced to 9 years' imprisonment with a non-parole period of 3½ years by the trial Judge. In refusing the appeal against severity of sentence the Court of Criminal Appeal alluded to the fact that the victim was old enough to be the mother of the accused. Further, the complainant was dragged off the street and although she appealed to her age for protection she was raped and left naked in the railway area. In the circumstances the Court considered the sentence to be perfectly reasonable and proper.

In *Aik* (C.C.A. 10 October 1975) the offender made an application for

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an extension of time within which to appeal against a sentence of five years' penal servitude with a non-parole period of 2 years, consequent upon a conviction for rape. The appellant appeared on his own behalf and placed particular reliance upon his age at the time of the offence, claiming he ought not to have been sent to gaol. Although the offender was only aged eighteen at the time of the application, the Court took the view that he had been dealt with surprisingly leniently, particularly in the light of his prior criminal record involving cumulative sentences totalling 3½ years for crimes, including rape and armed robbery. Accordingly the application was dismissed.

*Mental Condition of the Offender*

Where the offender has been convicted of rape or of other serious charges of a sexual nature it is not unusual for the courts to assess sentence in the light of medical and psychiatric evidence. However, it is clear that whether or not the offender is suffering under psychological or emotional stress, or stress which has a psychiatric basis, the protection of the community is the prime consideration of the sentencing court. This has been illustrated in *Slater*'s case (*supra*) where a lenient approach taken by the trial Judge, which relied to no small extent upon the medical and psychiatric evidence tendered on behalf of the offender, was rejected by the Court of Criminal Appeal.

Similarly in *Murphy (supra)*, it was pointed out that the

psychological stress from which the offender suffered did not justify the behaviour of the offender. In that case McClemens C.J. said:

> "Whatever the stresses from which this unfortunate man suffered, the stresses to which he exposed the girl and the potential effects on her in the future have also to be considered."

In *Turner* (C.C.A. 7 June, 1974) the offender was convicted of rape which he carried out while hiding in a woman's lavatory. The trial Judge imposed a sentence of six years' penal servitude but refrained from specifying a non-parole period under the terms of s.4(3) of the *Parole of Prisoners Act*. His Honour stated his reasons in writing as required by the section, and the relevant extract reads as follows:

> "Although mental illness was not pleaded by way of defence at the trial, after the trial psychiatric evidence was placed before me indicating that the prisoner had suffered from sexual deviations for a long period of time before the rape and, following his arrest and while on committal, he had been placed under the charge of the Parramatta Psychiatric Centre.
>
> Because of his antecedents and because this prisoner will, in my opinion, require special treatment I decided the question of his parole would more properly be considered by the Minister and I direct attention to the remarks I made on passing sentence.
>
> I originally deferred sentence for twelve months from the date of his conviction to enable him to have further psychiatric treatment. He was, however, allowed out of the Parramatta Psychiatric Centre on two occasions on both of which he committed further offences by entering lavatories for females and watching the occupants. On each occasion he was convicted and imprisoned for three months.
>
> Accordingly, the prisoner was brought up for breach of the

> bond on the deferred sentence and I ordered his further imprisonment on the 11th February 1974."

The relevant remarks which His Honour referred to in the second paragraph were as follows:

> "I propose now to sentence you to imprisonment; and I propose to direct that the attention of the Minister for Justice be specifically drawn to the facts of your case by the Clerk of the Peace in a detailed report of what has transpired, and to enable the Minister to see what is the best way he can deal with your case in the future. It may be that he could release you on licence on condition that you go into a mental institution where you will be appropriately dealt with."

The Court of Criminal Appeal considered that notwithstanding the absence of any prior convictions, the sentence of six years was a proper assessment of the sentence to be imposed. However, the principal question in relation to the appeal against sentence was whether it was proper for the trial Judge to refrain from specifying a non-parole period for the reasons given. Street C.J., with whom the other members of the Court agreed, said:

> "It is quite clear that His Honour had in mind the prospect of the Minister reviewing this appellant's position during the period of his imprisonment and there is no reason to doubt that this will in fact take place. The Minister has powers, for example under s.463 of the *Crimes Act*, to deal with the appellant along some such lines as His Honour contemplated as a possibility. There is in my view no reason to differ from the manner in which His Honour exercised his discretion."

Accordingly the appeal was dismissed.

In *Mills* (C.C.A. 20 December 1974) the victim submitted to being raped by the offender not so much by the fear that he would use a knife if she resisted but because she recognized that the offender was mentally disturbed. The Probation and Parole Service expressed concern upon the advisability of releasing Mills to the community until some positive effect of treatment became evident. McClemens C.J. at C.L., in delivering the judgment of the Court of Criminal Appeal, said:

> "It is unfortunate that there is no provision made in our law at the present time for a hospital order in which this man could be kept out of the community and under treatment for a long time, and compulsorily. The best we can do is to deal with him in the light of the existing law."

and further on His Honour said:

> "The best we can do is to seek in some measure to protect the public."

Accordingly, a sentence of five years' penal servitude was substituted for three years and a non-parole period of 18 months was fixed.

## OTHER OFFENCES AGAINST FEMALES

In this section a number of the more serious sexual offences committed against females which, in recent years, have attracted the attention of

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the Court of Criminal Appeal in relation to the adequacy of sentence, are considered. Statistical information available from Table 2 (supra) gives some indication of the kind and quantum of the penalties imposed upon sexual offenders who were tried in the Higher Criminal Courts during 1974. However, the sample of cases considered below are small and do not necessarily reflect the tariff or going rate for sentences imposed in respect of these offences.

*CARNAL KNOWLEDGE OF GIRL UNDER 10 YEARS*

Section 67 of the *Crimes Act,* 1900, simply provides that

> "Whosoever carnally knows any girl under the age of ten years shall be liable to penal servitude for life."

In *Doolan* (C.C.A. 27 March 1975) the appellant appealed against the severity of a sentence of 14 years' penal servitude on a charge of carnally knowing a girl under the age of ten years. The victim was 8 years old at the time of the offence. A non-parole period of six years, to date from time that the offender was taken into custody, was fixed.

*Circumstances of the Offence*

The Court of Criminal Appeal did not set out the relevant facts in any great detail. However, it is clear that the appellant had persuaded the girl to go with him, on a false pretext, to a room used as a storeroom in a church. There he assaulted her behind locked doors. The medical evidence indicated that, as a result of this offence, the victim suffered some permanent injury to her genital organs.

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*Subjective Considerations*

The appellant, who was a young man aged 17 years and 10 months at the time of the offence, suffered from a weakness for alcohol and drugs. Material was given at the trial as to his psychiatric condition which, according to the Court of Criminal Appeal, was carefully weighed by the trial Judge.

*Deterrence*

The Court noted that the trial Judge had placed particular emphasis upon the duty, resting upon the courts, to ensure that attacks of this nature were not repeated by other offenders.

In the result the Court held that no basis had been made out for interfering with the discretionary determination of his Honour in fixing both a head sentence of 14 years and the 6 year non-parole period. In so doing the Court implicitly endorsed the principle of general deterrence in cases of this nature.

*CARNAL KNOWLEDGE OF A GIRL ABOVE THE AGE OF 10 YEARS AND UNDER THE AGE OF 16 YEARS*

The penalty for which an offender may be liable varies according to the age of the victim at the time of the offence. Thus, in contrast to the maximum penalty provided by the legislature of penal servitude for life for those who carnally know girls under the age of 10 years, Section 71 deals with victims who are aged between 10 years and 16 years. That Section reads:

> "s.71. Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of

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sixteen years, shall be liable to penal servitude for ten years."

*Data Analysis*

Table 2 (*op cit.*) reveals that during 1974 this was the single most prevalent sexual offence tried by the Higher Courts. It was also the offence which earned the highest proportion of non-custodial dispositions. Thus 142 offenders or 83 per cent of those tried in the Higher Courts received bonds, whilst only twelve offenders, or about 7 per cent received prison sentences. The reason for the comparatively low imprisonment rate reflects the fact that in many instances the act is non-violent - i.e., it occurs with the consent of the victim in circumstances where she is not injured. In 1975 considerably fewer offenders were tried in the Higher Courts for this offence presumably because, by the *Crimes and Other Acts (Amendment) Act,* 1974, many of these offences became punishable summarily (see s.476 *Crimes Act,* 1900). However, as the Court Statistics for 1975 reveal, a substantial number of those charged with the offence in the Higher Courts receive non-custodial sentences.

TABLE 4:

(SEE NEXT PAGE FOR TABLE 4)

TABLE 4:

COURT STATISTICS 1975
UNLAWFUL INTERCOURSE WITH FEMALE 10-15 YEARS*

| | Number | % |
|---|---|---|
| Acquitted | 9 | 14.5 |
| Rising of Court | 1 | 1.6 |
| Committed to Child Welfare Institution | 1 | 1.6 |
| Recog. (and/or probation and/or fine) | 34 | 54.8 |
| Fine only | 0 | 0 |
| Governor's Pleasure | 0 | 0 |
| Periodic Detention | 1 | 1.6 |
| Imprisonment Less than 6 months | 4 | 6.5 |
| Imprisonment 6 months up to 1 year | 2 | 3.2 |
| Imprisonment 1 year up to 2 years | 5 | 8.1 |
| Imprisonment 2 years up to 5 years | 5 | 8.1 |
| Imprisonment More than 5 years | 0 | 0 |
| TOTALS: | 62 | 100.0 |

*from Statistical Report 7 Series 2 at p.100 *op cit.*

*Case Analysis*

That the Court of Criminal Appeal is fully conscious of the need to protect young girls from the attentions of older men, whether or not those attentions are initiated by the girls themselves, is illustrated in the case of *Bridge* (C.C.A. 4 October 1974). In that case the offender pleaded guilty to a charge under Section 71 of the *Crimes Act*, was sentenced to 15 months' imprisonment with a specified non-parole period of six months and then appealed to the Court of Criminal Appeal against severity of sentence.

The case revealed a number of mitigating considerations. Firstly, the Court of Criminal Appeal placed particular emphasis upon the fact that the girl was aged some 15 years and 9 months at the time of the offence. Had the girl been over 16 years of age at that time the same act would not have constituted a crime. Secondly, the girl was the instigator of the circumstances which led to the act of intercourse. Thirdly, the facts, which gave rise to the charge, became known only as the result of the registration of the birth of the child. (The child itself was conceived as a result of the act of intercourse).

*Subjective Considerations*

The Court also adverted to the offender's criminal record and noted that apart from one minor matter in the Children's Court in 1962 the appellant had a clean sheet. Perhaps more importantly, he had no criminal propensities and had shown no violence towards women. He was a good family man with a wife and two children and was only 24

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years of age at the time of the offence.

In the circumstances of the case the Court was of the view that a degree of leniency should be extended to the offender. Accordingly, the Court quashed the sentence of imprisonment and instead substituted a deferred sentence and ordered the appellant's release forthwith, upon his entering into a recognizance without surety in the sum of $100 to be of good behaviour for a period of 12 months and to come up for sentence if called upon.

*CARNAL KNOWLEDGE BY TEACHER, FATHER ETC.*

Special provision is made by the legislature where the offender occupies a certain position of trust in relation to the victim, and the victim is a girl of between 10 and 17 years of age. The relevant Section provides as follows:

> "S.73. Whosoever, being a schoolmaster or other teacher, or a father, or step-father, unlawfully and carnally knows any girl of or above the age of ten years, and under the age of seventeen years, being his pupil, or daughter, or step-daughter, shall be liable to penal servitude for fourteen years."

That the legislature sees this offence as being more serious than that prescribed by Section 71, is shown by the fact that the offender is liable to a longer term of imprisonment for this offence (an additional 4 years) and by the fact that the critical age of the victim is extended by one year (from 16 to 17 years of age).

In the following three cases, *Cummins* (C.C.A. 19 December 1974), *Banks*

(C.C.A. 9 May 1975), and *Wolfram* (C.C.A. 28 November 1975) the Court of Criminal Appeal adverted to the seriousness of charges laid under S.73 of the *Crimes Act,* 1900 and the need to relate the sentences to the maximum penalty prescribed by the statute. In *Cummins,* the appellant appealed against a sentence of five years' imprisonment with hard labour, with a non-parole period of two and a half years, imposed upon him in consequence of his pleading guilty to an offence under S.73 of the Act.

On his own admissions, the appellant had been having sexual intercourse with his step-daughter since she was thirteen and a half and this situation had continued for a period of some two and a half years.

The judgment of the Court of Criminal Appeal was delivered by McClemens C.J. at C.L. who, at the outset, stated that the matter had caused the Court considerable concern. The problem for the Court was that the offender was, apart from this relationship with his step-daughter, a person who looked after his family "adequately and well," and his wife was prepared to "stick by him."

*Mental Condition of Offender*

In addition, the evidence indicated that the appellant was deteriorating intellectually. He had contracted syphilis in 1951 and because he had not been treated in time he had developed distortions of vision and rapidly increasing deafness. His Honour described the offender's condition as follows:

> "When he got treatment it was too late to help the gross

> distortion of vision, the extreme deafness in both ears, paraesthesia of the legs and soles of the feet, and he had obvious brain deterioration, no concentration and very poor memory."

Further, medical opinion indicated that the he was unlikely to be able to initiate an attack or sexual assault on a girl, and that his behaviour was more like that of a child. His wife was said to have treated him like one. The Court went on to speculate that perhaps the appellant had so habituated the girl to sexual intercourse with him that she became the one who led him on.

*Objective Considerations Prevail*

However on balance, and in particular by relying upon both the objective considerations of the offence and the maximum penalty provided for the offence, the Court felt no justification for interfering with the sentence imposed. Accordingly, the appeal was dismissed, both as to the head-sentence and as to the non-parole period.

In addition the Court ordered the Registrar to send the psychiatric report to the Commissioner of Corrective Services. In so doing, his Honour said:

> "if there is any deterioration in this man's mental state, appropriate steps can be taken administratively and medically in his case. That is not a matter for us; it is a matter for the administration. As far as we are concerned, having given this matter quite anxious consideration we are of the opinion that having regard to the legal principles we have to enforce and the necessity of not interfering with the proper exercise of discretion by the trial judges except where that course is necessarily indicated, the order we have proposed is the appropriate one."

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In *Banks (supra)*, the Court of Criminal Appeal was constituted by Reynolds, J.A., Taylor, C.J. at C.L. and O'Brien, J. The appellant had pleaded guilty at the trial to carnally knowing his daugher within the terms of Section 73 of the *Crimes Act*, and he appealed to the Court of Criminal Appeal against the severity of the sentence of eleven years with a specified non-parole period of five years.

Briefly, the facts of the case were that the appellant had sexual intercourse with his daughter on a mattress at a tip and caused her some degree of physical injury.

Reynolds, J.A., who delivered the judgment of the Court considered that this was a case which called for a degree of leniency. His Honour considered it was not the worst case that could be envisaged, that alcohol had played a part in the offence, that the offender had some personal attributes in his favour, and that the offender was essentially sorry for what he had done. His Honour said:

> "In the case under consideration the appellant when affected by drink had become sexually excited and sought to gratify the desires aroused by means which are not only criminal but abhorrent and committed an action for which on any view he must go to gaol. However, given the nature of the offence, nearly every other consideration in the case calls for that degree of leniency which can properly be extended. It is not the worst case that can be envisaged within categories which fall under S.73, or indeed a very bad case. The offence was an isolated one. The appellant was proved to have been an industrious man, a constant worker and a good provider for his wife and his six children. He had, and there was no reason to doubt it, taken steps to avoid excessive drinking and although he lied initially he was essentially remorseful and ashamed."

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Therefore the Court considered that the sentence imposed by the trial Judge was disproportionate to the offence and to its surrounding circumstances and out of harmony with sentences imposed in similar cases. Reynolds J.A. added:

> "It is clear from his Honour's remarks on sentencing that he was distressed and moved by the nature of the evidence presented to him and he was indeed conscious that these circumstances might cloud his judgment. It seems to us probable that this experienced and thoughtful Judge made the mistake of thinking he had reached the state of mind and emotion where he could make a calm and dispassionate assessment of penalty."

Accordingly the sentence was varied to imprisonment of six years, and a non-parole period of two years was specified.

The last case to be considered under this heading is that of *Wolfram (supra)*. In this case the offender was sentenced to five years' penal servitude with a non-parole period of two years in consequence of his conviction of a charge of unlawful carnal knowledge of his daughter, who was aged 14 years and 10 months at the time of the offence.

*Application for Extension of Time*

The application to the Court of Criminal Appeal included an application for an extension of time within which to appeal against sentence. The application for leave to appeal against sentence was "many months out of time" and the only ground advanced for the granting of the extension of time was that the applicant was "not in good enough shape, mentally, to understand the actual sentence of five

years with two years' non-parole and should have appealed against it after the sentence." The applicant's mental state was attributed to an accident which he had suffered in 1973, when he fell about 40 feet and suffered cerebral and skeletal injuries. Also there was some evidence that he was not in full possession of his faculties and possibly, possessed a paranoid personality. However, in the course of considering the question of whether an extension of time should be granted the Court heard the full argument on the merits of the appeal.

*Betrayal of Trust*

In imposing the sentence of 5 years' penal servitude the trial Judge had placed particular emphasis upon the fact that the applicant had betrayed the trust which a child is entitled to have in her father. The crime itself had been singled out by the legislature to be dealt with alongside with schoolmasters and others in comparable positions of trust, who direct sexual attention to young girls within their care.

Although the Court of Criminal Appeal did not recount the details of the offence, the offender's background gives some insight into the situation prior to the event. Street C.J., who delivered the judgment of the Court said:

> "The applicant, who is at the present time aged 44, was residing with his wife and his two children, namely, the daughter referred to in the charge and a younger son, in a caravan in the Blue Mountains. It seems that the applicant commenced a sexual relationship with his daughter, whether proceeding to the full extent of inter-course being a matter perhaps of dispute, somewhat

earlier than the date of the particular occasion charged, that date being 28th September, 1974. The family was, as the psychiatrist has said, disintegrating at that time and the disintegration has continued. The fidelity of the applicant's wife was the subject of some criticism by the applicant himself and it seems that she admitted to having had some other association in the months preceding and contemporaneous with the time of this crime. The daughter herself was by no means free from other experiences; it is sufficient in this regard to quote from a passage in the summing-up:

> 'She was cross-examined by defending counsel, and she said she first told her mother about these incidents, or about some incidents, of a sexual nature when her father had his accident in August, 1973; her allegation being that certain events had been taking place before that date. Then after that, she continued to tell her mother of most of the occasions when these things happened. She agreed in cross-examination that in 1974, this being the year with which you are particularly concerned, she was having intercourse with a number of young men, and she agreed that, before she left home, her father, the accused, had spoken to her about her sexual conduct with these young men. But she said again that she left because he would not allow her out at nights and she was sick and tired of what he was doing.'"

*Deportation*

The question of deportation was raised during the proceedings. The applicant had come to Australia with his family from Canada and apart from the crime in question his character was regarded as clear. However, he expressed a desire to be deported to Canada, leaving his wife and children behind, so that he could commence a new life. However, the Court pointed out that it had no control over deportation, and that the matter was one for the relevant authorities. In the result the Court found that there was no sound basis for interfering

with the discretion of the trial Judge and therefore dismissed the application.

*INDECENT ASSAULT AND ACTS OF INDECENCY AGAINST FEMALES*

Again the age of the female is relevant to these offences and therefore also the penalty to which the offender may be liable. The relevant sections are Sections 76 and 76A of the *Crimes Act*, the latter being a new section introduced by the *Crimes and Other Acts (Amendment) Act* 1974 as a consequence of recommendations made by the Amsberg Committee. In addition the penalties under Section 76 were marginally increased also as a result of recommendations made by the Amsberg Committee. The Committee recommended as follows:

> "For the sake of the occasional situation where the facts of an offence constitute no more serious crime than indecent assault, but are of themselves very grave in their effect on the victim and are an affront to the community's conscience, we recommend an increase of one year in each of the maximum sentences under Section 76. We do so with some trepidation, being aware that courts are prone to regard an increase in the maximum sentence for an offence as a Parliamentary direction to increase *pro rata* the actual sentence they would have imposed but for the amendment. We can do no more than state that we do not wish to indicate any dissatisfaction with the level of sentences being generally imposed for indecent assault - we seek only to have a more adequate sentence available for the infrequent, shockingly grave, case where no more serious crime than indecent assault can be charged. We also recommend the creation of a new offence - act of indecency - to cover the situation where the indecency with a girl under the age of 16 years does not amount to an assault on her, and for this offence we recommend a two years penalty."*

Accordingly, the Sections now read:

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* *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (1973) No. 54 published by the Government Printer, N.S.W.

"76. Whosoever assaults any female and, at the time of, or immediately before or after such assault, commits any act of indecency upon or in the presence of such female, shall be liable to imprisonment for four years, or, if the female be under the age of sixteen years, to penal servitude for six years.

76A. Any person who commits any act of indecency with or towards any girl under the age of sixteen years, or incites a girl under that age to any act of indecency with him or another, shall be liable to imprisonment for two years."

*Data Analysis*

At the time of writing, there are no statistics available in relation to the number of offenders convicted under Section 76A. However, the figures given in the following Table indicate that apart from those placed on a recognizance a large proportion of those convicted of indecent assault on a female receive prison sentences of between 2 and 5 years.

COURT STATISTICS 1975

Indecent Assault on Female *

(See p.50 for Table)

COURT STATISTICS 1975

Indecent Assault on Female *

| | NUMBER | % |
|---|---|---|
| Acquitted | 5 | 5.3 |
| Rising of Court | 0 | 0 |
| Committed to Child Welfare Institution | 0 | 0 |
| Recogn. (and/or probation and/or fine) | 52 | 55.3 |
| Fine only | 0 | 0 |
| Governor's Pleasure | 0 | 0 |
| Periodic Detention | 1 | 1.1 |
| Imprisonment Less than 6 months | 0 | 0 |
| Imprisonment 6 months up to 1 year | 1 | 1.1 |
| Imprisonment 1 year up to 2 years | 12 | 12.8 |
| Imprisonment 2 years up to 5 years | 20 | 21.3 |
| Imprisonment more than 5 years | 3 | 3.2 |
| TOTALS: | 94 | 100.0 |

* From *Statistical Report 7 Series 2* at p.100. Published by the Department of the Attorney General and of Justice NSW Bureau of Crime Statistics and Research.

*ASSAULT ON A FEMALE UNDER 16 YEARS OF AGE*

In *Bronszewski* (C.C.A. 11 April 1975) the appellant applied for leave to appeal against the severity of a sentence of 4 years' imprisonment in consequence of being found guilty of an assault on a girl who was aged 4 years. The offence occurred when the child's mother had left

her in the flat with the appellant. When she returned, the appellant was lying naked on top of the child who was also naked on a bed. The child's legs were apart and he was lying between them. The medical evidence established both bruising and a degree of rupture of her hymen.

*Criminal Record of the Appellant*

Although the appellant had an extensive criminal record occupying over four pages of foolscap, it was generally confined to offences of dishonesty. There were no offences of violence or of a sexual nature in his record. However, the Court pointed out that the offender was involved in a course of "almost continual criminality."

*Drugs*

Although the appellant contended at the trial that he had no recollection of the circumstances of the offence and that he had taken some Mandrax tablets, the jury nevertheless considered that the appellant had intended the assault. The maximum sentence for the offence, as it stood at the relevant time, was 5 years, and it was urged on the appellant's behalf, that the extent to which he was affected by the drug ought to have been taken into account in assessing whether such a heavy sentence, relative to the statutory maximum, was appropriate.

However, the Court of Criminal Appeal rejected this argument and saw no justification for differing from the view which the trial Judge formed as to the seriousness of the offence. The Court therefore considered that the four years was an appropriate period of imprisonment. At the trial, the sentence of four years was fixed in

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association with a sentence of one and a half years' imprisonment for breach of a recognizance that the appellant entered into in connection with a number of property offences. The latter sentence was made cumulative on the four years' term for the indecent assault making a total of five and a half years, dating from 27 June 1974.

*The Non-Parole Period*

A non-parole period of three years was fixed by the trial Judge to expire on 9 December 1977, and it was submitted that this non-parole period was excessive. It was argued that if remissions were earned the appellant would have little time available during which he would be out on parole should he be granted parole at the earliest possible date. In response to this submission, Street C.J., who delivered the judgment of the Court, said:

> "There is not in our view any justification on this ground for interfering with His Honour's determination on the matter of the non-parole period. The situation with which His Honour was confronted was one which necessitated his determining the minimum period of imprisonment to be served in all the circumstances and the determination of three years ... does not in any way attract the intervention of this Court."

Accordingly, the appeal was dismissed.

In *Mitcheson* (C.C.A. 16 May 1975), the offender had been sentenced to imprisonment for twelve months with a stated non-parole period of six months as a result of having been convicted of assaulting, with an act of indecency, a girl under the age of sixteen. The girl was ten years of age at the time of the offence.

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The assault took place in the premises in which the appellant was residing. Whilst the girl and her sister were playing nearby he encouraged her to come into the house by displaying a $2 note. Once inside the offence was committed. Shortly afterwards the girl's mother called out for the child and she left.

*Background of Offender*

Although the appellant had two convictions for driving with excessive blood alcohol he had no serious criminal record. He was single and was described by the Court to have lived a useful life, and to have been in good employment. However, he was said to drink at weekends to excess and, on the occasion of the offence, he had had a considerable amount to drink earlier in the day.

*The Argument in Mitigation*

Counsel for the appellant drew the Court's attention to a favourable probation report and to the psychiatrist's report, both of which indicated that his actions on the whole were impulsive, and further that he was now contrite and ashamed of his behaviour. It was also argued that he should be released as he had already served some three months of his sentence, on recognizance.

In the result the Court said that the offence was serious and bad and accordingly dismissed the appeal.

In *Micevski* (C.C.A. 29 August 1975), the appellant applied for an extension of time to appeal against the severity of a sentence of twelve months' penal servitude with a specified six months' non-parole

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period passed upon him in consequence of his pleading guilty to a charge of assaulting a female with an act of indecency. However, in this case the Court considered that the events of the assault came perilously close to rape. Accordingly, Street C.J., in delivering the judgment of the Court, said:

> "Notwithstanding his prior good character and the evidence given in this regard ... and even giving the fullest weight to the elements of personal tragedy ... we see no basis whatever for interfering with the view taken by the learned trial Judge."

*Smith*'s case (C.C.A. 7 March 1975) was an application for leave to appeal against a sentence of 12 months' hard labour imposed upon the offender as the result of offences committed under S.76A of the *Crimes Act*. Although there were two charges, the learned trial Judge dealt with them as one because there was only one incident involved.

The Court did not detail the circumstances of the incident. However, Taylor, C.J. at C.L., who delivered the judgment of the Court described the incident as "disgusting" and that it was "committed towards two very young girls, one of whom was six and the other seven years of age."

*The Non-Parole Period*

The Court considered the sentence to be a proper one but noted that His Honour did not specify a non-parole period. As the sentence imposed was one of not more than twelve months he was not obliged under the relevant legislation to do so. The reason given by the trial Judge for not specifying a non-parole period was as follows:

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> "I have deliberately not fixed a non-parole period because, in fact, it appears that it would be almost useless. By ordinary remission you would get out in eight months' time, and the minimum non-parole period I could fix would be six months. It seems to me a useless exercise."

However, the majority of the Court were of the opinion that this approach was wrong, and that the accused could have the benefit of an effective non-parole period of six months. Furthermore, it considered that such a sentence was appropriate and accordingly the Court dismissed the appeal against the head-sentence but fixed a non-parole period of six months.

## OFFENCES AGAINST MALES

*BUGGERY*

Although the offence of buggery may be committed against females, prosecution for such offences are rare. When they occur they are often associated with rape charges, as in *Catlin* (C.C.A. 18 December 1975) where the charges arose from the same set of circumstances, involving the same victim. On that occasion the offender received concurrent sentences of eight years' penal servitude for one count each of rape and buggery. However, buggery prosecutions are more prevalent in the case of male victims, and for that reason they have been included under this heading.

As with rape, the offence of buggery may attract heavy custodial sentences. Generally, where the offender has committed the offence by the use of considerable force or violence, he may expect sentences in excess of 5 years, even though the maximum penalty for the offence

is 14 years' penal servitude. Section 79 of the *Crimes Act*, provides:

> "79. Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for fourteen years."

*Data Analysis*

Although, like rape, custodial sentences are commonly imposed for this offence, unlike rape a large proportion of convicted offenders are released on recognizance (see Table 2 *supra*). The following Table also indicates the sentences imposed on persons who were brought before the Higher Criminal Courts for this offence. However, as the sample is small, only a very general trend may be inferred from these statistics.

COURT STATISTICS 1975

Buggery and Bestiality

(See p.57 for this Table)

COURT STATISTICS 1975

Buggery and Bestiality*

| | NUMBER | % |
|---|---|---|
| Acquitted | 2 | 18.2 |
| Rising of Court | 0 | 0 |
| Committed to Child Welfare Institution | 0 | 0 |
| Recogn. (and/or probation and/or fine) | 4 | 36.4 |
| Fine only | 0 | 0 |
| Governor's Pleasure | 0 | 0 |
| Periodic Detention | 0 | 0 |
| Imprisonment Less than 6 months | 0 | 0 |
| Imprisonment 6 months up to 1 year | 1 | 9.1 |
| Imprisonment 1 year up to 2 years | 0 | 0 |
| Imprisonment 2 years up to 5 years | 2 | 18.2 |
| Imprisonment More than 5 years | 2 | 18.2 |
| TOTAL: | 11 | 100.0 |

* From Statistical Report 7 Series 2 (*Op.cit.*) at p.100

*The Seriousness of the Offence*

One explanation for the relatively few cases and therefore fewer sentences imposed for Section 79 offences may be that, especially in the consenting situation, little or no violence is involved.

Thus in *Kable* (C.C.A. 15 September 1972) the Court of Criminal Appeal pointed out that the offence of buggery appeared to be regarded

nowadays as less serious in some circumstances when the offence is committed between consenting males. However, in *Lebrocq* (C.C.A. 28 June 1974), the Court, consisting of McClemens C.J. at C.L., Begg, J. and Isaacs, J., also pointed out that if the offence is to be regarded as less serious in the eyes of the law in respect of certain circumstances, then it is for the legislature to amend Section 79.

*The Age of the Victim*

The legislature makes no distinction regarding the age of male victims - unlike sexual offences committed against females. However, the cases make it clear that the disparity of ages between the offender and victim are relevant to sentence. Thus in Lebrocq (*supra*), the offender was charged on counts of buggery and indecent assault. The Court of Criminal Appeal dismissed the appeal against the severity of sentences of 3 years' hard labour on the buggery charge, and 12 months' hard labour on the indecent assault charge, and in so doing placed particular emphasis on the ages of the appellant and his victim. McClemens, C.J. said:

> "One comes back to this: whatever may be the position between two men of mature age this is the case of a boy of fifteen and a man of thirty-one."

As with other sexual offences therefore, the disparity between the ages of the aggressor and his victim is a relevant factor to be considered in the sentences to be imposed.

In *Davy* (C.C.A. 4 April 1975) the offender was convicted for the crime of buggery, and sentenced to nine years' hard labour with a

non-parole period of five and a half years. The actual offences involved the waylaying of a 15-year-old youth in Goulburn, and by the use of threats terrifying him into submitting to the offences which occurred firstly, near some bushes in a darkened park and later on, in a disused house. The Court of Criminal Appeal agreed with the remarks of the trial Judge who considered this to be a most revolting crime:

> "The victim was a youth of fifteen. He gave no encouragement. He was waiting for his father. By threat of violence, particularly that he would be knifed, he was forced to subject himself to the vilest indignity that anybody could endure."

*Mitigating Considerations*

On behalf of the appellant it was submitted that the trial Judge had not given sufficient weight to the fact that the appellant had pleaded guilty to the charge and therefore saved the boy from the distressing experience of giving evidence in the witness box. It was also submitted that the fact that the appellant was under the influence of alcohol at the time of the offence and that he had assisted the police were relevant considerations to be taken into account. However, the Court of Criminal Appeal considered that His Honour had taken the above matters into account, and that had he not done so, the Court nevertheless considered that nine years was not too severe a sentence to impose in the circumstances of this particular case.

*The Non-Parole Period*

It was also submitted that the non-parole period was excessive in the view of the special remissions that the offender could earn. The time

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at which the appellant might be released differed by only a few months to the time at which he would be eligible for parole. Accordingly the Court reduced the non-parole period from 5½ to 4¼ years, but the head sentence of 9 years was confirmed.

In *Clarke and Cathro* (C.C.A. 7 February 1975) the offenders, who were both homosexuals, appealed against cumulative sentences totalling, in the case of Clarke, 15 years with a non-parole period of 10 years, and in the case of Cathro, 10 years, with a non-parole period of 5 years. These sentences were imposed in consequence of their pleading guilty to three separate charges of buggery committed by them in concert on three separate occasions. In each case the victim was a boy of about 15 or 16 years of age to whom the offenders had offered a lift in their panel van at night. The victim, on each occasion, was terrified into submitting to acts of sodomic rape. On the first count Clarke received 7 years' imprisonment, on the second count 4 years' and on the third count 4 years', each of the sentences being consecutive. In the case of Cathro, the sentences imposed were 5 years' imprisonment for the first count, and three years' imprisonment on each of the other two counts, again all sentences to be served consecutively.

*Cumulative Sentences*

In relation to the appeal against the severity of the head-sentence, it was submitted that at most there should have been only one cumulative sentence, making the third sentence concurrent with the second. However, the Court of Criminal Appeal rejected this argument pointing out that the offences were of an extremely serious nature. Furthermore, it

referred to the decision in *Enos* ((1956) 40 C.A.R. 92 at 94) where it was said that:

> "The business of a court is to consider what is the proper length of imprisonment to impose for a particular offence."

Furthermore, in *Combo* ((1971) 1 N.S.W.L.R. 703 at 705) the Court also said:

> "The judge fixes the objectively correct length of sentence according to the accepted standard for that type of offence."

Accordingly, the Court held that not only were the head-sentences proper, but that this series of offences was appropriate for the application of the provisions of the *Crimes Act* which made more than one cumulative sentence possible.

*The Non-Parole Period*

The Court of Criminal Appeal then referred to the authoritative statements of the High Court in *Lyons* (2 July 1974) where the principles on which a judge should fix a non-parole period were considered. It stated the following:

> "The judge, in fixing a non-parole period, must, we believe, have regard not to the time within which the paroling authority must consider the prisoner's case but to the time for which the prisoner must remain in confinement. The legislature in clear terms (Section 4 in the New South Wales Act ...) provided that the trial judge should determine that minimum period for which in his judgment, according to accepted principles of sentencing, the prisoner should be imprisoned.

> ... It is our opinion that the Act as a whole does not convert a sentence of imprisonment from a punishment into an opportunity for rehabilitation. We cannot understand how a sentence of imprisonment, either with or without hard labour, can, however enlightened the prison system is, be regarded as otherwise than a severe punishment for a crime which has been committed and for which the law has provided imprisonment, or imprisonment with hard labour, as the appropriate penalty. It is true that, in following the legislation of other states and enacting the *Parole of Prisoners Act,* 1966, the New South Wales legislature took a large step towards ensuring that a prisoner can, by his own behaviour while a prisoner, secure his release from confinement upon parole without serving the full term to which he has been sentenced, but the encouragement to reform so provided does not and obviously is not intended to take the sting out of imprisonment ....
>
> 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 called for such detention." [1974] 48 ALJR 297 at 299.

The Court then referred to its power to review the non-parole period fixed by a trial Judge under the terms of s.6(3) of the *Criminal Appeal Act* and under s.4B of the *Parole of Prisoners Act,* 1966. The Court then adverted to *R* v. *Gosper* (28 S.R. 568) wherein the principles of s.6(3) were enunciated in the following terms:

> "The Court of Criminal Appeal, in the exercise of the powers vested in it by virtue of s.6(3) of the *Criminal Appeal Act,* 1912, has an unfettered judicial discretion to review sentences imposed upon convicted persons without the necessity of considering whether, in imposing any sentence under review, the trial Judge proceeded upon any wrong principle, or upon any misapprehension of the facts."

Gosper followed the earlier High Court case of *Whittaker* (41 C.L.R. 230) and the Court referred to the fact that this approach had been

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followed consistently "in the ensuing years." (See, for example, *Evans* (1961) N.S.W.R 935 and *Tyrell* (C.C.A. 31 May 1974)). The same approach was to be applied under s.4B of the *Parole of Prisoners Act* and in particular the Court emphasised that "it is not incumbent upon the appellant to demonstrate any error of principle on the part of the sentencing Judge" before it could exercise its discretion in imposing such non-parole period as it thought proper.

*Remissions*

The Court then pointed out that in fixing the non-parole period, the Court was permitted to have regard to the prisoners entitlement to remissions under the *Prisons Act* and Regulations. It pointed out that prisoners who have not previously served terms of imprisonment were entitled, subject to conditions of good behaviour and the like, to remissions of one-third of the sentence. Those who had served terms of imprisonment previously were entitled to a corresponding remission of one quarter of the sentence. Further remissions could be earned under other provisions of the regulations. However, Street C.J., who delivered the judgment of the Court, said:

> "The non-parole period, if one is to be fixed, should expire before the time when such remissions would be given effect. The operation of the *Parole of Prisoners Act* could be rendered pointless unless such remissions were taken into account. For example, fixing a non-parole period which would expire either contemporaneously with or beyond the date on which the prisoner would normally be released by virtue of the remissions earned, would achieve nothing. If the Judge considers this to be the appropriate minimum period of imprisonment then he will normally refrain from fixing a non-parole period."

The Court then made reference to the requirements of s.4(3) of the

*Parole of Prisoners Act,* which requires a Judge, who refrains from specifying a non-parole period, to give his determination and the reasons therefor in writing. Furthermore, determination and reasons have to be given prior to the final determination of the matter (see *Titterton*, C.C.A. 7 December 1973, per McClemens C.J. at C.L.).

Ultimately the Court considered that the determination of the appropriate non-parole period:

> " ... involves in each case no more than a common-sense application of the *Parole of Prisoners Act* in the objective facts and circumstances under consideration, included amongst which are, of course, the relevant provisions of the current statutes and regulations relating to remissions."

The Court then turned to consider the sentences imposed in respect of Cathro and Clarke. With respect to the former, it considered that the aggregate sentences of eleven years and the non-parole period of five years was a proper sentence in the circumstances of the case.

However, the court found "some difficulty and anxiety" with respect to the sentence (aggregating 15 years with a non-parole period of 10 years) imposed upon Clarke. Street C.J. said:

> "The trial Judge was at pains to make it clear that Clarke was in effect being treated as if no non-parole period were being specified; yet His Honour stopped short of expressly refraining from so doing, and thus we have no reasons in writing as would in such case have been required by s.4(3). The Judge fixed a minimum non-parole period of ten years which in fact approximates the period the appellant would serve with ordinary remissions before being entitled to conditional or unconditional release under s.41(4) of the *Prisons Act*. His Honour did in fact specify a non-parole

> period and, although this Court has power so to do, we do not feel that in this case, in the absence of any contention to that effect by the Crown, we should overrule him by expressly refraining under s.4(3) from fixing a non-parole period. We must consider then what is a realistic and appropriate period to specify."

After evaluating all the relevant considerations the Court considered that eight years was an appropriate minimum term in Clarke's case and varied the non-parole period accordingly. In other respects the sentences against Clarke and Cathro were confirmed.

*Violence in Prison*

In *Stravropooulos* (C.C.A. 30 August 1974) the offence of buggery took place in the gaol of the Albury Police Station. The complainant was threatened and to some extent overpowered when he was overborne by five men and then homosexually raped by the appellant. The trial Judge imposed a sentence of six years' imprisonment in consequence of this offence (with a three-year non-parole period), and it was urged on the offender's behalf that this sentence was excessive, particularly in the light of his prior record which consisted of a number of relatively minor offences. After emphasising that persons who perpetrate violent acts can expect to be severely dealt with by the courts, Street C.J. said:

> "So far from there being any moderation of this approach when violence is brought to bear by one prisoner upon another, there is a significant added reason for the Courts taking a serious view where violence is brought to bear in the confined circumstances of prison life where inmates can neither choose the company they keep nor have they freedom to dissociate themselves from other inmates whose company they may detest. Where, as here, there is an act of homosexual interference with a

> prisoner directly against the will and assent of the passive prisoner there are strong grounds for dealing severely with the guilty party."

Accordingly the Court dismissed the appeal.

*INDECENT ASSAULT ON OR ACT WITH MALE*

The relevant section dealing with this offence is s.81 of the *Crimes Act,* and it provides as follows:

> "81. Whosoever commits an indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years.

*Data Analysis*

The offence of indecent assault on, or act with a male person is more likely to result in the offender receiving a recognizance, (sometimes subject to the condition that the offender be placed on probation, and sometimes in combination with a fine) than any other disposition. Indeed the statistics for 1974 indicate that approximately one-third of those convicted for this offence received custodial sentences (see Table 2 *supra*). The data for those receiving custodial sentences in the High Courts during 1975 are given in the following Table:

HIGHER COURT STATISTICS 1975

Indecent Assault on or Act with Male

(see p.67 for Table)

## HIGHER COURT STATISTICS 1975*

Indecent Assault on or Act with Male

| | NUMBER | % |
|---|---|---|
| Acquitted | 3 | 7.9 |
| Rising of Court | | |
| Committed to Child Welfare Institution | | |
| Recogn. (and/or probation and/or fine) | 25 | 65.8 |
| Fine only | | |
| Governor's Pleasure | | |
| Periodic Detention | | |
| Imprisonment Less than 6 months | | |
| Imprisonment 6 months up to 1 year | 2 | 5.3 |
| Imprisonment 1 year up to 2 years | 3 | 7.9 |
| Imprisonment 2 years up to 5 years | 3 | 7.9 |
| Imprisonment More than 5 years | 2 | 5.3 |
| Total: | 38 | 100.0 |

* From Statistical Report 7 Series 2 (*Op.cit.*) at p.100

*Case Analysis*

In *Burns* ([1969]2 N.S.W.R. 591) the Court of Criminal Appeal consisting of Herron, C.J., Sugerman, J.A. and O'Brien, J., considered the case of an applicant, who had been sentenced at the Court of Quarter Sessions (as it was then called), to imprisonment with hard labour for two years, and with a non-parole period of 10 months, in consequence of

his pleading guilty to a charge of indecent assault on a male person.

The appellant had been placed in charge of three boys and a girl in the home of their parents for the purpose of babysitting. During the evening when the boy was in the lounge watching television the applicant pulled down the boy's pyjama shorts and played with his penis. He then endeavoured to place his penis in the boy's back passage on two occasions. However, no actual penetration occurred and the boy was sent to bed.

*Imprisonment to be Avoided*

This was a case in which a man of previous good character had given way to sudden temptation, and the Court considered that to send a first offender to gaol for offences of this sort were to be avoided. Reference was made to the fact that the man was hard-working, had reached the age of 35 with a good record, and that with one small child his wife was not in a position to work.

> "We think it is a case in which the situation should be weighed up very carefully to see whether this was not an isolated lapse by a man who was suffering from a degree of sexual frustration in his married life and who succumbed to this temptation momentarily and probably after he had been drinking.
>
> ... We think this was an onset of sudden temptation. It was not a repetitive act; it had not happened before. The prisoner is of good antecedents and repute, a hard-working man. It may be that he suffered from certain tensions which might be described as psychiatric, although not truly so, but it is something that he would need to watch in the future. To send him to gaol for two years seems to us to be an unnecessary act of vengeance on behalf of the community and we do not think that the protection of the community requires such a term of imprisonment." (*supra* at p.592)

*Taste of Gaol a Sufficient Deterrent*

The Court pointed out that the appellant had already spent about a month in gaol and therefore that the taste of gaol had been a very sharp lesson to him. The Court considered that in the circumstances, a shorter sentence would not have added very much to the deterrent effect upon the prisoner to the time he had already spent in gaol. Accordingly, in the Court's view, the community would be better served if the offender were to be released to enable him to go back to his work and support his family.

In the result the sentence was varied and the prisoner was released on a recognizance to be of good behaviour for three years and to come up for sentence if called upon. Furthermore a term and condition of the bond was that he should place himself "under the treatment and control of the Adult Probation Service and that he obey their direction, if any be thought fit, in the matter of seeking psychiatric treatment and his addiction to intoxicating liquor." (*ibid*)

In *Combo* ((1971) 1 N.S.W.L.R. 703), the offender appealed against the severity of a sentence of 5 years' imprisonment with hard labour imposed on a charge of indecent assault on a male person.

*The Mental Defectives (Convicted Persons) Act*

The trial Judge declined to specify a non-parole period, and recorded his view that Combo was, within the meaning of the *Mental Defectives (Convicted Persons) Act*, 1939, a mentally defective person requiring supervision and control for his own protection as well as for the protection of other persons. He directed that his findings be forwarded to the Minister for attention pursuant to the Statute.

In turn the Minister was required to have the prisoner examined, as to his mental condition, by two legally qualified medical practitioners separately and apart from each other. A magistrate would then be required to conduct an enquiry, and if satisfied that the person was mentally defective within the meaning of the Act, he could then order that the prisoner be detained in an institution during the Governor's pleasure. The sentence imposed by the trial Judge would run concurrently with any period of detention imposed under the *Mental Defectives (Convicted Persons) Act* but, at the time of this appeal the order of the magistrate had not been made. Nevertheless, the Court considered that if the order were made it would not affect the sentence which the trial Judge imposed even though it could affect the administration of it.

*Danger to Society*

Counsel for the offender argued that the maximum sentence which was imposed by the trial Judge should be reserved for the worst cases and submitted that this was not such a case. The Court did not agree with this argument and said "it would be hard to imagine a more serious offence of this type than the offence committed by the appellant, a man of forty-two on a boy of fourteen." The Court then referred to the mental and emotional condition of the offender and said:

> "It may be that the appellant is suffering from some mental or emotional disturbance falling short of mental illness as legally defined but, as we understand the authorities, where viewed objectively as if the crime had been committed by a person of normal mental condition the sentence imposed by the trial Judge is a proper one and it ought not to be reduced where the appellant's condition is such that if he remains at large he is potentially a continuing danger to society and to himself." (*supra* at p.705)

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Next, reference was made to a medical report which stated that at a particular hospital the appellant had been known to be a very active homosexual and had infected a number of patients with venereal disease. Accordingly the Court was of the view that the sentence imposed by the trial Judge was perfectly proper and ought not be interfered with.

*Considerations Applicable to the Non-Parole Period*

With regard to the question of the non-parole period, the Court said that it was still the law that the Judge should fix the correct length of sentence objectively, and according to the accepted standard for that type of offence. However, different considerations apply to the determination of the non-parole period. The Court then cited the words of Lord Parker C.J. in *R* v. *Assa Singh* ([1965] 2Q.B. 312):

> "'This court has never in sentencing a man taken into consideration that he may be released for good conduct, and for that reason increased the sentence.'" *(ibid)*

However, different considerations apply to the fixing of a non-parole period where it is possible to take into account earlier release by virtue of Pt.XV of the Prisons Regulations, made under the *Prisons Act*, 1952:

> "In our opinion judges in fixing a non-parole period ought to take into consideration the likely length of remissions because, without taking these into account, the fixing of a significant non-parole period is not possible. A man cannot be released by the Parole Board before the non-parole period is over, but then it has a statutory discretion whether to release him or not on parole subject to conditions and subject to supervision." (*supra* at p.706)

The Court emphasised that the fixing of a non-parole period could be pointless where remissions were not taken into account and gave the following illustration:

> "A three years and six months non-parole period would be pointless where a five-year term of imprisonment was imposed because if the man earned all his remissions he would be released without conditions before his case could be considered by the Parole Board for release on parole. That would mean that during a year and a half when he might be under parole supervision he would be at liberty under no supervision at all." *(ibid)*

Assuming that the offender was not to be made subject of an order under the *Mental Defectives (Convicted Persons) Act*, with remissions he might be released in just over 3 years. The offender had only one prior conviction (for vagrancy in 1968), although he had spent most of his life in institutions. Accordingly, the Court considered it would be far better to release the offender on parole prior to the expiration of his full sentence so that the Parole Officers:

> "could see that he was housed, supervised, perhaps required to attend a mental hospital, and watched during the whole period, otherwise there will be a period of 16 months, possibly more, when he will have no supervision whatsoever.
>
> As pointed out in *Osborne* ([1968] 3 N.S.W.R. 291) and in *Barben* ((1968) 92 W.N. (N.S.W.) 182) the general policy and intendment of the *Parole of Prisoners Act*, 1966, is that wherever possible a non-parole period should be fixed in order that provisions of that Act should become applicable to a prisoner." *(ibid)*

*The Fixing of a Non-Parole Period not necessarily Act of Leniency*

Next the court made the following observation:

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> "To regard the fixing of a non-parole period as merely being a form of leniency is to fall into error. In individual cases, by reason of the operation of s.6(3) of the *Parole of Prisoners Act*, it be the very reverse, and it may in an individual case result in a more severe sanction than could happen where no non-parole period was fixed, because in the latter instance the Remissions Regulations may operate. There are, of course, some cases in which it is recognized by the Act that the fixing of a non-parole period is undesirable, and others in which it would be pointless (cf *R* v. *Hull* (1969) 90 W.N. (Pt 1) (N.S.W.) 488, at p.492)." (*ibid* at pp.706-7)

Accordingly the Court fixed a non-parole period of two years and nine months, confirming the sentence in other respects, and pointing out that this was not for the purpose of releasing a man who may be a menace in the future to boys earlier than otherwise might be the case but for the purpose of ensuring "as far as one can that when he is released he is released under supervision and to conditional liberty only." *(ibid)*

In *Murray* (30 August 1974), the appellant brought an application for leave to appeal against the severity of sentences imposed upon him in consequence of his pleading guilty to three charges of indecent assault on a male person. Two of the offences occurred on 5th November 1972, and the third arose on the 24th March 1973. After pleading guilty the appellant was sentenced to two years' imprisonment in respect of the 1972 offences and 2½ years cumulative in respect of the 1973 offence. The sentences were passed on 30th May 1974 and the trial Judge fixed a non-parole period of 20 months.

The appellant, who appeared in person in the Court of Criminal Appeal

presented a lengthy written statement putting forward a number of considerations relating to the application. The 1972 offences concerned a number of homosexual acts committed by the appellant and another adult on two 13 and 14-year-old boys. The appellant and his companion picked up the boys, gave them beer and after driving them some distance in their car apparently without any overt violence towards the boys, they committed a number of indecent acts.

*Age of Victim*

The Court stressed that the significant ingredient in the first two offences was the age of the boys upon whom the acts of indecency were perpetrated. The third offence occurred while the committal proceedings on the first two charges were current. On this occasion the appellant and the same adult companion picked up the boy on whom the offence was committed. They took him to a flat at Bondi and there certain further acts of indecency of a homosexual nature were committed on this boy, who was only aged 15. The appellant was aged 34 at the time of the offence. He was a confirmed homosexual and was apparently engaged in a homosexual relationship with the other adult who was involved in the same conduct.

> "The significant matter from the point of view of the administration of the criminal law is that these two homosexual adults preyed upon boys of ages ranging from 13 to 15. Notwithstanding the absence of any element of violence in respect of the 1972 occasion there was, although the appellant now disputes this, material before the Judge indicating that the boy concerned in the third offence was physically overborne."

*Assistance to Police and Remorse*

The appellant put forward material which indicated that on a number

of occasions he rendered material assistance to the police force in respect of a variety of criminal matters disassociated from homosexuality, and on more than one occasion he led to the successful apprehension and prosecution of other criminals. The Court acknowledged that this was undoubtedly a matter which the appellant was entitled to have taken into consideration in his favour in determining the proper measure of sentence to be passed upon him. He claimed, in this particular appeal, that this material was not placed before the sentencing Judge. However, when the Court considered the history of co-operation and assistance to the police force, it considered that this was not sufficient ground standing alone, for the Court to interfere, either with the sentence passed, or with the non-parole period. Secondly, the appellant asserted in his written statement that he genuinely repented the circumstances of the offences and the assaults committed on these boys. But the Court added:

> "But that repentence is not enough to justify the Court taking a lenient view where homosexual conduct is practised against young boys, and in particular it is not enough where an element of violence is present as must be taken to have been the case on the second occasion."

Finally the Court concluded as follows:

> [W]e do not consider that the omission to place before him the degree of assistance the appellant gave to the police on other occasions is sufficient to establish any error in the determination of the sentence or the non-parole period fixed at the first instance. Accordingly we are of the view that the appeal should be dismissed."

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In *Roberts* (C.C.A. 1 November 1974) the appellant pleaded guilty to two charges of indecent assault on an 8 or 9-year-old boy, and in consequence thereof he received two sentences of 2½ years' hard labour cumulative, with a non-parole period of two years and four months. Although the appellant was not represented in the proceedings before the District Court the trial Judge pointed out that he had refrained from placing weight upon the statement of the boy where it conflicted or contrasted with the free and voluntary confession which had been made by the appellant.

*The Appellant's Antecedents*

According to the appellant's written statement to the Court he had been living in a caravan and, although he was a married man, had separated from his wife and was presently aged 57. When he was five years of age he contracted polio which left him with a permanent disability in one leg. The affliction with polio delayed his entering school and his education was commenced at age 9, and he left school at 18.

*Criminal Record*

His work history could be regarded as satisfactory and he had no criminal associations so far as the police report was able to show. However, he did have two convictions of indecent assault on a male person for which he was sentenced on 13th June 1969 to 18 months' imprisonment with a non-parole period of 6 months.

*Circumstances of the Offence*

The first offence occurred when the boy went to the appellant's caravan and played cards with the appellant. The cards had

indecent pictures on their backs. The appellant gave the boy money but on this occasion there was little by way of interference between them. However, two days later the boy returned to play cards with the appellant again, and on this occasion they got into bed together. There was some physical contact between them when they were in bed together, and when the boy left he was given money again.

*Concurrent or Cumulative Sentences*

The Court pointed out that the two offences were committed two days apart, and that they were relatively closely related. The maximum penalty for the offence was five years, and the Court considered that in a situation such as this, two cumulative sentences of 2½ years each, making an aggregate of 5 years, was an excessive penalty to have imposed upon the appellant in the circumstances. It considered that concurrent, rather than cumulative sentences ought to have been imposed, although the Court added:

> "[W]e are not to be taken to be minimising the seriousness of offences of this nature committed by adult males upon boys whose age entitles them to the jealous protection of the criminal law."

*Subjective Considerations*

However, the court adverted to the fact that the appellant was a man of relatively advanced years who suffered from a physical disability since childhood. He had an apparently satisfactory work record, and although he had been before a court on a similar offence some five years earlier, he had not been known to have engaged upon similar

conduct since that occasion. The Court considered therefore, that a non-parole period of 12 months would be appropriate and ordered that the existing sentences be quashed. In lieu thereof, the appellant was sentenced to 2½ years' imprisonment with hard labour on each charge, the sentences to be concurrent and to date from 23 May 1974. The Court fixed a non-parole period to expire on 23 July 1975.

*Brogan*'s case (C.C.A. 31 July 1975) was described by Street C.J. as a tragic and difficult one. The appellant had been sentenced to cumulative sentences of 3 years' hard labour and 5 years' hard labour, in consequence of his pleading guilty to two charges of indecently assaulting males. The victims were boys of ten and seven years of age, respectively.

The offences involved the appellant masturbating in the presence of his victims. Although there was no major interference with either of the boys it appeared to be rather their presence and observation which the appellant sought in respect of this particular sexual deviance.

*The Appellant's Antecedents*

The appellant was a single man of 36 years of age, of above average intelligence and in all respects, except in regard to a weakness for alcohol which was evidenced by the two crimes with which he was charged, he had lived an apparently worthwhile and satisfactory life.

*Criminal Record*

However, the appellant did have a record of similar offences dating back to 1959, when he received a deferred sentence on four charges

of indecent assault on males. In 1961 he again received a deferred sentence on four charges. In 1969 he received a deferred sentence on a charge of indecently assaulting a male and in August 1972, he again received a deferred sentence on four charges of indecently assaulting a male, with another 20 similar offences taken into account.

*Mental Condition of the Offender*

According to psychiatric evidence, the appellant suffered from a brain condition which was affected by the consumption of alcohol. He had been treated by an eminent psychiatrist in earlier days at Callan Park for what was described as a "dysrhythm in the lower lobe of his brain." In 1971 the appellant recognizing that he had difficulty in controlling his weakness, voluntarily underwent psychosurgery. Apparently, this had some effect in diminishing his impulses in this particular direction but it appeared that there remained in the appellant's emotional make-up a residual weakness, exacerbated by the consumption of alcohol which still presented a risk of him again committing offences of the same kind. There was expert evidence by a psychiatrist, who considered that if the appellant were prepared to ensure that he submit himself to treatment by way of medication and consultation, there was a real prospect of ultimate recovery for him.

*Imprisonment and Rehabilitation*

Despite his record, the appellant had not been in gaol on any previous occasion and the Court said:

> "[I]t may well be that the shock to him of imprisonment, as indeed must follow in the present case, will be a significant factor in convincing him that he must himself go further in pursuing his rehabilitation."

*Alcohol*

Then with respect to alcohol the Court went on to say:

> "It seems clear that if he were to abandon alcohol he might well make some significant progress in this direction. Alcohol seems to be a not insignificant element in inducing in him a frame of mind, or a state of depression, that leads him into criminal conduct of this nature."

*Sentences Held Excessive*

Finally the Court of Criminal Appeal agreed that two sentences totalling eight years were excessive in the circumstances. It considered the offences were neither approaching the most extreme type of indecent assault on a male such as could properly attract the maximum of five years, and that the head sentences of three years and five years were excessive. However, it thought that this was a case in which cumulative sentences were justified and proper, because the offences were separate in point of time and in point of the identity of the boy involved. Accordingly the sentences of three years and five years were set aside, and sentences of 1½ years and 2½ years respectively, substituted.

*The Non-Parole Period*

The Court then considered the question of the non-parole period. It indicated that the deterrent effect of the sentence had to be

considered. However, it also considered that there was a basis for viewing that the appellant suffered from a diagnosed medical condition in his brain, and that full weight needed to be given to this fact when determining the non-parole period. The Court said:

> "Bearing in mind again the fact that this appellant had voluntarily undergone a brain operation which demonstrates his then determination to do something about removing this weakness from his emotional make-up, bearing in mind that this is the first time that he had been in gaol, and bearing in mind the optimism expressed or implicit within the evidence given by Dr. Bailey, we take the view that a non-parole period of 12 months as from the date of the sentence, that is to say, 24 April 1975, is an appropriate determination in this regard."

In the result the sentences were set aside, including the non-parole period, and instead, the appellant was sentenced to 18 months on the first charge and 2½ years on the second charge (to be cumulative) and a non-parole period of 12 months was fixed. Further the Court directed that the evidence of the psychiatrist and the terms of the reasons be placed on the appellant's file and drawn to the attention of the Departmental medical authorities. The Court further recommended that the appellant be given "such psychiatric and other medical treatment as his condition may appear to require."

In *Charlton* (C.C.A. 27 February 1976), the appellant appealed against the severity of a sentence of 2½ years, and a non-parole period of 11 months in consequence of his being convicted of a charge of indecent assault on a male person.

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*Circumstances of Offence*

The offence was committed in a public lavatory at Moss Vale where the complainant, who was a boy of 14 years, was attacked while leaving a cubicle in the lavatory. Some violence was perpetrated and the complainant showed some superficial damage to his skin in various parts of his body.

*Appellant's Antecedents*

The appellant was aged 39 and had been in regular employment for some years prior to the occurrence of the assault. He was apparently regarded, in the area in which he lived, as a law-abiding and peaceable citizen. Apparently he suffered from a hearing defect, he had a diminutive stature, a withdrawn nature and was of a somewhat solitary disposition.

*Criminal Record*

He had on his record in 1968 an entry for indecent assault on a male person, buggery and gross indecency on a male person, in respect of which he was released on a three-year good behaviour bond. In other respects his record was clear.

*Custodial Sentence Required*

However, the Court of Criminal Appeal considered that in view of the appellant's prior record, the circumstances of the crime itself, the need to protect young people from assaults of this nature, and in particular, in view of the presence of violence which was a difficult feature about the case, this case was taken out of the category of

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cases which could be dealt with by a deferred sentence. Therefore the Court was of the view that the head-sentence of 2½ years was appropriate.

*The Non-Parole Period*

However, with respect to the non-parole period there were a number of subjective elements in the appellant's favour which could be given weight, without in the opinion of the Court impinging upon the necessity to give full recognition to the elements of deterrence and retribution. First the Court took into account that the period of imprisonment had involved hardship upon the appellant. Apparently he had suffered violence at the hands of other inmates by reason of an expressed distaste on their part for the crime for which he was convicted. Secondly, he had also lost his job and third, had significantly prejudiced his hope of being able to acquire some land in Albury where he had intended to embark upon a farming enterprise. Indeed the conviction, and the period of imprisonment he had suffered "involved him in a major personal tragedy in his future life." Fourth the Court felt that his hearing deficiencies would constitute a significant obstacle in his being able to obtain gainful employment elsewhere. Accordingly the Court predicted that the offender would benefit from a lengthy period on parole, and that if a contemplated marriage were to eventuate it might result in a stabilising influence upon his future life. Finally the Court "not without hesitation" reduced the non-parole period from 11 months specified by the learned trial Judge, to the minimum period of 6 months.

## CONCLUSION

The bulk of cases considered in this Report are taken from recent unreported decisions of the Court of Criminal Appeal in New South Wales. Most of the cases involve appeals (or more accurately, applications for leave to appeal) against the severity of sentences imposed at the trial level. In some cases appeals are instituted by the Crown with challenges made as to the inadequacy of sentence. By examining these judgments it has been possible to discern a broad sentencing pattern and philosophy.

The most significant factor in sentencing involves an assessment of the seriousness of the offence. In this regard the legislature gives guidance by indicating the maximum penalties which may be imposed for particular offences. (The Court has often stated that the maximum penalty should be reserved for the most serious offence imaginable in its category). Appendix A contains, in summary form, a list of such penalties. A study of these penalties, when compared with the sentences imposed in practice reveals that maximum penalties are rarely imposed. For example, although rape carries a maximum penalty of penal servitude for life, the heaviest sentence imposed in the cases considered here is a sentence of penal servitude for 16 years.

Included in the concept of seriousness is the degree of violence used by the offender. Generally speaking the greater the degree of violence the more serious the offence and the heavier the penalty. Factors relevant to an assessment of the gravity of the offence include the use of weapons and the degree of injury, both mental and physical, caused to the victim.

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The disparity between the ages of the offender and the victim is also relevant in assessing the gravity of an offence. As indicated in this Report, the intention of the legislature to protect young girls from sexual molestation or interference can be easily discerned from the statutory grading of penalties. Similarly, persons in positions of authority or trust who take advantage of the very young are treated more harshly. It is of interest to note that although the ages of young female victims are specified in the legislation, this is not the case with respect to male victims. This may be an oversight in the legislation, although the cases involving male victims also show that emphasis is placed upon age disparity, particularly where older men take advantage of younger boys.

Factors that frequently emerge from the cases studied include the degree of premeditation involved in the crime, whether the offender was under the influence of alcohol at the time of the offence, whether the crime committed by the offender was out of character, the offender's reputation in the community and the offender's work record.

One factor particularly relevant to sex crimes is whether the victim precipitated or provoked the offence. For example, in a number of rape cases, where the victim had foolishly placed herself in a position of risk (for example by hitch-hiking) the Court has indicated that such conduct does not "excuse" the rape. Nevertheless, the sentences imposed in these cases appear to be slightly less severe than in situations where the offender has created the opportunity to commit the offence. An example of the latter situation is where the

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offender invades the privacy of the victim's home.

The Court's policy of sentencing in the more serious cases is clearly based on the principles of deterrence (both specific and general) and retribution. Rehabilitation of the offender, although important, assumes a secondary role, particularly in relation to crimes of violence. Even first offenders are likely to receive substantial custodial sentences. The two most significant factors in sentencing in this area are the circumstances of the offence with special emphasis on the degree of violence used, and the offender's prior criminal record. Appendix B contains in tabulated form a summary of these factors for rape offences.

Another important factor in assessing sentence is the medical or psychiatric condition of the offender. However, in many of the cases where the offender pleads, as a ground for mitigation of sentence, an emotional or mental disturbance, (short of mental illness) the Court tends to emphasise the need to protect the community in preference to considering the interests of the offender. Thus, if the Court is of the opinion that a sentence imposed by a trial Judge is proper and that the appellant's condition suggests that if he is to remain at large he is likely to be a potential danger to society and to himself, the sentence is unlikely to be reduced because of the offender's mental condition. On the other hand, where the offence itself is not particularly serious and the offender has a number of subjective elements in his favour, such as the fact that he has no prior convictions or that there is evidence indicating optimism in

relation to his treatment and cure, the Court may be expected to give weight to the rehabilitative aspect of punishment.

Rehabilitation as a policy consideration for sentencing is, as has already been suggested, a secondary or subsidiary consideration. Where weight is given to this principle, it usually means that a reduction of the non-parole period will follow. This in turn means a corresponding increase in the parole period, that is in the non-custodial, supervisory portion of the sentence. In cases involving little or no violence, the Court may allow an appeal against sentence on the ground that the appellant has already spent sufficient time in prison prior to the appeal being heard. The rationale for this approach is usually based on the assumption that the shock of imprisonment has taught the offender a lesson and, in the light of all the circumstances, no sufficient reason can be found which would justify the offender's continued detention.

Another plea for reducing the severity of sentence is remorse. Remorse is often expressed by the offender immediately after the offence, or leading up to, or during the trial. It is usually associated with a guilty plea whereby the victim is spared the need of testifying and is protected from the trauma of cross-examination. Evidence of remorse is often associated with an indication of the offender's willingness to co-operate with the police. However, in many cases where such submissions are raised, they appear to carry little weight with the Court of Criminal Appeal. This is because the Court often considers that the trial Judge has already taken these

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factors into account when determining sentence. Another reason is that, as with the offender's otherwise good character, the gravity of the offence often outweighs factors pleaded in mitigation. This approach tends to reflect the Court's general policy of deterrence and retribution.

In many cases, the subjective elements tend to be reflected in the length of the non-parole period rather than in the head sentence. It is in the area of the non-parole period that the prisoner's antecedents appear to have most effect. In certain circumstances, prior good character may result in the imposition of a comparatively shorter non-parole period although non-parole periods of less than one-third of the head sentence for violent crimes are rare. In most cases a non-parole period is set. However, where it is apparent that no benefit would obtain from the specification of a non-parole period the Court may decline to do so. Non-parole periods rarely exceed one-half of the head sentence. This is partly because of the offender's entitlement to remissions, which, under normal circumstances, enables him to be released after serving a proportion of approximately two-thirds, (for a first offender), and three-quarters (for an offender with a record of imprisonment) of the head sentence. The proportion of the sentence to be served may be further reduced because of special remissions, although entitlement to remissions is contingent upon the good behaviour of the offender in prison. In a number of cases the Court has held that it is proper in fixing a non-parole period to take into account remissions which an offender is likely to earn.

The non-parole period represents the minimum period of imprisonment

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which the offender is required to serve as a punishment for his crime. In some cases this means that there is little time between the expiration of the non-parole period and the earliest possible release date, taking into account likely remissions. Nevertheless even under these conditions, a non-parole period is normally specified.

Another interesting feature of the non-parole period is that the specification of a relatively short non-parole period is not intended to indicate leniency on the part of the sentencing judge. Indeed it may have the reverse effect because,upon release on parole, the offender is required to serve the balance of his sentence on parole thereby losing the benefit of remissions he might otherwise have obtained.

APPENDIX A.

This appendix sets out the principal sex offences with their prescribed penalties as contained in the *Crimes Act*, 1900 (N.S.W.), as amended. The information is given in an annotated form in order to provide a simple method of determining the statutory maximum penalties for these offences, and to facilitate the ease with which these offences and their penalties may be compared. However for more accurate information reference should be made to the relevant sections of the Act.

# STATUTORY LIMITS FOR SEXUAL OFFENCES

*Crimes Act,* 1900

| *SECTION* | *OFFENCE* | *MAX. PENALTY* |
|---|---|---|
| | *Rape and Similar Offences* | |
| 63 | Rape | P.S. Life |
| 65 | Attempts to commit, or assaults with intent to commit rape | P.S. 14 Yrs. |
| 66 | Procuring or inducing carnal knowledge by fraudulent means | P.S. 14 Yrs. |
| 67 | Carnal knowledge of girl under 10 years of age | P.S. Life |
| 68 | Attempts carnal knowledge, or assaults with intent to carnal knowledge, of girl under 10 years of age | P.S. 14 Yrs. |
| 71 | Unlawful carnal knowledge of girl of or above 10 years and under 16 years of age | P.S. 10 Yrs. |
| 72 | Attempts unlawful carnal knowledge or assaults with intent to have unlawful carnal knowledge of girl of or above 10 years and under 16 years | P.S. 5 Yrs. |
| 72A | Unlawful carnal knowledge or attempts to have unlawful carnal knowledge with person known to be an idiot or imbecile | P.S. 5 Yrs. |
| 73 | Unlawful carnal knowledge of girl of or above 10 years and under 17 years of age by teacher, schoolmaster, father, step-father | P.S. 14 Yrs. |
| 74 | Attempts unlawful carnal knowledge or assaults with intent to have unlawful carnal knowledge of girl of or above 10 years and under 17 years of age by teacher, schoolmaster, father, step-father | P.S. 7 Yrs. |
| 76 | Indecent assault upon or in presence of female; or girl under 16 years of age | Imp. 4 Yrs.<br>P.S. 6 Yrs. |
| 76A | Commits or incites act of indecency towards girl under 16 years of age with offender or another | Imp. 2 Yrs. |
| 78A | (a) incest - carnal knowledge by male of mother, sister, daugher or granddaughter;<br>(b) incest - female of or above 16 years of age by consent, permits grandfather, father, brother, or son carnal knowledge | P.S. 7 Yrs. |
| 78B | Attempts by male person to commit incest under Section 78A | Imp. 2 Yrs. |
| | *Unnatural Offences* | |
| 79 | Commits buggery and bestiality with mankind or animal | P.S. 14 Yrs. |
| 80 | Attempts to commit, or assaults with intent to commit, buggery and bestiality | P.S. 5 Yrs. |
| 81 | Commits an indecent assault on male of whatever age, with or without consent | P.S. 5 Yrs. |
| 81A | Procuring or attempts to procure by a male or is a party to the commission of act of indecency with another male in public or private | Imp. 2 Yrs. |
| 81B | Soliciting or inciting or attempts to solicit or incite by a male in public place | Imp. 12 Mths. |
| | *Misconduct with Regard to Corpses* | |
| 81C | Indecent interference with dead human body or improper interference or offers indignity to a dead human body or remains (whether buried or not) | Imp. 2 Yrs. |
| | *Attempts to Procure Abortion* | |
| 82 | A woman with child who unlawfully administers any drug or noxious thing or unlawfully uses any instrument or other means on herself with intent to procure an abortion | P.S. 10 Yrs. |

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| *SECTION* | *OFFENCE* | *MAX. PENALTY* |
|---|---|---|
| | *Attempts to Procure Abortion Contd.* | |
| 83 | Unlawful administration of drug or noxious thing or causes to be taken by any woman with or without child or unlawful use of any instrument or other means with intent to procure an abortion | P.S. 10 Yrs. |
| 84 | Unlawful supply and procuring of drug or noxious thing or any instrument knowing that same is intended to be unlawfully used with intent to procure the miscarriage of any woman, whether with child or not | P.S. 5 Yrs. |
| | *Concealing Birth of Child* | |
| 85 | Wilful concealment of birth by disposition of dead body of child, whether death occurred before, after or during birth, or attempts to conceal birth | Imp. 2 Yrs. |
| | *Abduction* | |
| 86 | Abduction from *motives of lucre* of woman with intent to marry or carnally know her, or caused her to be married or carnally known | P.S. 14 Yrs. |
| 87 | Abduction by fraud of female under 21 years out of possession and against the will of person having lawful charge of her, with intent to marry or carnally know her or cause her to be married or carnally known | P.S. 7 Yrs. |
| 89 | Forcible abduction of a female of any age with intent to marry or carnally know, or cause to be married or carnally known | P.S. 14 Yrs. |
| 90 | Abduction of unmarried girl under 16 years of age out of possession and against will of any person having lawful charge of her | Imp. 3 Yrs. |
| 90A | (a) kidnapping with intent to hold for ransom or any other advantage; | P.S. 20 Yrs. |
| | (b) if victim thereafter liberated without sustaining substantial injury | P.S. 14 Yrs. |
| 91 | (a) fraudulent or forceful enticement or detention of child under 12 years of age with intent to deprive any person having lawful charge of child or of the possession of such child or intent to steal any article from child, whosoever such article may belong; or | |
| | (b) any person who receives or harbours such a child knowing such child to have been enticed away or detained | P.S. 10 Yrs. |
| 91A | Procuring, enticing or leading away a person with or without consent for purposes or prostitution either within or without N.S.W. | P.S. 7 Yrs. |
| 91B | Procuring a person by fraudulent means - i.e., drugs, violence, threat or abuse of authority for purposes or prostitution either within or without N.S.W. | P.S. 10 Yrs. |
| 91D | Employment in brothel (other than police in course of duty) | P.S. 5 Yrs. |
| | *Bigamy* | |
| 92 | Bigamy | P.S. 7 Yrs. |
| 93 | Participation in Bigamy - i.e., married husband and wife knowing him or her to be married with respective spouses still living | P.S. 5 Yrs. |

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## APPENDIX B

This appendix contains a brief summary of recent rape (or rape related) sentencing decisions. The information given includes a brief description of the circumstances of each offence, some particulars of the offender's background (with special reference to his criminal history) and to the final determination of the Court of Criminal Appeal. Invariably factors other than those given may have influenced the Court in reaching its decision. Accordingly, if a more accurate assessment is required reference should be made direct to the judgments.

RAPE: SENTENCING DECISIONS IN THE NSW COURT OF CRIMINAL APPEAL

| *Case* | *Circumstances of the Offence* | *Offender's Record* | *Result* |
|---|---|---|---|
| *R* v. *Davy*<br>*R* v. *Edwards*<br>[1964-5]N.S.W.R. 40<br>11,12 Dec.<br>28 Feb. 1964 | With two other youths, they compelled a 19 yr. old girl to leave railway platform and enter concrete shelter, where she was stripped, raped, and subjected to other acts of gross indecency. | Information concerning previous record not given. | Applications dismissed.<br>10 yrs.P.S.<br>Time to count. |
| *R* v. *Jones*<br>[1971]1 N.S.W.L.R. 613<br>21 May - 4 Jun. 1971 | J with companion H met victim, a widow, in hotel. Three spent evening together drinking. At closing time victim offered J & H lift in her car. She was subsequently forced out of driving seat, J drove car and crashed it. Victim carried from car by both men to vacant land behind a fence where she was raped and subjected to other acts of indecency. Victim eventually deserted and left naked. | Information concerning previous record not given. | Appeal dismissed.<br>9 yrs. P.S.<br>NPP 3½ yrs.<br>Time to count. |
| *R* v. *Markou*<br>N.S.W.C.C.A. (Unrep)<br>No. 291 of 1974<br>30 May 1975 | Appellant followed victim home to her flat. When she answered door to his knock he forced his way in, threatened her with knife, forced her to undress and submit to intercourse. Threats continued throughout act of intercourse. | Has record of offences: starting at 13 yrs.of age. Has conviction for dishonesty between 1966 and 1969. Given suspended sentence in 1971 for wilful exposure and has conviction for dishonesty from 1972 to 1974. | Application dismissed.<br>10 yrs. P.S.<br>NPP 4½ yrs. |
| *R* v. *Voulgarakis*<br>N.S.W.C.C.A. (Unrep)<br>No. 316 of 1974<br>7 Mar 1975 | Rape (no other details given). | At the time of offence, on probation for committing an offence of an allied sexual nature. | Application dismissed.<br>12 yrs. P.S.<br>NPP 5 yrs. |
| *R* v. *Hiles*<br>N.S.W.C.C.A. (Unrep)<br>No. 55 of 1975<br>5 Sep 1975 | In middle of night he called at a country house where a woman was asleep in bed. After waking her up he threatened her with a rifle and forced her to submit to sexual intercourse. He worked for the same company as the victim's husband and knew he was absent on night work. | Married man aged 27 yrs. No prior history of violence or sexual assaults. Was fined for stealing in 1969 thereafter record confined to traffic offences. | Head sentence of 6 yrs. P.S. conf. NPP 4 yrs. - reduced to 2 yrs. Time to count. |
| *R* v. *Turner*<br>N.S.W.C.C.A. (Unrep)<br>No. 22 of 1974<br>7 Jun 1974 | Appellant hid in a women's lavatory and there forced a young woman to have intercourse with him. After being charged with this offence was released for a period of 12 months on terms that he would submit himself to medical care at a psychiatric centre. Whilst under this care committed two further offences of offensive behaviour in women's lavatories. | No previous offences of dishonesty, violence or sexual matters. | Application dismissed.<br>6 yrs. P.S.<br>NPP not spec. under s.4(3) of P of P Act.<br>Time to count. |
| *R* v. *Fissentzidis*<br>N.S.W.C.C.A. (Unrep)<br>No. 36 of 1974 | He gained access to the home of married woman with 5-week-old baby. He intimidated woman with pistol and forced her to have sexual intercourse with him. | Previous convictions for BE & S. assault, rape, and intent to rape. | Appeal dismissed.<br>14 yrs. P.S.<br>NPP 8 yrs. |
| *R* v. *Anthony*<br>N.S.W.C.C.A. (Unrep)<br>20 Dec 1974 | By subterfuge he abducted two girls, one of whom was only 11 years old. He committed rape on the older one and attempted unlawful carnal knowledge on the other. Abduction and rape were committed under bizarre circumstances, with threats of violence. Girls were detained by appellant for some 5 or 6 days, and further acts of intercourse took place but were not subject of this appeal. | Aged 40 years, previous convictions for BE & S date back to 1952. Was given life imp. on 15 Dec 1973 for murder of his wife. | Leave to appeal against severity of sentence granted. Direction that 16 yrs. imp. & 5 yrs. P.S be served cumulatively, quashed and in lieu the tw sentences to be served concurrent' No NNP spec. |

RAPE CONTD.

| *Case* | *Circumstances of the Offence* | *Offender's Record* | *Result* |
|---|---|---|---|
| *R* v. *Varner*<br>N.S.W.C.C.A. (Unrep)<br>No. 106 of 1974<br>2 Aug 1974 | A woman walking home was accosted by appellant and offered a lift, which she declined. Whilst en route across a park was followed by appellant, who had left his car and on reaching a dark section moved close to her, placed a hand across her mouth, pulled her down to the ground and raped her. A few days later he gave a lift to a young girl and molested her. | Aged 24 years, has two previous convictions for stealing; three for indecent assault on females when he was aged 16 & 17 years. | Appeal dismissed. 10 yrs.P.S. & 2 yrs. P.S. cumul. NPP to expire 4 Mar 1979. Time to count. |
| *R* v. *Findlay*<br>N.S.W.C.C.A. (Unrep)<br>No. 192 of 1974<br>18 Dec 1974 | Entered home of mother of two children, who lived next door, and by terror and violence, forced her to submit to sexual intercourse and other acts of gross indecency. | Has had two prior convictions for offences in nature of personality disorders. Was placed on bond for indictable offence committed in Victoria. An ex-serviceman who served in Vietnam. | Head sentence upheld NPP reduced to 4 yrs. (no further information given about orig.sentence) Time to count. |
| *R* v. *Mills*<br>No. 209 of 1974<br>20 Dec 1974 | During hours of darkness, girl entered car driven by Mills, was threatened by him with knife so offered no physical resistance when he raped her. | No information given regarding previous convictions; was considered opinion of court and Probation and Parole Service that Mills was danger to community. | Appeal by AG upheld. 3 yrs.P.S. incr. to 5 yrs. P.S. NPP reduced to expire 5 Mar 1976. |
| *R* v. *Murphy*<br>N.S.W.C.C.A. (Unrep)<br>No. 213 of 1974<br>20 Dec 1974 | Girl hitch-hiked ride in Murphy's car, subsequently threatened by him with knife, forced to strip, was bitten on breasts, forced to commit fellatio, bound with wire and raped. | No information given concerning previous offences. | Sentence quashed and in lieu 3 yrs. P.S. on first count, 8 yrs.P.S. concurrent with first sentence on second count. NPP to expire on 20 Dec 1977 (3 yrs.) |
| *R* v. *Wallis*<br>N.S.W.C.C.A. (Unrep)<br>No. 69 of 1975<br>25 Jun 1975 | Having accepted lift home in victim's car, Wallis told her to stop in secluded street; then he pulled beer can across her throat, punched her about face and body, held one hand across throat until she lost consciousness. When victim came to, she was bleeding from nose and mouth, almost all her clothes had been torn off, and it was immediately apparent to her that Wallis had had intercourse with her. | Aged 19 yrs. was affected by alcohol at time of attack. No prior history of crimes of violence, but was placed on probation for BE & S in 1973. Has been fined for traffic offences incl. one for DUI. | Appeal dismissed. 12 yrs. P.S. NPP 4 yrs.9 mths. |
| *R* v. *Slater*<br>N.S.W.C.C.A. (Unrep)<br>No. 164 of 1975<br>26 Sep 1975 | After drinking at hotel under closing time, he felt an urge for sexual intercourse with anyone to fall prey to him; then forced entry into four dwelling-houses in turn. In first terrorised mother and daughter occupants, brutually assaulting daughter until he was forced to flee; second house was unoccupied, so he stole a radio. After entering third house was frightened off and in fourth house found a 13 yr.-old schoolgirl in bed. By threatening her with knife, he forcibly abducted her from house took her to railway track, where he raped, her. He raped her for the second time in another nearby location and stole from her a watch before allowing her to return home. | Aged 29 yrs; has a record back to 1969, when convicted for stealing; was imprisoned in 1966 for carnal knowledge and served terms of imprisonment for dishonesty between 1967 and 1971. Did not mix with criminal element and was considered to be hard worker as well as good provider for his wife and children. | Appeal by A.G. upheld. 7 yrs. P.S. for rape incr. to 12 yrs. 12 mths. P.S. for assault incr. to 2 yrs P.S. cumul. upon 12 yrs. sentence. 6 mths. for BE & S concurrent to stand. 12 mths. P.S. for entering building with intent, incr. to 2 yrs. P.S. concurrent. In aggregate 14 yrs. in all. NPP 3 yrs. incr. to 6 yrs. P.S |

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RAPE CONTD.

| *Case* | *Circumstances of the Offence* | *Offender's Record* | *Result* |
|---|---|---|---|
| *R* v. *Griffiths*<br>*R* v. *Quon*<br>N.S.W.C.C.A. (Unrep)<br>No. 157 & 156 of 1975<br>31 Oct 1975 | With two other males, they gave the two victims lift in their car. Girls accepted an invitation to have Xmas drinks at a house. Upon entering dwelling, one girl was raped by Griffiths and the other by Quon. They used some degree of force to overpower their victims. | *Griffiths*, aged 21 yrs.two prev. convictions for dishonesty for which he was boundover or released on probation. Every possibility of effective rehabilitation. *Quon*, aged 17 yrs. committed to institution for stealing a MV in 1974, but showed no semblance of violence or of predisposition to sex crimes. | Appeals against head sentence dismissed. 11 yrs. P.S. NPP 6 yrs. reduced to 4 yrs. Time to count. |
| *R* v. *Kirby*<br>N.S.W.C.C.A. (Unrep)<br>No. 188 of 1975<br>10 Oct 1975 | After drinking at hotel, he went to home of friend who was out but in house was a girl of 7 yrs. lying on a bed. Appellant raped her, causing some injury and subsequent infection of a non-venereal nature. | Aged 20 yrs. No previous record for violence or sex offences. | Appeal dismissed. 11 yrs. P.S. NPP 5 yrs. Time to count. |
| *R* v. *George*<br>N.S.W.C.C.A. (Unrep)<br>No. 201 of 1975<br>3 Oct 1975 | The victim, girl hitch-hike , was riding in back of utility with appellant, who was passenger. When ute stopped girl dismounted and went for walk, following by appellant who subsequent assaulted and punched the girl, forcing her to submit to sexual intercourse. | Has lengthy record of criminal offences, mostly for dishonesty. Was sentenced to 9 mths. imp. for aggravated assault on female in Nov 1970. Was sentenced in Feb 1975 to 4 yrs. imp. for robbery and malicious injury. | Application dismissed. 8 yrs. P.S. NPP 5 yrs. to be served at completion of current sentence of 4 yrs. P.S. for robbery and malicious injury. |
| *R* v. *Hosa*<br>N.S.W.C.C.A. (Unrep)<br>No. 206 of 1975<br>21 Nov 1975 | Having become acquainted with the victim at party the night before, appellant went to her home the following morning, was invited in and subsequently raped her. No weapon or threat was used but the physical build of appellant was sufficient to force victim to submit. | Aged 32 yrs. No record or history of violence. Within local community, regarded as man of integrity and compassion, always ready to help his less fortunate fellow man. | Appeal against head-sentence dismissed. 8 yrs. P.S. NPP of 3½ yrs expiring 25 Jan 1979 reduced to expire 18 Aug 1977. 2 yrs. Time to count. |
| *R* v. *Aik*<br>N.S.W.C.C.A. (Unrep)<br>No. 218 of 1975<br>10 Oct 1975 | Appellant prevailed upon a female occupant of a house, to let him in under the pretext of seeking refreshment or drink. On gaining entry, threatened the female with a sharp pointed trowel and terrified her into submitting to sexual intercourse. | Aged 18 yrs. Record back to 1970 for dishonesty, sentenced in 1973 to 3½ yrs. imp. for rape, armed robbery, BE & S, and store breaking and stealing. | Application dismissed. 5 yrs. P.S. NPP 2 yrs. |
| *R* v. *Catlin*<br>N.S.W.C.C.A. (Unrep)<br>No. 226 of 1975<br>18 Dec 1975 | Met the victim in hotel, she accepted the offer of lift home. Appellant drove car to secluded spot and raped her. During act of intercourse there was penetration of the anus. | Aged 24 yrs. Spasmodic record back to 1965. Was sentenced to 15 mths. imp. in Jun 1970 for BE & S, larceny and common assault. Was fined in Nov 1973 for another offence of assault. | Application dismissed. 8 yrs. P.S. for rape. 8 yrs. for buggery, concurrent. NPP 3 yrs. |
| *R* v. *Lay*<br>*R* v. *Butt*<br>*R* v. *Carpena*<br>N.S.W.C.C.A. (Unrep)<br>No. 264 of 1975<br>No. 265 of 1975<br>No. 266 of 1975<br>16 Dec 1975 | Victim, 14-yr-old girl entered disused dwellinghouse with the three appellants with whom she was acquainted. When plied with wine she became intoxicated and lost consciousness. It was whilst she was in this condition that she was raped by the three appellants. In the meantime four or five other unidentified youths entered the dwelling, and they also partook of active intercourse with the girl. | *Lay*, aged 18 yrs. has record commencing in the children's court in 1974, has conviction for four offences of stealing MV's and six weeks later was again convicted for assault occasioning actual bodily harm, malicious injury and possession of a firearm. *Butt*, aged 18 yrs. Has convictions back to 1971, commencing in children's court for stealing in a dwelling and malicious injury. Was also charged with stealing in 1974. *Carpena*, aged 20 yrs; has record of some 13 offences between 1971 and 1975. Some were related to traffic offences, but include stealing, receiving goods in custody, and assault. | Appeal by A.G. upheld. For each respondent 3½ yrs. P.S. incr. to 5 yrs. P.S. NPP 6 mths. incr. to 15 mths. |

RAPE CONTD.

| *Case* | *Circumstances of the Offence* | *Offender's Record* | *Result* |
|---|---|---|---|
| *R v. Blaikie*<br>N.S.W.C.C.A. (Unrep)<br>No. 281 of 1975<br>30 Apr 1976 | Victim was a 13-yr-old girl. She first met appellant whilst she was playing on a trampoline, when accused asked her if she would like to join a team. The next encounter was when accused met her outside school. Girl went and changed into her bathing clothes, at his request, presumably to perform on the trampoline but before she had changed he assaulted her and the alleged rape took place. | Aged 31 years, the offender was married man with family. No earlier record of violence or sexual misconduct. But he had lengthy record, including a number of entries for dishonesty and a number of traffic offences, more often than not associated with drunkenness. Ref. was made to his psychiatric state. | Appeal dismissed,<br>10 yrs. P.S. NPP 3 3/4 yrs.<br>Time to count. |
| *R v. Puckering*<br>N.S.W.C.C.A. (Unrep)<br>No. 105 of 1976<br>17 Sep 1976 | Victim, an 11-yr-old girl was asleep in the same tent as her two brothers. The appellant, armed with a knife, forced his way into the tent (using the knife) in the middle of the night. He carried the girl out of the tent and unsuccessfully attempted to have sexual connections with her owing to her physical immaturity. (The appellant held the knife at her throat to keep her quiet). The appellant then proceeded to indecently assault the girl. | No prior convictions.<br>Aged 20 years. | Application dismissed.<br>8 weeks of time served is to count.<br>11 yrs. P.S. NPP 5 yrs. 8 weeks of time to count. |
| *R v. Patterson*<br>N.S.W.C.C.A. (Unrep)<br>No. 15 of 1976<br>2 Sep 1976 | Girl, aged 13 years, was assaulted by the appellant in a flat then occupied by him, with intent to rape. | Appellant was 36 years of age and had a record of trouble. In Australia he had a record which included entries for malicious injury, possessing a firearm, assault and larceny. In August 1973 he received a 3-yr. good behaviour bond for larceny of a motor vehicle, this being current at the time of the present charge. | Appeal dismissed.<br>5 yrs. P.S. NPP 2 yrs.<br>Time to count. |

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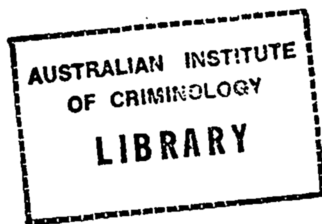
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AUTHOR'S NOTE

This report was prepared prior to the High Court's decision in *Griffith v. The Queen* (as yet unreported, 17 Aug. 1977). Although that case was not concerned with the sentencing of a sex offender, it is important in relation to the principles of sentencing generally. More particularly it is important in relation to the right of the Crown to appeal against sentence, and the power of the Court of Criminal Appeal to substitute its own view of the proper sentence to be imposed upon appeal.

In that case a particular form of bond which the trial Judge had imposed, and which *inter alia* required the offender to come up for judgment in 12 months, was held by the High Court not to be a sentence for the purpose of permitting an appeal by the Crown against sentence. Indeed the High Court held that a common law bind over or remand to come up for sentence, was not a sentence within the ordinary meaning of that word, nor was it a sentence within the meaning of Section 5D of the *Criminal Appeal Act*, 1912 (N.S.W.) - that is within the only section which authorises Crown Appeals against sentence.

In this Report reference is made to the power of the Court of Criminal Appeal, when reviewing sentence, to substitute its own view of the sentence which it considers ought to be imposed. This discretionary power has been expressed to be unfettered (see below at p.62 for example). However, Barwick C.J. and Jacobs J. in separate judgments have made strong statements indicating that the approach

taken by the Court of Criminal Appeal has been erroneous in this regard. For example, His Honour, Mr Justice Jacobs, at pp.20-21 said:

> "Under s.5D the Court has a wide discretion whether or not to interfere [with the trial Judge's sentence] even though it may reach the conclusion that another sentence should have been passed. In this respect s.5D [of the *Criminal Appeal Act*, 1912 (N.S.W.)] gives a wider discretion than s.6(3) [of the same Act] 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 trial Judge is given a wide discretion from the circumstance that a Court on appeal will not lightly conclude that another sentence should have been passed. *The incorrectness of the sentence must be manifest.* See *House v. The King* (1936), 55 C.L.R. 499, at p.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. Any different interpretation of *Whittaker v. The King* (1928), 41 C.L.R. 230 is in my opinion wrong." (Emphasis added)

Chief Justice Barwick also considered that *Whittaker v. The King* did not support the proposition that the Court has a complete and unfettered discretion to substitute what it thinks is a proper sentence without considering whether the trial Judge erred in a matter of principle, or acted unreasonably or in disregard of relevant evidence or in some other way exceeded or misused his sentencing discretion. The Chief Justice thought that the appellate powers of the Court were exclusively appellate. Further, the Chief Justice, at p.23 of his judgment said:

> "What it is claimed that *Whittaker v. The King* decided would give to the court a function more akin to original jurisdiction exercisable without reference to what has

> already been done and in the exercise of which the court was not constrained by those principles of appellate courts which concede to the presiding judge a discretion the exercise of which is not to be disturbed except for error.
>
> In my opinion, s.5D does not bear such a construction. It does no more, in my opinion, than give to the Court of Criminal Appeal authority to hear and determine an appeal by the Attorney-General against the sentence erroneously imposed by a trial Judge. Its reference to discretion, in my opinion, does no more than ensure that where a proper occasion arises for the allowance of an appeal, the court itself may substitute the sentence which it considers appropriate for that imposed by the trial Judge. Thus, no question of remitting the matter to the trial Judge for sentence in conformity with the reasons for judgment of the Court of Criminal Appeal arises. In other words, the court is not limited to acting as a court of cassation."

Although strictly *obiter* in relation to the question of whether the Court of Criminal Appeal has an unfettered discretion to impose its own sentence upon appellants, the *ratio decidendi* of the High Court decision is that the Crown cannot appeal against the inadequacy of a sentence when the disposition imposed by the lower court is a remand or bind over, requiring the offender to appear (if called upon), at a later point in time for sentence.

This means that whereas the Crown may be permitted to appeal against the inadequacy of a sentence, such as a term of imprisonment (subject of course, to the showing of an error if that line is to be adopted), it cannot appeal against a bond. Only legislative intervention can remedy this apparent anomaly.

Meanwhile the material presented in this report should be read subject to the decision in *Griffith v. The Queen*.

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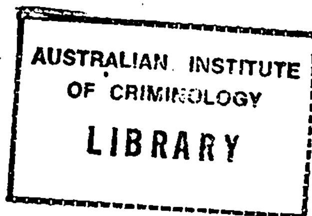
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# SENTENCING SEX OFFENDERS IN NEW SOUTH WALES

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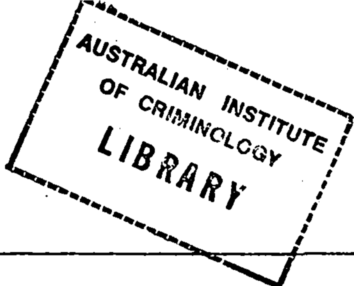
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