

Australian Bar Association & New South Wales Bar Association

National Conference 2018

Criminal Law Stream

Saturday 17 November, 2018

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I understand that it is my function to give the last of a series of cascading welcomes to delegates, this being the welcome to those discerning enough to attend the criminal law stream. Let me start by recounting an inspirational story for all whose practice is the criminal law.

In 1969 when I was a law student at the University of Queensland, Lord Wilberforce, who was visiting Australia, came to address us. These were the days when in an undergraduate law degree one studied rather more decisions of the House of Lords and the Privy Council than the High Court. It is difficult to convey to a present-day audience the excitement that his Lordship's pending visit generated in us rude colonials.

Lord Wilberforce did not disappoint. I still have a vivid image of him: a slightly built, wiry figure, with a thin face, aquiline nose and piercing eyes, which more than hinted at the intellect behind those splendid judgments. He spoke without notes for close on an

hour and was utterly captivating. I regret to say that I no longer remember what he had to say, save for one piece of advice. I interpolate that in 1969, as in every year since, our major concern was whether there would be enough jobs for lawyers when we graduated. Towards the end of his speech, Lord Wilberforce, with the instinctive understanding of the universal concern of the law student, told us not to worry and to rest easy because "crime is on the increase".

Of course, as we know, that statement may not necessarily be supported by the evidence. The work of the New South Wales Bureau of Crime Statistics and Research suggests a somewhat less alarming trend line. The Director of the Bureau, Don Weatherburn, has proved to be a marvellously calming figure. Over the course of our respective professional lives, Don Weatherburn has regularly appeared on Radio National to reassure the public of the constancy of the New South Wales murder rate.

Lord Wilberforce's prediction nonetheless has proved true with respect to the work of the High Court: criminal cases have indeed been on the increase. Shortly after its establishment, Griffiths CJ announced that the High Court would follow the practice of the Privy Council with respect to criminal cases¹. That practice was not to

¹ *Attorney-General of the State of New South Wales v Jackson* (1906) 3 CLR 730; [1906] HCA 90.

"interfere", as the Privy Council put it in *Bertrand*²: so often interference only led to "inconvenience" and "mischief". Special leave to appeal in criminal cases was to be confined to those in which there was some flagrant disregard of the forms of legal process or some manifest grave injustice³.

The conception of what was within the ambit of a "grave injustice" such as to warrant the High Court's interference was confined within narrow bounds. Dawson J instanced *Raspor v The Queen*⁴ as the most striking example of the Court's practice of declining to intervene in a case in which the issue was the safety of the verdict⁵. In *Raspor* the trial judge advised the jury to stop the trial and to acquit the accused having regard to the inadequacy of the evidence of identification. The jury rejected the advice and returned a verdict of guilty. The Court of Criminal Appeal of Victoria rejected an application for leave to appeal, and the High Court, in turn, declined to grant special leave, upon a view that the issue was no more than one of fact.

² *Attorney-General (NSW) v Bertrand* [1867] LR 1 PC 520 at 530.

³ *Bataillard v The King* (1907) 4 CLR 1282 at 1286 per Griffith CJ, quoting *Kops v The Queen; Ex parte Kops* [1894] AC 650 at 652.

⁴ (1958) 99 CLR 346; [1958] HCA 30.

⁵ *Morris v The Queen* (1987) 163 CLR 454 at 476; [1987] HCA 50.

Thirty years after the decision, Dawson J's invocation of *Raspor* was in aid of his Honour's dissenting reasons in *Morris v The Queen*⁶. In *Morris*, it will be recalled, special leave to appeal was granted on an issue of the sufficiency of the evidence to support the verdict. The majority held that the intermediate appellate court had failed to conduct an independent assessment in this respect. Dawson J considered, consistently with a line of authority dating back to *Jackson*, that the only issue in *Morris* was of fact and for that reason the appeal did not warrant the High Court's intervention.

Criminal lawyers are apt to think of *Liberato v The Queen*⁷ only in terms of the direction, favourable to the accused, to which the decision has lent its name. What criminal lawyers are apt to forget is that special leave to appeal was refused in *Liberato* on the ground that the Court was merely being asked to substitute its view of the safety of the verdict for that of the intermediate appellate court. The *Liberato* direction – that even if the jury prefers the evidence for the prosecution, it should not convict unless satisfied beyond reasonable doubt of the truth of that evidence and, even if it does not positively believe the evidence for the defence, it cannot find an issue against the accused contrary to that evidence if it gives rise to a reasonable doubt – stems from the separate dissenting reasons of Brennan J and Deane J.

⁶ (1987) 163 CLR 454.

⁷ (1985) 159 CLR 507; [1985] HCA 66.

One can discern a distinct difference in approach to the grant of special leave between *Liberato*, and *Morris* and subsequent decisions of which *SKA v The Queen*⁸ is, perhaps, the most striking example. This difference of approach is borne out by the statistics: in 1970, of the 87 matters determined by the High Court, only 3 were criminal cases. In 1990, 19 per cent of the matters determined by the Court were criminal cases. And in the past decade, 23 percent of the matters determined by the Court have been criminal cases.

The Court's reluctance to intervene in criminal cases was, of course, more pronounced in relation to appeals against sentence⁹. The first time special leave was granted to entertain a sentence appeal was in *Power v The Queen* in 1974¹⁰. The then Senior Public Defender in New South Wales, the legendary Howard Purnell, did not view the grant of special leave in *Power* as a favourable development. Without wishing to defame Dr Greg Woods QC, who got up the argument in *Power* and appeared as junior counsel in the hearing of the appeal, Howard Purnell was dismissive of "fancy left-wing lawyers" taking matters to the High Court and messing up the law.

⁸ (2011) 243 CLR 400; [2011] HCA 13.

⁹ *Whittaker v The King* (1928) 41 CLR 230; [1928] HCA 28.

¹⁰ (1974) 131 CLR 623; [1974] HCA 26.

Howard Purnell shared the view, common in earlier days, that the judges of the intermediate courts possessed a peculiar understanding of the treatment of criminal offenders in their state or territory, and the High Court should leave them to it. It was a view confirmed by the generally favourable approach to the accused in the New South Wales Court of Criminal Appeal under Kerr CJ.

Dr Woods worked magic on the Court of Criminal Appeal in *R v Portolesi*¹¹, in which Kerr CJ held that the proper approach in sentencing was to impose a short non-parole period which would give greater freedom to the Parole Board to determine when the prisoner was ready for release. Dr Woods tried to work the same magic on Blackburn J in the Supreme Court of the ACT. Blackburn J's rejection of *Portolesi* set the stage for *Power v The Queen*, in which the High Court explained that the enactment of parole legislation did "not convert a sentence of imprisonment from a punishment into an opportunity for rehabilitation"¹².

The High Court did not return to criminal sentencing after *Power* until *Veen v The Queen*¹³ ("*Veen [No 1]*"). Despite his reservations, Howard Purnell sought and obtained special leave in

¹¹ [1973] 1 NSWLR 105.

¹² *Power v The Queen* (1974) 131 CLR 623 at 627 per Barwick CJ, Menzies, Stephen and Mason JJ.

¹³ (1979) 143 CLR 458; [1979] HCA 7.

Veen [No 1], contending that, in dismissing Veen's appeal from the life sentence imposed on him for manslaughter, the Court of Criminal Appeal had embarked on a policy of preventative detention without legislative warrant. The stars were in alignment for the reception of Purnell's argument. The appeal was heard on 1 June 1978. Nagle J had delivered his report on the state of New South Wales prisons in March of that year. Jacobs J, in the leading judgment, quoted extensively from the Nagle Report with its description of the "appalling" conditions of the cells in the observation section, to which prisoners with psychiatric difficulties like Veen were exposed. With brio that one, perhaps, sees rather less these days, his Honour observed:

"[t]he present crime and the fact that three or four years previously he had committed a violent assault with a knife on his landlady showed that he was prone to violence but that can be said of many prisoners facing sentence"¹⁴.

In the decade following *Veen [No 1]*, the High Court showed a growing interest in sentencing law, culminating in *Veen [No 2]*¹⁵. The joint reasons in *Veen [No 2]* have always struck me as saying all that can usefully be said on the topic of sentencing: it is not a purely logical exercise and the "troublesome nature" of the discretion

¹⁴ *Veen [No 1]* (1979) 143 CLR 458 at 489.

¹⁵ *Veen v The Queen [No 2]* (1988) 164 CLR 465; [1988] HCA 14.

arises from the difficulty of giving weight to each of the purposes of punishment. Those purposes are various: protection of society; deterrence, both specific and general; retribution and reform. They are purposes that overlap and cannot be considered in isolation from one another in determining the appropriate sentence. And, famously, "[t]hey are guideposts to the appropriate sentence but sometimes they point in different directions"¹⁶.

In the spirited debate, between McHugh J on the one hand, and Kirby J on the other hand¹⁷, over the correctness of the "instinctive synthesis" approach to sentencing, I favour the McHugh J approach. There is a limit to the degree to which ratiocination usefully illuminates the evaluative judgment of how many years and months is appropriate for a given offence and a given offender.

The growth in sentencing appeals in the High Court is largely a reflection of the degree to which the sentencing of offenders has been elevated into an arcane science. The Court has not departed from its practice of refusing special leave to challenge a sentence on the ground of manifest excess or inadequacy. It is the legislative prescription of matters guiding the sentencing discretion that has proved such fruitful ground for the demonstration of legal error and

¹⁶ *Veen [No 2]* (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ.

¹⁷ *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25.

which serves to explain, at least in part, the increase in the Court's sentencing jurisprudence.

Betts v The Queen might be thought a striking illustration of that proposition¹⁸. The offender pleaded guilty to a sustained, brutal knife attack on his former partner. She had had returned to the apartment they had shared to collect her belongings on the understanding that he would not be present. An experienced District Court judge in imposing a sentence, which was not suggested to fall outside the range of discretion, erred in law by identifying as an aggravating factor that the victim was vulnerable in that she was alone in the apartment at the mercy of the offender. Under s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the offence was not, in law, aggravated by the victim's vulnerability; the statutory criterion of vulnerability is concerned with the class of victim and not with the circumstances of the offence. Error having been identified, it was incumbent on the appellate court to re-exercise the sentencing discretion. Whether the re-exercise of that discretion re-opened the primary judge's unchallenged factual findings was the issue in the High Court. An anterior issue, I suggest, is the folly of the legislative attempt to prescribe the range of considerations that are capable of aggravating or mitigating liability for an offence.

¹⁸ (2016) 258 CLR 420; [2016] HCA 25.

A less elaborate statutory regime for the sentencing of offenders, leaving the determination to well-settled common law principles, might focus attention on what should be the issue: whether, acknowledging that there is no single correct sentence for a given offender and a given offence, nonetheless the sentence exceeds the bounds of discretion. And, in the case of a prosecution appeal, whether the sentence falls below the bounds of discretion.

Perhaps the most striking change to the work of the intermediate appellate courts in sentencing, reflected in a lesser degree in the work of the High Court, is the increase in the number of prosecution appeals against sentence. This has occurred while the principles enunciated by Barwick CJ in *Griffiths v The Queen*¹⁹ have not been re-visited²⁰: prosecution appeals should be brought as a *rarity* to establish some matter of principle and to allow the appellate court to perform its proper function of laying down principles for the guidance of sentencing courts.

¹⁹ (1977) 137 CLR 293 at 310; [1977] HCA 44.

²⁰ See, eg, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 581[16] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; *Green v The Queen* (2011) 244 CLR 462 at 465 [1], 471-472 [24]-[27] per French CJ, Crennan and Kiefel JJ; [2011] HCA 49; *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 359[35] per French CJ and Gageler J; [2015] HCA 9.

The joint reasons in *Everett v The Queen*²¹ acknowledge that a matter of "sentencing principle" may extend to manifest inadequacy or excess in sentencing standards²². In separate reasons, Mc Hugh J held that a sentence that falls definitely outside the range can be regarded as within the rationale for Crown appeals²³. In *Griffiths* as in *Everett* there is recognition of the importance of consistency in sentencing to the due administration of criminal justice.

Griffiths was a New South Wales appeal. At the time it was decided there were 31 District Court judges in New South Wales²⁴. They were men whose practice at the Bar had been far more generalised than is common today. At present in New South Wales there are 68 District Court judges and their numbers are regularly augmented by acting judges. The Attorney-General has just announced the appointment of seven more judges to the District Court to deal with the backlog of work. These judges will be drawn from a Bar which is, and has been for 30 years, specialised.

²¹ (1994) 181 CLR 295 at 306; [1994] HCA 49.

²² (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron J.

²³ (1994) 181 CLR 295 at 306.

²⁴ West, *New South Wales Law Almanac for 1978* (1978) at 55.

As Gleeson CJ pointed out in *Wong v The Queen*²⁵, in the days when criminal justice was administered by a relatively small group of judges, it was easier to maintain consistency. The range of penalties for common offences was well known and, as his Honour neutrally observed, significant departures were readily identified. His Honour cautioned that, while the outcome of discretionary decision-making can never be uniform, it ought to depend as little as possible on the identity of the judge who happens to hear the case²⁶.

The function of the intermediate appellate courts is not only providing guidance in matters of sentencing principle but in seeking to ensure reasonable consistency in outcomes is important to the maintenance of confidence in the administration of criminal justice. The time may have come to recognise that Crown appeals against sentence should not be subject to the rigorous degree of restraint articulated in *Griffiths*. On that incendiary note, I will conclude this Welcome to the *rise2018* criminal law stream.

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²⁵ (2001) 207 CLR 584 at 592-593[10]; [2001] HCA 64.

²⁶ (2001) 207 CLR 584 at 591[6].