CHANGING HORSES*

The Hon Mr Justice M Campbell
Supreme Court of New South Wales

The implementation of the *Sentencing Act* 1989 required judicial officers and those appearing before them on sentencing matters to change horses in midstream. On the one hand the established principles and established patterns of sentencing continued, unless the Act set them aside, on the other the flow of prisoners coming forward for sentence and for review on appeal continued unabated.

Judicial officers and the profession appreciated that there would be difficulties in applying the new provisions and, even before the Act was proclaimed, positions had been taken on a number of key issues which it soon became apparent had the potential to affect the periods during which prisoners were to be held in custody.

I do not propose in this paper to go over the grounds of dispute, but rather to set forth the solutions to which the Appellate Courts have come and therefore the way in which judicial officers must now proceed. I should make it clear that the following material reflects my present understanding and is subject to any contrary decisions by the Appellate Courts and to further consideration after hearing argument in any particular case. The present seminar is timely for it is fair to say that the horses have been changed and that, in the main, the way a judicial officer should go about his or her task has become reasonably clear, although the particular outcome, as has always been the case, may still pose considerable difficulty. Other papers will discuss what, if any, changes have occurred in sentencing outcomes generally.

REMISSIONS

The first and major problem was whether the abolition of the system of remissions which operated prior to the *Sentencing Act* should be taken into account in considering the established pattern of sentencing for the particular offence. Immediately prior to the *Sentencing Act* a prisoner could confidently expect that both his head sentence and non-parole period, where one was fixed, would be reduced by approximately one third by way of remissions.

If it be assumed that sentences after the *Sentencing Act* were to conform to the established pattern of sentencing, treating the minimum term as equivalent to the old non-parole period, then a very substantial difference in the term imposed emerged if, on the one hand, a discount was allowed for the now abolished remissions or if, on the other hand, the previously available remissions were ignored in applying the established sentencing pattern.

In *R v Maclay*[1] the Court of Criminal Appeal rejected the appellant's submission which was summarised in the judgment of the Court as follows:

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* Paper presented at a professional seminar entitled "The *Sentencing Act* 1989", convened by the Institute of Criminology at Sydney University Law School, 8 August 1991.

1 [1990] 19 NSWLR 112.

> ... in fixing a minimum term under the *Sentencing Act* 1989 a sentencing judge should, in effect, work out the non-parole period that would have been specified prior to the new legislation, deduct from that the remissions that would have been given against the non-parole period, and fix a minimum term approximately equivalent to the balance.

The Court also rejected the approach of the trial judge which was to equate the minimum term with what he would have imposed as a non-parole period had he been sentencing prior to 25 September 1989 ignoring any questions of remissions. The Court said:

> It would be a strange thing if, in giving effect to legislation designed to introduce a new approach to sentencing, judges were intended to work out what they would have done under the old and discarded regime, apply to that the practical operation of a system of remissions administered by the executive and based on the prerogative power of mercy, and seek to replicate the net result in their future decision-making.
>
> In our view the duty of a sentencing judge fixing a minimum term under the new legislation is clear. Giving appropriate weight to well-established principles of sentencing, including those which require him to pay due regard to the maximum penalty provided by statute for the offence in question, the gravity of the objective features of the case, and all relevant subjective considerations relating to the offender, he is to determine what is an appropriate term during which the offender is to remain in custody before being eligible to be released on parole.[2]

The Court also said:

> .... The primary task of sentencing judges is to apply the new sentencing system according to the terms of the statute paying due deference to established general principles of sentencing. It is not their primary function to do their best to replicate what they would have done under the old system. Many features of the old system have gone, including remissions, and the concept of beginning with a head sentence and thus fixing a non-parole period as a proportionate part of the head sentence. The process now begins, as a rule, with the fixing of a minimum term to which there is added an additional term, and the relationship between the two is governed by statute. In carrying out the task of fixing a minimum term in such a case as the present, the sentencing judge should address the prescribed maximum penalty fixed by statute, and the gravity of the offence, paying regard to the objective features of the case and subjective considerations relevant to the particular offender.[3]

The Court accepted that "a judge may wish to have regard to sentencing patterns, including his or her own sentencing patterns established under previous legislation";[4] but indicated that "some caution" would need to be exercised in translating such sentencing patterns into actual decisions under the new legislation. I think it fair to take the view, although the language used in the judgment is qualified, that the Court considered that a factor attracting extra caution is the possibility that there may have been some subconscious response by sentencing judges to the effect of remissions which could not be expressly allowed for. The Court emphasised that preconceptions as to how prison terms

2 At 122.
3 At 126.
4 At 126.

resulting from sentences imposed under the *Sentencing Act* compared with earlier ones could not be allowed to dominate the application of the new statute.

In anticipation of some of the material I expect will be discussed in other papers, the Court observed that the answer to the question how such sentences will compare would emerge in due time.

Maclay makes it clear that sentencing judges are to apply the new Act, in the way set out above, without working forward from what they would earlier have done and that, whilst they may look at pre *Sentencing Act* patterns, such patterns are to be used with caution.

SUCCESSFUL APPEALS ON SENTENCE

It was held in *R v Valenti*[5] that the transitional provisions of the *Sentencing Act* did not exclude the operations of the Act in relation to sentences imposed by the Court in lieu of sentences quashed on appeal. That view was followed in *Maclay*.[6] A question accordingly arose as to whether the Court of Criminal Appeal, where an appeal against sentence was upheld, should simply sentence under the new Act or whether it should initially assess a sentence and non-parole period which would be appropriate to the circumstances if the *Probation and Parole Act* 1983 and the relevant provisions of the *Prisons Act* 1952 had not been repealed and then, in effect, redetermine the sentence as it would have been redetermined under the *Sentencing Act* had it been imposed before the commencement of the Act.

In *Radenkovic* Mason CJ and McHugh J expressed the view that the latter approach was the correct one and Toohey and Gaudron JJ, without determining the question, noted that it had the approval of the Court of Criminal Appeal in *R v T*[7] and other cases and made orders on that basis. Dawson J thought it inappropriate to determine the point.

The Court of Criminal Appeal has resentenced in accordance with this approach where appeals on sentence have been upheld, however, the question has become somewhat academic as only a small number of appeals against sentence imposed before September 1989 are likely to be heard in the future.

THE "BOTTOM UP" APPROACH

Section 5 of the *Sentencing Act* provides, inter alia:

(1) When sentencing a person to imprisonment for an offence a court is required—

(a) firstly, to set a minimum term of imprisonment that the person must serve for the offence; and

(b) secondly, to set an additional term during which the person may be released on parole

(2)

5 CCA, 6 December 1989, unreported.

6 Although see Mason CJ and McHugh J in *R v Radenkovic* (High Court, 13 December 1990, unreported) at 3.

7 CCA, unreported 15 March 1990.

The additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances

(3) ...

(4) The minimum and additional terms set for an offence together comprise, for the purposes of any law, the term of the sentence of the court for the offence.

The Minister in his Second Reading Speech described the method now required of a sentencing judge as the "bottom up" approach. A reading of the interesting papers prepared for the Seminars conducted by the Judicial Commission prior to the proclamation of the *Sentencing Act* shows that the general view was that s5 required, first, a determination of a minimum term and then and only then, the determination of an additional term. The last quoted passage from the judgment in *Maclay* appears to accept that, at least as a rule, such a sequential approach was required, although the point was not argued in that case.

If the *Sentencing Act* does require a strictly sequential approach, whereby the judge is required to set the minimum term before turning his mind to the duration of the additional term, obvious difficulties result in a case where special circumstances call for a ratio of minimum to additional term of less than three to one. On such an approach the minimum term cannot be reduced and the longer additional term must mean that the total sentence is increased. Further, it may be that the prisoner, contrary to the intention of the judge, may have to serve all or some of the increased additional term in custody.

This problem arose in *R v Moffitt*.[8] The Court of Criminal Appeal there held that whilst sub-s5(1) prescribed that a sentence must be composed of a minimum term and an additional term and that, when it comes to the actual imposition of sentence, the sentence must be expressed as comprising first a minimum term and then an additional term, it did not necessarily require that the judge apply his mind first to the minimum term and second to the additional term.[9] The judge is free to adjust the elements of the sentence as he sees fit provided, of course, that if the additional term exceeds the statutory maximum proportion there are special circumstances and that the aggregated term does not exceed a sentence for the offence which is appropriate.[10]

SPECIAL CIRCUMSTANCES

An important question dealt with in *Moffitt* was the meaning to be given to the phrase "special circumstances". The Court rejected the view that it meant an exceptional or special case or referred to a special or exceptional category.[11] Samuels JA[12] said that a determination whether there were special circumstances required a consideration of all the relevant circumstances including those applicable to a determination of the minimum

8 [1990] 20 NSWLR 114.
9 See per Badgery-Parker J at 134.
10 See per Samuels JA at 118.
11 See *Griffiths v The Queen* [1989] 63 ALJR 585 per Brennan and Dawson JJ at 585 and per Deane J at 590.
12 At 116.

term. "Special circumstances" were those circumstances which justify enlarging in the prisoner's favour the existing rehabilitative purpose of s5. Badgery-Parker J, with whom the other members of the Court agreed, said:

> If, however, it can be seen in an individual case that for reasons which can be identified in the facts of the individual case, a longer period of parole supervision is warranted than would be provided by adherence to the one-third rule, the judge is entitled to regard that as a special circumstance justifying a departure.[13]

Moffitt was a case in which there was to be an accumulation to some extent on an earlier sentence and Badgery-Parker expressed the view that this circumstance itself could amount to special circumstances, although the conclusion in that case that there were special circumstances was based upon subjective features and in particular the prisoner's good prospects of rehabilitation. *Moffitt* also illustrated the difficulty that can arise as a result of the terms of s9(3) which provides:

> If a further sentence is imposed during the additional term for the previous sentence or during the additional term that last expires, the further sentence may commence on the day it is imposed or on an earlier day specified by the court.

This provision can, where the last sentence is relatively short, result in the period during which a prisoner is at large under supervision being itself disproportionately short when compared with the total period of custody.

Before leaving the matter of "special circumstances" I should make brief reference to the case of *R v Phillips*.[14] I understand that an appeal has been lodged by the prisoner and it is appropriate that I do no more than take the relevant aspects from the judgment and leave any discussion to others.

Phillips was convicted of what could be described as a random or indiscriminate murder. It is clear that had the sentence of life imprisonment remained an indeterminate one that sentence would have been imposed. However, Her Honour concluded that the disturbed state of the prisoner's mind, and other factors, made a life sentence as now defined, that is, for the term of his natural life, inappropriate. She considered that she should fix a minimum term which reflected "the minimum term which can be appropriate to the seriousness of the offence" and that "the prisoner's release into the community should be dependent upon an assessment being made that he is not likely to be a danger to the community or to himself"; whilst, of course, accepting that he would have to be released in any event at the end of the additional term. The sentence imposed was a minimum term of 15 years and an additional term of nine years. Her Honour considered that in such circumstances "the proportions set out in s5 of the *Sentencing Act* are entirely inappropriate to a case such as this", and found special circumstances "which justify the setting of quite different proportions".

A similar approach was adopted in *R v Falconetti*[15] where a minimum term of five and one half years and an additional term of 11 and one half years were imposed following a

13 At 136.
14 Mathews J, unreported, 21 May 1991.
15 Mathews J, unreported 21 June 1991.

plea of not guilty to murder but guilty of manslaughter which was accepted on the basis of diminished responsibility.[16]

DISCRETION

A reading of the pre Act discussion papers and the subsequent cases can give the impression that in the absence of special circumstances or a fixed term, the additional term should be one third of the minimum term. No doubt in the vast majority of cases this will be the appropriate proportion, however, it is to be remembered that the statutory provision is "not exceed one-third". *Bugmy v The Queen*[17] and *R v Lian*[18] make it clear that the Court should consider whether, in the absence of special circumstances, the proportion should be one third or something less than that.

COMMONWEALTH OFFENDERS

Before the coming into force of the *Crimes Legislation Amendment Act (No 2)* 1989 (Cth) a court of this state fixed a "lesser term of imprisonment during which the federal offender is not to be eligible to be released on parole" pursuant to power conferred by s4 of the *Commonwealth Prisoners Act* 1967. A precondition of that power was that New South Wales law required that the court when sentencing a State offender fix a "lesser term of imprisonment during which the State offender is not to be eligible to be released on parole". In *R v Oti*,[19] it was put that the *Sentencing Act* did not provide for the fixing of a "lesser term of imprisonment during which the State offender is not to be eligible to be released on parole" and that accordingly the power conferred by s4 of the *Commonwealth Prisoners Act* did not apply. The Court held that a minimum term under the *Sentencing Act* did amount to such a lesser term and the argument failed. Whilst the new Commonwealth scheme has its own problems[20] *Oti* established that the *Sentencing Act* did not affect the operation of the earlier scheme.

CONCLUSION

The principal problems foreseen prior to the introduction of the *Sentencing Act* have now been dealt with authoritatively. No doubt further problems will arise, however, from the point of view of the sentencing judicial officer the approach to be adopted is, for all practical purposes, tolerably clear, even though the outcome in any given case may cause considerable difficulty. What the effect of the *Sentencing Act* has been in terms of the general level of sentences and upon the public perception of the administration of justice are matters that will no doubt be addressed in later papers and discussion.

16 See also *R v Leary* (Campbell J, unreported, 21 June 1991).
17 [1990] 169 CLR 525.
18 CCA unreported 28 June 1990.
19 [1990] 48 A Crim R 91.
20 See *DPP v El Karhani* (No 2) CCA, unreported 16 October 1990.