APPEALS AGAINST SENTENCE: THE ROLE OF THE NEW ZEALAND COURT OF APPEAL IN DETERMINING SENTENCING POLICY

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> "Sentencing is not an exact science and the circumstances of one offender can rarely be closely compared with those of another."[1]

Is there a coherent sentencing policy in New Zealand? What general policies emerge from decisions of the Court of Appeal, and in what circumstances will that Court be justified in altering sentences imposed by trial judges?

Imposition of sentence is a task which is almost exclusively at the discretion of the trial judge, but as the Court of Appeal emphasised in *R* v *Lawson*[2] and in previous decisions[3] public confidence in the administration of justice is best preserved if justice appears to be administered even-handedly. The purpose of the discretion is not to allow individual judges to pursue personal sentencing preferences but to enable the sentencing judge to tailor the sentence to both the facts of the case and the circumstances of the offender. The limits of the discretion are constrained by the offence in respect of which the offender has pleaded or is found guilty, and by the legislatively prescribed penalty relating to that offence.[4]

As a general rule the statutory penalty is a maximum penalty that is reserved only for the most serious offence of its type and consequently offers little guidance to and imposes little restriction upon the sentencing judge. In most cases less severe penalties are imposed, including penalties of a different kind altogether,[5] unless statutory requirements provide otherwise. This may occur where certain combinations of sentences are prohibited,[6] where the prescribed penalty is mandatory[7] or there is a

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1 *R* v *Lawson* [1982] 2 NZLR 219, at 223 per McMullin J.

2 Ibid.

3 For example, *R* v *Pawa* [1978] 2 NZLR 190; *R* v *Pui* [1978] 2 NZLR 193.

4 There are further limitations imposed by statute on the sentencing powers of District Court Judges, irrespective of the maximum sentence prescribed by the section creating the offence: see Summary Proceedings Act 1957, s 7; District Courts Acts 1947, s 28F. These sentencing limits may not be exceeded on appeal: *R* v *Barr* [1973] 2 NZLR 1.

5 For example the imposition of imprisonment is expressly discouraged by the legislature: see Criminal Justice Act 1954, s 13B. Where a statute empowers the Court to imprison, it may in addition, or instead, sentence the person to pay a fine: ibid, s 44(2).

6 Illustrations are the following: the sentences of corrective training and imprisonment may not be imposed for the same offence: Criminal Justice Act 1954, s 14A(3); no sentence can be cumulative upon a sentence of periodic detention or community service and vice versa: Criminal Justice Amendment Act 1962, s 14 and Criminal Justice Amendment Act 1980, s 5, respectively.

7 For example life imprisonment for murder: Crimes Act 1961, s 172.

mandatory minimum sentence,[8] or where certain sentences are precluded because of the offender's previous record.[9] In addition there are also certain procedural restrictions upon the judge's choice of sentence.[10]

The dearth of legislative guidance is tantamount to the legislature abdicating its policy-making function on sentencing to the judiciary.[11] The Criminal Justice Bill 1983 is evidence of the legislature attempting to re-assume, albeit somewhat tentatively, this role. However, the statutory language is expressed in such general terms as not to place any substantial fetter upon the present sentencing discretion.[12] The provisions are merely an affirmation of current sentencing practice which is based on principles that have emerged as a consequence of legislative provision for appeals against sentence. The defendant and the Crown may appeal to the High Court and, in certain circumstances, to the Court of Appeal, against sentence imposed in the District Court; and to the Court of Appeal against sentence imposed in the High Court. An extensive body of case law, both reported and unreported, has developed. Appellate review of sentence is now a well-established means of controlling sentencing discretion, reducing sentencing disparities and giving general guidance on sentencing principles.

8 For instance, the court is required to disqualify offenders from driving for a prescribed minimum period after conviction for certain motoring offences, "unless the Court for special reasons relating to the offence thinks fit to order otherwise": Transport Act 1962, s 30(1).

9 For example, no person sentenced to periodic detention is to be required to report to a residential work centre if he has been previously sentenced to corrective training, borstal or imprisonment for a term of one month or more: Criminal Justice Amendment Act 1962, s 14(1).

10 A sentence of detention must not be imposed without the defendant being legally represented, or having being given the opportunity to be so: Criminal Justice Act 1954, s 13A a probation report must be considered before imposing a sentence of corrective training or periodic detention: Criminal Justice Act 1954, s 14D and Criminal Justice Amendment Act 1962, s 15, respectively; the offender's means must be taken into account before imposing a fine: Criminal Justice Act 1954, s 45.

11 This is also true of new sentences (eg community service) which are often introduced without a clear statement from the legislature as to where within the existing structure of penalties, the new measure is designed to fit. For example, is community service only to be imposed in circumstances where imprisonment otherwise would have been the appropriate sanction and, if so, is there a relationship between the number of hours of community service and the number of weeks or months of imprisonment? The first issue was examined by the Court of Appeal in *R* v *Burton* [1982] 1 NZLR 602 — see also *R* v *Minto* [1982] 1 NZLR 606; the second has not been considered by our Court but see the decisions of the English Court of Appeal in *R* v *Brown* [1982] Crim LR 126 and *R* v *Lawrence* [1982] Crim LR 377.

12 Clause 5 of the Bill provides that where a person in the course of committing an offence punishable by five years imprisonment or more, "used serious violence against, or caused serious danger to the safety of, any other person", the court shall impose a sentence of imprisonment unless the court is satisfied that, because of ". . . the special circumstances of the case, the offender should not be so sentenced". Where a person is convicted of an offence against property punishable by a sentence of seven years imprisonment or less a custodial sentence is not to be imposed unless the court is satisfied that, because "the special circumstances of the case . . . any other sentence would be clearly inadequate or inappropriate". Ibid cl 6. At time of writing the Bill was before the Statutes Revision Committee.

I ESTABLISHING SENTENCING POLICY

The Court of Appeal stated in *R* v *Pawa* that it has "an important supervisory function . . . to ensure, within reasonable limits, the even-handed administration of justice throughout the country".[13] Similarly, the Court that same year in *R* v *Pui*[14] emphasised that it was necessary to attempt to achieve some reasonable degree of uniformity in sentencing. A marked difference in the sentences imposed on offenders who have committed similar offences in similar circumstances, and for which no justification can be shown, is of importance to the administration of justice generally in that an unjustified difference will tend to bring the administration of justice into disrepute.

As the Court of Appeal itself has recognised, it alone is able to lay down the judicial guidelines and settle the sentencing policy that is ultimately to be followed by the High Court.[15] It is inevitable that a court which gives reasoned judgments on appeals against sentence will draw upon broad principles. If these principles are not to be found in statute they will develop over a period of time, in the same manner as the courts have developed the common law over the centuries. This is how the principles of sentencing have developed in New Zealand since the creation of the Court of Appeal and, in particular, since it was given permanent composition in 1958.

1 *The Aims and Objectives of Sentencing*[16]

> The choice of an appropriate sentence can often be a difficult one. The general purposes and the probable effects of punishment are evaluated in different ways by individual Judges just as they are given a varying kind of significance by individual citizens. The particular purposes of punishment in particular kinds of cases are also likely to be given a greater or lesser emphasis by one Judge rather than another.[17]

What guidance is available to the sentencing judge in making this difficult choice"? The legislature has not selected a coherent sentencing policy from the theories of punishment that comprise this country's penal philosophy or jurisprudence of sentencing, and until the last decade there was little judicial guidance, with reported sentencing cases from the Court of Appeal being few and far between. Recently, however, the Court has become more conscious of its role as the determiner of sentencing policy

[13] Supra n 3 at 191.

[14] Supra n 3.

[15] See *R* v *Puru* [1984] 1 NZLR 248 where the Court constituted all five permanent members of the Court together with a High Court Judge who was sitting temporarily in the Court. This was said to be in order that the policy that was to be followed in sentencing for the offence of rape could be seen to be decided with final authority. The right of appeal to the Privy Council is examined infra n 57.

[16] Principles of sentencing may be divided into two categories: (1) those which assist in the determination of the appropriate level of sentence for the various types of offences (these are examined in this part); (2) those which determine the significance of matters, both mitigating and aggravating, independent of the particular offence committed, for instance the effect of the offender's record, the plea of guilty, other offences committed at the same time – "the one transaction rule", "the totality principle" – (these matters are beyond the scope of this article).

[17] *Pawa* supra n 3 at 191, per Richmond P.

and has indicated which purpose or purposes of punishment should guide the judge when imposing sentence for certain offences.

In the writer's view, the first concern of the sentencing court, and indeed the prime function of the criminal law, should be the protection of society, the protection of the community from crime. Moreover, fundamental concepts of justice and mercy and the principle of economy in sentencing should limit the imposition of punishment to the minimum necessary to achieve this fundamental objective.[18]

This principle has received recent muted recognition from both the judiciary and the legislature. For example, the Court of Appeal stated this year in *R* v *Puru* when considering sentence levels for rape that "[t]he sentence should be no more as well as no less severe than is justified and required for the protection of women, to mark rejection of such offences, and to punish the offender";[19] while the Criminal Justice Bill 1983 provides that the court in determining the length of a sentence of imprisonment imposed upon a violent offender is to have regard, among other matters, to the need to protect the public and, subject to this provision, that the term of any sentence of imprisonment is to be as short as is consonant with the safety of the community.[20]

The protection of society may be achieved by the adoption of any one or any combination of the various purposes of punishment, although to give force to any one of these purposes, to adopt one at the exclusion of the others, may result in the imposition of a sentence that is out of all proportion to the gravity of the offending. The nature and type of offence and the circumstances of the offender will usually dictate which purpose is to predominate. These are usually identified as to denounce; to exact retribution; to deter; to reform (rehabilitate); to incapacitate (prevent).

(a) Denunciation

A sentence should properly reflect society's condemnation and denunciation of the conduct concerned. For example in *R* v *Pue* the Court of Appea in increasing sentence stated: "The sustained violence of the respondents their 'prolonged and pitiless brutality' . . . required a sentence which wil reflect the sense of horror of the community at this crime";[21] and, similarly in *Puru*: "Society is entitled to exact a severe penalty from the offende so as to mark its condemnation of his conduct."[22]

18 This has been most aptly stated by Napier CJ in *Webb v O'Sullivan* [1952] SASR 65 a 66 in his oft-quoted statement: "The Courts should endeavour to make the punishmer fit the crime, and the circumstances of the offender, as nearly as may be. Our first cor cern is the protection of the public, but, subject to that, the court should lean towar mercy. We ought not to award the maximum which the offence will warrant, but rath the minimum which is consistent with a due regard for the public interest." See also *P* supra n 3; *Pawa* supra n 3; *R* v *Sargeant* (1974) 60 Cr App R 74; *R* v *Geddes* (1936) 3 SR (NSW) 554; *R* v *Cuthbert* (1967) 86 WN (NSW) 272; *Channon* v *R* (1978) 20 AL 1; *R* v *Davey* (1980) 2 A Crim R 254.

19 Supra n 15 at 254 per Woodhouse P.

20 See cls 5(2) and 7(2), respectively.

21 [1974] 2 NZLR 392 at 394.

22 Supra n 15 at 254.

(b) Retribution

This principle is no longer expressed in the form of the *lex talionis* of no more punishment than "an eye for an eye, a tooth for a tooth", but in modern times as simply requiring that wherever possible the punishment should fit the crime. An offender should receive his just desserts; there should be a just proportion between crime and sentence.

The Court of Appeal emphasised in *Pui*[23] that there are two matters that must be kept in balance when considering serious offences. There is a need for condign sentences to deter others and to demonstrate the rejection or repudiation by society of utterly uncivilised conduct; whilst on the other hand there is the equally important need to ensure that in comparable cases the level of punishment that is meted out by the courts in the name of the community is not allowed to ebb and flow depending on which member of the Judiciary is the sentencing judge. There is thus a need to demonstrate society's denunciation of a particularly serious, heinous or prevalent offence by the imposition of severe sentences, but some sense of proportion must be exercised otherwise the accused will be made a scapegoat for others who have committed similar crimes and not been apprehended.[24] In affirming these principles in *Puru*[25] the Court emphasised that the judicial obligation of the sentencer is to ensure that the punishment imposed in the name of the community is itself a civilised reaction, determined not on impulse or emotion but in terms of justice and deliberation.

(c) Deterrence

There are crimes of such a kind or gravity that, in all but exceptional cases, the primary consideration of the court must be to ensure that the sentence will serve as a deterrent.[26] Where a particular offence is serious, is prevalent in the community and is causing public alarm the court should give careful consideration to the imposition of a deterrent sentence. The New Zealand Court of Appeal emphasised in *R* v *Radich*[27] that reformation and rehabilitation of the offender are subsidiary considerations to the principle of deterrence. The Court said:[28]

> [O]ne of the main purposes of punishment . . . is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed

[23] Supra n 3.
[24] See *R* v *Withers* (1935) 25 Cr App R 53; *Pui* ibid.
[25] Supra n 15.
[26] Deterrence has a twofold aspect; it may both specifically deter the offender before the Court from re-offending (specific deterrence); and generally deter others who may be minded to offend in a similar way (general deterrence): see eg *R* v *Ball* (1951) 35 Cr App R 164.
[27] [1954] NZLR 86.
[28] Ibid, at 87 per Fair J.

> 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.

(d) Reformation (rehabilitation)

This aspect of sentencing assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. Where a sentence has the effect of turning an offender towards a criminal way of life, protection of the community is to that extent impaired. Conversely, where the sentence induces or assists an offender to avoid offending in the future, the protection of the community is to that extent enhanced.

While it is accepted that rehabilitation will not be achieved by penal measures taken at the end of the road (and that time may be the best reformer), rehabilitation has rarely been the paramount consideration in fixing sentence where offending is of a grave nature, even in the case of young offenders. For example in *R* v *Walker*[29] the Court of Appeal stated that the possibilities of the reform of youthful offenders in cases of violence may be overshadowed by the necessity to impose an appropriate sentence calculated to deter others.[30]

Rehabilitation may also give way to retributive principles. In *R* v *Lindeman*[31] the public interest in placing the responsibility of crime upon the person who committed it and in the imposition of the appropriate penalty was declared to be more important than the reformation of the criminal. Similarly, in *R* v *Elliot*[32] in examining s 39J of the Criminal Justice Act 1954, the Court of Appeal observed that although the concern of the section is with the hospitalisation of offenders and not their punishment, that concern cannot justify the detention of a minor offender as a committed patient. There is a need to maintain a reasonable proportionality between the gravity of the offending and the severe curtailment of liberty inherent in a s 39J order.

(e) Incapacitation (prevention)

The Court of Appeal has stated on numerous occasions that the preventive element in punishment is a factor which a sentencing judge may properly consider in imposing a finite sentence. In *R* v *Metcalfe*[33] the Court of Appeal with five Judges examined a term of imprisonment which although expressed in finite terms (the maximum sentence of fourteen years

29 [1973] 1 NZLR 99.
30 Compare *R* v *Greaves and Beasley* unreported, 8 August 1975 (CA 49/75, 55/75). See also *Radich* supra n 27 and *R* v *Jordan* [1979] 2 NZLR 268.
31 [1973] 1 NZLR 97.
32 [1981] 1 NZLR 295.
33 [1962] NZLR 1009.

imprisonment for rape had been imposed) was in effect an indeterminate sentence. The sentencing Judge indicated that while a sentence of five years imprisonment was appropriate for the offence, he had imposed an additional nine years imprisonment solely for the purpose of protecting society from the appellant. The Court held that such a penalty was not permissible in the absence of statutory authority. Nevertheless, it did expressly recognise that in the imposition of finite terms of imprisonment "the protection of the public is always a very important factor".[34]

The leading New Zealand case examining this principle of punishment is *R* v *Ward*[35] where the Court of Appeal reduced from four years to two a sentence of imprisonment imposed for burglary and related offences. The appellant, aged fifty-three, had spent thirty out of the last thirty-six years of his life in prison. The Court emphasised that it was proper when dealing with this class of offender to enlarge the period of confinement beyond that which would have been imposed had the offender not had a history of persistent offending and were it not thought necessary to protect the public from his depredations. Nevertheless, the Court adopted the words of Sir Michael Myers CJ in *R* v *Casey*[36] that the sentence imposed must still bear "some relation to the intrinsic nature of the offence and gravity of the crime" and stated:[37]

> We recognise that this balancing is not easy. No rigid lines are really possible. Moreover, the protection of the public against those likely to offend repeatedly can all too easily be seen as an additional punishment for past offences. For these reasons the law has sought to preserve the preventive aspect being given too much importance.

The controlling principle, the Court said, in ensuring that prevention did not over-ride other considerations was that the sentence imposed must bear a reasonable relationship to the gravity of the offence.[38]

2 *Sentencing Levels*

The New Zealand Court of Appeal has indicated the *sentencing range* for a few serious offences only. These include: manslaughter, causing grievous bodily harm to child – rare for sentence of imprisonment *not*

34 Ibid at 1014. This was reiterated in *R* v *Dolden* [1963] NZLR 862 where the Court held that where a convicted person is of subnormal mentality the sentence appropriate to the crime should be imposed and it should be left to the Department of Justice to decide whether in due course more suitable arrangements for his detention or treatment were desirable.

35 [1976] 1 NZLR 588.

36 [1931] NZLR 594 at 597.

37 Supra n 35 at 591 per McCarthy P.

38 The principle does not apply where the offender is qualified for a sentence of preventive detention. If the sentencing judge does not wish to impose such a severe sentence, he may impose a sentence adequate for the protection of the public which is of greater severity than that justified by the *Ward* principles: R v *Pratt,* unreported, 8 August 1978 (CA 61/78) (noted in [1978] BCL para 792). See also *R* v *Brown* unreported, 16 December 1982 (CA 181/82) (noted in [1983] BCL para 16) where it was said that where possible the indeterminate sentence of preventive detention should be avoided in favour of a finite one.

to be imposed;[39] rape – first offenders, in the region of four to seven years imprisonment[40] – median sentence three to five years imprisonment with 83 percent of all offenders sentenced to terms of between two and seven years[41] – in the ten years ending 1983 almost one-third of sentences were for five years or more and one-ninth were for at least seven years;[42] aggravated robbery – "cases in which planned armed robberies are carried out in premises such as banks so as to endanger the safety of considerable numbers of people . . . [u]sually attract sentences of six to eight years though both the upper and lower limits must obviously be regarded as flexible in the light of the particular facts";[43] and various types of drug offences.[44]

The Court of Appeal does not encourage the argument of appeals on the basis of a comparison with sentences said to have been imposed by other judges in like circumstances as the circumstances of individual cases may vary greatly.[45] However, schedules of penalties upheld or altered by the Court of Appeal in other cases have been incorporated into the judgments of the Court in a number of recent cases.[46] The cases noted are usually those in which little emphasis has been placed on the personal circumstances of the offender or the right of a judge to reflect the promptings of mercy in the sentence imposed. In *Moananui* the Court of Appeal in listing "typical cases" from that Court stated:[47]

> The selection is not of course exhaustive. In particular we have not included cases where lower sentences have not been disturbed on appeal by the persons sentenced and where no general observations of any importance have been made. When the Crown has not sought leave to appeal, such cases can be of little help in defining the acceptable range.

The purpose of the schedules would appear to be to give direction or guidance to the exercise of the sentencing discretion by providing judges with a general appreciation of the range of penalties considered appropriate by the Court for a particular type of offence. The cases do not purport to set rigid ceilings or to indicate base levels. Inclusion of the schedules

39 See *Heemi* v *R* unreported, 30 October 1981 (M 174/81) and *R* v *Kara* unreported, 1 July 1982 (CA 96/82) (noted in [1982] BCL para 800) respectively.
40 See *Pawa* supra n 3.
41 See *Pui* ibid.
42 See *Puru* supra n 15.
43 See *R* v *Moananui* [1983] NZLR 537 at 540 per Cooke J.
44 See *R* v *Curtis* [1980] 1 NZLR 406; *R* v *Smith* [1980] 1 NZLR 412; *R* v *Dutch* [1981] 1 NZLR 304; *R* v *Urlich* [1981] 1 NZLR 310; *R* v *Shewan, Humphries & Goss* unreported 16 March 1984 (CA 308/82, 155/82 and 172/82) (noted in [1984] BCL para 434). The sentencing pattern for drug offences is complex and has been detailed elsewhere: see Mathias "The Sentencing of Drug Offenders" [1981] NZLJ 3; Haig, "Sentences for Cannabis Offences" [1982] NZLJ 77.
45 The Court has repeatedly warned against placing too much emphasis on sentences imposed in other cases: eg *R* v *Brooks* [1950] NZLR 658; *Radich* supra n 27; *R* v *Rameka* [1979] 2 NZLR 592; *Ward* supra n 35. In the latter case the Court examined the records of penalties for comparable offences and stated that a satisfactory comparison was impossible as "the variations in the circumstances of offences are infinite": ibid at 591.
46 See eg *Pui* supra n 3; *Smith, Dutch, Urlich* supra n 44; *Moananui* supra n 43.
47 Ibid, at 539 per Cooke J.

clearly accentuates the Court's role of establishing sentencing guidelines. The indication of the range of punishments considered appropriate should be more conducive to a measure of consistency than the mere statement that a particular sentence is or is not suitable in the peculiar circumstances of a particular case.

II Powers to Interfere with Sentences

1 *Rights of Appeal Against Sentence*

Section 383(1)(c) of the Crimes Act 1961 provides that any person convicted on indictment[48] may appeal to the Court of Appeal *with the leave of that Court* against the sentence[49] passed on his conviction, unless the sentence is one fixed by law.[50]

Leave may be granted by a single judge of the Court of Appeal but when it is refused the applicant may renew his application to the Court.[51] A single judge has no power to hear an appeal, only an application for leave to appeal. The hearing by the Court of an application is usually treated as the hearing of the appeal itself; leave is assumed to have been granted.[52]

The Solicitor-General, with the leave of the Court of Appeal, may appeal against any sentence imposed on conviction on indictment other than one

48 A person is deemed to be convicted on indictment if he pleads guilty on indictment; or is committed to the High Court for sentence under s 44 or s 168 of the Summary Proceedings Act 1957; or he pleads guilty under s 321 of the Crimes Act after having been committed for trial – Crimes Act 1961, s 3 and cf *R* v *Rabjohns* [1913] 3 KB 171 and *R* v *Crago* [1917] NZLR 863; or he is found guilty after a District Court jury trial – District Courts Act 1947, s 28D(3).

49 "Sentence" is defined in s 379 of the Crimes Act 1961 as including, for the purposes of Part XIII of the Act (Appeals) "any order of the Court made on conviction; and the power of the Court of Appeal to pass a sentence includes a power to make any such order of the Court". In *R* v *Mahmod* [1979] 1 NZLR 62 this definition was assumed without argument to include a recommendation for deportation made under the Immigration Act 1964. "Sentence" includes a fine: *R* v *Farrell* unreported, 11 March 1976 (CA 79/75), *Hooton* v *Ministry of Transport* unreported, High Court, Auckland, 8 July 1980 (M 623/80); an order for payment of costs: *R* v *Howard* (1910) 6 Cr App R 17, *R* v *Hayden* [1975] 2 All ER 558; an order to pay compensation under s 403 of the Crimes Act 1961, or to make restitution under s 404, *ibid* and orders made on release on probation for payment of costs, damages or compensation: Criminal Justice Act 1954, s 8. A release on probation under s 6 of the Criminal Justice Act 1954 is deemed by subs (4) of that section to be a sentence or part of a sentence for the purposes of any appeal or application for leave to appeal. An order for disqualification from holding a motor driver's licence is a "sentence": see *Barton* v *Auckland City Council* [1977] 1 NZLR 732; *Ministry of Transport* v *Skerton* (1983) 2 DCR 169; cf *Tangata* v *Auckland City* [1971] NZLR 499 – a disqualification order is not a "sentence" within the meaning of that word as it appears in s 9(2) of the Criminal Justice Amendment Act 1962. A committal for sentence is not a "sentence": *R* v *London Sessions, ex parte Rogers* [1951] 2 KB 74.

A defendant may appeal under s 383(1)(c) to *increase* his sentence where he considers that sentence to be against his interests: *R* v *Stockdale* [1981] 2 NZLR 189.

Crimes Act 1961, s 393. Leave should not be granted unless there is a reasonably arguable ground upon which it can be contended, not necessarily successfully, that the appeal or application should be allowed: *R* v *Yuinovich* (1904) 7 GLR 74; *R* v *Broderson* (1905) 25 NZLR 861; *R* v *Bruges* (1906) 26 NZLR 389; *R* v *Mareo* [1936] GLR 193; and *R* v *Cooper* [1936] GLR 199.

See *R* v *Ross* [1948] NZLR 167. As to procedure upon granting or refusing of applications, see RR 42 and 43 of the Criminal Appeal Rules 1946.

fixed by law.[53] Where an appeal is against a sentence of detention it lapses and is deemed to be dismissed by the Court for non-prosecution if it is not heard before the date on which the person convicted has "completed serving that sentence".[54]

Section 144 of the Summary Proceedings Act 1957 provides that either party has the right to appeal to the Court of Appeal against any decision of the High Court on an appeal to that Court by way of case stated or on a question of law arising in a general appeal, but only with the leave of the High Court granted on the ground that the question of law involved is of general or public importance.[55] If the High Court refuses leave, the Court of Appeal, or one judge thereof, may grant leave.[56] There is no right of further appeal to the Privy Council and the decision of the Court of Appeal is final.[57]

53 Crimes Act 1961, s 383(2). For the purposes of an appeal to the Court of Appeal against sentence by the Crown "sentence" includes "any method of disposing of the case following conviction": ibid, s 383(4). The definition in s 379 of the Crimes Act 1961 is not excluded. There would appear to be no right of appeal by the Crown (other than on a question of law) where the defendant is discharged without conviction under s 42 of the Criminal Justice Act 1954, subs (4) of which deems such a discharge to be an acquittal. However an appeal against conviction and discharge under s 41 of that Act is not excluded.

54 Crimes Act 1961, s 383(3). The imposition of a short period of detention may preclude the possibility of an appeal by the Crown unless a hearing can be obtained forthwith. *Quaere* whether a person has "completed serving" a sentence when granted early release (remission) or when released on parole: cf Summary Proceedings Act 1957, s 115A(3) where the appeal lapses when "the defendant is released from detention . . . whether the sentence has expired or not". See also *Police* v *Parker* unreported HC Wellington, 2 March 1983 (M 621/82) (noted in [1983] BCL para 186) where the appeal continued and the defendant's release from detention was the prime factor in the decision not to increase an inadequate sentence: see p 653 infra.

55 An application to the Court under this section seeking to rely on the disparity between the sentence imposed on the applicant and that imposed on a co-defendant was dismissed where the discrepancy arose *after* the case was dealt with in the High Court. This was not a question of law that had arisen in the course of dealing with a general appeal from the District Court to the High Court: *French* v *Police* unreported, 12 December 1980 (CA 270/80).

56 For recent sentencing cases where leave to appeal has been granted by the Court of Appeal after refusal by a High Court Judge to do so see *Waymouth* v *Ministry of Transport* [1982] 1 NZLR 358 and *R* v *McPhee* unreported, 20 July 1981 (CA 38/81). In the latter case the length of a sentence was successfully attacked under this section. The Court held that a mistake in the High Court as to maximum sentence was a material error of law justifying the Court in granting special leave to appeal. The Court in reducing the term of imprisonment invoked its power under s 144(4) to adjudicate on the proceedings in the same manner as the High Court. (On any appeal against sentence the High Court may allow the appeal only where the sentence is one which the court imposing sentence had no jurisdiction to impose or is one which is clearly *excessive* or *inadequate* or clearly *inappropriate,* or where substantial facts relating to the offence or the offender's character and personal history were not before the District Court or were not substantially as placed before or found by that Court: Summary Proceedings Act 1957, s 121(3)(b). See also *Mihaka* v *Police* [1980] 1 NZLR 453.

57 The Court of Appeal has no jurisdiction to give leave to appeal to the Privy Council in a criminal matter: *Fryer* v *Superintendent of Her Majesty's Prison at Paparua* [19

2 *Powers of Court of Appeal*

On any appeal against sentence the Court of Appeal is empowered by s 385 of the Crimes Act 1961 either to quash a sentence and pass some other sentence warranted in law (whether more or less severe),[58] or to vary a sentence, or any part of it, or any condition imposed in it. The Court may quash any sentence, or part thereof, without imposing another sentence in its place.[59]

Subsection (3) of s 385 of the Crimes Act 1961 gives the Court of Appeal a wide discretion in dealing with appeals against sentences imposed in the High Court. It requires no more than that the Court "thinks that a different sentence should have been passed" and authorises the imposition of such sentence "as the Court thinks ought to have been passed". The section does not lay down any controlling principles which the Court should follow when considering an application by either the defendant or the Crown for an increase in sentence.

(a) General principles

When an appeal relates to the exercise by a judge of a discretionary power the principles upon which an appellate court should act were stated by

1 NZLR 693. There is, however, a right of appeal by virtue of Her Majesty's Prerogative to review decisions: *Falkland Islands Co* v *The Queen* (1863) 1 Moo NS 299, affirmed in *Arnold* v *King-Emperor* [1914] AC 644. This right of appeal is limited to cases where, "by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done": *R* v *Nadan* [1926] AC 482, 495, cited in *Woolworths (New Zealand) Ltd* v *Wynne* [1952] NZLR 496. Special leave to appeal to the Privy Council must first be obtained from the Privy Council; see *In re Dillet* (1887) 12 AC 459, and *Cordon-Cuenca* v *R* [1944] AC 105, [1944] 1 All ER 411. Special leave has been granted in only two cases from New Zealand, namely, *R* v *Annie Brown* [1898] AC 235 and *R* v *Nakhla* [1975] 1 NZLR 393; in the former case the appeal was dismissed; in the latter it was allowed. In *Muhammad Nawaz* v *King-Emperor* (1941) LR 68 IA 126, 127 Viscount Simon LC examined the limits of the jurisdiction exercised in criminal appeals by the Judicial Committee and stated: "The Judicial Committee is not a revising court of criminal appeal . . . . Neither is it concerned to review the exercise by the previous tribunal of its discretion . . . in awarding particular punishments." This was affirmed by the Committee in *Hardtmann* v *The Queen* [1963] AC 746, 757 where Lord Morris of Borth-y-Gest stated: "Questions as to what sentences are appropriate in particular cases (provided always that the sentences are within the limits laid down by law) are essentially questions of judgment and discretion. It is relevant to understand local conditions and by a knowledge of a country or community to have perspective by which to assess what sentences are necessary, reasonable, and just." In this case their Lordships found that the sentences were such as could be lawfully imposed and advised that the appeal should be dismissed.

The Court of Appeal has power upon an appeal by a prisoner to increase sentence: Crimes Act 1961, s 385(3). The Court of Appeal cannot do so, however, by reason of or in consideration of any evidence that was not given at the trial: *ibid,* s 389.

See eg *R* v *Johnson* [1909] 1 KB 439; *R* v *Bendon* (1911) 6 Cr App R 178; *R* v *Bradford* (1911) 7 Cr App R 42; *R* v *Brook* (1949) 2 KB 138.

Viscount Simon in *Charles Osenton & Co* v *Johnston* as follows:[60]

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified.

This case was not concerned with the sentencing of an offender; nevertheless, the oft-quoted dictum has been applied in the High Court when examining the exercise of the discretion to discharge without conviction.[61] Furthermore, the principles upon which the exercise of the sentencing discretion should be reviewed have been expressed in similar terms in the High Court of Australia. In *R* v *Cranssen* it was said:[62]

> The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority.

The Court of Appeal is thus not at liberty to exercise its own discretion merely by way of substitution for a different exercise of the same discretion by a lower court, on the ground only that the Court itself would have exercised the discretion differently. In practice, there were cases before the Court of Appeal was given a permanent composition in which this principle was sometimes overlooked, but since 1958 the Court has been clearly reluctant to entertain appeals against sentence except in the light of some general principle.

(b) Appeal by defendant

The New Zealand Court of Appeal has never examined generally the circumstances in which it will interfere with the sentence of a trial judge

60 [1942] AC 130, 138; [1941] 2 All ER 245, 250. See also *Evans* v *Bartlam* [1937] AC 473 [1937] 2 All ER 646; *Ward* v *James* [1966] 1 QB 273; *Fitzgerald* v *Beattie* [1976] 1 NZLR 265; *Birkett* v *James* [1978] AC 297.

61 See *Halligan* v *Police* [1955] NZLR 1185.

62 (1936) 55 CLR 509, at 519-520. See also *House* v *R* (1936) 55 CLR 499, 504-5; *R* v *Shershewsky* (1912) 28 TLR 364; *Skinner* v *R* (1913) 16 CLR 336; *R* v *Gumbs* (1926) Cr App R 74.

on appeal by the defendant. In *R* v *Brooks*[63] the Court quoted *Archbold's Criminal Pleading, Evidence and Practice:* "The sentence must be manifestly excessive in view of the circumstances of the case or be wrong in principle before the Court will interfere";[64] while four years later in *R* v *Radich* it said:[65]

> The basis upon which the Court should approach an application for a reduction is reasonably clear. It must be satisfied that the sentence is manifestly excessive, or wrong in principle . . . or there must be exceptional circumstances.

In practice, it may be difficult to distinguish between sentences quashed because they are "wrong in principle" and those similarly dealt with because they are "manifestly excessive". In determining whether a sentence is manifestly excessive the Court of Appeal would need to refer to the maximum sentence prescribed by law for the offence, the level of sentencing customarily observed with respect to the offence, the place which the conduct in question occupies on the scale of seriousness of offences of that type and the personal circumstances of the offender.[66] The fact that a sentence is manifestly excessive is usually, in itself, evidence that there has been an error in principle.[67] A sentence may be both manifestly excessive and wrong in principle as a consequence of the court overlooking, undervaluing, overestimating or misunderstanding some salient feature of the evidence[68] — taking into account an irrelevant factor,[69] overlooking a relevant matter,[70] or giving insufficient weight or excessive weight to a matter properly taken into account.[71] A sentence would be wrong in principle where the court exercises a non-existent discretion,[72] fails to recognise a discretion,[73] ignores an express restriction upon the exercise of the discretion,[74] or acts on the basis of an error in fact[75] or an error in law.[76]

63 Supra n 45 at 659.
64 32nd ed 328. The statement is based on the decisions of the English Court of Criminal Appeal in *Shershewsky* and *Gumbs* supra n 62.
65 Supra n 27 at 87.
66 See eg *R* v *Morse* (1979) 23 SASR 98.
67 *R* v *Ball* (1951) 35 Cr App R 164.
68 See *Skinner* supra n 62 at 340, per Barton ACJ.
69 For example viewing the conduct of the defence as an aggravating factor; lengthening a sentence to take account of remission or parole; taking into consideration offences with which the accused was not charged.
70 For example failing to recognise as a mitigating factor a plea of guilty, or time spent in custody before trial or sentence.
For example in drug cases the personal circumstances of the offender do not carry much weight: see cases cited supra n 44.
72 See eg supra n 7. See also the Immigration Act 1964, s 20, which provides that on conviction for certain offences the court must direct that a person be held in custody pending deportation.
See eg n 8 supra.
See eg Criminal Justice Act 1954, s 44B(4) which provides the court must consider certain matters before ordering confiscation of a motor vehicle.
For an example where the court is in error as to the factual basis for sentence see *Puru* where the sentencing judge mistakenly accepted that there had been an increase in sexual attacks on elderly women.
Illustrations are the following: where the maximum penalty is exceeded — *Barr* supra n 4; or where a particular sentence is imposed contrary to statute — see supra n 6, n 9 and n 10.

There was no elaboration by the Court in *Radich* upon "exceptional circumstances" but they would appear to encompass matters not raised in or disclosed to the sentencing court,[77] or matters arising *after* the imposition of sentence,[78] the consequence of which is that the sentence imposed by the trial judge is no longer appropriate. It is clear that the Court of Appeal will interfere if it is in a better position than the trial judge to assess the appropriate penalty. For example if a reduction is warranted by additional evidence called in the Court of Appeal pursuant to s 389 of the Crimes Act 1961,[79] particularly where sentence has followed a plea of guilty and consequently without evidence being heard.[80]

(c) Appeal by Crown

The Court of Appeal will not increase a sentence unless on a review of the facts and circumstances of the case it is clear that the sentence imposed is *manifestly inadequate* or that the Crown is able to point to some *error in principle* into which the sentencing judge has fallen.[81] Considerations justifying an increase should:[82] ". . . [S]peak more powerfully than those which ordinarily might justify a reduction . . . . [T]he Court is more reluctant to increase than it is to reduce a sentence." Sentences will only be increased by the Court of Appeal in "clear-cut cases".[83] Where there is a real error in sentencing which has resulted in a feeling of injustice from the public's point of view, then that error must be corrected.[84] This is usually done by increasing the sentence so as to reach the *lower range* of appropriate sentences.[85]

77 For example previous convictions due to computer error or the adoption of an alias by the offender: cf Summary Proceedings Act 1957, s 121(3)(b), supra n 56.

78 For example change in personal circumstances — pregnancy, ill health — both mental and physical, death of a spouse; change in financial circumstances — collapse of a business, bankruptcy.

79 See *R* v *Dickinson* (1909) 2 Cr App R 78; *R* v *Lane* (1911) 6 Cr App R 136; *R* v *Bradshaw, Beacham, and Williams* (1911) 6 Cr App R 221.

80 See *R* v *Nuttall* (1908) 1 Cr App R 180; *Preston* v *Richardson* [1949] GLR 391; *Mansion House Kawau, Ltd* v *Jebson* [1952] NZLR 988.

81 *Pue* supra n 21 (following an earlier decision of that Court in *R* v *Bustard* unreported, 2 July 1961 (CA 17, 19/71)).

82 *R* v *Wihapi* [1976] 1 NZLR 422, 424 per McCarthy P. The Court emphasised the need to be careful not to extinguish the right of a sentencing judge to adopt a merciful approach and to conclude that the state is best served by taking a form of action calculated to encourage reformation even in cases which might normally call for a deterrent sentence.

83 *R* v *Beaman* unreported, 16 November 1982 (CA 177/82) (noted in [1982] BCL para 1105). Where a community-based sanction has been imposed the Court is more reluctant to increase sentence than in circumstances where an inadequate custodial sentence has been imposed. See eg *R* v *Clark* unreported, 7 December 1981 (CA 159/81) where the Court refused to grant the Solicitor-General leave to appeal against a sentence of community service on the ground that to substitute a sentence of imprisonment would take back from the community a man who had been within it for five months, and would deprive him of the rehabilitation that he may have achieved and the opportunity of worthwhile employment. See also *R* v *Clark* unreported, 10 March 1981 (CA 266/81) (noted in [1981] BCL para 340).

84 *R* v *Samuels* unreported, 7 November 1980 (CA 133/80) (noted in [1980] BCL para 1081).

85 See *Urlich* supra n 44; *R* v *Simm* unreported, 9 October 1981 (CA 148/81) (noted in [1981] BCL para 980); *R* v *Steer* unreported, 7 December 1981 (CA 165/81).

A similar reluctance to increase sentence is evident in other jurisdictions where similar rights of appeal exist. For example Crown appeals have been described as cutting across "time-honoured concepts of criminal administration".[86] A Crown appeal puts in jeopardy "the vested interests that a man has to the freedom which is his, subject to the sentence in the primary tribunal".[87] Moreover, it has been said that Crown appeals "should be a rarity" and be brought only to "establish some matter of principle".[88] The approach of the Crown in New Zealand is more pragmatic. While Crown appeals are understandably less frequent than appeals by defendants, they tend nevertheless to be brought to correct departures from existing sentencing levels rather than to establish sentencing principles or policies.[89]

Pui[90] and *Puru*[91] are the exception. In both cases the Court of Appeal considered submissions by the Solicitor-General to the effect that there should be a change in sentencing policy for the offence of rape. The Court was invited to consider whether the general level of sentencing for that offence should be raised markedly. The Court responded in *Pui*, and reaffirmed in *Puru*, that "such a step should not be contemplated without convincing reasons".[92] On both occasions the Court held that there was insufficient evidence as to either any marked recent increase in the level of offending or as to the deterrent effect of increasing already severe sentences so as to justify a drastic change in sentencing policy. This was said to be particularly so with offences of this type which usually were not the products of planning and deliberation, and where the chances of apprehension were more likely to be given weight to by the offender than the consequences of conviction.

If the general increase is to be justified on the ground of deterrence there is force to this argument. The position as to denunciation and retribution is certainly not so clear. How is the prevalence of a particular offence and community attitude thereto to be established to the satisfaction of the Court? In *Puru* the Solicitor-General submitted that "now is an appropriate time to make a change because the matter is a live issue, the incidence of the crime may well be increasing, cases with aggravating factors are continuing, the continuance of aggravated cases is likely to cause increasing apprehension for personal safety and also resentment".[93] The evidence presented in support was not cited although the Court acknowledged that there had been "political pronouncements about the matter"[94] and that strong extraneous pressure" had been placed upon High Court Judges

Peel v R (1971) 125 CLR 447, 452 per Barwick CJ.
Whittaker v *R* (1928) 41 CLR 230, 248 Isaacs J.
Griffiths v *R* (1977) 15 ALR 1, 32 per Barwick CJ.
The function of Crown appeals has been succinctly stated by King CJ in *R* v *Osenkowski* (1982) 30 SASR 212, 213 to be "to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience".
Supra n 3.
Supra n 15.
Pui supra n 3 at 198; *Puru* supra n 15 at 250, respectively.
At 251.
At 249.

"to take individually a much harder line when dealing with cases of rape".[95] The Court did not examine whether there was any change in community attitude to the offence but rested content in noting that society utterly rejected offending of this kind and that judges as "concerned members of society . . . reflected those paramount considerations in discharging their judicial sentencing responsibilities".[96] It would appear to be implicit in the judgment that the Court may invoke its "general knowledge" as to the prevalence of a particular offence and the community attitude thereto.[97]

The Court, with respect, is correct in emphasising the need to keep some sense of proportion when it said "[t]he sentence should be no more as well as no less severe than is justified and required for the protection of women, to mark rejection of such offences, and to punish the offender".[98] But the judgment gives no indication as to how that Court in its role of settling sentencing policy is able to quantify this.

The New Zealand Court of Appeal on other occasions has considered statistics, concluded that the incidence of a particular offence is on the increase and imposed deterrent sentences.[99] Care must be taken by the Court when interpreting statistics of crimes known to the police. An increase may not reflect an upsurge in the commission of a particular type of crime but more efficient detection, or collation of data by the police, or an increased awareness and willingness to report on the part of the public. The gap between offences reported to the police and conviction rates was noted by the Court in *Puru,* but there was no reference to the dark figure of crime (unreported crime). Until a study such as the British Crime Survey[1] is carried out in New Zealand and repeated regularly it is difficult to see how "real evidence" can be obtained to satisfy the Court as to the increase and prevalence of offences such as rape, assault, "white collar" crime or

95 Ibid.

96 Supra n 15 at 254. The Court observed also that there had been an upward trend in the past five years in the level of sentences, particularly for the more aggravated kind of rape that the general level of sentencing in this country for this offence paralleled that in England and that the Court should hesitate long before increasing a general level of sentencing which would bear particularly heavily on one section of society or tend to single out young Maoris as a racial group. (A recent Justice Department study indicated that 45 percent of convicted rapists are Maori).

97 See eg *Hargreaves* v *Chakley* [1903] 9 ALR 78, *R* v *Ragen* (1916) 33 WN (NSW) 19; *R* v *Piercey* [1971] VR 647. Judicial notice should not be taken of reports by the news media as these may be biased and unreliable: *R* v *Wilson* (1974) 10 NSR (2d) 629.

98 Supra n 15 at 254.

99 For instance in *R* v *Atkinson* unreported, 16 March 1981 (CA 292/80) (noted in [1981] BCL para 234) the Court accepted evidence from counsel for the Crown that in New Zealand in the previous twelve month period 235 aggravated robberies had taken place (had been reported to the Police?!) and that this was the ninth armed robbery of a Post Office in the South Auckland Police district in the preceding twelve months. On hearing "the alarming statistics" the Court affirmed the decision of the sentencing judge that the time had arrived for the imposition of a truly deterrent sentence. Similarly, in *R* v *S* unreported, 26 October 1976 (CA 155/75) (noted in [1976] BCL para 903), the Court considered figures relating to the number of prosecutions in both Auckland and New Zealand for various types of drugs, noted the increase in charges involving heroin, and affirmed the need to keep really heavy sentences for trafficking in hard drugs.

1 Home Office Research Study No 76 (1983), London: HMSO.

"victimless" crime where the dark figure is believed to be high.[2] A similar sampling of community attitude towards various forms of crime is also necessary.

III Disparity of Sentence Between Co-offenders

There is no requirement in law that co-offenders should be treated alike. It is perfectly proper for the sentencing judge, or sentencing judges, where offenders are sentenced in different courts, to distinguish between co-offenders by imposing different sentences.[3] Essentially, sentencing a co-offender is not unlike sentencing an individual. The judge must assess the culpability and degree of participation of each offender, examine the aggravating and mitigating factors which affect each individual and then determine whether equal or different treatment is warranted. Where it can be shown that that a co-offender has received too long or too short a sentence, in that relevant considerations affecting the individual appellant have been overlooked or under- or over-emphasised, or irrelevant matters considered, then an appellate court may interfere.[4] In these circumstances the general principles relating to alteration of sentence on appeal are applicable in the same way as if the appellant was the sole offender.

Despite the frequency with which disparity in sentence between co-offenders is argued as a ground of appeal it is often both just and explicable by reason of differences in factors such as the degree of complicity, the character, circumstances and criminal record of each offender. The issue is more complex, however, where the appellate court is confronted with an offender whose sentence appears to be proper in every respect, but where his co-offender has received a sentence which in the opinion of the court is especially or unduly lenient. Our Court of Appeal has emphasised that the fact that one of two co-offenders jointly charged has received too short a sentence is not necessarily a ground for interfering with the longer sentence passed on the other.[5] The choice is between upholding the sentence and leaving the appearance of injustice[6] or reducing the sentence to what is considered to be an inappropriate level.[7] The response of the Court is to interfere with sentences that are *not excessive in themselves* only where, in the general interests of justice, it is desirable to remove a sense of grievance that there is a grave discrepancy between sentences imposed on different people involved in the same offence. The principle is stated concisely by the Court of Appeal in *R* v *Rameka* where the Court said "that it will in special cases have regard to disparity as a ground of appeal against sentence, but only when the disparity appears *unjustifiable and is gross*".[8]

2 As with robbery, kidnapping, manslaughter where the official statistics are believed to equate reasonably closely to the actual rate.
3 *Police* v *Egden* [1977] 1 NZLR 123.
4 *R* v *Richards* (1955) 39 Cr App R 191.
5 *Rameka* supra n 45.
6 Eg *Campbell* v *McHugh* [1951] GLR 376 where two employees, but not co-offenders, had stolen from the same company.
7 Eg *Richards* supra n 99, *R* v *Goldberg* [1959] VR 311.
8 Supra n 45 at 594 (emphasis added).

The Court of Appeal examined the principle further in its judgment in *R* v *Lawson.*[9] The test as to whether an appellate court should interfere with a sentence that was otherwise appropriate, on the grounds of disparity, was said to be *objective*, not subjective: "It is not merely whether the offender thinks that he has been unfairly treated but whether there is a real justification for that grievance; whether a reasonably minded independent observer aware of all the circumstances of the offence and of the offenders would think that something had gone wrong with the administration of justice."[10] There must be such a marked and unjustified disparity that it is not consonant with the appearance of justice.[11] This, presumably, could take the form of discrimination between co-offenders where neither the circumstances surrounding the commission of the offence nor personal factors warrant disparity; or of equal treatment where differentiation is required, or it could occur where the distinguishing features, though justifying some difference, do not appear to be of sufficient weight to justify the extent of the difference occurring between co-offenders. In *Urlich*[12] a disparity of five years between the sentence imposed on the appellant and a sentence subsequently imposed by a different judge on a female co-offender, similarly implicated, was so gross as to justify interference. The Court emphasised that with offences of drug dealing although less weight was to be given to disparity it could not be ignored entirely. In *Rameka* the disparity was justified by differences in the criminal records of the co-offenders and in the circumstances of their offending; in *Lawson* by reason of the differing purposes of punishment being pursued in respect of each offender.

The nature and diversity of the recognised theories of punishment present two obstacles to the reduction of disparity and the regulation of sentencing through appellate review. First, in assessing the extent of disparity it is important to establish what theory of punishment is being pursued as a matter of sentencing policy and to recognise that the freedom of individual judges to deal with offenders in the way they think best suited to the interests of the public and of the offenders themselves must be capable of being exercised not only when dealing with offenders in isolation but also when sentencing co-offenders. Secondly, without guidance from the Court of Appeal, the sentencing judge in the first instance and the High Court acting in its appellate jurisdiction have no yardstick with which to identify and measure disparate sentences. The inherent difficulty with the various purposes of punishment is that each emphasises different factors as being crucial to the sentencing decision. Where an identical purpose of punishment is being pursued in respect of each co-offender, unjustified disparity will be evident if the factors relevant to that particular purpose are the same for each co-offender, but differing sentences are imposed. However, where different purposes are being pursued, unjustified disparity

9 [1982] 2 NZLR 219.

10 Ibid at 223 per McMullin J.

11 The Court observed that a similar approach had been adopted by the English Court of Appeal, Criminal Division, in *R* v *Potter* [1977] Crim L R 112, *R* v *Weekes* (1980) Cr App R 161 and *R* v *Coffey* (1976) 74 Cr App R 168. See also *R* v *Pitson* (1972) Cr App R 391.

12 Supra n 44.

must be determined by examining the relevance of factors peculiar to each co-offender and to the particular purpose of punishment.

The New Zealand Court of Appeal has not attempted to distinguish between a disparity that is manifest at the time a sentence is passed upon an offender and that which arises as a result of a more lenient sentence *subsequently* being imposed upon a co-offender by another judge in another court. The temporal significance of a co-offender's grievance is relevant in England where the courts have stated that they will be slow to interfere with a sentence, save in the most exceptional circumstances, unless the disparity is based on circumstances prevailing at the time the sentence on appeal was passed.[13] The rationale is that a real sense of grievance will only be engendered when a sentence, proper in itself, is so disparate when compared with other sentences passed by the same judge *on the same occasion.*[14] This approach does not appear to have found favour with courts in Australia[15] and it is suggested that it is a distinction that our Court of Appeal should be slow to draw, particularly as disparity is most likely to arise where co-offenders, for whatever reason, are sentenced by different judges.[16] A sentence subsequently imposed upon a co-offender, or one altered on appeal, should constitute additional evidence reviewable by the Court of Appeal and justifying, where appropriate, in "exceptional circumstances", an alteration of sentence.[17] The Court is in a better position to sift the evidence pertaining to each co-offender and to perceive the substantial similarities or differences than the sentencing judge who is primarily concerned with the evidence presented to him in relation to only one of the co-offenders.

The writer has been unable to locate any cases in the Court of Appeal in which disparity of sentence has been argued by the *Crown* as a ground for an *increase* in sentence. There would appear to be no difficulty in this respect where the sentence imposed upon a co-offender is manifestly inadequate and this can be demonstrated by reference, inter alia, to a more severe sentence imposed upon another co-offender. It was so argued in the High Court in *Police* v *Parker*[18] where Greig J held that the penalty imposed on the respondent was in all the circumstances inadequate and so different from that imposed on the other two co-offenders that it displayed a disparity which, were it not for other matters,[19] would require rectification. The novelty of disparity being argued by the Crown was not considered; it was accepted that the disparity principle works both ways. Consequently the same disparity may be argued on appeal (including cross appeals) by counsel for each party.

3 Eg *R* v *Brown* [1975] Crim L R 177, *R* v *Stroud* (1977) 65 Cr App R 150.
4 See *Stroud,* ibid, at 153.
5 See eg *Mihailoff* v *Huffa* (1975) 10 SASR 66.
6 Many difficulties with disparity of sentence could be overcome by ensuring that co-offenders are sentenced by the one judge (preferably at the same time) and where this is impossible (eg as a result of different pleas or committal to the High Court for sentence) requiring, by statutory provision if necessary, that the judge sentencing at the later date be informed of the sentence that has been imposed on each of the co-offenders.
7 See Crimes Act 1961, s 389.
8 Supra n 54.
9 See discussion, ibid.

Where a sentence is appropriate having regard to the circumstances of the offence and the offender, it is unlikely that the Crown can sustain an appeal based solely on disparity. The ground of appeal would be that the Crown has been unfairly treated, in that a reasonably minded independent observer would think there is something amiss with the administration of justice. It would be difficult, perhaps impossible, for the Crown to establish that this fictitious character would view the otherwise appropriate sentence from the perspective of the Crown rather than that of the person who has received the harsh sentence and who may or may not be justifiably aggrieved. Justice to the respondent would appear to require no interference in the sentence. If the sentence with which comparison is being drawn is the subject of appeal, it would need to be examined in the light of the principles discussed above.

The Court of Appeal should be slow to interfere on the ground of disparity as the attaining of justice between co-offenders is at the expense of justice to other offenders who have committed similar offences and who have not received such lenient treatment. The elimination of one disparity creates further disparity. Where the Court reduces the sentence on one participant in an offence to the level of the sentence imposed on another participant, an injustice is done to the community as a whole if the latter sentence is inadequate, in that, instead of only one person being punished too leniently, two persons are so punished.

IV CONCLUSION

Within the bounds laid down by Parliament, the judge has a broad discretion to decide the most appropriate sentence in the individual case. Nevertheless, as has been noted in another jurisdiction, "a judge is not set adrift on an uncharted sea involving his bearing unaided a personal burden of attempting to achieve abstract justice."[20] Appellate review has enabled doctrines and principles to be established at common law in regard to sentencing which provide "the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges".[21]

There has been no definitive statement from our Court of Appeal as to the primary purpose of punishment. There is a veritable potpourri Judicial authority has been established for the following propositions deterrence is "one of the main purposes of punishment"; society's rejection and denunciation of certain offences are "paramount considerations"; the protection of the public is "a very important factor"; proportionality between offence and sentence must be considered; judges are enjoined to avoid sentences that are "weakly merciful".

The purpose of the criminal law is to bring wrong-doers to justice for the protection of the community. This should be the primary consideration when imposing sentence. The other so-called "purposes of punishment" should be seen to be the matters which the courts in the exercise of their discretion should balance to achieve this end. As our Court o

20 *R* v *Rushby* (1977) 1 NSWLR 594 at 597, per Street CJ.
21 Idem.

Appeal has stated in *Puru* an important consideration is to ensure that there is an appropriate degree of flexibility left to the judge so that punishment can actually be made to fit the crime and this writer would add to fit the criminal. However, a fundamental distinction must be drawn between the sentencing judge being left with the discretion to choose which policy to apply, and his being conferred with the discretion to choose how best to implement a given policy in the individual case. Faced with near silence from the legislature and with a "shopping list" of the recognised theories of criminal punishment from the Court of Appeal as a statement of sentencing policy, each sentencing judge inevitably becomes an independent policy-maker who is free to choose the purpose of punishment that suits best the circumstances of a particular case. To reduce sentence disparity precise and concise guidance to sentencing judges on the matter of sentencing priorities, objectives and policies should be a prime concern of both the legislature and the Court.

The hesitant steps taken in the Criminal Justice Bill 1983 to give direction to the exercise of the sentencing discretion, the trend in the last decade, in particular, of the Court of Appeal delivering written judgments establishing sentencing principles and, more recently, of incorporating schedules of penalties imposed in other cases, are conducive to the reduction of sentence disparity. Moreover, sentencing policies are now and will continue to be judicially determined largely, if not exclusively, by that Court. In so doing the Court must continue to tread carefully the fine line between the demand of justice for a reasonable degree of uniformity in sentencing and the requirement that the sentencing judge has that reasonable and just area of discretion for which the particular circumstances may call.