

Crown Appeals Against Sentence and Double Jeopardy

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INTRODUCTION

The *Criminal Appeal Act 1907 (UK)* created a new court for England and Wales to review possible miscarriages of justice to persons convicted on indictment. Convicted persons were granted a new right to appeal against conviction and/or sentence. The Act did not, however, grant the Crown any appeal rights at all and the newly created Court of Criminal Appeal thus had no jurisdiction to entertain a prosecution appeal against an acquittal, a prosecution appeal against sentence or a prosecution appeal against an interlocutory judgment or order – all of which, in some form, are now available in the UK and in New South Wales.

The impetus for the creation of the English Court of Criminal Appeal was growing public and political concern about the possibility of innocent persons being convicted and, to a lesser extent perhaps, inappropriately harsh sentences being imposed. Although the idea of a Court of Criminal Appeal was strongly opposed by the bulk of the judiciary and a range of other groups at the time, the political pressure created by the mounting public concerns about miscarriages of justice, fuelled by media reports, became irresistible. The creation of the English Court of Criminal Appeal can be seen as essentially a political response to changing social and political expectations and ideas. Such responses continue today in the UK and Australia.

The concept of a ‘miscarriage of justice’ in 1907 was quintessentially based on the interests and perspectives of persons accused and convicted of crime. The idea that a wrongful acquittal, an erroneous interlocutory order against the prosecution or an unduly lenient sentence can also constitute a miscarriage of justice was simply excluded and the concept of an ‘appeal’ in criminal proceedings was limited to appeals by the convicted, not appeals by the Crown (i.e. the community). This one-sided view was particularly evident also in the provision in the *Criminal Appeal Act 1907 (UK)* that the Court of Criminal Appeal did not have power to order a re-trial.

Since 1907 the nature of criminal appeals in England has undergone major shifts and reforms. Today the Crown can apply to the Court of Appeal, Criminal Division for a retrial of a person acquitted (in defined circumstances), it can appeal against an alleged lenient sentence and, in limited circumstances, it can appeal an interlocutory decision. The Court of Appeal can also order a re-trial of a person convicted. These major reforms demonstrate that the nature and operation of an appeal system do reflect prevailing social and political conditions, even if that takes some time. Moreover, these new rights of appeal for the prosecution can be seen as a type of

recasting of the meaning of the terms ‘justice’ and ‘miscarriage of justice’. Additionally, there has been a rebalancing of the general approach to criminal justice with the interests of the State and the public (including victims of crime) now being accorded greater weight.

In New South Wales that process got under way with the *Criminal Appeal Act 1912* and it is continuing.

The focus of this paper is the now longstanding power of the DPP to appeal to the Court of Criminal Appeal (CCA) against an alleged manifestly inadequate or excessively lenient sentence.

SENTENCING

The purposes of sentencing – denunciation, retribution (or revenge), incapacitation (or protection of the community), rehabilitation (or reform) and deterrence (both specific and general) – are well known. The extent to which it achieves any of those to any real level of satisfaction is problematic; however, in civilised societies it is the only generally acceptable mechanism we have for dealing with criminal offenders.

In *Weininger v The Queen* (2003) 212 CLR 638 Chief Justice Gleeson of the High Court of Australia described the sentencing task as:

“... a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour into the mathematics of units of punishment usually expressed in time or money”.

(Is it any wonder, then, that there remain enormous difficulties in trying to punish people into goodness?)

In an address to the New South Wales (‘NSW’) Parole Authorities Conference on 10 May 2006, NSW Chief Justice Spigelman said:

“As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved [in making parole decisions] is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters.”

And in an admonition to those who agitate unreasonably in the community for different approaches, he added:

“Long experience has established that such tasks are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill informed, or partly informed, public debate on such matters.”

In an earlier article in the Australian Law Journal the Chief Justice had added, in relation to sentencing:

“Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.”

Balancing all these considerations when deciding whether or not to institute a Crown appeal in an individual case is difficult.

In addition, weighing them against the need to ensure consistency in sentencing between numbers of like cases, one of the objectives of Crown appeals, can also pose problems but is essential. Sir Anthony Mason (later Chief Justice of Australia) said in *Lowe v The Queen* (1994) 154 CLR 606:

“Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community” (at [610-611]).

THE PROSECUTION’S INTEREST

“Appeal” can be an emotive word – when it is used, for example, in the sense of making an entreaty, an earnest request for an indulgence. In that sense it is a call for help. Strange, then, to think of the prosecutor – the “dark force” in criminal justice in the minds of some – pleading for help from an appellate court; but appeals are made regularly by the prosecution.

Of course, the prosecutor acts on behalf of the community and why should the community not need help on occasions? The changes mentioned above do serve to better safeguard the general public interest. The prosecutor acts in the public interest and that can now require a court decision to be corrected – or at least reviewed by a higher authority – in circumstances where previously there was no remedy. By that mechanism the prosecutor can contribute to the maintenance of standards and consistency in the criminal justice process that the public interest requires and the community expects and endorses.

Perhaps more fundamentally, the prosecutor is part of the executive arm of government but with judicial (or at least quasi-judicial) overtones. The prosecutor acts independently in prosecution decision making – independently of inappropriate influences from politics, the media and the community. The judicial arm acts even more independently; and rightly so. But it is still qualified independence, in that the judiciary is made accountable by several mechanisms. One is the mechanism of appeal and it may be invoked in appropriate circumstances by the prosecutor.

CROWN APPEALS AGAINST SENTENCE

As noted above, the *Criminal Appeal Act 1907 (UK)* did not grant the Crown a right to appeal against an alleged lenient sentence and such a right has never been recognised at common law. This probably reflects the importance attached to principles of double jeopardy in the broadest sense; but it is still perhaps surprising that this right was not granted to the prosecution in England until 1988. In Australia it appears that NSW was the first jurisdiction to create a statutory right of a Crown appeal against sentence in 1924 by amendment to the *Criminal Appeal Act 1912*. Initially the High Court held that an unfettered discretion had been given to the court by this legislation to alter the sentence imposed at first instance, but in later years many qualifications have come to be imposed. I address those qualifications below – they may well arise from concerns about double jeopardy, but the landscape is not so easy to survey these days.

Prosecutors' appeals are against allegedly inadequate sentences. In seeking to correct those sentences the Crown is pursuing not only the correction of error on the part of the sentencing court and the doing of justice in the individual case, but also greater consistency in sentencing throughout the criminal justice system.

One of the aims of the criminal justice process (as noted above) must be to seek to achieve consistency in sentencing – or at least to avoid any systemic impediments to it (accepting that individual sentencing aberrations will occur from time to time). As Mason J adverted to in *Lowe*, that is necessary in order to avoid claims of unequal justice or of unfairness in the operation of a compulsory process, contrary to the rule of law itself. Claims of that kind can do great harm to community confidence in and therefore acceptance of the criminal justice system and the prosecution has a role to play in averting them.

TESTS TO BE APPLIED

Deciding whether or not to appeal is as much art as science. To call the process 'imprecise' is to give it a certainty it does not deserve.

In deciding whether to commence a Crown appeal against sentence, the principal matters to look for on both sides of the equation are as follows. They are reflected in NSW Prosecution Guideline 29 (see: www.odpp.nsw.gov.au):

- whether or not the sentencer made a material error of law or fact, misunderstood or misapplied proper sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence, apparent from the remarks on sentence;
- manifest inadequacy of the sentence which may imply an error of principle by the sentencer;
- a sentence below the range of sentences (from past statistics and comparable cases) legitimately open to the sentencer;
- a need to correct a developing aberration in sentencing;

- a material irregularity in the sentencing proceedings themselves, including the exclusion of the prosecution's right to be heard;
- the species of double jeopardy that applies to such appeals and its effect in moderating any substituted sentence to a level below that which might have been appropriate at first instance;
- the appeal court's residual discretion not to interfere, even if it considers the sentence inadequate; and
- the prospects of success overall (taking into account also, perhaps, the offender's progress since the sentence was imposed).

The NSW Prosecution Guidelines also draw attention to the propositions that:

- prosecution appeals are and ought to be rare, as an exception to the general conduct of the administration of criminal justice; they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice;
- the appellate court will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate;
- the appellate court will take into account the advantages enjoyed by the sentencer which are denied to it;
- the appellate court will not be concerned whether or not it would have found the facts differently, but will consider whether or not it was open to the sentencer to find the facts as s/he did;
- scope must remain for the exercise of mercy by the primary sentencer; and
- if an appeal is to be instituted, it must be done promptly.

The High Court has held (*Bond v The Queen* (2000) 201 CLR 213 @ [27]; *Markarian v The Queen* [2005] HCA 25 @ [25]) that a Crown appeal against the inadequacy of a sentence should be brought only in exceptional circumstances and then only to correct an error of principle (perhaps as shown in a manifestly inadequate sentence). In *Griffiths v The Queen* (1977) 137 CLR 293 it was stated that Crown appeals should be “a rarity, brought only to establish some matter of principle”, an “extraordinary remedy, intended to be invoked rarely... and then only for reasons of great public importance” and that the “incorrectness of the [first instance] sentence must be manifest”.

The Court of Criminal Appeal has said more recently (*R v Baker* [2000] NSWCCA 85) that a Crown appeal – at any rate, a successful Crown appeal – should be rare. Spigelman CJ said:

“19 ...The authorities make it clear that Crown appeals should be rare. It may be that present practice does not reflect that restriction, nevertheless, successful Crown appeals should be rare. This is particularly so with respect to that category of appeals in which no particular error can be identified in

the sentencing process and the Crown must rely on an assertion of manifest inadequacy as a basis for a conclusion that some error of principle must have occurred.”

There is much debate about whether or not, and to what extent, those injunctions are borne in mind by Crown appellant and observed by appeal courts and it seems to be the case these days that they may be more honoured in the breach than the observance. “Rarity” does not seem to be a feature of Crown appeals; but neither are they excessively numerous.

Another aspect of the juggling act that must be undertaken is to balance the numerous pronouncements of appellate courts that Crown sentence appeals will not be successful if the end result would be to make only minor adjustments to sentences against the reality that the appeal court often does precisely that! The bench’s approach seems to depend upon its makeup on the day, there not being (at least in NSW in recent times) an established team of specialist criminal appeal judges (although some judges do sit often in that jurisdiction).

Of course, courts have long recognised that the mere fact of the commencement of a Crown appeal (even if it is later abandoned or dismissed) can have a detrimental effect upon a prisoner. In part for that reason courts have stated that (as noted above) Crown appeals ought to be rare, as an exception to the general conduct of the administration of criminal justice. Accordingly, when determining whether or not to appeal in particular matters, the prosecutor is faced with the often difficult task of balancing also the prisoner’s rights with the duty owed to the community to ensure that serious errors are corrected. In the NSW experience, fewer than half of the sentences referred to the DPP for consideration of a Crown appeal are actually directed to appeal and over the long term about 65 per cent of those are successful.

In its Monograph 27 of June 2005 “*Crown Appeals Against Sentence*” the Judicial Commission of New South Wales reported that for the period January 2001 to September 2004 the Crown appealed in 2.5% of all first instance sentencing matters. The numbers have fallen since then and in 2005-06 there were 80 Crown inadequacy appeals and 73 in 2006-07. In the latter two years the success rates were also down – 44% and 51% respectively.

These figures tend to show that only the strongest Crown appeal cases now proceed and only the very strongest succeed.

Crown appeals are an imperfect way to achieve consistency in sentencing (and perhaps largely ineffective), although that is one of the main considerations borne in mind when deciding whether or not to appeal. Other mechanisms have contributed to achieving consistency (e.g. guideline sentencing judgments, standard non-parole periods), but they are not perfect either.

RARE AND EXCEPTIONAL?

As noted above, at first it was thought that an appeal could be brought by the prosecution in the exercise of an ‘*unfettered discretion*’ (*Whittaker v The King* (1928))

41 CLR 230). In *obiter dicta* in *Griffiths v The Queen* (1977) 137 CLR 293, referred to above, Barwick CJ imposed restrictions (and some question with what authority he did so). Are the restrictions too onerous? Should appeals be available not only to establish points of principle but also to correct individual injustices? Are the courts allowing that, anyway?

In *R v Wall* [2002] NSWCCA 42 at [70] Wood CJ at CL said:

“70 ... it is important to note the principles which apply in relation to the determination of a Crown appeal against sentence:

*(a) The normal restriction upon appellate review of the exercise of a discretion, as set out in *House v The King* (1936) 55 CLR 499, applies to Crown appeals against sentence: *Dinsdale v The Queen* (2000) 202 CLR 321; with the result that this Court cannot merely substitute its opinion, as to the appropriate sentence, for that of the sentencing judge: *Lowndes v The Queen* (1999) 195 CLR 665 at 671; rather, it may interfere only where error either latent or patent is shown; *R v Tait* (1979) 46 FLR 386 at 388; and *Wong and Leung v The Queen* (2001) 76 ALJR 79 at para 58 and 109.*

*(b) Appeals by the Crown should generally be rare; *Malvaso v The Queen* (1989) 168 CLR 227 at 234, and unless there is a clear error of principle identified, it would be exceptional for the Court to interfere: *R v Baker* [2000] NSWCCA 85.*

*(c) A Crown appeal against sentence is concerned with establishing matters of principle "for the governance and guidance of courts having the duty of sentencing convicted persons": per Barwick CJ in *Griffiths v The Queen* (1977) 137 CLR 293 but this power extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing, that is, where the sentence is definitely outside the appropriate range for the case in hand: *Everett v The Queen* (1994) 181 CLR 295 at 299; *Dinsdale v The Queen* (2000) 202 CLR 32, at paras 61 and 62, and *Wong & Leung v The Queen* at para 109.*

*(d) The Court has a lively discretion to refuse to intervene even if error has been shown, and in deciding whether to exercise that discretion, it should have regard to the double jeopardy that a convicted person faces as a result of a Crown appeal: *R v Allpass* (1993) 72 A Crim R 561, *R v Papazis* (1991) 51 A Crim R 242 at 247, and *Wong and Leung v The Queen* at para 110.*

*(e) A sentence which is imposed as a consequence of a successful Crown appeal will generally be less than that which should have been imposed by the sentencing court: *R v Holder and Johnston* (1983) 3 NSWLR 245 at 256, and will generally be towards the lower end of the available range of sentence: *Dinsdale v The Queen* at para 62.”*

Must the Crown always establish that a sentence is manifestly inadequate? Is it enough to demonstrate error of principle? In *Makarjian v The Queen* [2005] HCA 25

the joint judgment seems to suggest that they are alternative bases for appellate intervention. Nevertheless, the “Wood principles” are routinely cited by the CCA.

Hulme J in *R v AA* [2006] NSWCCA 55, however, appeared to qualify them to some extent when he said at [4]:

“I do not regard all of the remarks of Wood CJ at CL in R v Wall [2002] NSWCCA 42 and Rothman J’s summary of them as a comprehensive and accurate summary of the principles that guide this court in the determination of appeals by the Crown against sentence”.

His Honour continued:

“6 Firstly, it is to be borne in mind that the Crown has a statutory right of appeal.

7 Secondly, as such an appeal is against the exercise of a discretionary judgment at first instance, the considerations referred to in paragraph (a) of the passage cited from R v Wall apply.

8 Thirdly, while it is undoubtedly desirable that appeals by the Crown be rare, that must greatly depend upon the extent to which there is error, or there are good grounds for thinking there is error, by first instance judges in the exercise of their sentencing discretions. Although cases answering that description may only be a small proportion of the total number of cases where sentences are imposed, my experience over the last ten years or so sitting in this Court is that such cases are not “rare”. Remarks of the Chief Justice in R v Baker [2000] NSWCCA 85 are to similar effect. Except possibly when overruled on appeal, the results of such cases all find their way into the sentencing statistics and are held up in the future as indicative of appropriate sentences. As I have remarked previously in this Court, it is almost unheard of for counsel for an offender to seek to argue from the first principles of sentencing. Rather is their preference to take this Court to the statistics, commonly accompanied by the submission, explicit or implicit, that this Court should regard the statistics as in practical terms setting the available range. Experience makes it apparent that this approach is too often accepted in the District Court.

9 Fourthly, I have concerns about Wood CJ at CL’s statement that “unless there is a clear error of principle identified, it would be exceptional for the Court to interfere”.

In *R v Chaaban* [2006] NSWCCA 107 at [39] Rothman J appeared to agree with Hulme J:

39 As was pointed out recently by Hulme J (R v AA [2006] NSWCCA 55) the rarity of a Crown appeal will depend largely upon the degree to which

sentencing judges make error and impose manifestly inadequate sentences. Similarly the residual discretion reposed in the Court not to intervene on a Crown appeal is a discretion to allow error to stand because to intervene would, in the circumstances, be unfair to the respondent. It depends very much on a subjective assessment by the Court on the effect of an intervention, the timing of it and issues associated with double jeopardy. (See R v AA, supra, at [57], [58] and [1])

Later Rothman J also said, in *R v Wilson-Winship* [2007] NSWCCA 163:

*“There exists a very real and live residual discretion to refuse to intervene even where there is error, identifiable or manifest. However, the legislature has granted a right of appeal by enacting section 5D of the Criminal Appeal Act 1912 (NSW). While the Court may discourage its use on other than rare occasions, that right of appeal is exercisable by the Crown and, when such an appeal is lodged, it must be dealt with in accordance with principle. Those principles however emphasise the exceptional character of a successful Crown appeal against sentence: see **R v Abboud** [2005] NSWCCA 251; **R v AA** [2006] NSWCCA 55.”*

The residual discretion not to intervene, despite error and/or manifest inadequacy, is very wide. How can consistency in the exercise of that discretion be promoted?

Is it a hard and fast rule that if re-sentencing does occur, the substituted sentence must be the “*least sentence that could properly have been imposed upon the respondent at first instance*” (per Gleeson CJ in *R v Rose* (Unrep, NSWCCA 23 May 1996), subsequently applied in many cases)? Should it be? What precedent value should such sentences then have?

Of the 293 cases surveyed by the authors of the Judicial Commission’s Monograph 27 referred to above, the CCA identified errors in 211 (72%). Crown appeals were allowed in 160 of those (76%). In the other 51 cases where error was found, the residual discretion not to interfere with the sentences was exercised and the Court declined to intervene to increase the sentences. The study analyses the bases for that action, the main reasons being delays in hearing the appeals and, more frequently, progress made in the interim towards rehabilitation of the offenders.

The study recorded the type and frequency of particular errors found in the 211 cases. In 151 of the cases there were multiple errors, according to the classification of categories of errors adopted by the study.

Those categories were grouped under the three groupings identified by the High Court in *House v The King* (1936) 55 CLR 499. The most common were errors of principle (in 91% of cases). In that grouping the three most common sub-categories were:

- objective seriousness (in 65.4% of cases)
- non-parole period (in 39.3% of cases)
- totality (in 25.1% of cases)

The percentages in these three categories alone (totaling well over 100%) show that multiple errors were not uncommon.

The “Australian Standard Offence Classification” (ASOC) system was used to categorise the offences. This system uses categories such as ‘Homicide and related (including driving occasioning death)’, ‘Acts intended to cause injury’ and ‘Theft and related’. The results indicated that no particular category was over or under-represented, with the possible exception of homicide and related offences (over-represented) and unlawful entry/burglary (under-represented).

The role of the CCA in selecting the ‘right’ sentence, just as determining whether or not to appeal against a sentence, is also often as much art as science, so it seems. In *R v Wilson* [2005] NSWCCA 112 the Crown appealed against a sentence of 12 years imprisonment with a non-parole period of eight years for murder. This sentence was imposed by a Supreme Court Justice with Court of Criminal Appeal experience. In the CCA one of the justices was ‘*not persuaded*’ that the sentence was ‘*so manifestly inadequate as to require [the] Court to intervene to increase it ...*’ Another justice determined that the sentence should be increased to 20 years imprisonment with a non-parole period of 15 years; however, he was persuaded to concur with the third justice who was of the view that the sentence should be increased to 15 years with a non-parole period of 11 years.

(No wonder the public and the media are confused! Not to mention the prosecutor appellant...)

These disparate approaches to determining the “right” sentence by the CCA raise questions of profound importance and reflect the difficulties in achieving greater consistency in approaches and outcomes and acceptable “justice” in sentencing. It could be argued that the judicial views expressed in *R v Wilson* are a result of the traditional “instinctive synthesis” methodology of sentencing gone mad; but, so far, no better system has been suggested to replace it.

CONCLUSION

A comparison of the powers and role of the English Court of Criminal Appeal in 1907 with the powers and role of the contemporary Court of Criminal Appeal in NSW reveals significant differences. An important dimension to these features is allied changes to the right of the prosecution to appeal. In NSW, at least, the most significant of these changes have occurred in recent years as a result of political concerns with miscarriages of justice in terms of erroneous acquittals and inadequate sentences. The balance between the rights and interests of the individual accused, on the one hand, and the rights and interests of the public (including victims of crime), on the other, has to some extent been reset.

These changes have created new challenges for the Court of Criminal Appeal and the prosecution arm of government. The notion of the “public interest” is now at the forefront of decision-making at all levels.

As noted earlier, even the notion of criminal “justice” has to some extent been redefined in making the public interest a greater priority. There is now greater intervention in sentencing and the regulation of trial proceedings by the executive,

with the prosecution having increased powers of appeal. The judiciary, of course, has no choice but to hear and determine the appeals brought under its expanded jurisdiction.