APPEALS AGAINST SENTENCE SEVERITY

Sentencing judgments of the NSW Court of Criminal Appeal

NSW Bureau of Crime Statistics and Research

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SENTENCING JUDGMENTS OF THE N.S.W. COURT OF CRIMINAL APPEAL

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PREFACE

Sentencing appeals are a neglected subject in Australian criminological research. Though sentencing appeal decisions have been the object of considerable legal scrutiny and analysis, little empirical attention has been paid to the task of describing the actual character of the appeal process. An important component of the latter is an assessment of the extent to which sentencing appeals in practice conform to the legal theory of appellate intervention in sentencing.

The present report, written by Dr. Weatherburn when he was Deputy Director of the Bureau, contains the results of an analysis of some 500 Court of Criminal Appeal judgments. The main aims of the study he conducted were to provide a general description of the dominant features of the appeal process in sentencing and to conduct an assessment of some of the legal assumptions underlying that process. The results, I think, provide some challenging insights into the system of appellate review in sentencing and make a valuable contribution to the Bureau's program of research on sentencing issues and problems.

Dr A.J. Sutton
Director

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At the end of a trial process in which an accused person has been convicted of one or more indictable offences, the trial judge must decide what sentence to impose upon the offender. With few exceptions the range of penalties open to the judge is very wide. In New South Wales it includes various bonds, fines, diversion and community service orders, periodic detention and imprisonment. Within most of these penalty categories there is a broad choice as to the quantum of penalty which may be imposed. For the most part the legislature has confined itself to the provision of a range of sentencing dispositions accompanied by statutory maximum penalties which exert only very broad constraints on the discretion available to the sentencing judge.

It has not always been so. Up until the mid-nineteenth century in England, the common-law allowed judges no discretion in sentencing other than in cases involving the reprieve of a capitally convicted offender.[1] According to Thomas[2], in England:

> "It was not until the major reforms enacted between 1827 and 1840 had substantially diminished the scope of capital punishment, and had substituted terms of transportation fixed by the sentencing judge in the exercise of a statutory discretion, that judges began to perform a sentencing function resembling in any way their modern role in the sentencing process. Transportation gave way in turn to penal servitude in the 1850's, and the Consolidation Acts of 1861 established a statutory foundation for sentencing which remained intact... until the beginning of the revision of the substantive criminal law in the late 1960's."

Fox and Freiberg, in their comprehensive work on sentencing in Victoria, point out that imprisonment was available as a sanction in New South Wales from its inception as a colony. In fact:[3]

> "One of the earliest steps taken by the (N.S.W.) Legislative Council, when it came into existence in 1824 was to deal with the inadequacy of the public gaol by designating the hulk of the ship "Phoenix" in Sydney Harbour as a floating prison."

By 1870, New South Wales had begun the process of consolidating the criminal law it had inherited from England along lines similar to those of the English criminal law consolidation Acts. In that year the N.S.W. Legislative Council appointed a Royal Commission to:[4]

> "enquire into the state of the Statute Law of (the) Colony, and submit proposals for its revision, consolidation and amendment; and also to make a like inquiry into the practice and procedure of the Colonial Courts."

The Commissioners[5] considered that the most pressing of these tasks was the consolidation and amendment of the criminal law, especially that part of it associated with punishment.[6] They recommended (with some diffidence) a system of statutory maximum periods of penal servitude and imprisonment[7] based on:[8]

> "the enormity of the crime in itself or its injurious consequences to individuals, or to the public."

The periods of penal servitude were to be life, fourteen years, ten years and five years. The seven year multiple owed its origins to periods of transportation which penal servitude had replaced. The five year multiple appears to have been introduced in the belief that the maximum penalty in English law for certain offences was too high.[9] In devising this scheme of statutory maximum penalties, though, the Commissioners were not unmindful of the need to provide sufficient scope for the exercise of judicial discretion:[10]

> "The old and trusted servant, who deliberately avails himself of his position to steal some article of value, and the girl who, under sudden temptation, pilfers a ribbon, are necessarily in the same legal category; but the two offences differ so widely in every other aspect, as obviously to require the allowance of extreme latitude to the tribunal which apportions punishment to them."

Nevertheless the Report of the Commission did not recommend the breadth of judicial discretion afforded judges in England. Considering that discretion "perhaps too unfettered", they recommended supplementing the system of statutory maximum penalties with a complementary system of statutory minimum penalties. The argument put forward for the latter system was that:[11]

> "When legislative authority has thus set its mark on an offence, by assigning to the offender (in respect at least of the worst examples) his due place in the scale of crime, the Court can have no right to reduce that offence practically to a lower one, by awarding him a punishment prescribed for offenders of a stated less degree. We propose therefore to establish uniform rules for the guidance of Judges in this respect, limiting their discretion considerably... Thus where the fixed period is Penal Servitude for life, the minimum proposed is seven years; and, where servitude for fourteen years to ten years is prescribed, the minimum periods are five years and four years respectively."[12]

This argument for minimum penalties is somewhat curious. It seems to assume that offence categories have been defined in such a way as to negate the possibility of an offence in one category ever being more

serious than an offence in a category attracting a higher maximum penalty. It is hard to see why this should be so. Perhaps the most that could be said in relation to one offence category with a higher maximum penalty than another category is that the worst example from the former is more serious than the worst example of the latter.

In any event the argument of the Commissioners must have seemed convincing to the N.S.W. Legislative Council. Section 8 of the Criminal Law Amendment Act of 1883 carried into effect the recommendations of the Royal Commission Report on minimum and maximum penalties. The Act itself consolidated the criminal law in similar terms to the English criminal law consolidation Acts, though with a number of new offences and a generally reduced scale of maximum penalties for offences drawn from Imperial and Local Statutes.[13]

There were no major changes to this system of minimum and maximum penalties in New South Wales until 1924. The Crimes Act (1900) carried over into Section 442(1) the basic terms of S.8 of the earlier Criminal Law Amendment Act. It did, however, extend the alternative of imprisonment to offences attracting a maximum penalty of penal servitude for life and it created new sections (c.f. ss443 and 447) empowering courts to impose additional or cumulative sentences on repeat offenders. Apart from the periodic creation of new or redefinition of old offences the next major development in the area of sentencing came with the passing of the Criminal Appeal Act in 1912.

That Act, modelled substantially on its English counterpart passed some three years earlier, established a right of appeal against conviction on any ground involving law alone. It also established a right of appeal, conditional upon leave being granted by the new Court of Criminal Appeal, against conviction or sentence on any grounds involving mixed questions of law and fact. The Act attracted considerable parliamentary debate but very little of it centred upon the creation of a system of appellate review of sentences, as such. Instead, most of the debate concerned the composition of the Court of Criminal Appeal and the desirability or otherwise of including members of the District Court bench within that appellate tribunal.[14] The argument in favour of their inclusion was eventually lost and the Court of Criminal Appeal was established as a division of the N.S.W. Supreme Court.

In 1924 the minimum penalty provisions of the N.S.W. Crimes Act were dropped, significantly widening the scope of judicial sentencing discretion. The Crown was also given a right of appeal against sentence.[15] The reforms attracted no parliamentary debate, perhaps because of Parliament's preoccupation with other aspects of the amending legislation, most notably the extension of the role and powers of magistrates' courts.[16]

These changes were to be the last significant alterations to the structure of sentencing discretion until the passage of the Parole of Prisoners Act in 1966. That Act gave somewhat belated recognition to

the zeitgeist of rehabilitation which had earlier come to dominate American penal philosophy. The notions of parole it advanced are now too well known to deserve rehearsal here, though it is worth observing that the introduction of parole in New South Wales came at the time of its decline in those countries which had first introduced it.[17] The importance of the N.S.W. Parole of Prisoners Act derived from the fact that it markedly increased the complexity of the sentencing decision process but failed to deliver any statutory guidance either on the objects the Act sought to achieve or the way in which the new discretion in sentencing was to be exercised. In this respect the Act reflected the sort of legislative deference to judicial sentencing discretion which had coloured the creation of statutory maxima in the Crimes Act.

The legislative mood of interest in rehabilitation which had led to the introduction of parole in New South Wales gave way in the 1970s to a quest for alternatives to imprisonment (other than fines and bonds of various descriptions). The Periodic Detention of Prisoners Act, passed by State Parliament in 1971, introduced the possibility of weekend detention on the argument that there was a clear need for a greater array of sentencing options.[18] This Act was followed in 1979 by the Community Service Orders Act and, in 1981, the scope of the Periodic Detention of Prisoners Act was widened.[19]

All of these changes naturally enhanced the scope of judicial discretion in sentencing. As Fox and Freiberg have argued[20] they also complicated the process of judging which penalty was appropriate to what offence. None of the Acts embodying the changes provided anything but implicit guidance on the objects meant to be served by the new penalties or upon which offenders and in what circumstances they were to be used. As with the choice of non-parole period and sentence, these were matters left to the exercise of judicial discretion. That discretion was bounded only by the maximum periods of periodic detention or community service orders prescribed generally by the Acts in question.

These were not the only legislative changes to alter judicial discretion or perhaps more importantly, its effects. The enhancements to that discretion just described were taking place against a backdrop of ever more determined efforts to control prison costs and prison overcrowding.[21] The most notable of these efforts was the development of a system of remissions and the connection of that system to the parole process with the passage of the Probation and Parole Act in 1984. These changes, though, were less concerned with altering the substance of discretion in sentencing than they were with undoing some of the consequences of its exercise.[22] Indeed, the application of remissions to non-parole (and non-probation) periods, though it represented the most substantial alteration to the <u>effect</u> of judicial discretion since the advent of parole, took place on the assumption that:[23]

> "The courts must retain their flexibility and discretion."

Thus in over one hundred years the statutory framework of sentencing discretion in New South Wales (and Australia) had not moved greatly from its origins. The primary approach of the legislature remained (and remains) the specification of the maximum penalty associated with each new offence. In company with the discretion thus afforded them, sentencers may choose to specify a minimum period in custody. Beyond this, the major legislative initiatives affecting sentencing have been the creation of the Court of Criminal Appeal and the development of new kinds of penalties. The problem of how to approach the task of sentencing has been left entirely to the courts.

2. DEVELOPMENT OF SENTENCING PRINCIPLES

The evident reluctance on the part of legislatures in England and Australia to propound principles of sentencing to guide the exercise of judicial discretion has not been matched by any corresponding reticence on the part of the courts. The establishment of appellate courts in both countries accelerated the development of case-law surrounding sentencing. In England, according to Thomas:[24]

> "From its earliest days, the predecessors of the Court of Appeal (Criminal Division) recognised that `while no invariable tariff can ever be fixed, the task of the court was by `the revision of sentences... to harmonize the views of those who pass them, and so ensure that varying punishments are not awarded for the same amount of guiltiness'."

This recognition of the need to revise sentences in the interests of uniformity was later accompanied by a declared duty on the part of the Court of Appeal (Criminal Division) to lay down principles and guidelines to assist sentencers in the exercise of their discretion.[25] These principles and guidelines, though lacking the force of law, were nonetheless intended to be binding on judges of the Crown Court and, where applicable, magistrates exercising summary jurisdiction.[26]

The cumulative effect of this appellate involvement in the regulation of judicial sentencing discretion is claimed by Thomas to have been the creation of two systems of sentencing reflecting different penal objectives and governed by different principles. As he puts it:[27]

> "The sentencer is presented with a choice: he may impose, usually in the name of general deterrence, a sentence intended to reflect the offender's culpability, or he may seek to influence his future behaviour by subjecting him to an appropriate measure of supervision, treatment or preventative confinement. In some instances both objects may be pursued simultaneously and find expression in the same sentence, but more frequently this is not possible."

Of the two systems, the most developed is undoubtedly that associated with deterrence. The tariff system of sentencing, as it is often called, is based on the assumption that:[28]

> "The overwhelming majority of offences which come before the criminal courts arise from factual situations which conform to a recurring pattern and which can be categorized by reference to particular elements. This recurring pattern of factual situations provides a basis for a corresponding pattern of sentences, which can be adjusted to accord with detailed

> variations of particular cases. The conventional relationships between frequently encountered factual situations and corresponding levels of sentence constitute the foundations of the tariff."

The task of the sentencer, in the majority of cases, according to Thomas[29], is:

> "... to relate the facts of the incident with which he is dealing to the established pattern, determine what sentence would be appropriate for that particular set of facts considered in the abstract and then turn his attention to the question of mitigating circumstances peculiar to the offender. The governing principle is that the gravity of the particular incident in the abstract... determines the upper limit of permissible sentences in that case."

The task of appellate courts is to adjudicate upon which facts may be considered relevant to sentencing, what the objects of sentencing in particular classes of case are meant to be and how the relevant facts of an offence are to be interpreted in relation to those objects. The large body of decisions which results from these adjudications constitutes the principles of sentencing and their violation provides the main basis of appellate intervention. Compliance with the principles is claimed to provide:[30]

> "... a framework by reference to which the sentencer can determine what factors in a particular case are relevant to his decision and what weight should be attached to them. Properly used, they offer a basis for maintaining consistency of sentencing different offenders, while observing relevant distinctions, making appropriate allowances for individual factors and preserving adequate scope for the exercise of judicial discretion."

Australian appellate courts, while clearly stopping short of acknowledging two systems of sentencing `each with its own penal objectives and governed by different principles', have fully embraced the common-law approach to the regulation of sentencing discretion.

Street C. J. has spoken of the `cool reason' which should characterize sentencing and, in *R. v. Rushby*, acknowledged that:[31]

> "The doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case at hand, and promotes consistency of approach on the part of individual judges."

It is doubtful, nonetheless, whether the N.S.W. Court of Criminal Appeal (or other comparable courts in Australia) ever accepted quite the supervisory role in sentencing described by Thomas as true of courts in England. The general approach of the N.S.W. Court of Criminal Appeal has been to intervene only where `it is shown that there is some error in the approach of the Court below'.[32] In *R. v. Nicholls and Anor.*, the N.S.W. Court of Criminal Appeal quoted with approval the observations of Halse J. in *R. v. Jenkins* ((1938)38. S.R. 298 at 301):[33]

> "... in my opinion, it is a sound general rule that this Court should not interfere with a sentence unless, in its view, it is quite disproportionate to the offence, or unless the presiding judge has fallen into some error of principle. This rule is not of universal application. But, generally speaking, the Court does not alter sentences on other grounds than those mentioned; and certainly not on the ground that the members of the Court would have passed a different sentence if they had presided at the trial..."

Where a sentence appears unduly excessive or lenient but no manifest error of sentencing principle presents itself, the tendency is to argue that the sentence `discloses' an error of principle.[34] This line of argument, though patently circular, shows the extent to which the justification for appellate intervention is based on the assumption of correcting violations of sentencing principles. In contrast the English Court of Appeal (Criminal Division) has shown itself rather more willing to intervene to give effect to sentencing policies in relation to specific offences of one kind or another.[35]

The commitment in Australia to altering sentence only on the basis of a violation of sentencing principles extends to Crown appeals, though (as earlier noted) these do not exist in England. Generally, however, Courts of Criminal Appeal in Australia have been reluctant to treat such appeals on the same footing as defence appeals. The decision of the N.S.W. Court of Criminal Appeal in *R. v. Didham and Dennison*[36] is instructive in this regard. After acknowledging that the detection of error was "fundamental" to appellate intervention in both Crown (i.e. s.5D) and Defence (i.e. s.6(3)) appeals the Court quoted, with approval, the judgement of Jacobs J. in *R. v. Griffiths*:[37]

> "Under s.5D the court has a wide discretion whether or not to interfere, even though it may reach the conclusion that another sentence should have been passed. In this respect s.5D gives a wider discretion than s.6(3) where the court is bound to interfere once it reaches the conclusion that the sentence was not both warranted in law and one that should have been passed. The trial judge is given a wide discretion from the circumstance that a court on appeal will not

> lightly conclude that another sentence should have been passed. The incorrectness of the sentence must be manifest: see *House v. R.* (1936) 55 CLR 499 at 505. But if it does so conclude it must interfere in the case of a defendant's appeal; it may in its discretion interfere in the case of an appeal under a 5D."

These differences aside, the basis on which appellate intervention in sentencing is meant to proceed does not differ markedly between England and Australia. The routine work of the Court of Criminal Appeal in sentence matters, if its own account of its activity is accepted, basically involves a search for errors of judgment on the part of the sentencer.

Though these errors are occasionally manifest only in the sentence under review, ordinarily they should appear as violations of sentencing principles. The judgment of the Court of Criminal Appeal in a successful appeal, then, will identify the error of principle involved and record a new sentence which lies within the range for the offence in question. Thus it is clear that the Court of Criminal Appeal has a crucial role to play in ensuring uniformity, not only in the alternate sentences which are imposed upon offenders, but in the general approach of the courts to factors potentially relevant to sentence. The Court of Criminal Appeal may not deal with the bulk of appeals against sentence (appeals against Local Court penalties being far more frequent) but the cases with which it does deal are just those where the discretion of the sentencing court is at its widest and the concomitant risk of sentencing disuniformity at its greatest.

3. EVALUATING THE SENTENCE APPEAL PROCESS

Surprisingly enough, there has been little attention paid to the task of evaluating the efficacy of the system of sentence appeals to the Court of Criminal Appeal. There seems to have been a tendency in some quarters[38] to assume that the statement of legal principles said to govern the appeal process may be taken, *mutatis mutandis*, as a description of how the court actually operates. This may indeed be the case. But it is important to recognise that a valid description of the legal principles said to govern the exercise of judicial discretion, whether it be in the matter of sentencing or any other matter, does not, by itself, afford any guarantees about the actual exercise of that discretion. The latter is an empirical, not a legal question.

This point is much better recognised, thanks in the main to the pioneering work of Hogarth[39] in the field of sentencing, than in the related area of sentencing appeals. Hogarth and his successors were able to show that a broad range of non-legal factors influence the choice of sentence.[40] The significance of this work and research on sentence disparities which followed it[41] is not that legal accounts of the sentencing process were shown to be wrong. It is that a more complete understanding of sentencing as a human process now informs the debate about regulation of judicial sentencing discretion. The mere existence of a system of common-law principles on sentencing is not now taken to vouchsafe the conclusion that sentencing decisions are explicable largely in legal terms.

This point might be taken to be true, *ipso facto*, of sentence appeal decisions. But there has been a dearth of empirical studies of the sentence review process. By and large, research on sentence appeal decisions has concentrated almost exclusively on detailing the legal implications of those decisions in the context of statutory law on sentencing.[42] Occasionally this approach has been supplemented with statistical profiles of actual sentencing practice.[43] Even more occasionally one finds a general statistical breakdown of the frequency of certain kinds of appeal (e.g. sentence versus conviction rates) and the characteristic outcomes of those appeals (e.g. successful versus unsuccessful).[44] Nowhere is there to be found any empirical analysis of factors affecting appeal decisions or an empirical assessment of the impact of those decisions on the sentencing practices of lower courts.

The result of this is that the picture created of the sentence appeal process is drawn in the main from reported appeal judgments of the courts. These judgments are necessarily unrepresentative and tend to generate a somewhat idealised picture of the sentence review process. The unrepresentativeness stems from the fact that judgments are usually reported because they signify an important change, clarification or development of sentencing principles and procedure. The idealization thus created is enhanced by the fact that sentencing

judgments, while conveying information as to how the courts do operate, also convey prescriptions about how the courts should operate. In the absence of empirical information on the operation of the courts these prescriptions are easily taken as accounts of what happens in practice.

Despite this, judgments of the Court of Criminal Appeal are a particularly useful subject of empirical enquiry. Though, like sentencing judgments, they may not contain a completely comprehensive account of the factors influencing the court's decision, appeal judgments provide the single most important (if not the only) vehicle by which courts become aware of errors in their approach to sentencing. Thus whereas appellate courts are wary of taking the sentencing judgment as a complete and final account of the reasons for sentencing[45], sentencing courts themselves must take appeal judgments as containing a complete account of the reasons for intervention (or non-intervention).

The significance of this becomes apparent when one attempts to subject the legal account of the appeal process to empirical scrutiny. Because the appeal judgment may be taken (from a legal perspective) to contain a complete statement of the reasons for the appeal decision, there is no need to look much beyond the judgment when assessing those reasons. From a practical point of view this is very convenient. Unlike judicial remarks on sentencing, appeal judgments are accessible, succinct and generally very uniform in style. This makes them admirable subjects of empirical analysis.

What aspects of the legal account of the appeal process might profitably be subjected to empirical examination? Much of this depends, of course, on the nature of the empirical examination. Disregarding practical constraints however, there are several issues worth investigating, some to obtain a better understanding of the general character of the appeal process, others to evaluate the truth of legal claims made about it. In the former category one might include questions such as the following:

(1) To what extent is the distribution of appeals against sentence uniform over sentencers?

(2) To what extent is the distribution of appeals against sentence uniform over offences?

(3) What is the sentence profile of cases in which appeals are lodged?

(4) What sorts of principles are referred to by the Court of Criminal Appeal in accepting/rejecting an appeal against sentence?

(5) What is the success rate of appeals against sentence?

In the latter category one might include questions such as:

(6) What sorts of adjustments are made to sentences in cases where an appeal is successful?

(7) What are the relative lengths of original sentences in cases where an appeal is successful as against cases where it is unsuccessful?

(8) What is the relationship between the appeal outcome and whether or not errors of principle are located in the original sentencing judgment?

(9) What role is played by reference to earlier appeal decisions in the determination of sentence appeals?

(10) What evidence is canvassed in cases where a sentence is altered simply on the ground that it is outside the range appropriate to the facts in question?

Question (6) bears on the claim that sentences are only altered on appeal if they are manifestly excessive or lenient. Answers to question (7) provide a basis for assessing actual sentences in terms of the standards applied by the appeal court. Question (8) is directed to the presumption that (ordinarily) the Court of Criminal Appeal will only change a sentence where it can detect an error of sentencing principle. Question (9) provides a means of assessing the role played by reference to sentencing principles in the routine determination of sentence appeals. Finally, answers to question (10) ought to provide some insight into the basis on which range judgments are made by the Court of Criminal Appeal.

These questions by no means exhaust the possibilities. They simply provide a good indication of the sorts of issues worthy of empirical investigation in the sentence appeal process. In every case the analysis may be conducted wholly through an analysis of sentencing judgments of the Court of Criminal Appeal. In every case the results attest to the utility of those judgments as a means of developing a jurisprudence of sentencing and ensuring greater uniformity in the sentencing practices of courts.

The guiding aims of the empirical evaluation here to be reported were (1) to map out the dominant features of sentence appeal judgments in the routine work of the Court of Criminal Appeal and (2) to provide, where possible, some empirical assessment of assumptions implicit in the appellate review of sentencing decisions. The first aim was chosen with the intention of providing a basic description of the operating characteristics of the sentence appeal process. This is done simply to remedy a general deficit in public knowledge about the subject. The second aim is chosen with the intention of subjecting the legal description of the sentence appeal process to some empirical scrutiny in order to promote discussion of the role of the system of appellate review in regulating the exercise of sentencing discretion.

4. METHODOLOGY

A full appraisal of the system of sentence appeals to the Court of Criminal Appeal would require an analysis of both Crown and Defence appeals. The analysis reported here deals only with Defence appeals. The reason for this is simply that Crown appeals against sentence, because they occur much less frequently than Defence appeals, are much less amenable to analysis across the range of questions here addressed. It is proposed that a second report, dealing with Crown appeals on a more restricted range of issues, will be produced as a sequel to this report.

Apart from concentrating on Defence appeals there were two other constraints on the choice of case for investigation in this study. One was that the original sentence and the altered sentence (in cases of successful appeal) were both continuous periods of imprisonment. This constraint excluded a very small number of cases involving appeals against fines, bonds, community service orders and periodic detention. Its purpose was simply to facilitate the process of analyzing sentence changes on appeal. The other constraint was that, where co-offenders both appealed against sentence, the judgment concerning the second of the two offenders was not included within the study. The purpose of this constraint was to minimize statistical dependence among the observations made.[46]

Within these constraints a sample of 513 N.S.W. Court of Criminal Appeal judgments on appeals against sentence severity was drawn from the period 1981 to 1985. This represents all cases meeting the above criteria dealt with by the Court between June 1981 and December 1985. The variables on which information was drawn from each judgment included:

(V1)	case number;
(V2 to V4)	case date*;
(V5)	original sentencer;
(V6)	principal offence;
(V7)	number of counts of principal offence;
(V8)	length of sentence for this offence;
(V9)	number of other offences involved;
(V10)	number of matters admitted to on a schedule 9;
(V11)	aggregate sentence;
(V12)	non-probation/non-parole period;
(V13)	whether the appellant had been convicted of a similar offence previously;
(V14)	whether the appellant had been convicted of any other offence previously;
(V15)	the number of prior episodes of imprisonment;

*V2 = day, V3 = month, V4 = year.

(V16) appellant's gender;

(V17) appellant's age;

(V18) whether the appellant was described as a principal in the commission of the offence;

(V19) whether the appellant was described as addicted to heroin;

(V20) whether the victim (if any) was described as injured in the offence;

(V21) whether there was any reference to the statutory maximum penalty for the offence;

(V22) whether an issue of sentencing principle was raised;

(V23) (if so) which issue of principle;

(V24) whether the appeal was successful;

(V25) (if so) whether there was a change to the length of the aggregate sentence;

(V26) (if so) what the new aggregate sentence was;

(V27) whether there was any change to non-probation/non-parole period;

(V28) (if so) what the length of the new non-probation/non-parole period was;

(V29) the number of previous court decisions cited;

(V30) whether any evidence of sentence ranges was referred to;

(V31) the plea of the appellant to the original offence.

The information on these variables was entered onto pre-coded sheets, punched to computer tape and analyzed on a Burroughs 770 using SPSS.[47] A copy of the coding sheet and the coding rules appear as Appendix I and Appendix II, respectively. It should be emphasized, however, that the variables were coded entirely from the judgment itself. The absence of reference to some issue or material in a judgment does not imply that the appeal hearing itself did not contain references to that material or issue. It just signifies an absence of reference in the written judgment to the information in question.

Though a complete statement of the coding rules is given in Appendix II, certain coding details crucial to an understanding of the results which follow, are given below:

(V6) Principal offence. The offence attracting the most severe penalty, or, if two or more offences attracted the same (most severe) penalty, the first-mentioned offence (Question 5).

(V13) Convicted of a similar offence previously? In this question 'similar offence' was defined broadly. Thus for a sex offence, a similar offence was any other sex offence; for a

break, enter and steal, any other theft offence, for a robbery, any other robbery; for a violent offence any other offence involving violence etc. (Question 12).

(V18) Appellant a principal in the commission of the offence? This variable was coded as a `yes' if the Court of Criminal Appeal expressly described the appellant as a principal or concurred with such a description. It was coded as a `no' only if the appellant was expressly referred to as not being the principal in the offence. Those for whom the issue was not raised were classified as `inapplicable' on this item (Question 17).

(V22) Was an issue of principle raised? A comment by the court was counted as a reference to a `sentencing' principle if it involved a generalization as to the sentencing implications of either (a) features of the offence or offender (b) features of the material on which the original sentencing decision was based or (c) procedures adopted in sentencing or (d) rules of statutory interpretation. Generalizations which noted `the seriousness of offences of this type' or which simply canvassed the merits of the appeal in terms of features of the offence and the offender in question were not taken as references to sentencing principles (Question 21).

(V24) Was the appeal successful? An appeal was classified as successful if any aspect of the sentence order was altered which materially affected the length or character of the sentence to be served. A technical correction to a sentence (i.e. one designed to give effect to the original sentencer's express intention) was not counted a successful appeal (Question 23).

5. RESULTS

5.1 General characteristics of the sample

Figure 1 shows the percentage distribution of (grouped) principal offences within the sample. For the purposes of comparison the percentage distribution of principal offences among cases resulting in a conviction in N.S.W. Higher Criminal Courts is also shown.[48] The similarity between the two distributions is a broad measure of the similarity between cases dealt with by the Court of Criminal Appeal (as appeals against sentence severity) and the profile of cases dealt with by Higher Criminal Courts.

It is obvious from the figure that there are some marked differences between the two groups. The non-independence of observations within them[49] rules out the possibility of carrying out any statistical tests on these differences, but is unlikely that they are fully attributable to sampling variation. It would appear, in particular, that theft-related offences are far less common and robbery offences far more common in the appeal sample than in the general population of cases concluded in the Higher Criminal Courts of N.S.W. Among the remaining offence categories differences are also evident, except in the category of assault, for which cases seem equally likely to appear on appeal as they are on conviction in the higher courts. These observations, of course, tell us nothing about the similarity or otherwise of cases <u>within</u> offence categories, though this issue will be raised in relation to sentence comparisons later on.

Figure 2 shows the distribution of the number of:

(a) counts of the principal offence;
(b) other offences; and
(c) matters admitted to on a schedule 9 for the appeal sample.

The median values of these distributions are, respectively, 1.2, 0.4 and 0.08. Thus most appeal cases in the sample involved one or two counts of the principal offence, either none or only one other offence and no other matters admitted to on a schedule 9. These figures obviously vary with the offence in question.[50]

Table 1 below compares, to the extent possible, median sentences (in months) associated with the appeal sample with median sentences in the general population of cases dealt with by Higher Criminal Courts in 1983.[51] Offence categories selected were those with 20 or more observations in them in the appeal sample.

Even so (and within the broad offence categories displayed in Table 1) it is evident that the median sentence is consistently lower among the general population of cases dealt with by Higher Criminal Courts than among those dealt with by the N.S.W. Court of Criminal Appeal. The differences are particularly marked in the cases of robbery, drug importation and, to a lesser extent, sexual assault.

Figure 1

Distribution of Offence Type in Higher Criminal Courts and Court of Criminal Appeal Sample

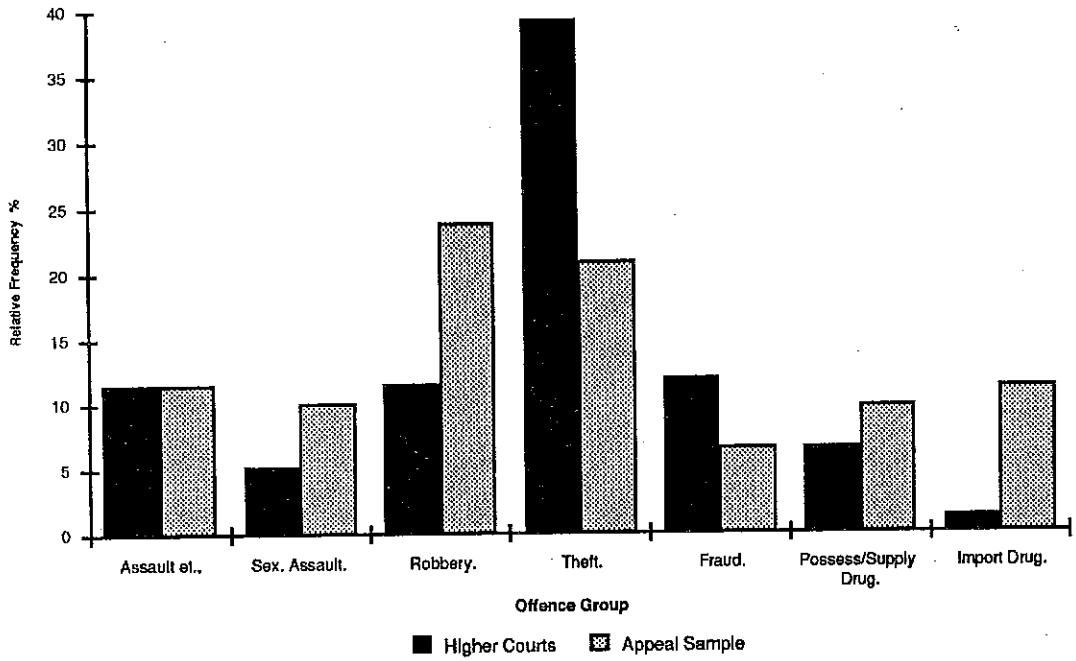


Figure 2

Distribution of Counts of Principal Offence, Other Offences & S.9 Offences

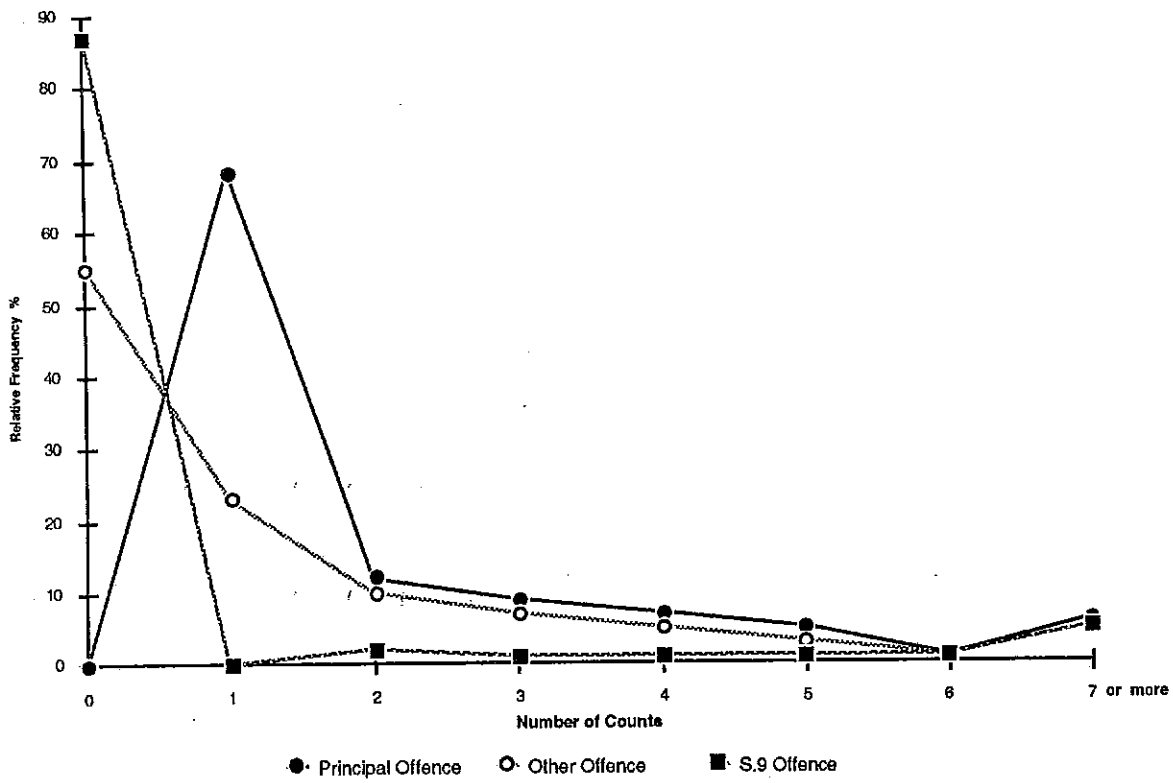


TABLE 1
Median sentences for selected offences (in months)
Appeal sample and general population compared

Offence category	Median sentence (appeal)	Median sentence range (higher courts)
Assault (general)	106.7	84 - 96
Sexual assault	84.0	48 - 60
Robbery	95.7	36 - 48
Theft	36.9	24 - 36
Fraud	36.3	24 - 36
Drug supply	60.2	36 - 48
Drug importation	107.8	48 - 60

The data suggest that the Court of Criminal Appeal not only deals with a different offence category profile than Higher Criminal Courts (see Figure 1) but also deals with more serious cases within those categories. This conclusion however, must be set against the possibility that the higher sentences in the appeal sample arise <u>despite</u> the comparability of those cases with others in the general Higher Criminal Court population. This, it might be argued, is the very reason they were the subject of defence appeal.

Table 2 shows the same offence groups, this time exhibiting the associated median non-parole periods for the principal offence.

TABLE 2
Median non-parole period (NPP) for selected offences (in months)
Appeal sample and general population compared

Offence category	Median NPP (appeal)	Median NPP (higher courts)
Assault (general)	47.6	20.7
Sexual assault	48.0	21.3
Robbery	47.9	21.4
Theft	23.8	10.2
Fraud	24.0	11.1
Drug supply	27.0	20.7
Drug importation	48.0	21.6

Table 2 reinforces the impression generated by Table 1. It is evident that the non-parole periods of those appearing before the Court of Criminal Appeal are markedly longer than those in the

general population of cases dealt with in Higher Criminal Courts. Whether this arises because the cases involved are more serious or because the sentences themselves are simply longer (or both) cannot, as earlier noted, be determined from the data. It is worth observing, however, that despite the differences in Tables 1 and 2, the great majority of defence appeals against sentence dealt with by the Court of Criminal Appeal are unsuccessful. The implications of this point will be dealt with in more detail later in the report.

In considering the circumstances of a case which might precipitate a defence appeal, the sentencer (him or herself) is a worthy subject of examination. The size of the sample of cases examined here and the large number of judicial officers involved means that it is not possible to isolate the contribution of an individual sentencer from other case factors in determining the likelihood of a defence appeal. Nevertheless, since judges generally sat on roughly comparable numbers of criminal cases and each dealt with the full spectrum of criminal offences, there is reason to expect some uniformity in the frequency of sentence appeals involving different sentencing judges.

Figure 3 shows the frequency of appeal against different judges (numbered 1 to 62) among the sample of appeal cases studied.[52] The distribution of appeal frequency across judges appears markedly non-random, two judges in particular (numbered 6 and 20) being very frequently the sentencers involved in an appeal against sentence severity.

Unfortunately it is not possible to subject the distribution to any statistical testing. There are too many judges with too few appeals against their sentences. Moreover it is not known how many cases each judge sat on. Without this information it is impossible to calculate exact appeal rates or probabilities. On the other hand, the fact: (a) that the turn-over of judges during the sample period was extremely low; (b) that each judge spends comparable periods dealing with criminal matters, and; (c) that the distribution of appeal frequency ranges from nought to more than fifty appeals, militates against the assumption that the variation depicted in Figure 3 is random. It would seem more probable that defendants are much more likely to appeal against the sentences imposed by some judges than by others. Whether this is because sentences imposed by these judges are higher or not is difficult to say.[53]

The success rate of the appeal sample is shown in Figure 4, along with the percentage of times the aggregate sentence, non-parole period or both aggregate sentence and non-parole period were altered. From the figure it is evident that only 27 per cent of appeals are successful and, therefore, in the great majority of cases (i.e. 73%), the appeal is unsuccessful. Where the appeal <u>is</u> successful, the non-parole period is much more likely to be the object of the alteration than the aggregate sentence. The non-parole period is obviously altered whenever the aggregate sentence is but not vice versa.

Figure 3

Frequency of Appeal by Original Sentencer

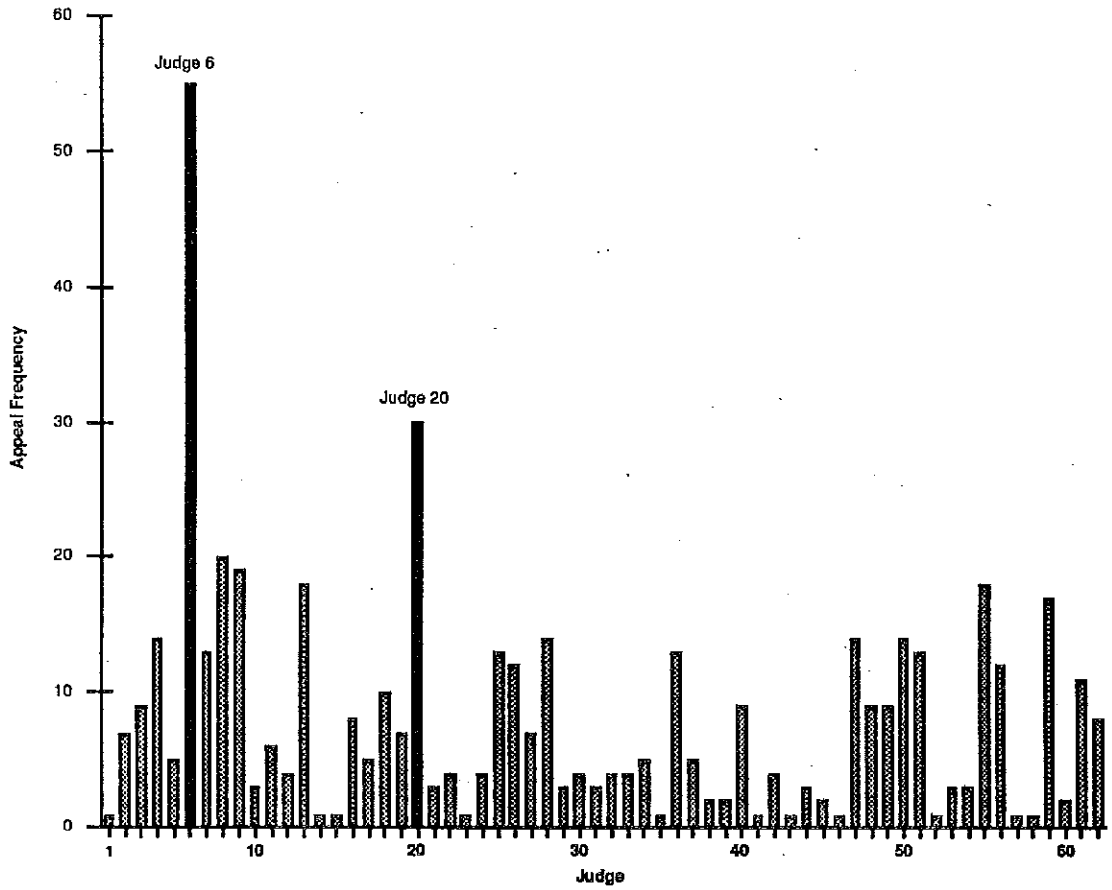


Figure 4

Distribution of Variations in Sentence Change
in Successful Appeals

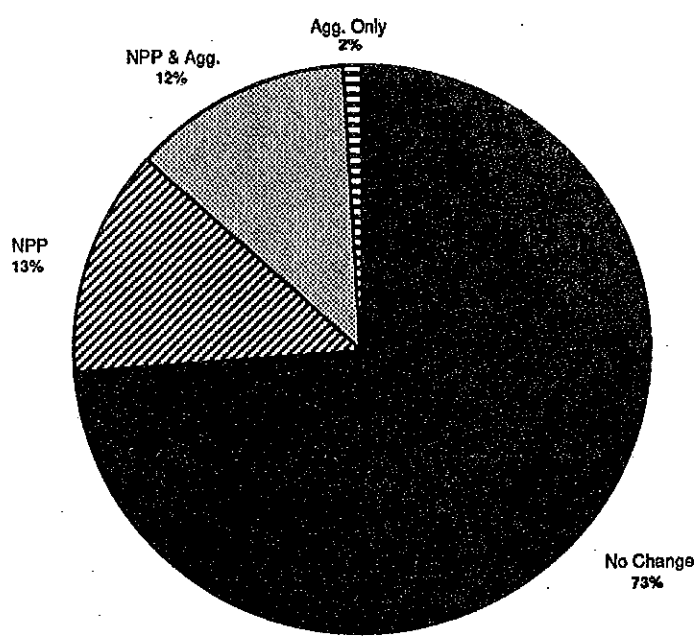


Figure 5 deals with the character of the appeal, in particular, with whether it was an appeal based solely on the argument that the aggregate sentence was `outside the range' for the offences concerned or whether an issue of principle was raised. On the broad classification of an issue of principle employed in the study,[54] some forty-six per cent of cases were found to involve an issue of principle of some sort. This figure is surprisingly high, but analysis reveals that seventy-seven per cent of cases in which an issue of principle is raised involve just four different issues. In order of importance these are: (1) arguments involving alleged sentence disparities between co-offenders; (2) arguments involving the proximity of the non-parole period expiry date to that of the aggregate sentence; (3) arguments comparing the sentence imposed with the statutory maximum penalty; (4) and arguments over the facts surrounding the original offence (see Figure 5). The first two sorts of issues constitute the main ground of the appeal argument in over fifty percent of those cases where any issue of principle is raised at all.

These results suggest that the general system of sentencing principles said to govern the exercise of judicial discretion in sentencing does not play any explicit part in shaping the response of the Court of Criminal Appeal to appeals against sentence severity. This is an impression confirmed on examination of Figure 6 which shows the distribution of the number of cited cases in the Court of Criminal Appeal judgments examined. In eighty-seven per cent of judgments no previous cases are cited. Among the thirteen per cent of judgments in which there is some reference to an earlier decision of the court, the reference is usually only to one or two cases.

It might be thought that this is because evidence of past sentencing decisions is frequently canvassed without reference to the actual cases involved. The last column of Figure 6 does not support this possibility. In only one per cent of cases was there any reference to evidence of sentence patterns for particular offences <u>other</u> than the earlier cited cases. Reviews of sentence severity, then, overwhelmingly proceed without express regard to prior sentencing decisions or empirical evidence of the effect of those decisions. This suggests that the Court of Criminal Appeal's assessment of defense appeals may involve a degree of `resentencing' on the material placed in front of it. The next section explores this issue further.

5.2 Appeal outcome and sentence alterations

The two key dimensions of interest of appeal outcome are whether or not the appeal was successful and, if so, what sorts of adjustments were made to the sentence. These dimensions are discussed, in turn, below.

Figure 5
Distribution of Bases of Appeal Argument

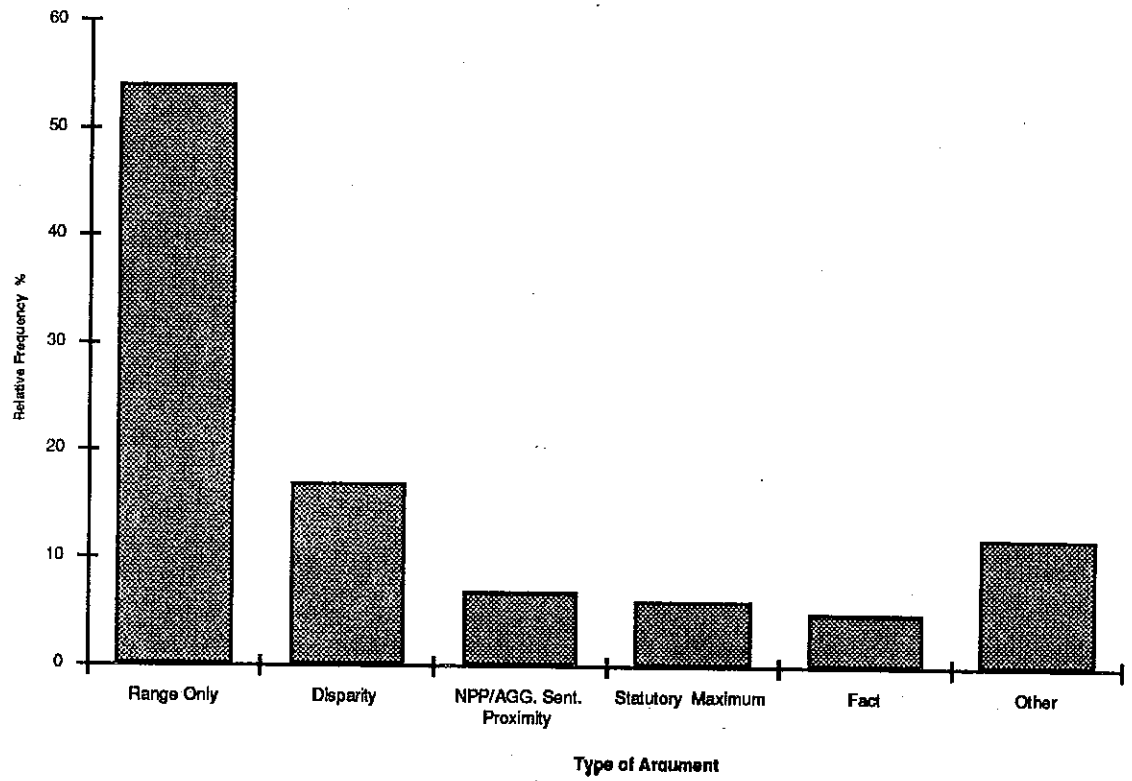
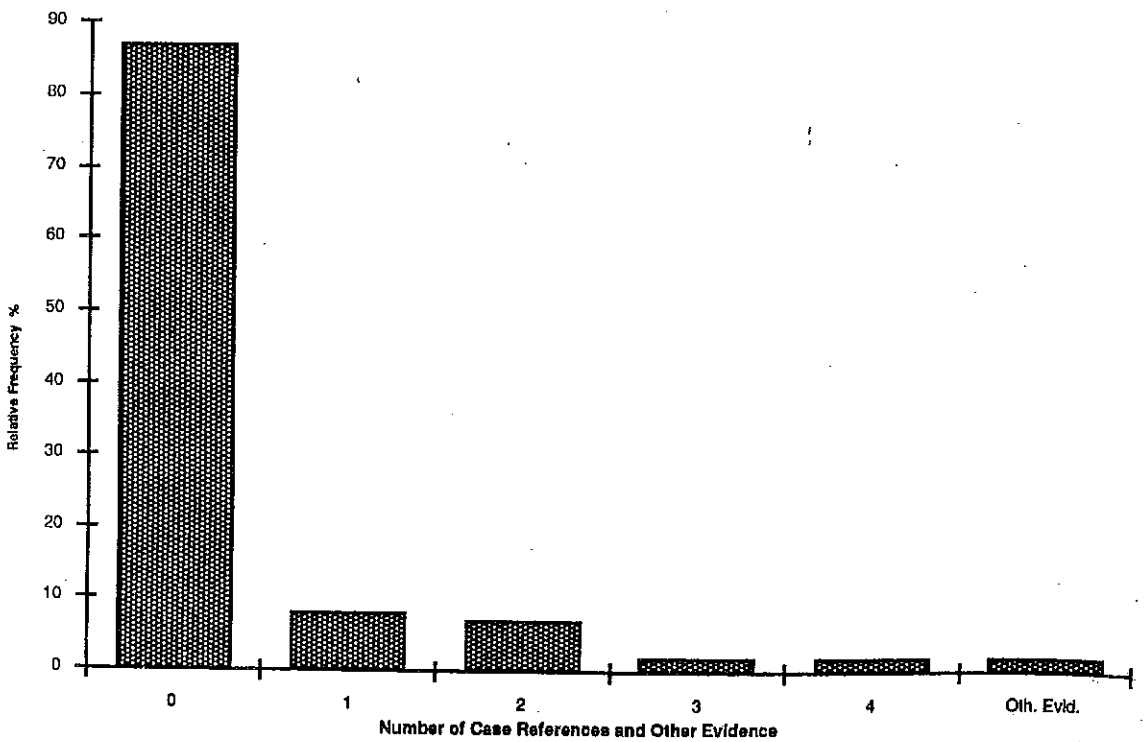


Figure 6
Distribution of Frequency of Case References and Other Evidence



Appeal outcome

The analysis of factors determinative of appeal outcome presents special problems. To begin with, it is possible to examine variations in appeal outcome along such a large number of dimensions that the risk of a Type I error[55] becomes unacceptable. Secondly, there is the problem of choosing a suitable statistical tool for assessing the relationship between appeal outcome and a set of independent variables some of which are categorical and others of which are continuous. Finally there is the ever-present risk that any significant co-variation of appeal outcome with some independent variable A is simply an artifact of co-variation between appeal outcome and another variable B, with which A is itself correlated.

These problems were tackled in the present study by using the statistical technique of logistic regression. A detailed account of this method may be found in Fienberg.[56] The procedure is analogous to multiple regression, except that the dependent variable is the logarithm of the odds ratio associated with the dichotomous variable of interest. In the present case the logarithm of the odds ratio of appeal outcome (i.e. success or failure) was treated as the dependent variable, the independent variables being factors recorded from the Court of Criminal Appeal judgment itself. The advantage of logistic regression is that it makes express provision for a mixture of categorical and continuous independent variables, yet still permits an assessment of the partial contribution of each of these to variation in the dependent variable.

Nevertheless it remains neither feasible nor desirable to include all the potential variables in the present study as factors in a logistic regression to assess their effect upon appeal outcome. The sample of cases studied, though large, would not justify such an analysis. Preliminary investigations suggested little co-variation between appeal outcome and most of the variables listed in Section 4 above, with the exception of V6 (principal offence), V13 (previous similar offence), V14 (previous different offence), V15 (total number of previous imprisonments), and V22 (whether a principle was raised or not). Sentence (V11) and non-parole period length (V12) appeared weakly related to appeal outcome, as did V18 (whether the appellant was described as a principal offender or not).

Three of these variables (V13, V14 and V15) each measure different facets of an appellant's prior record. For this reason they were included in the regression analysis in the form of a single compound variable (PREVOFF). This variable assumed the value `0' when there were no previous offences mentioned in the judgment and `1' when previous offences (whether similar or different) were mentioned. Separate, a priori, considerations dictated the inclusion of all bar one of the remaining variables. These considerations derive from the intervention policy of the Court of Criminal Appeal.

According to the Court, a sentence will be altered (i.e. an appeal will be successful) only if either the sentence is outside the range for the offence in question or an error of principle is involved. The first condition suggests that an interaction may be expected between appeal outcome, on the one hand, and offence and sentence or offence and non-parole period, on the other. The second consideration also invites the inclusion of V22 (whether a principle was raised or not) in the regression analysis. The variable not included in the regression analysis among the group listed above was V18 (whether the appellant was described as a principal offender or not). It was excluded because its effect was essentially restricted to one category of offence, namely drug offences.[57]

The regression model first fitted thus consisted of V24 (appeal outcome) in association with V7 (offence), V11 (aggregate sentence), V12 (non-parole period), PREVOFF and V22 (whether a principle was raised or not). Each variable was fitted first and then last, so as to assess its relationship with V24, once the effect of the other variables had been accounted for. The corresponding unadjusted and adjusted chi-squares are shown in Table 3, below:

TABLE 3
Unadjusted and adjusted chi-square scores for V6, V11, V12, PREVOFF and V22

Variable	df*	X^2 unadjusted	X^2 adjusted
V6 (offence)	6	14.4+	10.9
V11 (aggregate sentence)	1	4.7+	2.6
V12 (non-parole period)	1	8.0+	6.6+
PREVOFF (previous offences) ...	1	10.6+	8.5+
V22 (principle raised?)	1	5.2+	3.9+

* = degrees of freedom
\+ = significant at $p<.05$

Table 3 shows that, while all of the factors included in the regression were significantly related to appeal outcome before any other factors were considered, only three factors (V12, PREVOFF and V22) were significant <u>after</u> all other factors had been included in the regression. The chances of a successful appeal were significantly increased: (a) as the absolute length of the non-parole period increased; (b) when the appellant had no prior record mentioned in the court's judgment; and (c) when an issue of principle was raised in connection with the appeal. The latter finding is intriguing in view of the finding (c.f. Figure 5) that the most common issue of principle raised concerned the issue of sentence disparity between co-offenders.

In order to assess the possible impact on appeal outcome of an offence -sentence or offence - non-parole period interaction, a second regression was carried out in which these two interaction terms were fitted after separately entering offence and then sentence and offence and then non-parole period into the regression. Neither interaction proved significant: V6-V11 interaction, df = 6, X^2 = 6.2, p>.05; V6-V12 interaction, df = 6, X^2 = 8.4, p>.05. It would appear therefore, that the influence of non-parole period length on appeal outcome is not related to the principal offence on the basis of which it was imposed. This finding and those noted in respect of PREVOFF and V22 will be discussed in greater detail in Section 6.

Sentence alterations

The final question to be addressed in this section concerns adjustments made to sentences (and non-parole periods) in cases where the appeal is successful. Such adjustments are meant to be made only where the sentence under review is manifestly outside the range and/or an error of sentencing principle has been made. One would expect, therefore, that the adjustments would tend to be substantial but would nonetheless vary according to the amount by which the original sentence or non-parole period exceeded the range which the Court of Criminal Appeal deemed appropriate in the circumstances.

Figure 7 shows the relationship between the size of the original aggregate sentence in a successful appeal and the magnitude of the new aggregate sentence imposed on the appellant by the Court of Criminal Appeal. There is a striking linear relationship between the two variables. The correlation between the original aggregate sentence length and the new aggregate sentence in a successful appeal is +.96, indicating that approximately ninety-two per cent of the variation in the magnitude of the new aggregate sentence is associated with the length of the original sentence. This is true despite the fact that the data in Figure 6 is undifferentiated with respect to offence or offender characteristics or any other characteristics of the cases in question.

The position is no less clear in relation to non-parole period adjustments. Figure 8 shows the relationship between the length of the original and the length of the new non-parole period in a successful appeal. The correlation between the two variables is again +.96. The significance of these relationships from the standpoint of the appeal process is readily discerned when the equations for the best-fitting linear regression for the two figures are written out. Let NAS and OAS stand for new aggregate and original aggregate sentences, respectively, and NNP and ONP be given corresponding meanings in relation to the non-parole period. Then the best-fitting linear regressions are given by:

$$NAS = (.76 \times (OAS)) - 7.5$$

and

$$NNP = (.75 \times (ONP)) - 1.9$$

Figure 7

Aggregate Sentence Change x Sentence Length

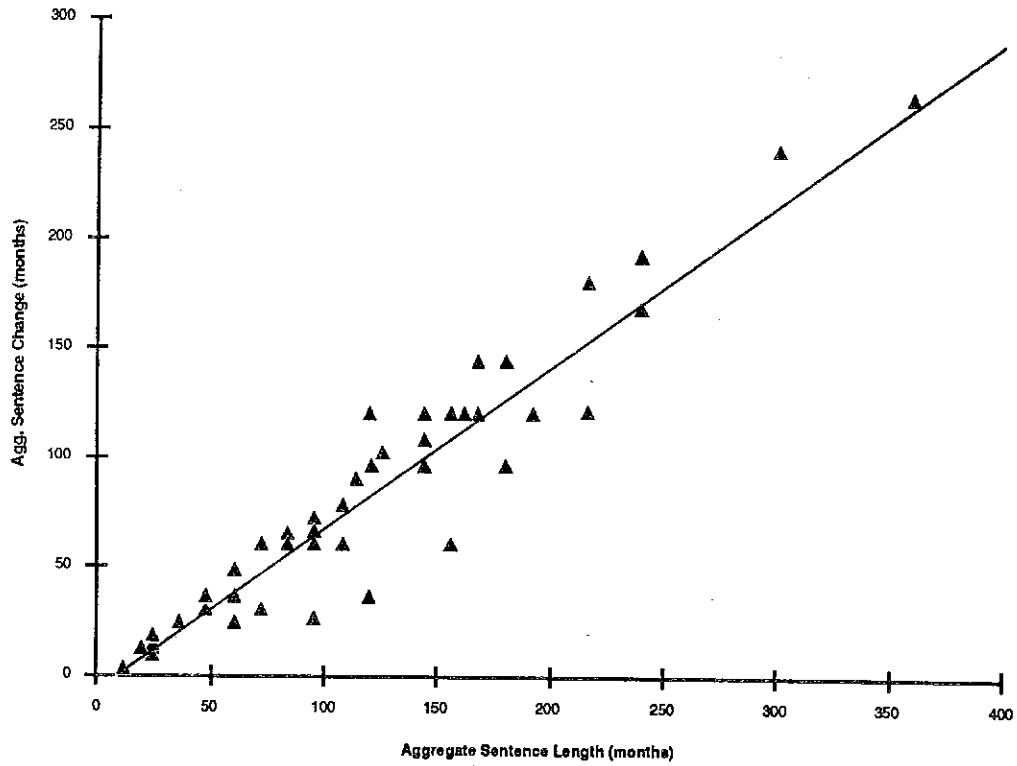
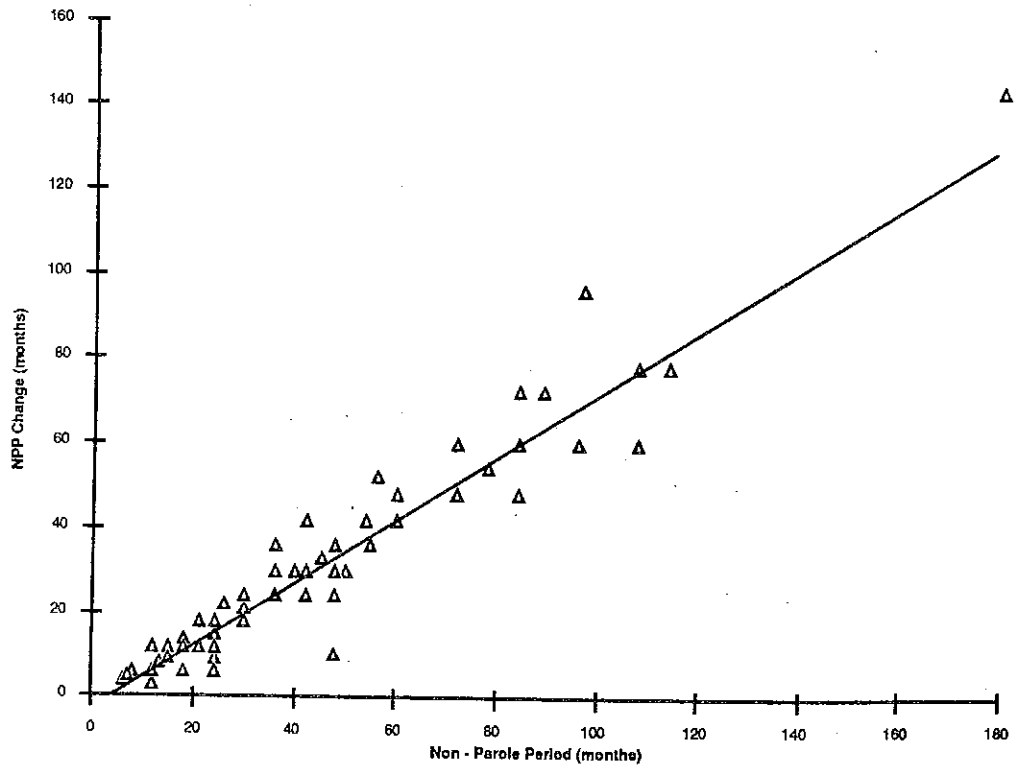


Figure 8

NP Period x NP Period Change



It is evident from the slope coefficients of these expressions that, with very little deviation, the new sentence or non-parole period is some seventy-five per cent of the old sentence or non-parole period. In short, the Court of Criminal Appeal in a successful defence appeal, generally takes a standard twenty-five per cent off the aggregate sentence and non-parole period regardless of the facts of the offence or the particulars of the offender involved in a case.

The final result worthy of comment under the heading of sentence alterations concerns the relationship between the length of the non-parole period and that of the aggregate sentence. Among the full sample of cases studied, the non-parole period averaged about forty-four per cent of the length of the aggregate sentence. The range of the non-parole period/aggregate sentence ratio, however, included values as low as .13 and as high as .86. It is interesting to enquire, therefore, as to whether, in a successful appeal, there was any tendency to alter the non-parole period/aggregate sentence ratio. Figure 9 shows the distribution of this ratio (expressed as a percentage) for successful appeals before and after the adjustments to sentence made by the Court of Criminal Appeal.

It is evident from inspection of Figure 9 that changes to this ratio were, if anything, only very slight. Table 4 confirms this impression in relation to the mean, standard deviation and range statistics of the two distributions.

TABLE 4

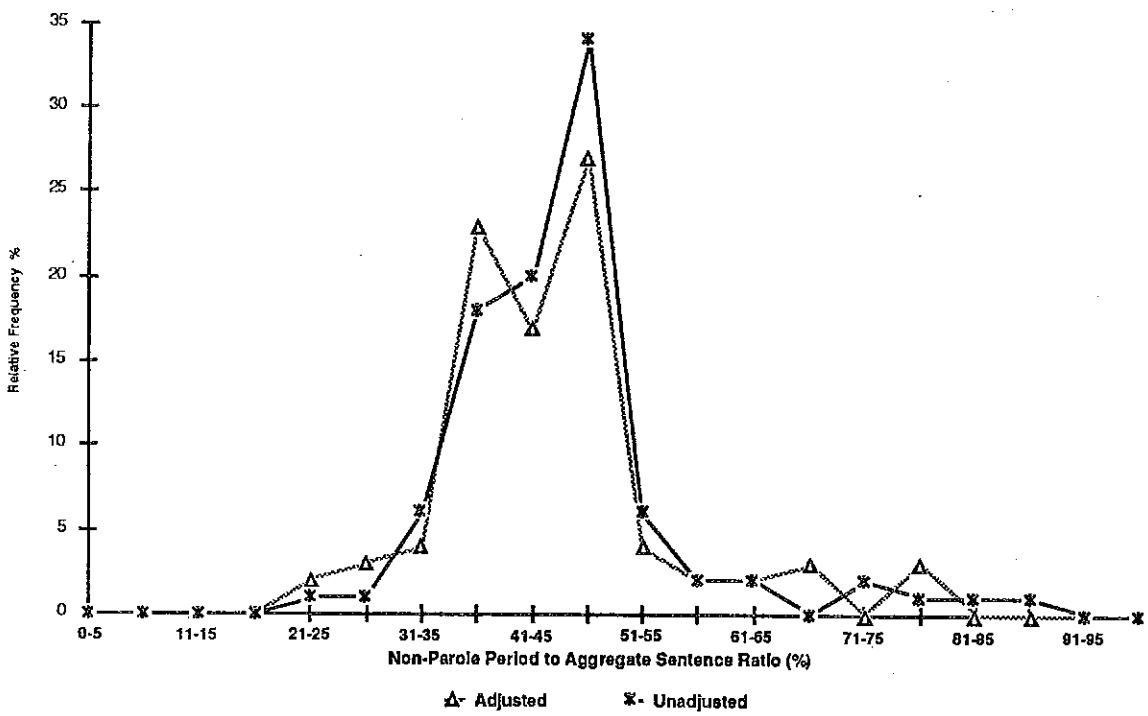
Means, standard deviations and ranges of the non-parole period/aggregate sentence ratio distributions for successful appeals before and after sentence alterations

	NPP/Agg. Sentence Ratio (%)*		
Distribution	Mean	SD	Range
Before sentence changes	46.1	9.4	25-86
After sentence changes	44.9	10.9	25-80

*Figures are given in months.

Figure 9

Distribution of Non-Parole Period to Aggregate Sentence Ratio



6. DISCUSSION

The results depicted in Figure 1 and Tables 1 and 2 are consistent with the widespread view that sentencing appeal cases are an unrepresentative sample of cases dealt with at first instance in Higher Criminal Courts. In one sense this is to be expected, since appeals against sentence severity are generally to be anticipated from cases in which the sentence, at least, deviates from the pattern of sentences normally handed down. Figure 1, however, shows that there are some marked differences in the offence profile of cases dealt with by the Court of Criminal Appeal compared to that of cases dealt with at first instance in Higher Criminal Courts. There is no reason to expect this result and no immediate explanation for it.

The large differences in sentence and non-parole period length between cases dealt with by the Higher Criminal Courts and those dealt with by the Court of Criminal Appeal are not unequivocal evidence that the cases involved are very different. However the size of the difference, particularly in relation to non-parole length (where appeal sample non-parole periods are typically double the length of non-parole periods in the general population), tends to suggest that the cases as well as the sentences may come from the serious end of the spectrum. At all events it is clear that the profile of cases coming forward on appeal presents a distorted picture, at least of non-parole period lengths and possibly also of the cases themselves.

To the extent that the Court of Criminal Appeal forms its impressions of sentencing practice at first instance from the pattern of sentence appeals, those impressions are likely to be incorrect. The fact that the Court rejects seventy-four per cent of appeals against sentence severity may be taken as implying that, in the great majority of cases, it sees the sentence and non-parole period imposed as `within the range', whatever their respective lengths. As evidenced in relation to Table 3, there is no discernible tendency for the Court to grant appeals in cases where the non-parole periods or sentences are longer. In fact, if anything, the reverse is the case. It would seem that either the sentence and non-parole period range tolerable to the Court is very wide or that cases which go to the Court of Criminal Appeal on severity grounds are generally much more serious than those which do not.

The distribution of appeal frequency over sentencers (c.f. Figure 3) raises more questions than it answers. The sample chosen did not permit a rigorous examination of the possibility that judicial officers whose sentences were very frequently appealed against may have been more severe sentencers. Nor did it allow any assessment of: (a) whether the Court of Criminal Appeal was more likely to uphold an appeal in such cases; or (b) whether appeals upheld had any effect on the judicial officer's subsequent sentencing practice. All of these questions are worthwhile subjects of further investigation

in view of the possibility that some judicial officers may be up to five or six times more likely to have their sentences appealed against than others.

Figures 5 and 6 showed the system of appellate review of sentences to be a somewhat more prosaic process than commonly presumed. Despite the conventional wisdom that the assessment of a sentence appeal involves reference to a complex and evolving system of case-law, the fact is that fifty-four per cent of cases raise no issue of sentencing principle at all. Among those which do, arguments over alleged disparity between the sentences of co-offenders, arguments over the proximity of the non-parole period to the aggregate sentence expiry date and arguments over the facts surrounding the original offence accounted for a further thirty-five per cent of cases. A clarification of one or more of these areas of sentencing principle might conceivably reduce the need for and frequency of appeals against sentence severity, though the possibility that sentence appeals would simply shift onto a new footing cannot be dismissed.

The manifest importance of sentencing disparity between co-offenders as an issue of principle, coupled with the fact that issues of principle, when raised, improve the prospects of a successful appeal raises especially interesting possibilities. The Court of Criminal Appeal would seem particularly sensitive to issues of parity when these can be raised in a compelling manner. It may be that the systematic provision of statistical evidence on sentencing for similar cases <u>not</u> involving co-offenders could markedly alter the frequency and success rate of defence appeals against sentence.

Figure 6 nevertheless confirmed the impression that appellate review of sentencing at present rarely involves any substantial issue of principle, in the finding that eighty-seven per cent of sample judgments involve no reference to any prior (identified) court decision at all. Among the thirteen per cent of judgments where there is some reference to a prior case, there is rarely more than one such reference. Moreover, other evidence of sentencing practice (e.g. statistical evidence), appears in less than one per cent of the sample of cases studied. Clearly most issues of sentencing principle, where they are raised, are dealt with without any express regard to the cases establishing those principles. It would also appear that, among the majority of cases (successful or unsuccessful) in which the question is simply one of whether the sentence is `outside the range', the issue is resolved without any reference to verifiable evidence as to the nature or extent of that range. These facts must raise significant questions as to the utility of the Court of Criminal Appeal's judgments as a source of guidance to courts lower in the appellate hierarchy.

Perhaps the most interesting finding, though, concerns the results of the logistic regression on factors in Court of Criminal Appeal judgments which are predictive of appeal outcome. Theoretical considerations (c.f. Section 2 above) might have led one to anticipate an association of appeal outcome with the relationship

between offence and aggregate sentence and offence and non-parole period. A similar relationship might have been anticipated between appeal outcome and whether or not an issue of principle was raised in the judgment. The reason for the first anticipated finding is the expectation that the higher rather than the lower sentences and non-parole periods in a given category of offence would be more likely to result in a successful defence appeal. The fact that an error of sentencing principle is the other major ground for an appeal forms the basis of the second of these expectations.

The results shown in Table 3 support the second but not the first of these predictions. There appears to be no clear tendency for the Court of Criminal Appeal to grant an appeal to sentences and non-parole periods at the upper end of the range in a given offence category than at the lower. On the other hand there does seem to be a tendency to grant a successful appeal in cases involving longer non-parole periods regardless of the offence in question. It may be that the Court of Criminal Appeal is more sensitive to the impact of long prison sentences and hence more willing to show leniency in these cases. This conclusion, however, must be treated with some caution. Offences attracting long non-parole periods also attracted a significant proportion of cases in which no non-parole period was specified, due to the seriousness of the offence or the antecedents of the offender.[58] The residual group with specified non-parole periods may represent a biased sample with respect to the offences involved. There is also the fact that the percentage reduction in sentence length in successful appeals was constant for all sentence lengths. This does not suggest greater sensitivity to long periods of imprisonment

The failure to find an interaction between appeal outcome and the offence-aggregate sentence and offence - non-parole period relationship is susceptible to two possible interpretations. The first is that, contrary to its stated rationale, the Court of Criminal Appeal may not alter sentences which are `outside the range' for a given category of offence so much as alter those sentences which the Court itself would not have imposed. Such a strategy is consistent with the finding that the Court usually does not alter sentence, if it is assumed that the Court responds to certain infrequently occurring features of cases when deciding whether or not to intervene. These features may have less to do with the offence than with the offender, though more will be said on this shortly.

The second possibility is that the `recurring factual situations' in respect to which a tolerable sentence range is implicitly defined, are not related in any systematic way to the legal categories of offence. Within the category of break, enter and steal, for example, it may be that the Court is as disposed to altering long sentences as it is to altering short sentences, depending on the factual particulars of the offence itself. Put another way, it might be said that the Court responds to sentences which are outside the range for a given set of case facts and that this situation is as likely to

arise at the serious end of the legal category of offence as at the less serious end. This line of argument places a heavy demand on assumptions about Court of Criminal Appeal decision-making but must be admitted as a possibility.

The chief difficulty presented by Table 3 to the conventional explanation of appellate intervention in sentencing, however, is the finding in relation to the variable PREVOFF. This variable, it will be recalled, is a compound variable expressing the influence of an offender's prior criminal record on appeal outcome. Table 3 showed that the absence of a prior criminal record significantly improved an offender's prospects of a successful appeal against sentence severity. There is no reason to expect such a result, especially in view of the Court of Criminal Appeal's stated intention not to `resentence'[59], that is, not to respond to case characteristics which would have prompted the Court itself to impose a different sentence to that which was originally imposed. The finding that a prior, criminal record (or, at least, the reference to one in the Courts judgment) diminished the prospects of a successful appeal, suggests that some degree of substitution of its discretion for that of the original sentencing court is occurring.

Figures 7 and 8 showed results which are as striking as those of Table 3, if not more so. The fact that the Court of Criminal Appeal, in a successful appeal, usually takes a constant twenty-five per cent off each aggregate sentence and non-parole period, regardless of offence and offender details, is exceedingly difficult to reconcile with traditional legal theories of appellate intervention. Given the Court of Criminal Appeal's stated intention not to intervene unless a sentence is `manifestly' outside the range, the resulting sentence alterations would be expected to be no minor revision of the original sentence. Nevertheless, if the Court was endeavouring to revise the original sentence to bring it back into range, the size of the revisions involved would vary with the amount by which the original sentence exceeded the range. The present results, on conventional wisdom, would have to be read as implying that whenever judicial officers impose custodial sentences which are too long, they reliably do so by twenty-five per cent of the length of the original aggregate sentence and non-parole period.

This seems somewhat unlikely but, interestingly enough, the tendency of the Court of Criminal Appeal to reduce sentences and non-parole periods by a constant proportion of their length might be partly explicable in terms of a psychological finding known as Weber's law.[60] Weber found that the threshold detectable difference between any pair of stimuli along a large number of dimensions (e.g. light and sound intensity, weight, length etc.) was determined by the ratio of their positions on those dimensions. This has been explained by Fechner[61] as being due to a logarithmic relationship between the perceived intensity of a stimulus (i.e. its perceived brightness, loudness, weight, length etc.) and the actual intensity of that stimulus. If perceived sentence severity were logarithmically

related to actual sentence length, the Court of Criminal Appeal's action, in reducing sentences by a fixed percentage of their length, amounts to a fixed quantum reduction in their perceived severity. This possibility draws support from scaling research on penalties in criminology.[62]

However credible this psychological account of the Court's intervention may be, it does little to dispel the impression of a somewhat mechanical approach to sentence reductions in successful defence appeals. There is no more reason to expect a fixed quantum reduction in the perceived severity of a sentence than there is to expect a fixed percentage reduction in the actual length of the sentence. In both cases the Court seems to be responding without great sensitivity to the circumstances of the offence and offender involved. It is responding almost solely to the length of the original aggregate sentence and non-parole period.

It is difficult to give a compelling explanation of this result, but two possibilities are worthy of consideration. The first is that the Court of Criminal Appeal, in setting a new sentence, is no better placed to form a view of the quantum of punishment warranted by an offence than the original sentencing court. There is no objective scale relating case facts to sentences or sentence ranges. In any event the Court is more poorly placed to assess the facts of a case when presented with them only by way of a transcript of the original proceedings. Thus the Court of Criminal Appeal has no anchor point (or measure) by which to determine the amount a sentence might exceed what was called for in the circumstances. Viewed in this light, the adoption of a fixed percentage reduction in sentence and non-parole period length is just implicit recognition by the Court that there is no objective basis on which to effect variable reductions in sentence severity.

Another important and perhaps related point is that the workload of the Court of Criminal Appeal is high and has been steadily increasing over recent years. In 1986, for example, the Court of Criminal Appeal disposed of an average of 3.75 appeals per sitting day.[63] Since many of these appeals are against conviction and are time-consuming, it is likely that there is considerable pressure on the Court to dispose of appeals as quickly as possible. It may well be that the Court simply does not have time to deliberate at length on the extent to which a sentence or non-parole period exceeds what was called for. The primary decision may be one of whether the appeal is to be upheld. The resulting adjustment, when and if it occurs, may be relatively automatic. It is interesting, in this regard, to observe in Table 4 the strong tendency of the Court in a successful appeal to preserve the original ratio of non-parole period to aggregate sentence length.

Whether or not these explanations are accepted, the overall results of the present study paint a very different picture of the appeal process to that depicted in legal analyses of sentence appeals.

Cases are rarely referred to, evidence of sentencing practice almost never reported and the role played by sentencing principles highly restricted. In addition, a degree of `resentencing' on the facts of a case seems to be occurring, and sentence adjustments, in successful appeals, do not support the supposition that sentences are being brought back within the range by the amount by which they exceeded it. All these findings run counter to the somewhat idealized representation of the appeal process normally encountered in legal descriptions of appellate review. This does not mean that the sentencing appeal process is inequitable in any sense. The present study does not address this issue. The point is rather that we must look much further than the legal analysis of sentencing appeal decisions to fully understand the process of appellate review.

In practical terms the present results suggest that, however equitable the intervention policies of the Court of Criminal Appeal, it is unlikely that those interventions are well understood by the courts whose sentences are overturned. Because the majority of sentence appeals are range appeals, yet little evidence concerning range is adduced by the Court (whether in the form of reference to earlier cases or other evidence), the original sentencing court has little basis for reshaping its future sentencing practice. This position is exacerbated by the great reluctance on the part of the Court of Criminal Appeal to suggest guidelines for the sentencing of particular classes of case.[64] These guidelines cannot be `induced' by original sentencing courts simply from altered sentences because the dimensions along which case similarity may be inferred are practically endless.

The position is no more satisfactory in cases where an issue of principle is raised. Nearly a third of these involve arguments concerning sentence disparity between co-offenders. Their frequency suggests that the case-law in this area may be in need of clarification, though it may be that defence counsel run disparity arguments whenever co-offenders are involved, regardless of the merits of the argument in the case in question. Nevertheless, the fact that the great majority of issues of principle, where they <u>are</u> raised, involve just four kinds of argument, suggests that concentrated appellate effort in these areas may do more to promote sentencing consistency than devotion to the elaboration of general principles. Perhaps more important to the promotion of sentencing consistency, though, is: (a) the provision to the Court of Criminal Appeal of detailed information on sentencing practices in lower courts; and (b) the use by the Court of Criminal Appeal of this information to formulate sentencing guidelines for particular patterns of offending. By this means, appeal decisions would be informed by a better understanding of the `collective wisdom' lying behind actual sentencing practice, while sentencing courts themselves would stand to gain a better understanding of the reasons for intervention (or non-intervention) in that practice.

Of course, given the caseload of the N.S.W. Court of Criminal Appeal, it may be unrealistic to expect lengthy reflection on the issues raised by each case. A reduction in this caseload by one means or another is doubtless a necessary precursor to a more active and informative Court of Criminal Appeal.

NOTES

1. D. A. Thomas. Principles of Sentencing. Second Edition. Heinemann. London, 1979, Chapter 1, p. 6.

2. ibid.

3. R. Fox and A. Freiberg. Sentencing: State and Federal Law in Victoria. Melbourne, Oxford University Press, 1985, Chapter 9, p. 338.

4. New South Wales Legislative Council. Consolidation of the Criminal Law. First Report from the Commissioners appointed to Enquire into Law Reform; together with a Draft Bill, 1871, p. 3.

5. C. J. Stephen, W. C. Windeyer, S. G., W. M. Manning, Q.C., E. Butler, Thos. Iceton, and W. M. Barker.

6. op. cit., ref. 5., p. 6.

7. Penal Servitude at this time generally meant hard labour on the roads or other public works of the Colony. See s.399. Criminal Law Amendment Act (1883).

8. op. cit. ref. 4., p. 6.

9. ibid.

10. ibid. p. 7.

11. ibid. p. 6.

12. Corresponding minima were assigned for sentences of imprisonment.

13. op. cit. ref. 4., p. 7

14 See, for example, the N.S.W. Parliament Hansard, 5/12/1911, p. 2,304.

15. Both changes were introduced under the Crimes (Amendment) Act (1924) No. 10.

16. op. cit. ref. 14.

17. See F. Rinaldi. Parole in Australia, Penology Monograph. No.5, Australian National University, 1975, Chapter 2, p. 11.

18. See. N.S.W. Parliament Hansard, Vol. 90, 24th November 1970, p. 8,146.

19. The scope was widened by extending the power to grant Periodic Detention to all courts, by increasing the statutory maximum length of a periodic detention sentence and by liberalising the legal threshold for use of the disposition.

20. See A. Freiberg and R. Fox. Sentencing structures and sanction hierarchies, Criminal Law Journal, 1987 10/4:216 - 235.

21. See D. Weatherburn. Reducing the N.S.W. prison population. sentencing reform and early release, Criminal Law Journal, 1986, 10/3:119 - 138.

22. ibid.

23. See N.S.W. Parliament Hansard, 24th November 1983, p. 3,461.

24. op. cit. ref. 1., pp. 3 - 4.

25. op. cit. ref. 1., p. 4.

26. op. cit. ref. 1., p. 4.

27. op. cit. ref. 1., p. 8.

28. op. cit. ref. 1., p. 30.

29. op. cit. ref. 1., p. 35.

30. op. cit. ref. 1., p. 92.

31. R. v. Rushby (1977), 1 N.S.W.L.R. 594 at 597.

32. R. v. Lanfranchi. Unreported N.S.W. Court of Criminal Appeal, 18/3/77.

33. R. v. Nicholls and Anor. Unreported. N.S.W. Court of Criminal Appeal, 21/9/78.

34. See, for example, ref. 3., p. 98.

35. R. v. Aramah (1983). 4 Criminal Appeal R. (8). 407; [1983] Criminal Law Review 271. R v Bibi (1980). 2 Criminal Appeal Report. (s) 177; 71 Criminal Appeal Report, 380.

36. R. v. Didham and Dennison. Unreported N.S.W. Court of Criminal Appeal 3.3.78.

37. R. v. Griffiths 15. A.L.R. 1 at p. 30.

38. See D. A. Thomas, op. cit. ref. 1.

39. J. Hogarth. Sentencing as a Human Process. University of Toronto Press, 1971.

40. ibid, Chapter 9.

41. See, for example, P. Grabosky and R. Rizzo. Dispositional disparities in courts of summary jurisdiction: the conviction and sentencing of shoplifters in South Australia and New South Wales, 1980. Australian and New Zealand Journal of Criminology, 1983, 16:146 - 161.

42. See, for example. I. Potas. Sentencing of Violent Offenders in N.S.W. Law Book Co., Sydney, 1980.

43. ibid.

44. Australian Bureau of Statistics. Higher Criminal Courts, 1983, Table 19, p. 30.

45. Believing, quite rightly, that the trial judge is in the best position to assess the culpability of an offender.

46. Co-offenders are normally sentenced by the same judge. It is unlikely that, if the sentence of one offender is deemed too high, the probability of the co-offender's sentence being altered is unaffected.

47. Statistical Package for the Social Sciences. Version 9.

48. The data are drawn from the N.S.W. Higher Criminal Court Statistics produced by the Australian Bureau of Statistics for 1983. This is, unfortunately, the most recent set of statistics published.

49. The appeal sample is a subset of the population of Higher Criminal Court appearances.

50. Break, enter and steal offenders generally had much higher values on (a), (b) and (c).

51. The sentence classification scheme of the A.B.S. Higher Criminal Courts statistical collection only permits a determination of the range within which the median must lie.

52. It was not possible to distinguish judges against whose sentence no appeal was lodged from those who left the bench during the study period. It should be noted though: (a) that the most frequently appealed against judge (i.e. judge 6) actually retired during the study period; and (b) judicial turnover in the sample was generally very low.

53. The two judges with the highest frequency of sentence appeals did not have enough cases in any one category, except robbery, to justify sentence and appeal outcome comparisons. Comparisons within the category of robbery, however, provided no firm evidence of either higher average sentences or increased chances of a successful appeal.

54. See Appendix I.

55. A Type 1 error occurs when the hypothesis of no significant effect is falsely rejected. See W. Hays. Statistics for the Social Sciences. Holt, Rinehart and Winston, London, Second Edition, 1977, p. 367.

56. S. Fienberg. The Analysis of Cross-Classified Data. The M.I.T. Press. Second Edition, 1981, pp. 97 - 99.

57. Persons convicted of drug offences and referred to in the appeal judgement as `principal' offender, were significantly less likely to have their appeals against sentence severity upheld.

58. See the N.S.W. Probation and Parole Act, 1983, ss. 21(1).

59. op.cit. ref. 32.

60. For a useful discussion of Weber's Law see A. T. Welford. Fundamentals of Skill. Methuen and Co, 1971, Chapter 2.

61. ibid, p. 28.

62. See, for example, M. L. Erikson and J. P. Gibbs. On the perceived severity of legal penalties, The Journal of Criminal Law and Criminology, 1979, 70/1:102 - 106.

63. See, Court Delays. Bulletin of Attorney General's Department, October, 1987.

64. See, D. Weatherburn. Sentencing principles and sentence choice. Criminal Law Journal, 1987, 11/4:213-228.

APPENDIX I

QUESTION FORMAT

1. Case Name

2. Case Date

3. Case Number

4. Original Sentencer

5. Principal Offence

6. Number of Counts Principal Offence

7. Length (in months) of Sentence for this Offence

8. Number of other offences involved (excluding S9)

9. Number of S9 matters (`00' if there are none)

10. Aggregate Sentence (in months)

11. Non-Probation/Non-Parole Period (in months)
(88 = none specified).

12. Had the appellant been convicted of a similar offence previously?
(1 = yes, 2 = no)

13. Had the appellant been previously convicted of any other offence?
(1 = yes, 2 = no)

14. State the total number of previous imprisonments
(9 = unknown)

15. Appellant's gender
(1 = male, 2 = female)

16. Appellant's age
(in years, 99 = unknown)

17. Was the appellant described as a principal in the commission of the offence?
(1 = yes, 2 = no, 8 = inapplicable; appellant acted alone)

18. Was the appellant said to be addicted to heroin?
(1 = yes, 2 = no)

19. Was anyone injured in the commission of the offence?
(1 = yes 2 = no)

20. Was there any reference to the statutory maximum penalty for the offence in question?
(1 = yes, 2 = no)

21. Was an issue of principle raised?
(1 = yes 2 = no)

22. Which issue of principle?
1 = disparity with co-offender
2 = question of statutory maximum
3 = N.P.P. too close to A.S.
4 = issue over fact
5 = regard paid to remisssions
6 = other issue of sentencing principl
7 = inapplicable

23. Was the appeal successful?
(1 = yes, 2 = no)

24. Change in aggregate sentence?
(1 = yes, 2 = no)

25. New aggregate sentence (in months)

26. Change in N.P.P.?

27. New N.P.P. (in months 8 = inapplicable)

28. Number of past cases referred to

29. Any other evidence of range
(1 = yes, 2 = no).?

30. Plea (1 = guilty, 2 = not guilty)

APPENDIX II

CODING RULES

Question	Rule	Variable
1.	Appellant's name	inappl.
2.	Date on which appeal heard	V2 - V4
3.	Date on which originally sentenced	V1
4.	Name of Judicial Officer imposing original sentence	V5
5.	The offence attracting the longest period of imprisonment or, if two offences attract the same period of imprisonment, the first-mentioned offence.	V6
6.	Self - evident	V7
7.	Self - evident	V8
8.	Self - evident	V9
9.	Self - evident	V10
10.	This is the total period of imprisonment a prisoner is liable to serve under the term or terms of imprisonment imposed.	V11
11.	Self - evident	V12
12.	Code `1' if the judgment refers to a conviction for a previous similar offence. Code `2' otherwise.	V13

Question	Rule	Variable
13.	Code `1' if the judgment refers to a conviction for a previous different offence. Code`2' otherwise. An offence is `similar' if it falls within the same set of offence code groupings. (The offence code groupings were: assault, sexual assault, theft and fraud, robbery (incl. armed robbery), drug offences, driving offences, escape/absconding, other). An offence is `different' if it does not fall within the same grouping.	V14
14.	If no prior imprisonments are mentioned in the judgment, code `0'. If otherwise, determined the number of separate imprisonment episodes and record the number.	V15
15.	Self - evident.	V16
16.	Self - evident.	V17
17.	Code `1' if the appellant is expressly referred to as a principal in the offence Code `2' if the appellant is expressly referred to as not being a principal. Code `8' otherwise.	V18
18.	Code `1' if expressly so referred to. Code `2' otherwise.	V19
19.	Code `1' if the appellant was referred to as having injured a person. Code `2', otherwise.	V20
20.	Code `1' if the judgment at any point refers to the statutory maximum penalty for any of the offences for which the person stands convicted and in respect of which he/she has lodged an appeal against sentence.	V21

Question	Rule	Variable
21.	Code `1' if the judgment contains a generalization as to: (a) a feature of the offence or offender which should be taken into account in sentencing but wasn't; or (b) a feature of the offence or offender which was taken into account but shouldn't have been; or (c) procedures to be adopted in sentencing; or (d) rules of statutory interpretation. Code `2' if the judgment simply refers to the question of whether the sentence is outside the `range' for the offence in question or refers to the weight or emphasis which was given a factor, otherwise acceptable as a consideration in sentencing.	V22
22.	Code `1' if the judgment refers to the question of co-offender sentencing disparity `2', if the judgment compares or contrasts the sentence or sentences imposed with the relevant statutory maximum or maxima, `3' if the judgment refers to the relationship between the length of the non-probation or non-parole period and the length of the aggregate sentence, `4' if the judgment refers to evidence which (it is alleged) should not have been taken into account in sentencing, `5' if the judgment refers to the possibility that remissions were taken into account when the original sentence was imposed.	V23
23.	Code `1' if either the non-parole period was altered (or specified when it had not been) or the aggregate sentence was altered or both. Code `2' otherwise.	V24
24.	Self - evident.	V25

Question	Rule	Variable
25.	Self - evident.	V26
26.	Self - evident.	V27
27.	Self - evident.	V28
28.	Code `2' unless the cases referred to are identified.	V29
29.	Code `1' if the judgment contains any other evidence of sentences which are handed down for this or any other offence.	V30
30.	Code `1' if the appellant pleaded guilty to the principal offence (see rule 5) and `2' otherwise.	V31