ARTICLES

IN SPITE OF ITSELF?: THE HIGH COURT AND THE DEVELOPMENT OF AUSTRALIAN SENTENCING PRINCIPLES

Richard Edney*

ABSTRACT

The High Court of Australia has throughout the majority of its history been reluctant to grant special leave to appeal in cases involving appeals against sentence. Due to this reluctance the development of Australian sentencing principles by the High Court was stultified. Fortunately, this reluctance to develop sentencing principles began to fall away in the 1970's and the High Court has since that time become an active facilitator of sentencing jurisprudence. As a consequence it is now possible to detail distinct Australian sentencing principles. The history of this change of approach by the High Court will be considered as will the reasons for the lack of development of Australian sentencing principles. In addition, the implications for Australian criminal law will be considered as will the impact on State and Territory Courts of Criminal Appeal. Finally, it will be suggested that the move of the High Court into the

* BA LLB (Hons) Dip Crim (Melb). Barrister and Solicitor of the Supreme Court of Victoria. Senior Lecturer in Law at Deakin University Law School. My thanks to David Ross QC who provided comments on an earlier draft of the article. Also, the comments provided by the anonymous reviewer were immensely helpful and I extend my gratitude to that person. Of course, all errors and omissions remain mine. Address for correspondence: richard.edney@deakin.edu.au

important area of criminal sentencing in the late 1970's cannot – and should not – be wound back as the development of Australian sentencing principles is fundamental to the proper, rational and consistent punishment of offenders.

INTRODUCTION

Historically, the High Court of Australia has been disinclined to entertain appeals against sentence in criminal matters from State and Territory Supreme Courts. Such a view as to the High Court's role in sentencing began to change in the late 1970's as the Court granted special leave in a small number of matters involving questions of general sentencing principle[1]. The number of cases on sentencing increased during the 1980's[2] and the amount of the sentencing jurisprudence produced by the High Court in approximately the last fifteen years[3] has seen an even more pronounced emergence of what may be identified as distinct Australian sentencing principles[4].

---

1 *Griffiths* (1977) 137 CLR 293; *Veen (No 1)* (1979) 143 CLR 458.

2 For instance, see *De Simoni* (1981) 147 CLR 383; *Neal* (1982) 149 CLR 305 *Lowe* (1984) CLR *Veen (No 2)* (1988 165 CLR 465; *Mill* (1988) 166 CLR 59.

3 See, for instance, *Bugmy* (1990) 169 CLR 525; *Radenkovic* (1990) 170 CLR 623; *Dimozantos (No 1)* (1992) 174 CLR 504; *Dimozantos (No 2)* (1993) 178 CLR 122; *Anderson* (1993) 177 CLR 520; *Everett* (1994) 181 CLR 295; *Savvas* (1995) 129 ALR 319; *Mitchell* (1995) 184 CLR 333; *Maxwell* (1996) 184 CLR 501; *Postiglione* (1997) 189 CLR 295; *Lee Vanit* (1997) 190 CLR 378; *Pearce* (1998) 194 CLR 610; *Siganto* (1998) 194 CLR 656; *Lowndes* (1999) 195 CLR 665; *Thompson* (1999) 165 ALR 219; *AB* (1999) 198 CLR 111; *Olbrich* (1999) 199 CLR 270; *Inge* (1999) 199 CLR 295; *R H McL* (2000) 203 CLR 452; *Dinsdale* (2000) 202 CLR 321; *Ryan* (2001) 206 CLR 267; *McGarry* (2001) 207 CLR 584; *Wong* (2001) 207 CLR 584*; Cheung* (2001) 209 CLR 1; *Cameron* (2002) 209 CLR 339; *Weininger* (2003) 212 CLR 629; *Putland* (2004) 218 CLR 174; *Johnson* (2004) 78 ALJR 616; *GAS & SJK* (2004) 217 CLR 198; *Fardon* (2004) 78 ALJR 1519; *Markarian* (2005) 215 ALR 213; *Strong* (2005) 79 ALJR 1171; *York* (2005) 79 ALJR 1919.

4 Justice Michael Kirby, 'Why has the High Court become more involved in Criminal Appeals?' (2002) 23 *Australian Bar Review* 1. See also Justice Michael Kirby, 'The Mysterious Word "Sentences" in s 73 of the Constitution' (2002) 76 *Australian Law Journal* 97, 107–108.

To examine how the High Court has reached this particular point in its sentencing jurisprudence, and the implications for Australian criminal law of this shift in judicial approach, it will first be necessary to examine the historical reluctance of the High Court to exercise its appellate jurisdiction in appeals against sentence. It is then proposed to examine the thawing of the approach of the High Court to sentence appeals. To do this, the analysis will necessarily be historical to a degree and will involve consideration of distinct historical periods of the High Court and how they have reflected a particular judicial ideology towards sentencing and how this has changed over time[5]. The assumption that is made is that it is possible, from a historical perspective, to identify particular trends in sentencing and how the High Court has perceived its role in establishing Australian sentencing principles.

It will be contended that in the more recent history, and despite a proclaimed reluctance to do so on the basis that it is for the Courts of Criminal Appeal of the States and Territories to perform this function[6], the High Court has been active in the development and refinement of Australian sentencing principles. The resulting sentencing jurisprudence now makes it proper and appropriate to claim that there is a distinctly Australian approach to the sentencing of offenders. That is, there is now in existence a body of Australian sentencing principles. Or, to put it another way, there are now in existence a comprehensive range of authorities concerning basic and fundamental aspects of the sentencing process that apply throughout Australia

---

5 It is not proposed to attempt an explanation as to why the High Court has now become more involved in appeals against sentence. Justice Kirby, above n 4, at 5–17, identifies the following as reasons for the increase in sentence appeals:

- Change in work content
- Criteria for special leave
- Intermediate criminal appeals
- Changing personnel
- Provision of legal aid
- Specialist Bar
- Science and Technology
- The proviso
- Context of law and order
- Attitudinal changes

6 For a recent example see *York* (2005) 79 ALJR 1919, 1927 (Hayne J).

notwithstanding differences in statutory regimes in the States and Territories in the sentencing of offenders.

EARLY DECISIONS OF THE HIGH COURT ON SENTENCING: 1903–1935

The High Court of Australia was established – subject to appeals in certain instances to the Privy Council – as the ultimate Court of Appeal for Australia in 1903. Established under the *Commonwealth Constitution of Australia Act* the High Court and the scope of its powers are detailed in the *Commonwealth Constitution.* The *Judiciary Act 1903*, as amended, provides for the exercise and implementation of those constitutional powers in statutory form. Under its appellate jurisdiction pursuant to s 73 of the *Constitution* the High Court was able to hear appeals from all judgments from the Full Courts of the States and Territories Supreme Courts. Importantly, and as a means of explaining the absence of the development of Australian sentencing principles, only certain matters had the ability to be litigated before the High Court as a matter of right. These generally involved commercial and civil matters over a set monetary value[7]. In addition, constitutional matters and certain other disputes were capable of being heard and determined by the High Court in its original jurisdiction. Thus the High Court had no discretion in such matters but was compelled, notwithstanding the aspect of such a jurisdiction in reducing the capacity of the High Court to control its own workload, to hear and determine such matters.

APPLICATIONS FOR SPECIAL LEAVE IN CRIMINAL APPEALS

In contrast, appeals in criminal proceedings, both against conviction and sentence, were governed by different rules. There was no automatic right to appeal from State and Territory Supreme Courts to the High Court. Instead, an appellant in a criminal matter had to persuade the High Court to grant special

---

7 See, for instance, *Amos v Fraser* (1906) 4 CLR 78, 87-88 (O'Connor J).

leave[8]. The decision to grant leave was discretionary. An early illustration of a refusal to grant special leave to appeal arose in *The King v Snow*[9] where the Crown sought to appeal against a directed verdict of not guilty by the trial judge under *Trading With the Enemy Act 1914* (Clth). The Court recognized its jurisdiction to deal with the matter pursuant to Section 73 of the *Constitution*[10] but declined to do so.

Originally, the initial threshold test developed by the High Court required that the appellant demonstrate a possibility of either a miscarriage of justice or that the question of law raised by the appeal was of general importance to the administration of criminal justice in Australia. Of particular importance in this context was the decision of the High Court in *Skinner v The King*[11]. *Skinner* involved an appeal from the New South Wales Court of Criminal Appeal against conviction and sentence. As a preliminary matter, Barton ACJ noted the considerations which were to determine whether the High Court would grant special leave to appeal in criminal cases. Barton ACJ held:

> …it has been clearly laid down that the considerations upon which special leave to appeal in criminal matters will be granted differ to a material extent from those which it will be granted in civil cases. Where there has been an apparent miscarriage of justice, or a departure from the principles of natural justice, or where the case is one of extraordinary importance in respect of the future administration of law – where there are considerations of that or the like nature, the Court will, but only after full consideration of all the circumstances, grant special leave to appeal.[12]

Note that the concerns identified by Barton ACJ and the basis upon which leave would be granted, particularly a possible miscarriage of justice or the significance of the case for the future administration of criminal justice, remain highly pertinent in the current approach of the High Court to special leave in criminal matters. The use of the word 'extraordinary' and the need to satisfy other tests as detailed by Barton ACJ in *Skinner's*

---

8 For examples from the High Court's history see *Millard v The King* (1906) 3 CLR 827; *McGee v The King* (1907) 4 CLR 1453.

9 (1915) 20 CLR 315.

10 *The King v Snow* (1915) 20 CLR 315.

11 (1913) 16 CLR 336.

12 (1913) 16 CLR 336, 341 (Barton ACJ).

case provided a high standard to be met by an appellant in a criminal matter.

This interpretive stance of the early High Court to its appellate jurisdiction in criminal matters did not develop autonomously. The early High Court appears to have been influenced by the practice of English Courts, particularly the Judicial Committee of the Privy Council[13]. In place of developing an indigenous framework to the elucidation of fundamental appellate principles that would assist the Court in dealing with a criminal appeal workload, the High Court adopted the interpretive framework of the Judicial Committee of the Privy Council[14]. This approach was detailed in *Eather v The King*[15] (despite the passionate dissent of Isaacs J[16]). Thus 'imported' criteria from that jurisdiction provided the test to determine whether or not special leave would be granted in criminal matters.

---

[13] This approach to appeals in criminal matters was also evident in the approach to domestic criminal appeals in England and it did not merely stymie the development of criminal jurisprudence in Australia – and other colonies – but also in that country. As is noted by Louis Blom-Cooper QC and Gavin Drewry in their fascinating work *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (1972) 270:

> The criminal law has long been, and still is (though to a lesser extent) the jurisprudential Cinderella of the English legal system; although the part it plays within the system has not been so much despised as disdainfully ignored. With the notable exception of such unlikely Prince Charmings as Mr Justice Stephen in the last century and Lord Devlin in this, English judges have appeared anything but eager to conduct a juristic courtship with either the administration of criminal justice or the substantive criminal law. This is due as much as anything to the absence, until this century, of any formalized appeal process. And when the Court of Criminal Appeal was finally established in 1907, it was virtually the final Court of Appeal in criminal matters; the House of Lords remained hermetically sealed off fromthe process of laying down the fundamental principles of criminal law…

[14] See *Kops v The Queen; ex parte Kops* [1894] AC 650; *Ex Parte Carew* [1897] AC 719; *Arnold* [1914] AC 644.

[15] (1915) 19 CLR 409, 412–413 (Griffith CJ, Barton, Gavan Duffy, Powers and Rich JJ). See also *Bataillard* (1907) 4 CLR 1282.

[16] (1915) 19 CLR 409, 413–429. Justice Isaacs maintained this position – and thus the need for the High Court of Australia to be a proper national appellate Court of Appeal for the citizens of Australia – consistently while he sat on the High Court. For a further example see *Ross* (1922) 30 CLR 246, 259 (Isaacs J).

THE ROLE OF THE HIGH COURT IN REVIEWING SENTENCES

The other important aspect of the decision in *Skinner* are the important statements of sentencing principle, particularly concerning the role of appellate courts in reviewing sentences imposed by a trial Judge. The dictum of Barton ACJ and Isaacs J are especially important as they have contained within them the ideas that were to be fully developed in *House v The King*[17]. In determining the appeal against sentence in *Skinner*, Barton ACJ first affirms the role of sentencing judge and the unique position occupied by him or her in comparison with appellate Judges. Barton ACJ emphasized that the

> …sentence is arrived at by the Judge at the trial under circumstances, many of which cannot be reproduced before the tribunal of appeal. He hears the witnesses giving their evidence, and also observes them while it is being given, and tested by cross examination. He sees every change in their demeanour and conduct, and there are often circumstances of that kind that cannot very well appear in any mere report of evidence.[18]

Thus for Barton ACJ, because of the forensic advantage of the sentencing judge, an appellate court ought to show deference to that judge who would have found certain findings of fact in conditions that could not be replicated upon appeal.

The second aspect of Barton ACJ's dicta in *Skinner's* case flows from that finding and contains the matters that an appellant must satisfy in order to impugn the sentence of the trial Judge. Barton ACJ notes:

> It follows that a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the

---

17 (1936) 55 CLR 499.

18 *Skinner v The King* (1913) 16 CLR 336, 339–340.

> Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.[19]

On the issue of the appeal against sentence Isaacs J reached a similar conclusion[20] but relied on English authority. His Honour approved the following dicta in the decision *R v Sidlow*,

> Of course if there was evidence that the Judge in passing sentence had proceeded on wrong principle or given undue weight to some of the facts proved in evidence the Court would interfere; but it was not possible to allow appeals because members of this Court might have inflicted a different sentence more or less severe. [21]

THE RECEPTIVITY OF THE HIGH COURT TO CRIMINAL APPEALS

The early High Court decisions provided appellants in criminal appeals with a difficult standard to meet. In appeals against sentence, mere dissatisfaction or grievance would not be sufficient for the Court to entertain the matter. The reported authorities in this period disclose a reluctance to grant special leave in criminal matters[22]. The initial judicial reluctance of the High Court to engage in establishing sentencing principles was confirmed in *Skinner* and would later become fortified in *House v King*. In addition, there was little manifestation of a consciousness in those early decisions that the High Court regarded itself as having a role in creating those sentencing principles that would be of benefit in the development of an Australian criminal law. Instead, this function would be discharged by State and Territory Courts of Criminal Appeal. This is not surprising. As a matter of history, Australia had only reached nationhood in 1901. The High Court of Australia itself had begun sitting only in 1903. In those circumstances, the High

---

19 (1913) 16 CLR 336, 340.

20 (1913) 16 CLR 336, 342–343.

21 (1907) 24 TLR 754, 755 (Alverstone CJ, Darling & Channell JJ).

22 For an example of the brevity that this approach sometime resulted in see the judgment of the High Court in *Waterhouse* (1911) 13 CLR 228 where Chief Justice Griffith – who delivered judgment for the Court – simply stated: 'All that is necessary to say is that the decision of the Full Court was clearly right. Leave to appeal will be refused.'

Court would have perhaps been concerned more with fundamental aspects of governance in the interpretation of the *Constitution* and the development of the relationship between the legislative powers of the States and the Commonwealth[23]. In addition, in the appellate jurisdiction of the High Court only certain matters were permitted a 'right' to appeal and criminal cases did not fall within that category. Finally, the enduring influence of the English approach to criminal appeals cannot be underestimated.

THE ACHIEVEMENTS OF THE EARLY HIGH COURT IN SENTENCING JURISPRUDENCE

At the end of this first period of development of High Court sentencing jurisprudence, the following features may be identified. First, in criminal appeals – including those appeals against sentence – there was a discretionary decision to be made by the High Court whether to grant special leave to appeal. An appeal against sentence to the High Court was not as of right for a sentenced person and the discretion governing such applications would be determined by those features identified by Barton ACJ in *Skinner's* case: either a miscarriage of justice or some other aspect of the case which would have future significance for the administration of criminal justice. In addition, in *Eather's* case the practice of the High Court to follow English practice in determining whether to grant special leave in criminal appeals was confirmed[24]. Second, in determining sentence appeals in the High Court, the Court would place great store upon the sentence imposed by the sentencing

---

[23] See, for instance, *Bond v The Commonwealth of Australia* (1903) 1 CLR 13; *The Commonwealth v Baume* (1905) 2 CLR 405; *Attorney General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949; *The King v Governor of South Australia* (1907) 4 CLR 1497; *State of South Australia v State of Victoria* (1911) 12 CLR 667; *Amalgamated Society of Engineers & the Adelaide Steamship Company Limited & Ors* (1920) 28 CLR 129; *Mainka v Custodian of Expropriated Property* (1924) 34 CLR 297; *Federal Capital Commission v Lauriston Building & Investment Company Pty Ltd* (1929) 42 CLR 582; *Huddart Parker Limited & Ors v Commonwealth of Australia* (1931) 44 CLR 492; *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266; *State of Tasmania v State of Victoria* (1935) 52 CLR 157.

[24] Also see *Barton-Smith v Railton & Ors* (1918) 25 CLR 427.

Judge and it would only be in the identification of an error by the sentencing Judge would appellate intervention be justified[25].

Thus the High Court had made it clear that it would only involve itself in criminal appeals in a narrow range of circumstances. For sentence appeals this would be significant. This interpretive stance of deference to the original sentencer – in the absence of particular types of error – would continue and become more pronounced following the decision of the High Court in *House v The King* and its narrow vision of the appellate process in appeals against sentence[26]. The consequence of such an approach would be the absence of substantial development in Australian sentencing principles.

AN INTERLUDE: THE FOUNDATIONAL CASE OF *HOUSE V THE KING*

In describing the historical approach of the High Court to sentencing it is not possible to underestimate the significance of the decision in *House v King*[27]. The dicta of the majority in that case in determining the basis upon which an appellate court may intervene in the exercise of the sentencing discretion by a trial judge has been enduring. Not only is it still guiding the determination of criminal appeals in State and Territory Supreme Courts and the High Court[28], but it also stalled the development of Australian sentencing principles. It is first necessary however to consider *House v The King* in some greater detail. The test in *House v King*, which will shortly outlined and which built upon the decisions in *Skinner*[29] and *Whittaker*[30], is also of significant importance to the sentencing of offenders as it has contained

---

25 For instance, see *Whittaker v The King* (1928) 41 CLR 230.

26 (1936) 55 CLR 499.

27 (1936) 55 CLR 499.

28 See, for instance, *Dinsdale* (2000) 202 CLR 321, 325-326 (Gleeson CJ and Hayne J).

29 (1913) 16 CLR 336, 340 (Barton ACJ) 342 (Isaacs J).

30 (1928) 41 CLR 230, 243-250 (Isaacs J).

within the assumptions of the instinctive synthesis approach to sentencing[31].

House v King should be considered the foundational case of sentencing principle under Australian criminal law. The decision itself is somewhat of anomaly in that although it was a criminal case, an appeal to the High Court was found to exist of right as the proceedings were heard at first instance in the Federal Court of Bankruptcy[32]. The importance of the decision requires close analysis both for its continuing influence but also for its historical importance in prohibiting the development of sentencing principles. It is a decision that builds upon earlier decisions of the High Court that conceived narrowly the applicable sentencing principles and the role and scope of intervention in appeals against sentence.

THE FACTS OF *HOUSE V KING*

House v King was an appeal against sentence by the appellant who had pleaded guilty to certain offences under the *Bankruptcy Act 1924 (Clth).* The principal offence for which the appellant pleaded guilty was essentially one of trading while insolvent. It appears from the judgment that the appellant had obtained funds illegally in the course of his business to sustain his inveterate gambling. At trial the appellant had pleaded guilty to one offence

---

[31] This methodology of sentencing requires that substantial deference is to be given to the sentencing judge's original decision on sentence as he or she 'instinctively' synthesises all relevant matters in determining the appropriate sentence in all the circumstances of the offence and offender. Although the term 'instinctive synthesis' was first articulated in *R v Williscroft* [1972] VR 292, 300 (Adams & Crockett JJ), it is arguable that it described a process of reasoning in sentencing that has been a feature of Australian criminal law for a significant period of time. On this point see Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do With it? A Blueprint for a Coherent Approach to Punishing Criminals' (2003) 27 *Criminal Law Journal* 119, 122-124. The High Court of Australia recently affirmed the desirability of this approach to the sentencing task, save in limited circumstances: see *R v Markarian* (2005) 79 ALJR 1048, 1057-8 (Gleeson CJ, Gummow, Hayne & Callinan JJ). For a discussion of this case see Richard Edney, 'Still Plucking Figures Out of the Air? *Markarian* and the Affirmation of the Instinctive Synthesis' (2005) 5 (6) *Bourke's Criminal Law News Victoria* 50.

[32] (1936) 55 CLR 499, 504 (Dixon, Evatt & McTiernan JJ). As a result, no issue of the appellant having to seek special leave arose.

under the Act and was sentenced to three months imprisonment to be served by way of hard labour.

On appeal to the High Court the sole ground of appeal was that the punishment was excessive in all of the circumstances. It appears from the judgment that on appeal there was no further elaboration of that ground to incorporate an argument based on a specific sentencing error nor was an argument agitated that the trial judge had made any fundamental errors of fact which had vitiated the sentencing discretion. The High Court dismissed the appellant's appeal and found that the sentence imposed upon the appellant was not excessive and was open to the trial judge in all the circumstances. In dismissing the appeal the High Court laid down the test which is now synonymous with this decision. I will set out the dicta in full given the analysis that will follow:

> …the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[33]

In coming to these conclusions the High Court considered English authority on the proper approach to be taken by appellate courts to sentence appeals. As previously noted, the High Court adopted a similar interpretive approach to sentence appeals from

---

[33] (1936) 55 CLR 499, 504–505 (Dixon, Evatt & McTiernan JJ).

English Courts. It did not deviate from this approach in *House v King*. Part of the method of that approach was to place great weight on the original sentence imposed by the trial judge. This meant that when the court was faced with an appeal that attempted to impugn the sentencing discretion the onus was squarely on the appellant to demonstrate an error by the sentencing judge. Without disclosure of error the court would be reluctant to intervene.

THE TWO TIER TEST WITHIN *HOUSE V KING* AND ITS INFLUENCE

Essentially the test within *House v King* contains two aspects or dimensions. It is also not strictly a test that is confined to judicial decisions concerning the imposition of sentence, but is a more general test to evaluate whether a discretionary decision has been properly made. The first part of the test is concerned with identifying whether there has been an error or fault in the decision making process. The second part of the test is more of a qualitative type that is directed to the ultimate result to determine whether that result is appropriate in all the circumstances. The fact that the test itself is not necessarily strictly applicable to appeals against sentence, but judicial and administrative decision making more generally, is significant because it discloses a vision of the appellate process that is perhaps too narrowly circumscribed in appeals against sentence. Thus it is not concerned with whether the sentence is proper or the appropriate 'fit' with all the circumstances of the offence and the offender[34], but is instead directed to the process of decision making. This narrow conception of the role of the appellate court is unlikely to provide – and under Australian criminal law did not – a fertile ground for the development of positive sentencing principles.

Thus *House v The King* may be considered to have assisted in the *underdevelopment* of sentencing principles under Australian law for a significant period of time. The impact was evident not only in the reluctance of the High Court to treat seriously the sentencing of offenders as an appropriate subject matter for the

---

[34] The notion of 'fitness of the sentence to the offence' is the test applied in Canadian appellate courts in appeals against sentence under the *Canadian Criminal Code*. See C Ruby, *Sentencing* (4th ed, 1994) 487–495.

development of a comprehensive jurisprudence but also in respect of State and Territory courts who could have drawn upon the articulation of sentencing principles and would be bound by such jurisprudence. In effect then *House v King* was debilitating to the development of a more sophisticated approach to the punishment of offenders. As a result sentencing as an intellectual and principled exercise was undermined by a narrow vision of the appellate process in sentencing appeals.

What the approach in *House v King* also emphasised was deference to the judicial wisdom of the trial Judge in sentencing. In effect, it made sentencing seemingly a matter of preference, or choice, for the sentencing judge. A sentencing judge was accorded an extremely high degree of discretion in the imposition of penalty and effectively was constrained only by the statutory maximum for the offence and a rider that the sentence was not excessive. Private, subjective and opaque judicial decision making was the consequence and a remarkable degree of faith was placed in the intuitive correctness of the discharging of the sentencing discretion, notwithstanding the significant interests of the offender that would be interfered with. The articulation and application of sentencing principles was unlikely to emerge in an environment which was essentially 'anti-jurisprudential'[35] and did not require sentencers to expound why one sentence was chosen over all others. The lack of exposure of the reasons for sentence that could be tested and reviewed upon appeal meant that doctrinal development was unlikely to occur. More fundamentally, the narrow type of appellate inquiry in sentencing envisaged by *House v King* meant it unlikely that the Court would be engaged in development of fundamental sentencing principles as it was confined to a search for forensic error.

HOUSE V KING AND BEYOND : 1937–1976

For nearly forty years after the decision in *House v King,* sentencing as a distinct part of the jurisprudence of the High Court barely developed. Those years may be described as a

---

[35] See generally J Smith, 'Clothing the Emperor: Towards of Jurisprudence of Sentencing' (1997) 30 *Australian and New Zealand Journal of Criminology* 168.

wasteland in the development of sentencing principles by the High Court. The extent of non-involvement in criminal appeals involving sentence during that period is stark. The response of the High Court during this time generally involved the court simply asserting that such matters were generally the province of the State and Territory courts and that the High Court was not the appropriate forum for such appeals[36]. A handful of decisions were the product of those years[37].

Little of doctrinal significance was provided, or emerged, in the area of sentencing[38]. It would have appeared to a criminal lawyer at that time that the principles of sentencing would be left to develop jurisdiction by jurisdiction and with the aid of legislative amendment rather than the articulation of general sentencing principles by the ultimate appellate Court of Australia. In case after case when the High Court did hear and determine a sentence appeal the reasons provided were rudimentary and there was little attempt to develop sentencing principle[39]. For instance, in *Stokes*[40] in determining that the sentences imposed 'appear to be severe' the High Court simply stated that

> … we think the period too long. It follows that the term must be reduced. On the whole we think that they should be reduced to eighteen months each.[41]

The approach to appellate review of sentences in criminal cases as set out in the earlier High Court case of *House v King* was

---

36 *White* (1962) 107 CLR 174, 176 (The Court).

37 *Vaughan* (1938) 61 CLR 8; *Cranssen* (1936) 55 CLR 509; *Green* (1939) 61 CLR 167; *Harris* (1954) 90 CLR 652; *O'Meally* (1958) 98 CLR 13; *Stokes* (1960) 105 CLR 279; *White* (1962) 107 CLR 174; *Hayes* (1967) 116 CLR 459; *Devine* (1967) 119 CLR 506; *Lucas* (1970) 120 CLR 171; *Richardson* (1974) 131 CLR 116; *Power* (1974) 131 CLR 623.

38 There were occasional traces of sentencing principle. See for instance *Cranssen* (1936) 55 CLR 509, 521, where Dixon, Evatt and McTiernan JJ held, in allowing an appeal against sentence held that the penalty imposed by the sentencing judge: '…appears a crushing punishment bearing no proportion either to the impropriety of the applicant's conduct or the kind of penalty which would suffice as a deterrent.'

39 See *Vaughan v The King* (1938) 61 CLR 8; *Green v The King* (1939) 61 CLR 167; *O'Meally v The Queen* (1958) 98 CLR 13; *Hayes v The Queen* (1967) 116 CLR 459; *Devine v The Queen* (1967) 119 CLR 506; *Lucas v The Queen* (1970) 120 CLR 171.

40 (1960) 105 CLR 279.

41 (1960) 105 CLR 279, 284.

confirmed in *Harris*[42], as was the high test for special leave in a criminal case[43]. A stand out case – and indicator of where the High Court could move in the area of sentencing – that departed from this trend appeared late in this period in 1974 in the case of *Power*[44]. If anything, *Power* represents the 'rupture' point between an interpretive stance from the High Court that did not place great moment on its role in creating a sentencing jurisprudence for the States and Territories of Australia and signals a shift to a more vital and considered approach by the Court to the sentencing of offenders. Evidence of this rupture is revealed in the content and structure of the judgment. The comparisons with other decisions from the High Court on sentence are startling and demonstrate a significant – yet formally undisclosed – change in judicial methodology. Instead of short reasons which would have no persuasive weight and provide little point of sentencing principle for other cases, the decision in *Power* carefully traces the area of concern in the appeal. That area of concern was parole and how the sentencing judge ought to approach that issue when sentencing an offender who will receive a sentence of immediate imprisonment[45].

Notwithstanding the anomaly of *Power*, it would not have been possible to describe a discrete area of jurisprudence as distinctly articulating an Australian approach to the sentencing task in the mid 1970's. In short, it would not have been reasonable to claim that there were in existence 'Australian Sentencing Principles'. The sentencing principle that is derived from *House v King* had as its provenance jurisprudence from another nation which had adopted a narrow approach to criminal appeals. Moreover, it was a 'negative' test that would be unlikely to lead to the development of sentencing principle. For Australian sentencing jurisprudence to develop there would have to be a weakening of the hold of *House v King.* Before we consider further the development of Australian sentencing principles and how they have emerged since the late 1970's it is first proper to consider the principles that High Court has applied in more recent history as governing the decision as to whether or not to grant special

---

42 (1954) 90 CLR 652.

43 *White* (1962) 107 CLR 174.

44 (1974) 131 CLR 623. Also see *Peel* (1971) 125 CLR 447.

45 *Power* (1974) 131 CLR 623, 627-630 (Barwick CJ, Menzies, Stephen & Mason JJ).

leave in an appeal against sentence. It is to be noted that the principles governing the exercise of this discretion retain a high degree of resemblance to the early decisions of the High Court.

CONTEMPORARY PRINCIPLES GOVERNING SPECIAL LEAVE APPLICATIONS IN SENTENCING APPEALS

The High Court of Australia has on numerous occasions stated that it should not, and will not, be an ordinary forum for appeals against sentence from State and Territory Supreme Courts[46]. In addition, mere excessiveness of sentence will not be sufficient to warrant a grant of special leave in the absence of error[47]. In short, there needs to be something 'special'[48] about the case in terms of its significance in raising an issue of general importance[49] as well as the possibility of a grave and substantial injustice should the court not deal with the case[50], or a 'gross violation of the principles which ought to guide discretion in imposing sentence'[51]. As was noted by the Court in *Liberato v R*[52]:

> It has been repeatedly affirmed by this court that it is not a court of criminal appeal and that it will not grant special leave to appeal in criminal cases unless some point of general importance is involved, which, if wrongly decided, might seriously interfere with the administration of criminal justice.[53]

---

46 As such the development of sentencing standards and principles has been held to be the province of State and Territory Supreme Courts. See, for instance, *Veen* (1979) 143 CLR 458, 472 (Mason J); *Neal* (1982) 149 CLR 305, 309 (Gibbs CJ) 323 (Brennan J).

47 *House v The King* (1936) 55 CLR 499, 505. Also see *Lowe v The Queen* (1984) 154 CLR 606, 621–622 (Dawson J).

48 See, for instance, *Craig v The King* (1933) 49 CLR 429, 442 (Dixon & Rich JJ); *Colefax* [1962] ALR 399; *Lowe v The Queen* (1984) 154 CLR 606, 621 (Dawson J).

49 *Veen* (1979) 143 CLR 458, 461 (Stephen J) 467 (Mason J) 473 (Jacobs J).

50 *Cornelius v The King* (1936) 55 CLR 235, 236 (Starke J).

51 *White* (1962) 107 CLR 174, 176.

52 (1985) 159 CLR 507.

53 *Liberato* (1985) 159 CLR 507, 509 (Mason ACJ, Wilson J & Dawson J).

And as was stated by Justice Kirby, when discussing the nature of the High Court's appellate jurisdiction in criminal matters, in *Postiglione*[54]:

> The restraints which authority and legal principle impose upon courts of criminal appeal are even more severe when it comes this to this Court. It will not grant special leave to appeal against a sentence, still less allow an appeal, merely because the sentence appears excessive…[55]

Justice Kirby then highlights the sound policy grounds for such an approach to be taken by the High Court:

> As the *Judiciary Act 1903* (Clth) (s 35A) indicates, the authority and practice of the Court and the necessities imposed by its workload and composition require that it cannot, and should not, fulfil a general function of re-scrutinising sentencing decisions of appellate courts.[56]

As noted earlier, the tradition of criminal appeals to the High Court being regulated in such a manner is of long standing and was evident early in the history of the High Court. The reference to provisions of the *Judiciary Act 1903* (Clth) cited by Justice Kirby details the tests to which the court may have regard in granting special leave[57]. S 35A of the *Judiciary Act 1903* (Clth) provides:

> (a) whether the proceedings in which the judgment to which the application relates was pronounced involves a question of law:
>
> (i) that is of public importance, whether because of its general application or otherwise; or
>
> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
>
> (b) whether the interests of the administration of justice, either generally or in the particular case, require

---

54 (1997) 189 CLR 295.

55 (1997) 189 CLR 295, 337.

56 Ibid.

57 The same criteria apply whether or not the case is a criminal or civil matter. For an overview of the procedural requirements for applications for special leave to the High Court see Maree Kennedy SC, 'Applications for Special Leave to the High Court' (2005) 1 *High Court Quarterly Review* 1.

> consideration by the High Court of the judgement to which the application relates

The decision whether to grant special leave under the provisions of s 35A of the *Judiciary Act 1903* (Clth) in a matter is discretionary and circumscribed by broad principles and may be described as a structured discretion[58]. The fact that the Court is faced with a discretionary decision in special leave applications ensures that the Court has significant latitude in its decision-making as to which cases will be subject to a full hearing before the Court. As a result of this filtering process the Court itself fulfills a central role in the development of the common law in Australia through the judicial choice of cases which are, or are not, granted special leave[59]. There are strong policy grounds why the court should be involved in dealing with a limited caseload. As the 'apex'[60] of the Australian judicial system it is important that the High Court's limited resources are dedicated to matters that raise matters of fundamental importance and which assist with the development of the Australian common law[61]. Moreover, if the authority and esteemed regard with which the Court is held is to continue it must be able to function as a proper appellate court that decides the important cases that arise for consideration under Australian law.

At the same time the High Court, standing as the ultimate Court of Appeal under Australian law, should not articulate a position that would result in excluding matters that should be heard. The development in Australian sentencing principles since the late 1970's by the High Court suggests that the Court has become conscious of the importance of its role in providing authoritative guidance in matters of fundamental importance to the sentencing of offenders. Despite the resemblance to early authorities on how the Court should exercise its discretion to grant leave to appeal in criminal cases the Court *in practice* has displayed a greater willingness to articulate positive sentencing principles. What the development of those sentencing principles suggests also is that

---

58 As Dawson J notes, when discussing the nature of the amendments to the *Judiciary Act 1903* (Clth) and the introduction of s 35A that 'section, as far as it goes, is declaratory': *Morris* (1987) 163 CLR 454, 475 (Dawson J).

59 See generally D Solomon, 'Controlling the High Court's Agenda' (1993) 23 *University of Western Australian Law Review* 33.

60 *Eather v The King* (1914) 19 CLR 409, 427 (Isaacs J).

61 *Morris* (1987) 163 CLR 454, 475 (Dawson J).

the Court has modified its interpretive framework in respect of appeals against sentence. Interestingly, the High Court continues to emphasise particularly that sentence appeals are matters for State and Territory Courts but has yet – and despite itself – developed an important 'catalogue' of Australian sentencing principles.

THE EMERGENCE OF A HIGH COURT SENTENCING JURISPRUDENCE 1977–1989

The years 1977–1989 may be thought of as the first phase of a return to jurisprudence in the realm of sentencing by the High Court and the first 'wave' of development of Australian sentencing principles. In this phase of the history of the High Court some of the most important cases that now underpin principles of Australian sentencing were decided.

In *Griffith*[62] – and in a decision that perhaps marks the origin of the development of substantive Australian sentencing principles – the leading judgment of Chief Judge Barwick stated the seminal position on Crown appeals under Australian law[63]. In a model judgment, Chief Justice Barwick specifies the proper basis for the operation of Crown appeals under Australian law. His Honour notes the tension between the need for the finality in criminal proceedings, especially from the perspective of the sentenced offender, and the important function of appellate courts in maintaining sentencing standards. The decision in *Griffiths*, in conjunction with the later High Court of Australia decisions in *Everett*[64] and, to a lesser extent, *Malsavo*[65], have provided significant guidance to State and Territory courts in determining Crown appeals[66].

Shortly after *Griffith*, the High Court of Australia in the decision of *Veen (1)*[67] and in the later counterpart decision of *Veen (2)*[68]

---

62 (1977) 137 CLR 293.

63 See generally Richard Edney, 'The Rise and Rise of Crown Appeals in Victoria' (2004) 28 *Criminal Law Journal* 351.

64 (1994) 181 CLR 295, 299 (Brennan, Deane, Dawson and Gaudron JJ).

65 (1989) 168 CLR 227.

66 See for instance *R v Clarke* [1996] 2 VR 520, 522–523 (Charles JA).

67 (1979) 143 CLR 458.

identified proportionality as the guiding principle that would set the outer limit upon which an offender could be properly punished. As part of the sentencing exercise an offender's punishment would be limited by the seriousness of his or her offending in respect of the harm caused and by his or her culpability. The doctrine of proportionality in sentencing and its importance was further confirmed in *Chester*[69] and *Hoare*[70]. And notwithstanding the emergence of statutory regimes of preventive detention – and the High Court's confirming of their constitutionality[71] – the principle of proportionality in the sentencing of offenders remains fundamental to Australian criminal law[72].

Building upon these earlier decisions – and perhaps revealing a change towards criminal appeals – the High Court in the early 1980's gave judgment in important cases involving the prohibition on sentencing for uncharged acts[73], the relevance of aboriginality to sentencing[74] and fundamental sentencing principles of parity[75] and totality[76]. At the end of this period of development the High Court had finally emerged to provide some basic principles that were – and are – vitally important to the proper sentencing of offenders. With this development there was now in existence a nascent set of Australian sentencing principles. The following period – 1990–2005 – in which sentencing principles were further developed by the High Court confirmed that the Court would not return to a position where it contributed little to the principles that guide the sentencing of offenders throughout Australia.

---

68 (1988) 164 CLR 465.

69 (1988) 165 CLR 611.

70 (1989) 167 CLR 348. Also see *Baumer* (1988) 166 CLR 51.

71 *Fardon* (2004) 78 ALJR 1519.

72 See generally R Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

73 *De Simoni* (1981) 147 CLR 383.

74 *Neal* (1982) 149 CLR 305.

75 *Lowe* (1984) 154 CLR 606.

76 *Mill* (1988) 166 CLR 59.

AUSTRALIAN SENTENCING PRINCIPLES FURTHER EMERGE : 1990–2005

The years 1990–2005 have seen the High Court further develop basic and fundamental principles in sentencing in a number of sentence appeals. The principles detailed in those cases have had resonance not just from the States and Territories from which they have emerged but – like the cases decide in the first wave of greater High Court involvement in sentences appeals – have had an Australian wide application. This is important. The cases between 1990–2005 have thus built upon the foundation of the earlier identified phase of greater High Court participation in the sentencing of offenders in matters of sentencing principle. In aggregate then, the decisions during this and the earlier period – 1977–1989 – have provided a coherent body of Australian sentencing principles.

This has occurred notwithstanding that the High Court has continued to emphasise in judgments involving sentence appeals that in most instances that sentencing standards and principles are for the Courts of Criminal Appeal in the States and Territories to develop[77]. Through a finely selective and judicious process the court itself has been able to identify and promote the development of Australian sentencing principles. This may appear counterintuitive. It is not. Rather, the Court by resisting those applications for special leave which may have only a State or Territory concern has been able to craft an impressive sentencing jurisprudence. Not only has the High Court built upon the sentencing principles developed between 1977–1989 it has been able to extend those further to consider a more extensive arrange of concerns in sentencing.

The range of sentencing matters in which the High Court has provided significant judgments on matters pertaining to sentencing since 1989 include: parole[78], substantive and procedural aspects of the guilty plea[79], suspended sentences[80],

---

77 *York* (2005) 79 ALJR 1919.

78 *Bugmy* (1990) 169 CLR 525. Also see *Shrestha* (1991) 173 CLR 48; *Inge* (1999) 199 CLR 295.

79 *Maxwell* (1996) 184 CLR 501.

80 *Dinsdale* (2000) 202 CLR 321.

character in sentencing[81], totality[82], the standard and onus of proof in sentencing[83], interpretation of jury verdicts for the purpose of sentencing[84], principles of cumulation and concurrency[85], the relevance of uncharged offences to the discharge of the sentencing discretion[86], guideline judgments[87], guilty pleas[88], habitual criminals[89], Crown appeals[90], indefinite detention orders[91], plea agreements[92] and other judicial comment concerning the appropriate judicial methodology in sentencing matters[93]. Interestingly, in the most recent sentencing case before the High Court, the Court considered a specific matter pertaining to the sentencing process. In that decision, the High Court held that safety concerns by an offender that may arise as a result of a sentence of immediate imprisonment were a relevant sentencing consideration[94].

What is clear is that the High Court's involvement in the development of sentencing principle is now entrenched and cannot be clawed back. I now turn to what this represents for the Courts of Criminal Appeal of the States and Territories in the practice and development of sentencing principles in their respective jurisdictions.

---

81 *Ryan* (2001) 206 CLR 267.

82 *Postoliogne* (1997) 189 CLR 295.

83 *Olbrich* (1999) 199 CLR 270. Also see *Weininger* (2003) 212 CLR 629.

84 *Cheung* (2001) 209 CLR 1.

85 *Pearce* (1998) 194 CLR 610.

86 *Weiniger* (2003) 196 ALR 451.

87 *Wong* (2001) 207 CLR 584.

88 *Cameron* (2002) 209 CLR 339.

89 *Strong* (2005) 79 ALJR 1171.

90 *Everett* (1994) 181 CLR 295.

91 *McGarry* (2001) 207 CLR 584.

92 *GAS v The Queen*; *SJK v The Queen* (2004) 217 CLR 198.

93 *Markarian* (2005) 79 ALJR 1048. Also see *AB* (1999) 198 CLR 111; *Ryan* (2001) 179 ALR 193; *Wong* (2001) 207 CLR 584.

94 *York* (2005) 79 ALJR 1919, 1923–4 (McHugh J).

AUSTRALIAN SENTENCING PRINCIPLES IN PRACTICE: A BLENDED JURISPRUDENCE

The development of Australian sentencing principles by the High Court has not occurred in a vacuum. In particular, there must be appropriate recognition of the dynamic relationship that now exists between the High Court and the Courts of Criminal Appeal at the State and Territory level. Through becoming more involved in the jurisprudence of sentencing – and by developing Australian sentencing principles – the High Court as the ultimate Court of Appeal for Australia looms more significant in the operation of State and Territory Courts of Criminal Appeal. Those Courts of Criminal Appeal can no longer function independently of the High Court and must ensure that fundamental aspects of sentencing are in conformity with decisions made by that Court.

The result of this move by the High Court into greater areas of sentencing principle has been the development of a *blended jurisprudence* in State and Territory Courts of Criminal Appeal[95]. What I mean by blended is that in many instances appellate decisions on sentence will often involve those Courts of Criminal Appeal relying upon their own jurisprudence *and* the principles developed by the High Court, particularly on matters of basic principle such as parity, proportionality and totality, in determining the outcome of an appeal against sentence[96]. Thus the jurisprudence of the High Court on sentencing principles forms a fundamental substratum upon which the appellate exercise of State and Territory Courts of Criminal Appeals in matters of sentence is determined[97].

---

[95] Which then would – and should – 'trickle down' into the practice of intermediary and local or summary courts.

[96] As well in certain cases upon jurisprudence developed in other States and Territories.

[97] For some examples of where Courts of Criminal Appeal in the States and Territories of Australia have relied upon sentencing principles of the High Court see, for example, **South Australia:** *Rucioch v Police* (2004) 88 SASR 326, 330–332 (Doyle CJ) (reliance on *Pearce* and *Olbrich*); *R v Dubois* (2004) 88 SASR 304, 309 (Sulan J) (reliance on *Dinsdale*); *Wessling v Police* (2004) 88 SASR 57, 60–61 (Besanko J) (reliance on *House v King* and *Dinsdale*); *R v Lennon* (2003) 86 SASR 295, 296 (Doyle CJ) (reliance on *Everett*); *R v Liddy (No 2)* (2002) 84 SASR 231, 268 (Mullighan J) (reliance on *Shrestha*) 272–281 (Gray J) (reliance on *RH*

The articulation and entrenchment of these fundamental principles in this manner should tend to promote – in the absence of legislative amendment or change – the solidification of those principles as basic norms of Australian sentencing and perhaps an even more uniform and consistent approach to sentencing so that the type pf punishment is contingent more on the nature of

---

McL, *Veen (No 2)* and *Ryan*); *Saxon v Commonwealth Services Agency* (2004) 88 SASR 382, 384 (reliance on *Veen (No 2))*; **Queensland:** *R v TL* [2005] 1 Qd R 659, 662–664 (reliance on *Mill* and *Weininger*); *R v Nagy* [2004] 1 Qd R 63, 69–75 (Williams JA) (reliance on *Pearce, Cameron, Lowe* and *Postiglione*); *R v Gilles, ex parte Attorney-General* [2002] 1 Qd R 404, 408 (Pincus JA) (reliance on *Dinsdale*); *R v Sheppard* [2001] 1 Qd R 504, 514 (Williams J) (reliance on *Neal* and *Malvaso*); **Western Australia:** *Western Australia v Miller* (2005) 30 WAR 38, 41–42 (Steytler P) (reliance on *Everett, Malvaso* and *Pearce*); *Yarran* (2003) 27 WAR 427, 432 (McKechnie J) (reliance on *Chester, Lowndes, McGarry* and *Thompson*); *Mustafa* (2002) 27 WAR 73, 85 (Murray J) (reliance on *Postiglione* and *Olbrich*); **Tasmania:** *Langridge* (2004) 12 Tas R 470, 482–483 (The Court) (reliance on *Dinsdale*); *R v Minney* (2003) 12 Tas R 46, 55 (Crawford J) (reliance on *Chester*); *Williams* (2002) 11 Tas R 258, 265–266 (The Court) (reliance on *Cheung*); *Strachan v Brown* (2000) 9 Tas R 291, 299-300 (Underwood J) (reliance on *Pearce*); *Hrasky v Boyd* (2000) 9 Tas R 144, 151 (Underwood J) (reliance on *Griffiths* and *Everett*); **Northern Territory:** *R v Leach* (2005) 145 NTR 1, 11–13 (Martin CJ) (reliance on *Olbrich, Veen (No 1), Weininger* and *Veen (No 2))*; **ACT:** *R v Lappas* (2004) 152 ACTR 7, 24–25 (Cooper & Weinberg JJ) (reliance on *Everett, Lowndes* and *Dinsdale*); **New South Wales:** *R v MJR* (2002) 54 NSWLR 368, 373 (Spigelman CJ) 375–376 (Mason P) (reliance on *Radenkovic, Siganto, Mill* and *Wong*); *R v SLD* (2003) 58 NSWLR 589, 592–594 (Handley JA) (reliance on *Veen (No 1), Veen (No 2), Chester* and *Bugmy*); *R v Morgan* (2003) 57 NSWLR 533, 540 (Wood CJ) (reliance on *Dinsdale*); *R v Way* (2004) 68 NSWLR 168, 182 and 192 (The Court) (reliance on *Veen (No 2)* and *Hoare*); **Victoria:** *R v Taudevin* [1996] 2 VR 402, 404 (Callaway JA) (reliance on *Lowe*); *DPP (Clth) v Goldberg* [2001] VSCA 107, [14] (Vincent JA) (reliance on *Dinsdale*); *DPP v Waack* [2001] VSCA 108, [14], [24]–[27] (The Court) (reliance on *Everett*); *DPP v Rzek* [2003] VSCA 97, [22]–[24] (Eames J) (reliance on *Everett*, *Dinsdale* and *Lowndes*); *R v Langdon* [2004] VSCA 205, [41]–[57], [67], [70], [76] (Gillard J) (reliance on *Olbrich, Dinsdale, Pearce* and *Lowe*); *R v Dunne* [2003] VSCA 150, [19], [35] (Batt JA) (reliance on *Weininger, Ryan* and *Olbrich*); *DPP v Josefski* [2005] VSCA 265, [4]–[8] (Maxwell P) [83] (Chernov JA) (reliance on *Griffiths, Everett, York, Malsavo, Wong, Johnson* and *Markarian*).

the offence committed rather than where the offender is detected and sentenced[98].

This process is not simply however the result of the High Court imposing its sentencing will upon State and Territory Courts of Criminal Appeals. In a number of instances the High Court has relied upon a sentencing principle or particular type of analysis that has been developed by a State or Territory Court of Criminal Appeal. Thus the Court has drawn upon influential decisions from State and Territory Courts and adapted them in determining sentence appeals. Some excellent examples of this transference of jurisprudence are the decisions of the High Court in *Olbrich*[99] where the Court adopted the test for the onus and standard of proof in sentencing from the Victorian Court of Criminal Appeal in *Storey*[100] and the decision of the High Court in *Siganto*[101] where there was significance reliance on earlier Victorian Court of Criminal Appeal authority on the sentencing of an offender found guilty after trial.

In addition, State and Territory Courts of Criminal Appeal are able to distinguish or not follow decisions of the High Court on an aspect of sentencing principle. This may occur for numerous reasons. The decision of the High Court and the relevant principle may not be strictly *pari passu* to the point on appeal or the particular factual matrix may be different[102]. An example

---

98 See also the apposite comments on this point by Justice McGarvie in *Nagy* [1992] 1 VR 637, 649 that:

> The situation should be avoided where, with courts throughout Australia sentencing under the Commonwealth Act, the form of sentencing which is permissible should vary according to whether a drug courier who cooperates with the authorities was apprehended at Melbourne Airport or Sydney Airport.

See also see *R v Jackson* (1972) 4 SASR 81, 91–92 (The Court); *Griffiths* (1977) 137 CLR 293, 326 (Jacobs J); *Medina* (1990) 108 FLR 288, 292-293 (Malcolm CJ).

99 (1999) 199 CLR 270, 281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

100 [1998] 1 VR 359.

101 (1998) 194 CLR 656. The High Court expressly approved the Victorian Supreme Court decisions in *Richmond* [1920] VLR 9 and *R v Gray* [1977] VR 25.

102 Another reason why a State or Territory Court of Criminal Appeal may distinguish or not follow a decision of the High Court may be because the particular statutory regime that governs the sentencing of offenders varies

from New South Wales is illustrative of this point. In *R v SLD*[103] the appellant appealed against a finding by the sentencing Judge who – in the course of determining the appropriate sentence – found that he posed a risk of re-offending in a similar manner[104]. A specific complaint upon appeal was that the sentencing Judge had not made this finding of fact beyond reasonable doubt in accordance with the decision of the High Court in *Olbrich*[105]. Handley JA distinguished *Olbrich's* case by stating that the decision in that case

> …was, in terms, limited to "facts", and future probabilities or possibilities are not "facts" in any meaningful sense.[106]

What this example demonstrates[107] is not only the organic tradition of the common law and its importance to the development and refinement of sentencing principles, but that the role of State and Territories Courts of Criminal Appeal will still remain important notwithstanding the move of the High Court into the area of sentencing and its development of sentencing principles. In particular, State and Territory Courts of Criminal Appeal will still perform the role of maintaining *standards* in sentencing for their respective jurisdictions. The High Court has consistently maintained that on sentencing standards the Courts of Criminal Appeal in the States and Territories are best placed to fulfil this role because of their experience and knowledge of local conditions[108].

The development of Australian sentencing principles should not – and do not appear to have – undermine the integrity of local

---

from the original State or Territory upon which the High Court decision is based.

103 (2003) 58 NSWLR 589.

104 (2003) 58 NSWLR 589, 591 (Handley JA).

105 (1999) 199 CLR 270, 280–281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

106 (2003) 58 NSWLR 589, 592 (Handley JA).

107 A further example is provided by the decision of the New South Wales Court of Criminal Appeal of *R v Sharma* (2002) 54 NSWLR 300 where the Court distinguished the High Court decision in *Cameron* (2002) 209 CLR 339.

108 *Veen (No 1)* (1979) 143 CLR 458, 497 (Aickin J); *Neal* (1982) 149 CLR 305, 309 (Gibbs CJ); *Radenkovic* (1990) 170 CLR 623, 636 (Mason CJ & McHugh J). For recent judicial comment on this point see *York* (2005) 79 ALJR 1919, 1927 (Hayne J).

standards as they pertain to the appropriate level of criminal sanctions and thus are more fundamentally concerned with the extent of punishment rather than fundamental principle in the far majority of cases. Or, another way, the 'tariff' for particular offences are intimately known to the respective Courts of Criminal Appeal and are more properly determined by that Court save that any tariff would be subject to appellate intervention by the High Court should it contravene basic sentencing principles[109].

CONCLUSION

As a matter of historical record the High Court has displayed a reluctance to become involved in articulating sentencing principles for the sentencing of offenders. The change of position by the High Court in relation to sentencing appeals became evident from the late 1970's as the Court signalled an indication that it would be more willing in the future to grant special leave to appeals involving matters of fundamental importance in the sentencing of offenders. This has occurred, notwithstanding that the test to determine whether to grant special leave in criminal matters has not changed significantly.

This articulation of Australian sentencing principles is reflective more of a change of practice and a new interpretive stance to sentence appeals by the High Court. One almost senses a degree of confidence emerging in the High Court and a desire to become involved, in an appropriate manner and within certain limits, in the development of Australian sentencing principles. It is contended that this is a welcome development for the consistency of sentencing principles across Australia.

A consequence of this involvement is that it is now almost impossible for the High Court to turn away from the further development and refinement of Australian sentencing principles. The narrow appellate vision in sentencing matters that was engendered by the decision in *House v King* is unlikely to be resuscitated. The jurisprudence that has now emerged from the High Court, particularly from 1977 onwards, cannot be altered nor resiled from, without a radical change of attitude from the

---

[109] And meet the test for special leave to appeal.

High Court to sentence appeals. *House v King* will of course remain a substantial impediment to the far majority of appellants who appeal against sentence, but it will be no longer of such import that it would prevent the further development of Australian sentencing principles. At this stage there can be no retreat from the development of Australian sentencing principles and what is likely to occur in the future is instead a continuing dialogue about what matters in sentencing by the High Court. This is a positive development and can only ensure that the sentencing of offenders throughout Australia is marked by a higher degree of consistency.