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R v MJR
[2002] NSWCCA 129

Court of Criminal Appeal: Spigelman CJ, Mason P, Grove J, Sully J and Newman A-J

22 November 2001, 12 April 2002

Criminal Law — Sentence — Factors to be taken into account — Where sentencing practice moves adversely against offender between date of offence and sentence — Sentence at time of offence relevant.

Held: (Mason P dissenting) On sentencing for an offence it is proper for a court to take into account the sentencing practice as at the date of the commission of the offence when sentencing practice has moved adversely to an offender. (374 [31]; 378 [69], 379 [71]; 384 [105])

R v Shore (1992) 66 A Crim R 37; *R v Moon* (2000) 117 A Crim R 497, followed.

R v PLV (2001) 51 NSWLR 736, not followed.

Note:
A Digest (3rd ed) — CRIMINAL LAW [820]–[821].

CASES CITED

The following cases are cited in the judgments:

Attorney-General for New South Wales v Perpetual Trustee Co Ltd (1952) 85 CLR 237
Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia (1913) 17 CLR 261
Bakker v Stewart [1980] VR 17
Brown v Allen, Warden, 344 US 443 (1953)
Buckman v Button [1943] KB 405
Daire v Stokes (1982) 32 SASR 402
DPP v Lamb [1941] 2 KB 89
Erven Warnink Besloten Vennootschap v J Townend and Sons (Hull) Ltd [1979] AC 731
Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49
Ha v State of New South Wales (1997) 189 CLR 465
Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349
Lamb v Cotogno (1987) 164 CLR 1
Mill v The Queen (1988) 166 CLR 59
Poyner v The Queen (1986) 60 ALJR 616; 66 ALR 264
R v L (1991) 174 CLR 379
R v Moon (2000) 117 A Crim R 497
R v Morton [1986] VR 863
R v Oliver [1944] KB 68
R v PLV (2001) 51 NSWLR 736
R v Shore (1992) 66 A Crim R 37
R v T (1990) 47 A Crim R 29
R v Todd [1982] 2 NSWLR 517

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R v Watson [1999] NSWCCA 227
Radenkovic v The Queen (1990) 170 CLR 623
Richardson v Brennan [1966] WAR 159
Samuels v Songaila (1977) 16 SASR 397
Siganto v The Queen (1998) 194 CLR 656
Wong v The Queen (2001) 76 ALJR 79; 185 ALR 233

APPEAL

This was the hearing of an application for leave to appeal, and to appeal against sentences of imprisonment passed upon the appellant in the District Court in relation to charges of sexual intercourse without consent and indecent assault.

G R Heathcote, for the appellant.

R A Hulme, for the respondent/Crown.

Cur adv vult

12 April 2002

1 **SPIGELMAN CJ.** In the course of sentencing the applicant, her Honour Judge Backhouse QC, approached the sentencing exercise on the basis that the sentencing practice at the time of the commission of the offences during the 1980's should be applied, rather than the higher level of severity that, it was alleged, had been adopted since that time. If, as has proven to be the case, this Court were to allow the appeal and conduct the sentencing task afresh, then the issue arises as to whether this was an appropriate sentencing principle to apply.

2 The Court has sat a bench of five by reason of the fact that a conflict has emerged in previous judgments of the Court on this matter.

3 The proposition was put to the Court in *R v PLV* (2001) 51 NSWLR 736. In that case I said (at 744):

> "[93] The applicant was sentenced to a period of two years with a very short non-parole period of three months. It was submitted that by reason of delay he was exposed to punishment as an adult and to a sentencing regime which it was submitted was 'harsher' than that which existed in New South Wales at the time the offences were committed. The Court was referred to no authority in support of the proposition that sentences should be in accordance with practices at the time an offence was committed, rather than in accordance with practices at the time of conviction. I see no reason why this Court should establish such a principle for the first time.
>
> [94] I do not understand how a Court would go about determining what it would have done twenty years before. The balance between the various objects of sentencing — deterrence, retribution, rehabilitation — does vary over time. The proposition for which the appellant contends is both artificial and inappropriate. Sentencing should be based on practices extant at the time of conviction."

4 I went on to indicate that even if the principle were established, it would not avail the applicant in that case, by reason of the fact that there was no material before the court to indicate that sentencing practices had in fact become more harsh and that, in any event, the sentence imposed in that case was likely to have been regarded as lenient at any time. Simpson J agreed with me (at 745).

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Smart A-J took a different view (at 745), although not in the result. His Honour (at 746 [106]) took into account the sentence which would have been imposed in the mid 1970's, when the offences occurred.

5 It now appears, contrary to the position as it appeared to the Court in *R v PLV*, that there was prior authority for the proposition. In *R v Shore* (1992) 66 A Crim R 37 at 42, Badgery-Parker J, with whom Mahoney JA and Hunt CJ at CL agreed, expressly approved the trial judge's statement of his approach as follows: "In my opinion I should, so far as I am able to do so, seek to impose upon the offender a sentence appropriate not only to then applicable statutory maxima but also to then appropriate sentencing patterns. That is by no means easy, but in my view I must endeavour to do so".

6 In *R v Shore* the charges concerned conspiracy to import cannabis resin and the possession of narcotic goods reasonably suspected of having been imported in Australia. The applicant had originally been arrested in August 1974, but absconded while on bail. He was re-arrested in November 1990 and extradited to Australia. The Court produced a schedule of sentences outlining the sentencing practice in or about 1974. The schedule was structured in columns of the drug, the quantity, the plea and the sentence. In the course of his reasons, Badgery-Parker J also referred to the significance for the sentencing task of identifying the role performed in the importation by the person sentenced. His Honour emphasised the difficulty of the task of reconstructing a past sentencing pattern, but concluded that the sentence imposed in the case was at the upper limit of what would have been regarded as appropriate in 1974.

7 The principle approved in *R v Shore* — that a sentencing judge should have regard to the range of sentences imposed at the time of the commission of the offence — was applied by a two judge bench of this Court in *R v Watson* [1999] NSWCCA 227 at [26]. That case was concerned with sexual assault offences that had occurred during the 1970's, including counts under s 61D of the *Crimes Act* 1900. Levine J, with whom Smart A-J agreed, found guidance as to sentencing practices at that time from Ivan Potas, *Sentencing Violent Offenders in New South Wales* (1980) Sydney, Law Book Co Ltd.

8 The issue has also arisen in this Court in *R v Moon* (2000) 117 A Crim R 497 at 502 [23] where Whealy J applied *R v Shore* and referred to *R v Watson*. His Honour also emphasised the difficulty of applying the principle:

> "[23] Although the principle stated in *Shore* is clear, its application in a particular appeal is often a difficult matter. First, there is a need to have a clear picture as to the range of penalties imposed at the earlier point of time. In *Shore's* case for example, there was an extensive analysis of over twenty cases of importation of drugs (see Schedule, *Shore* at 49). Secondly, the perceived difference between the range of sentences disclosed at the earlier point of time and the sentence imposed by the sentencing judge may reveal a discrepancy. Nevertheless it may be one of not so high a kind that the appellate court should interfere (*Shore* at 43)."

9 To similar effect, are the observations of Smart A-J (at 746 [107]) in *R v PLV* where his Honour said:

> "The judge correctly had regard to the position which existed in 1974 when the offence was committed and the applicant's present position. There are practical difficulties in trying to recapture the situation which existed 25 years ago. Reference to the odd decided case may not be helpful in trying to obtain an overall picture. Whilst it is not perhaps the

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> best source, there are judges who have a reasonably good recollection of the practice in the courts and the sentences imposed in the period 1965 to 1980. There are judges who do not have such knowledge. If there is no substantial evidence as to that practice and the sentencing judge is not aware of them then they obviously cannot be taken into account."

10 These practical difficulties were the basis of my observation in *R v PLV* (at 744 [94]) that the attempt to conduct a sentencing exercise on this basis is "artificial". Nevertheless, in view of this line of authority of which I was unaware at the time of *R v PLV*, it is necessary to re-consider the opinion I expressed in that judgment that a prior sentencing pattern was irrelevant.

11 Sentencing practices change and can do so in both directions. Community attitudes to particular offences are not static. Matters which were once regarded as significant crimes, eg, consensual homosexual intercourse, came to be not so regarded and, eventually, ceased to be offences at all. For a period prior to the repeal of the relevant legislation, the courts would have imposed lower sentences than they had at a previous time. On the other hand, some matters, perhaps including sexual assault, have come to be regarded as requiring increased sentences. This may be by reason of a change of community attitudes. Alternatively, it may be as a result of a change in objective circumstances, eg, an increase in prevalence of the offence.

12 The basic submission made on behalf of the applicant in this case was to the effect that there was an element of unfairness involved in sentencing an offender on a harsher basis than would have been the case if he had been sentenced at a time reasonably proximate to the commission of the offence. This was said to be so at least in a case where the offender was not himself or herself responsible for the delay, other than in the sense that the offender had not confessed to the crime. In the present case, the delay occurred by reason of the period that elapsed before the applicant's daughter complained about his conduct.

13 Counsel for the applicant submitted that an offender was entitled to the benefit of a change in sentencing practice which led to lower than previous sentences, but would not be subject to a higher level of sentence when practice had changed in that direction.

14 Where the sentencing practices have increased by reason of greater salience being given to issues of general deterrence, eg, because of increased prevalence, the practice at the time of conviction would appear to be entitled to greater weight. More fundamentally, my first reaction to this submission propounded on the part of the applicant was to reject it as illogical. Why should this principle, if there be one, operate only in favour of an offender?

15 On further reflection, I recalled the classic aphorism of Oliver Wendell Holmes Junior: "The life of the law has not been logic: it has been experience" (O W Holmes Jnr, *The Common Law* (1882) London, Macmillan & Co at 1).

16 Furthermore, I recalled Fullagar J's warning in *Attorney General for New South Wales v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285 to resist: "… the temptation, which is so apt to assail us, to import a meretricious symmetry into the law".

17 A similar debate has arisen in the context of increases in the maximum penalty for an offence between the commission of the offence and trial. A number of English decisions held that the maximum at the date of the conviction is applicable (*DPP v Lamb* [1941] 2 KB 89; *Buckman v Button* [1943] KB 405 and *R v Oliver* [1944] KB 68). These decisions have been

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subject to criticism in England and would now be inconsistent with Article 7 of the European Convention of Human Rights — signed in Rome on 4 November 1950 — (see F A R Bennion, *Statutory Interpretation*, 3rd ed (1997) London, Butterworths at 235–240). The decisions have not been followed in Australia (see *Samuels v Songaila* (1977) 16 SASR 397; *Richardson v Brennan* [1966] WAR 159; *Daire v Stokes* (1982) 32 SASR 402; *Bakker v Stewart* [1980] VR 17; D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) Sydney, Butterworths at [9.19]). The issue in this line of cases is one of statutory interpretation and the strength of the presumption against retrospectivity.

18 The position was put beyond doubt by statute in New South Wales, with similar provisions to be found for the Commonwealth in the *Crimes Act* 1914 (Cth), s 4F; in Queensland, *Acts Interpretation Act* 1954 (Qld), s 20C; in the ACT, *Interpretation Act* 1967 (ACT), s 33A; in Victoria in the *Sentencing Act* 1991 (Vic), s 114. In New South Wales, the provision is now found in s 19 of the *Crimes (Sentencing Procedure) Act* 1999 (formerly s 55 of the *Interpretation Act* 1987) which states:

> "19(1) If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.
>
> (2) If an Act or statutory rule reduces the penalty for an offence, the reduced penalty extends to offences committed before the commencement of the provision of the Act or statutory rule reducing the penalty, but the reduction does not affect any penalty imposed before that commencement.
>
> (3) In this section, a reference to a penalty includes a reference to a penalty that is expressed to be a maximum or minimum penalty."

19 As can be seen by contrasting s 19(1) and s 19(2), the legislature has applied the policy that offenders receive the benefit irrespective of the change, that is, if the penalty goes up, they are not subject to it, if it goes down, they receive the benefit of it. This applies a notion of fairness which also appears to underlie some of the reasoning in *Samuels v Songaila* where Bray CJ said (at 404): "It may be that the courts would be more ready to find a retrospective intention in mitigating legislation".

20 Similarly, King J said (at 420–421): "… the presumption against retrospectivity is stronger where the provisions impose some additional burden, obligation or penalty. If Parliament were to reduce a penalty, it might appear that Parliament had judged the former penalty to be harsher or unjust and therefore intended that the harshness or injustice should not be continued even in relation to offences already committed".

21 To similar effect, the Full Court of the Supreme Court of Victoria in *R v Morton* [1986] VR 863 at 866, in a sentencing context, said (at 867): "The fact that a benefit is conferred outweighs the presumption against retrospectivity".

22 Accordingly, in that case, the court applied a new statutory provision which required the court to take into account a plea of guilty when fixing a sentence, which applied in circumstances in which the pre-existing sentencing practice of the court would not have given credit for the plea.

23 Although phrased in the language of statutory interpretation and the application of the presumption against retrospectivity, as was appropriate to the issues before the courts, the approach reflected in these decisions may be

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equally appropriate for the consideration of the effect of a change in sentencing practice by the courts.

24 Further assistance is provided in the reasons in *Radenkovic v The Queen* (1990) 170 CLR 623. That case concerned the determination of the appropriate approach to be adopted by this Court when it quashed sentences imposed by the sentencing judge *before* the commencement of the *Sentencing Act* 1989 and came to re-sentence the convicted person *after* the commencement of that Act. The difficulty arose because of the substantial benefit that prisoners had received from the operation of a system of remissions which it was a purpose of the 1989 Act to abolish. Pursuant to transitional provisions, prior sentences had been administratively transformed into the new terminology of minimum and additional terms on a basis that all prisoners would receive the benefit of all remissions. This Court had determined all remissions would be credited to the prisoner when re-determining a sentence in this Court, as had been done administratively for all other prisoners (see *R v T* (1990) 47 A Crim R 29).

25 In *Radenkovic v The Queen*, Mason CJ and McHugh J in approving the approach adopted in *R v T* said (at 632):

> "In the context of an appeal against sentence, when a court of criminal appeal is called upon to re-sentence because it has quashed the sentence initially imposed, considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him than the law as it existed at the hearing of the appeal. The convicted person had an entitlement when he was sentenced by the sentencing judge to a sentence imposed in conformity with the requirements of the law as it then stood. He should not be denied that entitlement simply because the sentencing judge made a mistake, whether that mistake resulted in a sentence that was too harsh or too lenient. In our view it would require a very clear indication of statutory intention to displace that entitlement." (cf at 648, per Toohey J and Gaudron J)

26 It is, of course, clear in the context of statutory interpretation that where Parliament manifests an intention that a new sentencing regime operate retrospectively, the courts will give effect to that intention (see *Siganto v The Queen* (1998) 194 CLR 656 at 662). It may also be the case that the purpose to be served by a change in sentencing practice would require the court to take into account the new practice even when sentencing for an offence that occurred many years before, eg, an increased emphasis on general deterrence because of prevalence. Nevertheless, that will not necessarily be so.

27 Section 19 of the *Crimes (Sentencing Procedure) Act* 1999 and its predecessor reflects a principle of perceived fairness applicable to maximum and minimum penalties, which it is appropriate to adopt for other aspects of the exercise of the sentencing discretion.

28 It is not necessary to delve into the difficult issue of whether the common law can be developed by analogy with statute, at least when so expressed in what the High Court referred to as "that simple form" (see *Lamb v Cotogno* (1987) 164 CLR 1 at 11). Nor even in what the High Court then referred to as the "attenuated version" of the same idea reflected in the reasons of Lord Diplock in *Erven Warnink Besloten Vennootschap v J Townend and Sons (Hull) Ltd* [1979] AC 731 at 743. See also *Esso Australia Resources Ltd v*

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Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49 at 60 [19]–[28] especially.

29 It is sufficient for present purposes to employ the statute as reflecting a principle of fairness that it is appropriate to adopt, in much the same way as the High Court referred to statute in determining issues that involved a change in community attitude about whether it was possible for a man to rape his wife.

30 In *R v L* (1991) 174 CLR 379 at 390, Mason CJ, Deane J and Toohey J said:

> "In any event, even if the respondent could, by reference to compelling earlier authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept the notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. *The notion is out of keeping also with recent changes in the criminal law of this country made by statute*, which draw no distinction between a wife and other women in defining the offence of rape. It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law." (emphasis added)

31 Similarly, I am now satisfied, after assessing the above authorities, that it is, "out of keeping" with the provisions of s 19 of the *Crimes (Sentencing Procedure) Act*, for this Court to refuse to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender. Accordingly, the view I expressed in *R v PLV* was incorrect.

32 As to the facts of this case, I agree with the reasons of Sully J and the orders his Honour proposes.

33 **MASON P.** A bench of five sat to resolve an issue of sentencing principle on which earlier courts had diverged unwittingly.

34 The issue is this: In cases where the statutory maximum penalty for an offence has not been altered, should a court sentencing for an offence committed in the distant past seek to apply the appellably acceptable "intuitive synthesis"/"tariff"/"guideline" of today or that which was prevalent at the time of the offence?

35 (The alternatives point to different theoretical approaches to the sentencing task, some stemming from the common law, others based on overriding statutory constructs. The differences do not matter in the present context. Common to each is the notion that excessively high or excessively low sentences will be disturbed by the Court of Criminal Appeal, thereby promoting principled consistency and equality before the law. I shall use the expression "pattern" to encompass the various alternatives.)

36 We are dealing with situations where the statutory maximum has remained constant and where nothing in the statutory framework gives primacy to the present over the past, or vice versa, as regards the acceptable patterns of sentencing for the same offence.

37 In my opinion the statutes referred to by the Chief Justice whose reasons I have had the benefit of reading and the decision in *Radenkovic v The Queen* (1990) 170 CLR 623 deal with different situations to that presented here. They concern situations where statute has impacted to some degree on the appropriate sentence. With respect to those who see it otherwise, I do not find

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them analogous. This relieves me of the burden of considering whether it is legitimate to look at them in seeking to discern a principle of Australian common law.

38 Furthermore, the issue does not concern itself with the distinct need to ensure fairness to the individual prisoner in sentencing for a stale crime (cf *R v Todd* [1982] 2 NSWLR 517 at 519, *Mill v The Queen* (1988) 166 CLR 59 at 64, *R v PLV* (2001) 51 NSWLR 736 at 746–748).

39 The question has seldom presented itself. The reasons include: (a) the relative infrequency with which crimes are prosecuted long after their commission; (b) sentencing patterns seldom vary perceptively over time; and (c) in this State the statutory maximum penalty often changes from time to time.

40 Proposition (a) is no longer true in relation to child sexual abuse. In recent years there have been many trials involving events occurring 20 or 30 years previously.

41 The problem thus identified has spawned conflicting decisions in this Court. No one's researches have revealed discussion elsewhere, although I would be amazed if this jurisdiction were the only one in the common law world to have faced the issue.

42 The competing authorities are *R v Shore* (1992) 66 A Crim R 37 and *R v PLV*. In his judgment in the present case Spigelman CJ cites (at 370 [7]–[8] supra) the key passages and refers to two pre- *R v PLV* decisions that cited *R v Shore*. *R v PLV* was decided by a Court that had not been referred to the earlier precedents.

43 I prefer the judgment of the Chief Justice in *R v PLV*. The core reasons were (at 744):

> "[94] I do not understand how a court would go about determining what it would have done twenty years before. The balance between the various objects of sentencing — deterrence, retribution, rehabilitation — does vary over time. The proposition for which the appellant contends is both artificial and inappropriate. Sentencing should be based on practices extant at the time of conviction."

Simpson J agreed (at 745) with the Chief Justice. Smart A-J dissented on the present matter (at 746).

44 The Chief Justice's reasons in *R v PLV* are, with respect, principled and practical. The weight of precedent does not stand in the way.

Principle

45 Stated bluntly, it is wrong for a court to apply earlier patterns that have been repudiated as erroneous in the single eye of the law.

46 There is tension between acknowledgement that judges may change the common law and the still useful fiction known as the declaratory theory. One effect of the declaratory theory is the masking of individual responsibility for judicial decision-making, thereby promoting public acceptance of the rule of law. The theory was and remains attractive because, as Professor Cross pointed out (R Cross, *Precedent in English Law*, 2nd ed (1968) Oxford, Clarendon Press at 25–26) "it concealed a fact which Bentham was anxious to expose, namely, that judge-made law is retrospective in its effect". Bentham put the matter brutally when he stated that "it is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and

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then beat him. This is the way you make laws for your dog: and this is the way that judges make law for you and me" (*Works* (Browning ed) at p 235). The declaratory theory is not inimical to change in the common law, but it attributes change to clearer perceptions of the grand tapestry of "the Law" as distinct from individual judicial whim.

47 Isaacs J described the theory in classical terms when, in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 275, he said: "A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong, in the opinion of those whose present function is to interpret and enforce the law …".

48 Later, in a celebrated passage he referred to the judicial oath which binds the judge "to do right to all manner of people according to law" and continued (at 278): "If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right".

49 However one understands Isaacs J, the passage illustrates one point of convergence between the declaratory theory and the insights of the realist school of jurisprudence. Our system of law works on the basis that it is what *today's* appellate courts declare to represent "the law" that binds all inferior courts and, through them, all citizens of a polity governed by the rule of law. Justice according to law means that all judges must accept and apply the latest authoritative declarations. Refusal to do so is contrary to the judicial oath. It is also futile, because departure from current orthodoxy can anticipate appellate reversal. The upshot is that a judge has no right to follow yesterday's orthodoxy in preference to today's orthodoxy. There is a narrow exception where the majority of an appellate bench properly determine that it is proper to change back to earlier orthodoxy.

50 I see no reason why these principles do not apply to the judicial administration of proper sentencing patterns, even though a "proper" sentence in a particular case cannot be completely equated with a common law principle. In my view, this conclusion draws some additional support from the passage in *Wong v The Queen* (2001) 76 ALJR 79; 185 ALR 233 at 95 [80]; 254 [80], that I cite below.

51 The High Court has declared that the technique of prospective overruling is incompatible with judicial power (see *Ha v State of New South Wales* (1997) 189 CLR 465).

52 One consequence is that the judicial overruling of prior authority is necessarily retroactive in impact. This can have harsh consequences (cf *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349). As Callinan J put it in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 104: "Legislators can, and usually do enact transitional provisions when they change the law. The courts have so far found and provided no like means of cushioning the impact of decisions which effect significant changes".

53 Recently, in *Wong* (at 95 [80]; 254 [80]), Gaudron J, Gummow J and Hayne J indicated that departures from hitherto accepted levels of sentence should not be effected prospectively. I do not understand this to preclude courts from having regard to the prevalence of an offence in deciding an

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appropriate sentence and increasing the "tariff" accordingly (cf *Poyner v The Queen* (1986) 60 ALJR 616; 66 ALR 264), but this particular and exceptional sentencing principle does not falsify my general proposition.

54 In *R v PLV*, the Chief Justice cited (at 744) the practical difficulty of determining what courts would have done twenty years before in sentencing matters.

55 Smart A-J disagreed (at 746), stating that there are judges who have a reasonably good recollection of sentences imposed in the period 1965–1980. He stated an effective rule of default, suggesting that if there is no substantial evidence as to the practice and the sentences of the past and the sentencing judge is not aware of them, then they obviously cannot be taken into account. I have some difficulty with a principle that hinges upon the availability of sentencing judges with excellent memory spans.

56 Lying behind these pragmatics is the question of principle that I have endeavoured to state in my discussion about judicial method. The principle is epistemological in a sense and it can be expressed in the following conundrum. Question: How does today's judge know if yesterday's prevalent sentencing patterns were aberrant or correct? Answer: The judge should consult authoritative decisions. Question: What if recent authorities contradict earlier authorities? How does the judge know which is correct? Answer: The judge does not need to know if the earlier authorities were correct, because he or she must accept current orthodoxy as binding even if it differs from the orthodoxy evidenced by yesterday's sentencing patterns.

57 The premise upon which the issue of principle comes to be decided in the area under consideration (penalties for child sexual assault) is that the pattern of sentences has increased. I suspect that there has been an increase, although there is no hard data. If I am right, this putative increase has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes. These reasons — and there may be others — indicate to me that, in the present context, a sentencing court should prefer today's attitudes to the laxer patterns of previous years.

58 In the converse case — where greater knowledge leads to greater sympathy and lesser sentences — the same attitudes should prevail and for the same reasons. Naturally, statute may provide otherwise.

59 Accordingly, I see no reason to differentiate between sentencing patterns that become more or less severe over time. In my opinion, this is more than a point of symmetry. An offender does not acquire some vested legal right to be dealt with as at the date of the offence or some later date representing a reasonable time for detection and trial of the "average" offender.

60 None of this means that the wisdom of the past is inferior to the wisdom of the present. It is simply that the judges are not free to prefer the former over the latter when they administer justice *according to law*. One is reminded of Jackson J's comment in *Brown v Allen, Warden* 344 US 443 (1953) at 540: "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final".

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Practicality

61 There are manifest difficulties in discovering past sentencing patterns and determining if differences are material. Smart A-J's rule of default is but a partial answer, it has its own objections in point of principle.

Precedent

62 This is not an area where there is a body of long standing and considered precedent. The precedents are conflicting.

63 Nor is it an area where would-be criminals have charted their course having regard to the prevailing tariff. I do not believe that the deterrent impact of a pattern of sentencing in this area was or is that finely tuned.

64 I do not consider *R v Shore* to be a strong precedent. Badgery-Parker J (with whom Mahoney JA and Hunt CJ at CL agreed) said this (at 42):

> "[The sentencing judge] said:
>
> > '… In my opinion I should, so far as I am able to do so, seek to impose upon the offender, a sentence appropriate not only to then applicable statutory maxima but also to then appropriate sentencing patterns. That is by no means easy, but in my view I must endeavour to do so.'
>
> That description of his Honour's task and the way in which the law required him to approach it was, with respect, completely correct, and neither party before us submitted otherwise."

65 In other words, the point was not argued and this Court offered no reasons in support of the sentencing judge's "completely correct" description of his task. This was a strong and learned Court of Criminal Appeal, but *R v Shore* does not invoke any of the considerations that call forth the doctrine of stare decisis.

66 In *R v Watson* [1999] NSWCCA 227 (a decision of a bench of two) Levine J (at [26]) merely cited and applied *R v Shore* with approval but without discussion. Smart A-J agreed.

67 In *R v Moon* (2000) 117 A Crim R 497, Whealy J applied the principle stated in *R v Shore* while remarking upon the difficulty of its practical application (at 502 [22]–[23]). As I read the reasons of the other judges (Fitzgerald JA and Howie J), they do not discuss the issue. Howie J adverts to a "sentencing range current at the time of offending" (at 511 [71]), but the surrounding discussion suggests that his Honour was dealing with a range that reflected different *statutory* policies (at 510–511). There is no reference to *R v Shore* in their reasons.

68 I cannot therefore view these recent discussions as representing a critical mass of precedent that would restrain this Court from giving effect to the other considerations to which I advert in my judgment.

Postscript: appellate processes

69 This Court of five was convened to resolve a matter of principle and conflicting precedent. For the reasons stated above no serious issue of stare decisis is involved, although the position might have been different had *R v PLV* not been decided. In these circumstances, it would in my view be an unfortunate process of appellate decision-making that *R v Shore* should be afforded any primacy simply because it was the earlier decision or because it was not drawn to the Court's attention in *R v PLV*. This specially convened Court should examine the issue afresh, choosing between *R v Shore* and *R v*

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PLV (or indicating a third position) based on what, in our considered opinion should be declared/revealed/stated to be the true path of the common law.

Disposition of appeal

70 This appeal concerns offences committed in the 1980s, but there is (as the other judgments point out) no evidence of what is said to have been a perceptibly more lenient sentencing pattern at that time. On that basis I entirely agree with the orders Sully J proposes and (subject to the above remarks) the reasons upon which they are based.

71 **GROVE J.** I have had the advantage of reading, in draft form, the judgments of both the Chief Justice and Sully J. Uninhibited by prior authority, I would have been minded to reach a conclusion on the issue of account to be given to "past" sentencing patterns which the Chief Justice expressed in *R v PLV* (2001) 51 NSWLR 736. However, for the reasons now given I am content to express my concurrence with his regard of his then view as incorrect.

72 In relation to the application for leave to appeal against sentence in the instant case, I agree with the orders proposed by Sully J for the reasons which he has given.

73 **SULLY J.** The applicant seeks leave to appeal against sentences of imprisonment passed upon him on 30 March 2001 by her Honour Judge Backhouse QC at the Sydney District Court.

74 The applicant pleaded guilty in the Local Court to six charges, each of which alleged a serious incident of sexual misconduct on his part. The complainant in five of the six matters was his elder daughter M; and the complainant in the remaining matter was his younger daughter K.

75 The applicant was committed accordingly to the District Court for sentence. The applicant asked Backhouse DCJ, to take into account in connection with his sentencing on the six charges to which he had pleaded guilty, a further ten matters which were listed on a Form 1 pursuant to s 32 of the *Crimes (Sentencing Procedure) Act* 1999.

76 In the result, the applicant stood for sentence in connection with sixteen separate offences. Eleven of those offences involved admitted acts of sexual intercourse; the nature of the intercourse in each case having been digital penetration of the complainant's external genitalia. The remaining five offences concerned incidents of indecent assault; the nature of the indecent assault being, in each case, indecent fondling of the complainant's breasts.

77 The following brief particulars of each of the six charges to which the applicant pleaded guilty are taken from the succinct and helpful summary included in the written Crown submissions.

Charge 1

78 This charge alleged an act of sexual intercourse with the complainant M without her consent and with knowledge that she was not consenting, the complainant then being under the age of 16 years, namely 11 or 12 years of age. The offence was dated between 10 April 1983 and 24 April 1983. The offence was charged pursuant to s 61D of the *Crimes Act* 1900. A contravention of that section attracts a statutory maximum penalty of imprisonment for ten years.

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79 The brief facts are that the complainant was asleep; she awoke to find the applicant crouching over her in bed. The applicant penetrated with his finger her external genitalia.

Charge 2

80 This charge alleged an indecent assault committed on the complainant M between 1 February 1984 and 31 March 1984. The charge was laid pursuant to s 61E of the *Crimes Act*. Such an offence attracts a statutory maximum penalty of imprisonment for four years.

81 The brief facts are that the complainant was, once again, asleep in bed. She was awakened by the action of the applicant who was fondling her breasts under her pyjama top.

Charge 3

82 This charge alleged an incident of sexual intercourse with the complainant M without her consent and with knowledge that she was not consenting, the complainant then being under the age of 16 years, namely between 13 and 14 years of age. The charge was dated between 26 December 1984 and 26 December 1985. The charge was laid pursuant to s 61D of the *Crimes Act*. It attracted upon conviction a statutory maximum penalty of imprisonment for ten years.

83 The brief facts are that the victim was, once again, asleep in bed and awoke to find the applicant standing over her. Her pyjama pants were pulled down and her doona cover pulled completely off. The applicant, once again, penetrated with his finger her external genitalia.

Charge 4

84 This charge alleged an act of sexual intercourse with the complainant M without her consent and with knowledge that she was not consenting, the complainant then being under the age of 16 years and under the authority of the applicant. This charge was dated between 1 July 1987 and 31 July 1987. The charge was laid pursuant to s 61D(1A) of the *Crimes Act*; and attracted upon conviction a maximum penalty of imprisonment for 12 years.

85 The brief facts are, once again, that the complainant was awoken from sleep by the action of the applicant's finger penetrating her external genitalia.

Charge 5

86 This charge alleged an incident of indecent assault on the complainant M between 20 October 1989 and 1 November 1989. The charge was laid pursuant to s 61E of the *Crimes Act*; and it attracted upon conviction a statutory maximum penalty of imprisonment for four years.

87 At the time of this offence the complainant M was aged 18 years. She was awakened by the action of the applicant fondling her breasts while she was asleep in bed.

Charge 6

88 This charge alleged an incident of sexual intercourse with the complainant K, the applicant's younger daughter, without her consent and with knowledge that she was not consenting, the complainant then being under the age of 16 years and under the authority of the applicant. This offence was dated between 23 March 1987 and 31 December 1987. The charge was laid pursuant to

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s 61D(1A) of the *Crimes Act*; and it attracted upon conviction a statutory maximum penalty of imprisonment for 12 years.

89 The complainant K suffered at the time, and continues to suffer, from cerebral palsy and associated intellectual impairment. On the particular occasion she was showering. The applicant approached her from behind and placed his finger in her external genitalia. The complainant K was aged at the time 13 or 14 years.

The Form 1 offences

90 As previously noted there were ten such additional offences. Six of them related to acts of sexual intercourse with the complainant M at a time when she was under the age of sixteen. These offences were contraventions of s 61D of the *Crimes Act*; any such offence attracting upon conviction a statutory maximum penalty of imprisonment for ten years. One further matter alleged an act of sexual intercourse with the complainant M at a time when she was aged 16 years. That charge was laid pursuant to s 61D of the *Crimes Act*; and it attracted upon conviction a statutory maximum penalty of imprisonment for eight years. Of the remaining three matters, two charged indecent assaults upon the complainant M at a time when she was some 17 years of age. Those offences were contraventions of s 61E of the *Crimes Act*; and attracted upon conviction a statutory maximum penalty of imprisonment for four years. The remaining charge was, also, one of indecent assault upon the complainant M; but at a time when she was under the age of 16 years. That offence contravened s 61E of the *Crimes Act* and attracted upon conviction a statutory maximum penalty of imprisonment for six years.

91 (In the above summary I have used consistently the expression "imprisonment" as a matter of convenience and notwithstanding that the relevant legislation as it stood at the relevant times provided, in connection with some of the summarised offences, penalties of penal servitude rather than of imprisonment. Nothing turns for present purposes upon the distinction, since abolished, between the concepts of penal servitude and of imprisonment.)

92 The sentences passed upon the applicant by her Honour were as follows:

Charge 1: Imprisonment for a fixed term of 4 years to commence on 13 November 2000;

Charge 2: Imprisonment for a fixed term of 2 years to commence 13 November 2000;

Charge 3: Imprisonment for a fixed term of 4 years to commence 13 November 2000;

Charge 4: Imprisonment for 9 years with a non-parole period of six years to commence 13 November 2000 and to expire on 12 November 2006. In connection with this sentence her Honour took account of all of the matters listed on the Form 1;

Charge 5: Imprisonment for a fixed term of 2 years to commence 13 November 2000;

Charge 6: Imprisonment for a fixed term of 5 years to commence 13 November 2000.

93 The effect of this sentencing structure was to pass upon the applicant an effective sentence of imprisonment for nine years with a non-parole period of six years; the non-parole period to commence on 13 November 2000 and to expire on 12 November 2006. It is this effective overall result which is the subject of the present application for leave to appeal.

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94 The first submission in support of the application is put as follows in the written submissions of learned counsel for the applicant:

> "Even though her Honour took into account the matters on the Form 1 in imposing sentence on Count 4, a significantly lesser sentence was appropriate. Her Honour has fixed a head sentence which is 75 per cent of the maximum term of imprisonment prescribed by Parliament, in a case in which, on a consideration of the objective facts alone, such a head sentence is excessive. *Furthermore, this head sentence was fixed notwithstanding that her Honour held that a 30 per cent discount was appropriate, given the plea of guilty alone. It is submitted that these figures alone show that her Honour fell into error*." (emphasis taken from counsel's written submission)

95 In my opinion, this submission should be upheld.

96 The learned sentencing judge, in her Honour's remarks on sentence, noted correctly that the applicant's pleas of guilty to those charges alleging acts of sexual intercourse had been accepted by the Crown "… on the basis that the finger of the prisoner penetrated the external genitalia but did not penetrate what was referred to in oral submissions as the vaginal canal". Her Honour noted, correctly, that "… When these offences were committed, penetration by the finger of the external genitalia did not amount to sexual intercourse within the meaning of the *Crimes Act*". Her Honour noted a submission of counsel for the present applicant "that the offences involving sexual intercourse by digital penetration of the external genitalia are significantly less serious than some of the other types of conduct which amounts to sexual intercourse within the meaning of the *Crimes Act*". Her Honour then dealt with that submission as follows: "As I have said, the Crown has accepted the pleas are on that basis and it is on that basis that the sentencing will proceed. That is to say that although they are serious offences, the criminality involved is not as great as it might otherwise be".

97 Her Honour's statement that "when these offences were committed, penetration by the finger of the external genitalia did not amount to sexual intercourse within the meaning of the *Crimes Act*", although correct as to the effect of the *Crimes Act* as it then stood, requires qualification in the light of the amendments made to the *Crimes Act* by the *Criminal Legislation (Amendment) Act* 1992. As her Honour explains, correctly, in her remarks on sentence, that amending legislation "retrospectively converted what was at the time of the commission of the offences indecent assault to the significantly more serious offence of sexual intercourse".

98 When her Honour came to consider the level of sentence appropriate to Charge 4, she was constrained, of course, by the statutory maximum of imprisonment for 12 years. That constraint remained in place even when the Form 1 offences were taken, properly, into account in connection with the framing of a sentence upon Charge 4 in particular. Taking the view least favourable to the applicant, that is to say the view that Charge 4, in conjunction with the Form 1 offences, merited the statutory maximum penalty of imprisonment for 12 years, a discount of 30 per cent in consideration of the plea of guilty must have entailed that the available maximum penalty fell from imprisonment for 12 years to imprisonment for 8.4 years. That consideration would entail, without more, that the sentence of nine years could not stand, accepting that a discount of 30 per cent was properly allowed; and it was not contended otherwise on the hearing of the appeal. That basic miscalculation

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entailed in the fixing of a head sentence of imprisonment for nine years, is magnified by the consideration that her Honour considered, clearly and in my respectful opinion correctly, that the Charge 4 offence, whether looked at in isolation or in conjunction with the Form 1 offences, could not properly attract the statutory maximum penalty.

99 The foregoing considerations entail, without more, manifest error in the sentencing process. It is, therefore, proper for this Court to intervene and to re-sentence the applicant.

100 It becomes, thereupon, necessary to consider whether this Court, in approaching that question of re-sentencing, should re-sentence in accordance with established sentencing practice at the time of the commission of the various offences, rather than in accordance with current sentencing practice. The importance of that issue for the purposes of the present application lies in the fact that it has been submitted for the applicant that current sentencing practice has embraced a more severe sentencing regime than that obtaining during the period between 1 October 1982 and 1 November 1989, the period within which there occurred the sixteen matters in respect of which the applicant was sentenced.

101 As matters stand, the question of principle thus posed is the subject of conflicting decisions of this Court. The present application was heard, therefore, by a specially convened Bench of five judges.

102 What has to be resolved comes down, put very simply, to a choice between two possible approaches: one exemplified by the decision of a Bench of this Court in *R v PLV* (2001) 51 NSWLR 736; and the other exemplified by the decision of a differently constituted Bench of this Court in *R v Shore* (1992) 66 A Crim R 37. Before writing my present judgment I have had the benefit of reading in draft the judgment of the Chief Justice in the present matter. His Honour refers to, and quotes from, all of the appropriate authorities. I need not repeat what is thus detailed by his Honour.

103 Were the Court now approaching the particular issue wholly unconstrained by previous authority, I would myself incline to favour the view expressed by the Chief Justice in his Honour's judgment in *R v PLV* (at 744 [94]). No doubt it is the case, as the Chief Justice points out (at 371 [15] and [16] supra), that the development of the common law has not always preferred unyielding logic to pragmatic experience; but I would be confident that neither Oliver Wendell Holmes Jnr nor Fullagar J intended to suggest that the courts either should not, or do not at least attempt to, formulate their guiding principles in terms which a reasonable mind would regard as both intelligent and intelligible. The difficulty that I have with the approach exemplified by the decision in *R v Shore* arises, not because there is, as I respectfully think, anything inherently illogical in principle with that approach; but because the approach entails in practice, in my opinion, a selectivity which is, to borrow from the Chief Justice in *R v PLV* (at 744), "artificial and inappropriate".

104 As a practical matter, the approach in *R v Shore* cannot be implemented, as it seems to me either intelligently or intelligibly, unless it happens, as was fortuitously the fact in *R v Shore* itself, that there exists an authentic and credible body of statistical material that is capable of putting practical flesh upon the theoretical bones of an approach that entails reconstructing what would have been done twenty or so years previously. In that connection, I am in complete and respectful agreement with what is said by Whealy J and by

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Smart A-J, respectively, in the passages cited by the Chief Justice (at 370 [8] and [9] supra).

105 In the present matter the Chief Justice has (at 371 [10] supra) come to the conclusion that the view expressed by his Honour (in par [94]) in his Honour's judgment in *R v PLV* ought not to be followed. I respectfully agree with that view; but I wish to make it clear that I do so only for the reason that the decision in *R v Shore* has stood unreversed since 1993, and has been followed consistently in subsequent decisions of this Court which have considered the correctness in principle of the approach for which *R v Shore* stands as authority.

106 That conclusion resolves the disputed issue of principle that was seen as requiring the consideration of a specially convened five judge Bench. There remains, however, the application of that principle, as now endorsed by the decision of this Court, to the particular facts of the applicant's case.

107 It is the case, as was frankly conceded by learned counsel for the applicant, that there does not exist a body of statistical material that is relevant to the applicant's case and that is similar in kind and in scope to the body of material, the existence of which was, as I respectfully think, crucial to the reasoning upon which the decision in *R v Shore* rests. In the absence of some such acceptable statistical material, this Court is constrained, in my opinion, to take the non-statistical approach which is described as follows by Howie J, (Fitzgerald JA concurring), in his Honour's judgment in *R v Moon* (2000) 117 A Crim R 497 at 511 [70]–[71]. Howie J says, case citations omitted, and I respectfully agree:

> "The nature of the criminal conduct proscribed by an offence and the maximum penalty applicable to the offence are crucially important factors in the synthesis which leads to the determination of the sentence to be imposed upon the particular offender for the particular crime committed. Even after taking into account the subjective features of the offender and all the other matters relevant to sentencing, such as individual and general deterrence, the sentence imposed should reflect the objective seriousness of the offence: …, and be proportional to the criminality involved in the offence committed: … . Whether the sentence to be imposed meets these criteria will be determined principally by a consideration of the nature of the criminal conduct as viewed against the maximum penalty prescribed for the offence.
>
> When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the court will by approaching the sentencing task in this way effectively sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time."

108 Applying that approach to the particular facts of the present case, I would reason as follows:

[1] The offence charged as Charge 4 was, standing alone and considered objectively, a very serious offence. It was very serious on its own particular facts and without more. It was the more serious when taken in conjunction with the ten separate offences detailed in the Form 1.

[2] A proper sentence in connection with Charge 4, undiscounted and taking into account the ten Form 1 matters, could properly be

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set, considering only objective criminality, at a head sentence of imprisonment for nine years.

[3] Accepting that it is appropriate to allow a discount of 30 per cent in consideration of the plea of guilty, (and the contrary was not submitted), that sentence of nine years requires to be reduced by two years and three months: that is to say, to be reduced to a head sentence of six years and nine months.

[4] That reduced sentence of six years and nine months requires further reduction to make allowance for the relevant subjective features of the applicant's individual case. It could not be denied that there are such features; and that, standing alone, they are powerful. It is, however, trite that subjective features, however powerful, cannot properly be allowed simply to overwhelm the proper weighting of the relevant objective facts. That is, in my opinion, an important matter of principle in connection with a case of the present kind. In my opinion a reduction in head sentence from six years nine months to six years six months would be, therefore, appropriate in the present case.

[5] Upon that premise, I am of the opinion that a proper non-parole period would be five years, leaving a possible parole period of one year six months.

[6] There are, undoubtedly in my opinion, features of the applicant's case which are capable of being regarded properly as "special circumstances". The apportionment which I have proposed in the immediately preceding paragraph would entail a non-parole period equating to about 77 per cent of the proposed head sentence. To the obvious complaint that such a result gives no effective weight at all to the applicant's special circumstances, I would respond that this is one of those cases in which the use of special circumstances in a way that would produce a non-parole period of less than five years would produce an end result that was manifestly inadequate to the requirements of the particular case.

[7] Consequent upon that approach to the re-sentencing of the applicant in connection with Charge 4 and the associated Form 1 matters, I would not interfere with the fixed term imposed in respect of Charge 6, an offence which I regard as particularly reprehensible having regard to the disabilities of the complainant; but I would make the sentence concurrent with the sentences passed in connection with the other five charges.

[8] I would not interfere with the terms of the sentences passed upon the applicant in the Court below and in connection with Charges 1, 2, 3 and 5.

109 The foregoing reasoning, if accepted, entails that the applicant will be sentenced, in effective overall terms, to imprisonment for six and a half years rather than for nine years; with a non-parole period of five years rather than one of six years. In my opinion no further relaxation in the applicant's favour can be justified, having regard to the very serious objective criminality of each of the sixteen matters calling for punishment; and to the overall criminality of the persistent abusive conduct of the applicant over a period of some seven years.

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110 For the whole of the foregoing reasons I propose the following orders:

[1] That leave be granted to the applicant to appeal against sentence;

[2] That the appeal against sentence be allowed; but only as to the sentences passed in the District Court on Charges 4 and 6;

[3] That those two sentences be quashed, and that the applicant be re-sentenced as follows:

— On Charge 4, and taking into account the offences scheduled on the Form 1, to imprisonment for six years and six months to commence on 13 November 2000 with a non-parole period of five years to commence on 13 November 2000 and to expire on 12 November 2005,

— On Charge 6 to imprisonment for a fixed term of five years to commence on 13 November 2000.

[4] That save as aforesaid the sentences passed in the District Court be confirmed.

111 **NEWMAN A-J.** I agree with the reasons given by the Chief Justice and Sully J and the orders proposed by Sully J.

Orders as at 386 [110] supra

Solicitors for the appellant: *B Hayward & Co.*

Solicitors for the respondent/Crown: *S E O'Connor,* Solicitor for Public Prosecutions.

I M NEWBRUN,
Barrister.