HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

R H McL APPELLANT

AND

THE QUEEN RESPONDENT

R H McL v The Queen [2000] HCA 46
31 August 2000
M95/1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation:

P F Tehan QC with C B Boyce for the appellant (instructed by Leanne Warren & Associates)

W H Morgan-Payler QC with C J Ryan for the respondent (instructed by Solicitor for Public Prosecutions (Victoria))

CATCHWORDS

R H McL v The Queen

Sentencing – Power of Court of Appeal to re-sentence on remaining convictions after quashing some convictions – Counts properly joined – No appeal against sentence by either Crown or appellant – Principles of proportionality and totality – Whether Court of Appeal had power to increase the sentences of the appellant on the remaining convictions – Whether Court of Appeal gave adequate reasons for increase in sentence – Whether substituted sentence ordinarily subject to ceiling on total punishment so appellant not exposed to risk of increased punishment following a successful appeal.

Words and phrases – "totality principle", "ceiling principle".

Crimes Act 1958 (Vic), s 569(1).
Sentencing Act 1991 (Vic), s 16(3A).

1 GLEESON CJ, GAUDRON AND CALLINAN JJ. The principal issue in this appeal concerns the meaning and application of s 569(1) of the *Crimes Act* 1958 (Vic), a provision which has counterparts in other Australian jurisdictions, and which gives power to the Court of Appeal in a criminal appeal, in certain circumstances, to re-sentence an appellant who has been convicted of multiple offences and who appeals successfully against some of his convictions. There is a subsidiary issue as to whether, in the present case, there was a failure by the Court of Appeal to comply with the requirements of procedural fairness.

The offences and sentences

2 In August 1997, following a trial before Judge Harbison and a jury, in the County Court at Melbourne, the appellant was convicted of a number of offences against his two step-daughters, A and B. The offences against A occurred over a period between 1988 and 1996. She was aged from 11 to 19 over the period. The victim B was aged from 11 to 15 over the period of the offences against her. The appellant was convicted of eight offences of incest, four offences of causing A to take part in an act of prostitution, one offence of rape, two offences of gross indecency, and one offence of indecent assault.

3 The maximum penalty for incest was imprisonment for 20 years; the maximum for rape was (in the circumstances) treated by the sentencing judge as being 10 years; the maximum for causing a child to take part in an act of prostitution was 7 years; the maximum for indecent assault was 5 years; the maximum for an act of gross indecency was 3 years.

4 The counts against the appellant were joined in a single presentment. It is not suggested that this was inappropriate. The jury found the appellant guilty on counts 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 16, 18, 19, 20, 23 and 24.

5 By virtue of s 16 of the *Sentencing Act* 1991 (Vic), the sentences imposed in respect of counts 3 and 4 were to be served concurrently. By virtue of s 16(3A) of the *Sentencing Act*, as it then stood, by reason of the sentences imposed in respect of counts 3 and 4, the appellant became a serious sexual offender, which meant that, unless the sentencing judge exercised her discretion to the contrary, the sentences imposed in respect of the remaining counts (except counts 8, 9, 12, 16, 18 and 19) would be served cumulatively.

6 The sentences imposed were as follows: count 2 – 9 months; count 3 – 12 months; count 4 – 12 months; count 5 – 12 months; count 6 – 18 months; count 8 – 18 months; count 9 – 3 months; count 10 – 18 months; count 11 – 18 months; count 12 – 12 months; count 16 – 12 months; count 18 – 24 months; count 19 – 24 months; count 20 – 24 months; count 23 – 12 months; count 24 – 6 months. Her Honour ordered that the sentences imposed in respect of counts 2 and 3 be

served concurrently; that the sentences imposed in respect of counts 8 and 9 be served concurrently; that the sentences imposed in respect of counts 10 and 11 be served concurrently; that the sentences imposed in respect of counts 18, 19 and 20 be served concurrently; and that all other sentences should be cumulative. The total effective sentence was 12 years imprisonment. A non-parole period of 10 years was fixed.

7 In her remarks on sentence, Judge Harbison found that the effects of the appellant's behaviour upon A and B "must have been devastating".

8 Her Honour, having set out the sentences and recorded that the total sentence was 12 years imprisonment, said:

> "In my view that is an appropriate sentence taking into account the total criminality of your behaviour. It is what I consider to be proportionate to the gravity of [the] offences concerned considering them in the light of the evidence I have detailed about the circumstances of their commission and being aware of the need not to impose a crushing sentence upon you having regard to your age and circumstances."

9 The age of the appellant was forty-four. He was an invalid pensioner.

The appeals

10 On 27 August 1997, the appellant applied for leave to appeal against the convictions and sentences. On 14 September 1998, the appeals came on for hearing. During the course of argument, the court gave counsel for the appellant an indication of a view as to the sentences that had been imposed upon the appellant, and reminded counsel that, under s 568(4) of the *Crimes Act*, on an appeal against sentence the Court of Appeal had power to increase the sentence imposed at first instance. The appellant's response, after taking legal advice, was to apply for leave to abandon the application for leave to appeal against the severity of the sentences. Leave was given. Argument continued in relation to the appeal against the convictions. In the course of further argument, a question was raised as to the effect upon sentence if the Court of Appeal were to quash the convictions on some counts, but not others. Counsel for the respondent submitted that, in that event, the case could be dealt with under s 569(1). The Court of Appeal reserved its decision.

11 The Court of Appeal, a few days later, notified counsel that the matter would be re-listed for further argument as to the possible application of s 569(1). On 21 September 1998 the Court re-convened, and heard submissions from counsel for the parties as to its powers under s 569, and as to the course it should take in the light of those powers.

The decision of the Court of Appeal[1]

12 The application for leave to appeal against the convictions was directed to all counts on which the appellant was convicted. Only one argument was successful. It concerned a misdirection given by the trial judge about the use the jury could make of certain evidence in relation to the alleged offences against the victim B. There were five such alleged offences. The misdirection affected four of them (those the subject of counts 2, 5, 6 and 23). It did not affect the other count involving B, count 11 (incest).

13 The leading judgment was written by Batt JA, with whom Phillips CJ and Kenny JA agreed. The Court of Appeal decided to quash the convictions on counts 2, 5, 6 and 23 and to order a new trial on those counts. The remaining convictions stood. Having dealt with the matter of the convictions in his reasons, Batt JA turned to the question of sentence. He pointed out[2] that the effect of quashing the four convictions, if no further order were made, would be to leave a total effective sentence of 8½ years, with a non-parole period of 10 years. It was obvious that there was a need to alter the non-parole period, and it was agreed that s 569(1) conferred power to do that[3]. The area of contention concerned the head sentence.

14 For reasons which he explained, Batt JA concluded that the individual sentences, and the total effective sentence of 8½ years, for the convictions which stood, were manifestly inadequate. That conclusion was well open as a matter of discretionary judgment, and no attempt was made in this Court to suggest otherwise, or to suggest that there was any error in the reasoning by which Batt JA reached that conclusion.

15 Indeed, the conclusion was almost inevitable because of the way the original sentences had been structured. The principle of totality which Judge Harbison applied is well recognised. It was stated in Thomas, *Principles of*

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1 *R v R H McL* [1999] 1 VR 746.

2 [1999] 1 VR 746 at 774.

3 [1999] 1 VR 746 at 775.

Sentencing[4], in a passage quoted with approval by this Court in *Mill v The Queen*[5] in the following terms:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'."

16 In *Mill*[6] this Court said:

> "Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

17 The reason for the concluding observation appears from the judgment of Ormiston JA in *R v Lomax*[7].

18 It is apparent that Judge Harbison, at least in part, followed the second of the two courses referred to in *Mill*. For example, the individual terms of imprisonment set for some offences of incest were 12 months, and that for one of the offences of child prostitution was 12 months. Sentences of that level were obviously influenced by considerations of totality. In the result, when four of the convictions were quashed, the sentences for the remaining convictions were likely to be, and were found to be, manifestly inadequate.

19 In expressing his reasons for the conclusion of manifest inadequacy, Batt JA said[8]:

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4 2nd ed (1979) at 56.

5 (1988) 166 CLR 59 at 63.

6 (1988) 166 CLR 59 at 63.

7 [1998] 1 VR 551 at 562-563.

8 [1999] 1 VR 746 at 779.

> "I regard counts 10 and 11, where incest was committed upon each stepdaughter in the presence of the other alternately, as particularly serious instances of the crime. The offence constituted by count 20, committed in the presence of two men with whom [the victim] had been forced to prostitute herself, was also a very serious instance of the crime. It is scarcely possible to imagine a worse offence of gross indecency than that committed by the applicant, involving, as it did, forced cunnilingus of the victim's mother. Child prostitution is a serious offence. The four instances of it here, committed against a stepdaughter, are serious indeed. The offences the subject of counts 18 and 19, in which two men were involved on the same occasion and which the applicant video-recorded, are heinous."

20 This Court was told, in the course of argument, that, for a total effective sentence of 8½ years, it might be expected that a non-parole period of the order of 5 years would be fixed.

21 It was in those circumstances that Batt JA, addressing the provisions of s 569(1), declined to affirm the sentences passed upon the appellant and merely fix a new non-parole period. He preferred the alternative, offered by the section, which was that the Court of Appeal should pass such sentences, in substitution for the original sentences on the counts for which the convictions stood, as it thought proper.

22 One of the matters which Batt JA took into account was the new trial that was proposed in relation to the four counts in respect of which convictions were quashed. In that connection, he referred to a remark made by Aickin J in *Ryan v The Queen*[9] to the effect that it can seldom be appropriate to use s 569(1) in a case where a new trial has been ordered under s 568(2). Batt JA said[10]:

> "His Honour was concerned that, if the accused were to be convicted on the new trial, the trial judge would then impose a sentence appropriate to that offence alone and would under the then legislation have been authorised to impose a sentence to commence on the expiration of the increased sentences by then being served on the remaining counts. But the legislation relating to the imposition of sentences has been changed since *Ryan* was decided. Now, in the ordinary case, unless otherwise

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9 (1982) 149 CLR 1 at 14-15.

10 [1999] 1 VR 746 at 777-778.

directed by the court every term of imprisonment imposed on a person must be served concurrently with any uncompleted sentence of imprisonment imposed on that person, whether before or at the same time as that term: *Sentencing Act* 1991, s 16(1); and, in the case of a term of imprisonment imposed on a serious sexual offender for a sexual offence the court may direct otherwise than that it be served cumulatively on any uncompleted sentence of imprisonment imposed on that offender, whether before or at the same time as that term: s 6E of that Act as it now stands and s 16(3A) as it stood at the time of sentence. Moreover, since *Ryan* was decided the principle of totality and its method of implementation have been further expounded by the High Court in *Mill v R*[11]. Thus, the sentencing judge after the new trial, at any rate where, as here, service of the custodial portion of the sentences imposed on the remaining counts would not have been completed, would be able to achieve a sentencing disposition which did not infringe the principle of totality or crush the applicant. (I distinctly abstain from any comment as to what that sentence should be in the event of conviction.) Moreover, one must bear in mind that the new trial may result in acquittals. In that event, *if* the sentences on the remaining counts as they presently stand are manifestly inadequate and *if* this court has not passed another sentence, the anomaly created by the alteration of the overall sentence in consequence of the setting aside of convictions on some counts, the existence of which Brennan J demonstrated in *Ryan*[12], would remain." (emphasis in original)

23 The process of discretionary reasoning appearing in the above passage involved no error of principle. In the course of argument in this Court, references were made, not by counsel, but by members of the Court, to the decision in *Gilmore*[13] in which Street CJ[14] referred to a consideration which a judge, re-sentencing after a second trial an offender who had earlier appealed successfully against the conviction at a first trial, ought to take into account. In brief, in the absence of countervailing considerations, the sentences imposed following the first trial should be regarded as the upper limit of the sentence to be imposed following the second trial, otherwise an offender will be seen to have been worse off as a result of having brought a successful appeal against a conviction. The weight to be given to that consideration depends, of course,

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11 (1988) 166 CLR 59 at 63, 67.

12 (1982) 149 CLR 1 at 23-24.

13 (1979) 1 A Crim R 416.

14 (1979) 1 A Crim R 416 at 419-420.

upon the circumstances of the individual case. This would be a matter relevant to the exercise of discretion by a judge sentencing the appellant following convictions after a second trial on the four counts in question. It may well have been a matter which Batt JA had in mind when he expressly, and appropriately, declined to say anything that might pre-empt such an exercise of discretion. If it has a bearing either way, the decision in *Gilmore* operates against, rather than in favour of, the appellant in the present appeal, because it could be used to support an argument, of the kind foreshadowed by Batt JA, that the sentences imposed following a retrial should be made concurrent with the sentences imposed by the Court of Appeal. However, as Batt JA recognised, it is undesirable to say anything, at this stage, that would pre-empt an exercise of discretion at a future sentencing proceeding.

24 Having decided that the case was a proper one for the exercise of the power to re-sentence, Batt JA decided to follow *Lomax*[15]. Unlike Judge Harbison, he gave effect to what he called the principles of proportionality and totality, not by imposing individual sentences which were less than such as reflected the gravity of the individual offences, but by making substantial use of the discretion given by the legislation to order that such sentences be served concurrently. His Honour said[16] that he intended to propose individual sentences that were as nearly appropriate as the number of offences would permit, and then make them largely concurrent. For example, he said that count 8, for reasons he gave, should attract the maximum available custodial sentence of 2 years, and that counts 18 and 19 should each attract the nearest whole number of years to the maximum custodial sentence available. He also attached weight to what he described as considerations of double jeopardy but said[17]:

> "In the particular circumstances of this case, however, the latter principle does not require that the total effective sentence resulting from the individual sentences now to be imposed after directions as to concurrency or cumulation be lower than the total effective sentence resulting from the individual sentences imposed by her Honour after such directions."

25 He concluded[18]:

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15 See [1998] 1 VR 551 at 567-568.

16 [1999] 1 VR 746 at 779.

17 [1999] 1 VR 746 at 779-780.

18 [1999] 1 VR 746 at 780.

"I would therefore propose that, in substitution for the sentences passed on the appellant on the below-mentioned counts by her Honour, the appellant be sentenced to the following terms of imprisonment, namely:

Count 3	-	Incest	-	2	years;
Count 4	-	Incest	-	2	years;
Count 8	-	Gross Indecency	-	2	years;
Count 9	-	Indecent Assault	-	2	years;
Count 10	-	Incest	-	4	years;
Count 11	-	Incest ('B')	-	4	years;
Count 12	-	Child Prostitution	-	2	years;
Count 16	-	Child Prostitution	-	2	years;
Count 18	-	Child Prostitution	-	4	years;
Count 19	-	Child Prostitution	-	4	years;
Count 20	-	Incest	-	4	years;
Count 24	-	Incest	-	2 years.	

I would direct that the sentences imposed on counts 3, 4, 12, 16 and 24 be served concurrently on each other; that the sentences imposed on counts 8 and 9 be served concurrently on each other; that the sentences imposed on counts 10 and 11 be served concurrently on each other; and that the sentences imposed on counts 18, 19 and 20 be served concurrently on each other. I would direct that otherwise the sentences imposed by this court be served cumulatively upon each other. That makes a total effective sentence of 12 years' imprisonment. Having regard to the gravity of the offences, and the lack of rehabilitative prospects, I would fix a non-parole period of 10 years."

The grounds of appeal

26 The grounds of appeal relied upon are as follows:

"(i) The Court of Appeal of the Supreme Court of Victoria erred in law in applying the provisions of s 569(1) of the *Crimes Act* 1958 (Vic) to the sentences imposed upon Counts 3, 4, 8, 9, 10, 11, 12, 16, 18, 19, 20 and 24 of the presentment.

(ii) The Court of Appeal of the Supreme Court of Victoria erred in law in failing to accord procedural fairness to the Appellant."

Ground (i)

27 Section 569(1) provides:

> "If it appears to the Court of Appeal that an appellant, though not properly convicted on some count or part of the indictment … has been properly convicted on some other count or part of the indictment … the Court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the count or part of the indictment … on which the Court considers that the appellant has been properly convicted."

28 It is one of a number of provisions described by the heading: "Powers of Court in special cases". It follows s 568, which is headed: "Determination of appeals in ordinary cases". It was agreed in argument that, pursuant to s 568(4), if the application for leave to appeal against sentence had not been abandoned, the Court of Appeal would have had powers to make the orders it made in re-sentencing the appellant. It was in an attempt to evade that possibility that the application was abandoned when the Court of Appeal began to express concern about the adequacy of the sentences.

29 Section 569(1) was considered by this Court in *Ryan*[19]. Stephen J observed[20] that, although the provision has been part of the law of Victoria for many years, and has its counterparts in the United Kingdom and other Australian jurisdictions, the occasions for its application have been rare. It was suggested in argument in the present case that the reason for that may be that ordinarily cases are dealt with under s 568(4), or corresponding provisions, and that it would be unusual to have a case where a problem of the present kind arose and there was no appeal against sentence on foot.

30 The problem which arose in *Ryan* does not exist in the present case. It was that, although the appellant had been convicted on multiple counts in a presentment, the subject matter of his appeal related to one only of those counts, and the propriety of the convictions on the other counts did not arise for consideration, either directly or indirectly, by what was then the Court of Criminal Appeal. It was held that, in those circumstances, the condition of the operation of s 569(1), expressed in its opening words, was not made out. One member of the Court, Brennan J, decided the case on a somewhat different basis, which is also immaterial in the present case. His Honour held that, in the circumstances of that case, the counts had not been properly joined.

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19 (1982) 149 CLR 1.

20 (1982) 149 CLR 1 at 3.

31 In his written submissions, counsel for the appellant examined the historical background of the United Kingdom legislation on which s 569(1) was modelled. This subject, together with the course of English authority upon the legislation, was considered in the judgments in *Ryan.* It is unnecessary to repeat what was there said. One of the reasons why counsel went to this history was to support a submission that, when properly understood, s 569(1) has no application to a case such as the present, where separate sentences have been imposed in respect of each of a number of counts in an indictment. According to this argument, the provision was intended to apply only where a general sentence is imposed in respect of all counts collectively or, perhaps, where a sentence is imposed in respect of the most serious of a number of offences and no sentence is imposed in respect of others. This submission cannot be accepted. A similar argument was expressly considered and rejected in *Ryan* by Stephen J[21] and Brennan J[22]. As Brennan J observed, although general or global sentences in the case of multiple offences have, in the past, been common in England, they are virtually unknown in Victoria, and may not be permissible. It is unnecessary to resolve the latter question. It suffices to say that current sentencing practice in Victoria requires the imposition of individual sentences in relation to each count upon which an appellant is convicted unless, of course, it is decided that for some sufficient reason no sentence should be imposed in relation to a particular offence.

32 The purpose of s 569(1) was explained by Brennan J in *Ryan*[23] as follows:

> "When an accused person is convicted on two or more counts regularly joined, the trial judge is entitled to assess an appropriate overall sentence having regard to the entire course of criminal conduct which constitutes the several elements of the offences of which the accused is convicted. If the offences are founded on the same facts, it is necessary to ensure that the appropriate penalty for the same act or omission is not imposed twice; if the offences are part of a series, the entirety of the criminal conduct of the same or similar character, rather than the several acts or omissions constituting the separate offences, may determine the appropriate overall sentence to be imposed. In pronouncing sentence, however, the trial judge imposes separate sentences in respect of the several offences of which the accused has been convicted, effecting the

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21 (1982) 149 CLR 1 at 9.

22 (1982) 149 CLR 1 at 25.

23 (1982) 149 CLR 1 at 22-23.

appropriate overall sentence by adjusting the severity of the separate sentences and, when custodial sentences are imposed, by ordering that they be served either concurrently or cumulatively.

On appeal against conviction, if the conviction upon one or more counts is quashed but the conviction upon another count or other counts stands, the sentences in respect of the quashed convictions must be set aside while the sentences in respect of the other convictions stand. The overall sentence may thus be altered, and the alteration may prove to be anomalous. Section 569(1) of the *Crimes Act* allows the correction of such an anomaly. It empowers the Full Court to alter the sentence when a conviction on one count in an indictment is quashed and a conviction on another count stands."

33 It was further submitted on behalf of the appellant that, either because, on its true construction, the provision does not authorise such a course, or, alternatively, as a matter of proper exercise of discretion, the Court of Appeal cannot, or should not, use s 569(1) for the purpose of correcting what it regards as inadequacy in the sentences imposed by a sentencing judge. This, it is said, is a process which may be undertaken, in the event of a prosecution appeal against inadequacy, under s 567A, or in the event of an appeal against severity by an offender, under s 568(1), but it is not a proper exercise to be undertaken under s 569(1). This submission must also be rejected, for reasons given by Brennan J in relation to a similar submission in *Ryan*. His Honour said[24]:

"It was submitted further that it would be unjust for the Full Court of its own motion to increase a sentence in respect of a conviction against which neither the appellant nor the Crown has appealed. The sentence affirmed or substituted by the Full Court must plainly be a sentence which, after an appeal against conviction on one or more counts is allowed, is supported by the conviction or convictions which stand; it cannot be the sentence in respect of the conviction or convictions which are quashed. Given a regular joinder of the counts, there is no injustice in increasing the sentence in respect of a conviction which stands if the increase is occasioned by the setting aside of the sentence which carried the appropriate penalty for conduct which constitutes either an element of the offence or a part of the series of offences for which the appellant stands convicted. Full justice is done to an appellant when the Full Court quashes a conviction on some count or part of the indictment on which he ought not to have been convicted; it goes beyond the requirements of

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24 (1982) 149 CLR 1 at 25.

> justice to relieve him of the appropriate penalty for conduct for which he still stands convicted. The power to affirm the sentence or to substitute another sentence under s 569(1) is not needed when there are appeals against that sentence under s 567A or s 568. Section 569(1) must have an operation additional to that for which those sections provide."

34 It was argued, that, as a matter of the proper exercise of discretion, the occasion to exercise the power given by s 569(1) would ordinarily arise only when there is some connection between the convictions which are left standing and the alleged offences in respect of which convictions have been quashed such as to warrant a conclusion that the quashing of some convictions requires an alteration of the sentence imposed in respect of others. That is so. Of course, in the absence of some connection, it would not have been proper to join a number of counts in the one indictment or presentment in the first place. As the analysis of Brennan J in *Ryan* demonstrates, and as the facts of the present case illustrate, sufficient connection to justify an exercise of the power under s 569(1) may be found in the principle of totality. Much may depend upon the manner in which the sentencing judge has applied that principle. If the judge has followed the course recommended in the cases of *Mill* and *Lomax*, and responded to considerations of totality, not by reducing individual sentences, but by fixing individually appropriate sentences and making them wholly or partly concurrent, then no occasion to invoke s 569(1) may arise. On the other hand, if, as in the present case, a sentencing judge has given effect to considerations of totality partly by imposing individual sentences which were less than they would otherwise have been, then that is the very kind of case which may call for an exercise of the power to re-sentence under s 569(1).

35 Finally, it was argued that, as a matter of discretion, it was inappropriate for the Court of Appeal to re-sentence as it did, bearing in mind the orders for a new trial on the four counts in respect of which the convictions were quashed, and the possibility that, in the future, the appellant will be sentenced in respect of those counts.

36 As a passage from the reasoning of Batt JA quoted above demonstrates, this is an important discretionary consideration, and was taken into account by the Court of Appeal. No error has been shown in the reasoning of Batt JA in relation to that matter. Section 569(1) required the Court of Appeal, once it decided to quash some of the convictions, and not to quash others, to consider the sentences on the convictions left standing, in the light of the alternatives presented by the section. The options available to the Court were either to affirm the sentences in respect of those convictions or pass sentences in substitution. Having concluded that the sentences imposed in respect of convictions left standing were manifestly inadequate, as they were, it is not easy to see why, in the particular circumstances of the present case, the Court of Appeal might have

decided to adopt the course of affirming those sentences. As a matter of discretion, it was, at the least, open to the Court of Appeal to decide that it would not affirm the manifestly inadequate sentences, and would re-sentence the appellant. Upon such re-sentencing, the Court of Appeal took into account the matter of the possible new trial, and considerations of proportionality, totality and double jeopardy. Batt JA expressed his reasoning in relation to those subjects, and explained why he thought that the fresh sentences he proposed were appropriate. No error has been shown in his reasoning in that respect.

37 Ground (i) must fail.

Ground (ii)

38 This ground of appeal may be dealt with briefly.

39 There was no procedural unfairness to the appellant in the course that was adopted by the Court of Appeal. The Court gave adequate warning of the possibility that, if it quashed some of the convictions, it might increase the sentences in respect of others. That is what led to the abandonment of the appellant's application for leave to appeal against sentence. Thereafter, the appellant was given full opportunity, by his counsel, to put submissions on s 569(1), both as to questions of power, and as to matters of discretion.

40 Ground (ii) must fail.

Order

41 The appeal should be dismissed.

42 McHUGH, GUMMOW AND HAYNE JJ. The issue in this appeal is whether the Court of Appeal of Victoria, after quashing the appellant's convictions on several counts in a presentment, had power under s 569(1) of the *Crimes Act* 1958 (Vic) ("the Act") to increase the sentences for the remaining counts in the presentment on the ground that the total effective sentence on those counts was manifestly inadequate. The issue arises in circumstances where there has been no appeal against sentence by either the prosecution or the appellant and the Court of Appeal has ordered a re-trial of the counts in respect of which the convictions were quashed.

43 In our opinion, the appeal should be dismissed on the ground that, in the circumstances of the case, the Court had power to increase the sentences of the appellant on the remaining convictions and that it made no error in determining that it was appropriate to increase the sentences in the manner which it did. The appellant's claim that the combination of the new sentences and the order for a new trial is an injustice is premature. If he is convicted on his re-trial and the new sentences (there may be only one) are to commence after the expiration of the sentences imposed by the Court of Appeal, he may be able to make out a claim that the new sentences are manifestly excessive or are a miscarriage of justice. But he cannot make out such a claim now.

44 The Court of Appeal was entitled to increase the remaining sentences because they were imposed for offences which were part of a continuing course of criminal conduct by the appellant and those individual sentences did not reflect the appropriate punishment for the offences for which they were imposed. That was because Judge Harbison had compressed the individual sentences to ensure that their totality did not reflect more than proper punishment for the course of the criminal conduct. An example of the compressed nature of the sentences is shown by the sentence for rape for which the appellant received a sentence of only 18 months. Given the long course and the nature of the appellant's criminality, it would have been an error on the part of the Court of Appeal to have left the remaining sentences standing, sentences which individually and collectively were then manifestly inadequate to reflect the appellant's criminality.

Facts and procedural history

45 The appellant was found guilty by a jury of committing various sexual offences against his two step-daughters, "CJM" and "KMM". They were the daughters of the appellant's wife from her previous marriage. All the offences of which the appellant was convicted were committed in the family home. They commenced in 1988 and continued until August 1996. Against CJM, the appellant was found guilty of:

(a) five counts of incest (counts 3, 4, 10, 20 and 24);
(b) one count of gross indecency (count 8);
(c) one count of indecent assault (count 9); and
(d) four counts of causing a child to take part in prostitution (counts 12, 16, 18 and 19).

Against KMM, the appellant was found guilty of:

(a) one count of gross indecency (count 2);
(b) three counts of incest (counts 5, 11 and 23); and
(c) one count of rape (count 6).

Sentences imposed at first instance

46 Judge Harbison sentenced the appellant to the terms of imprisonment as set out in the table below. Her Honour directed that the sentences on counts 2 and 3, counts 3 and 4, counts 8 and 9, counts 10 and 11, and counts 18, 19 and 20 be served concurrently. All other sentences were to be served cumulatively. The total effective sentence imposed by her Honour was 12 years. Her Honour fixed a non-parole period of 10 years. The changes to those sentences by the Court of Appeal are also set out in the table.

Count – Offence	Sentence imposed by Judge Harbison	New sentence imposed by the Court of Appeal pursuant to s 569(1)
Count 2 – Gross Indecency	9 months	NIL – conviction on this count quashed and re-trial ordered
Count 3 – Incest	12 months	2 years
Count 4 – Incest	12 months	2 years
Count 5 – Incest	12 months	NIL – conviction on this count quashed and re-trial ordered.
Count 6 – Rape	18 months	NIL – conviction on this count quashed and re-trial ordered.
Count 8 – Gross Indecency	18 months	2 years
Count 9 – Indecent Assault	3 months	2 years
Count 10 – Incest	18 months	4 years
Count 11 – Incest	18 months	4 years

Count 12 – Child Prostitution	12 months	2 years
Count 16 – Child Prostitution	12 months	2 years
Count 18 – Child Prostitution	24 months	4 years
Count 19 – Child Prostitution	24 months	4 years
Count 20 – Incest	24 months	4 years
Count 23 – Incest	12 months	NIL – conviction on this count quashed and re-trial ordered
Count 24 – Incest	6 months	2 years
TOTAL EFFECTIVE SENTENCE	12 years with non-parole period of 10 years.	12 years with non-parole period of 10 years.

Appeal to the Court of Appeal

47 The appellant appealed against his convictions on all counts and applied for leave to appeal against sentence on all counts. However, he sought, and was given, leave to withdraw the application for leave to appeal against the sentences. The Court of Appeal[25] (Phillips CJ, Batt and Kenny JJA) allowed his appeal in respect of the convictions on counts 2, 5, 6 and 23 because of a misdirection by Judge Harbison about the use to which the jury could put the evidence of a sexual relationship between the appellant and CJM in determining the appellant's guilt on the counts relating to KMM. Those convictions were quashed. The Court of Appeal ordered a new trial in respect of them. Otherwise the appeal was dismissed.

48 The effect of quashing the convictions on counts 2, 5, 6 and 23 was that the total effective sentence of imprisonment was reduced from 12 years to 8½ years, but the non-parole period remained at 10 years. However, the Court of Appeal held that it had power under s 569(1) of the Act to increase the sentences

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25 *R v R H McL* [1999] 1 VR 746.

on the remaining counts. That section has counterparts in other Australian jurisdictions[26]. It relevantly provides:

> "If it appears to the Court of Appeal that an appellant, though not properly convicted on some count or part of the indictment ... has been properly convicted on some other count or part of the indictment ... the Court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the count or part of the indictment ... on which the Court considers that the appellant has been properly convicted."

By s 566 of the Act, "indictment" includes presentment.

49 The Court of Appeal thought that the total sentence of 8½ years on the remaining counts was "manifestly inadequate."[27] It ordered that, in substitution for the sentences passed by Judge Harbison, the appellant should be sentenced to the terms of imprisonment set out in the above table. The Court of Appeal ordered that sentences imposed on counts 3, 4, 12, 16 and 24 be served concurrently with each other, that the sentences imposed on counts 8 and 9 be served concurrently with each other, that the sentences imposed on counts 10 and 11 be served concurrently with each other, and that the sentences imposed on counts 18, 19 and 20 be served concurrently with each other. The Court of Appeal ordered that otherwise all sentences should be served cumulatively. The result was that the appellant was given a total effective sentence of 12 years. The Court of Appeal ordered a non-parole period of 10 years.

The quashing of convictions resulted in no decrease in sentence

50 Notwithstanding that four convictions had been quashed, the total effective sentence imposed by the Court of Appeal was the same as that imposed by Judge Harbison. The appellant contends in this Court that he is now worse off than if he had not successfully appealed against four of his convictions. Not only does he have to serve the same length of sentence with the same non-parole period as Judge Harbison had imposed, but he is now at risk of getting an increased sentence if he is convicted at the new trial of the counts of rape, gross indecency and incest.

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26 *Criminal Appeal Act* 1912 (NSW), s 7(1); Criminal Code (Q), s 668F(1); *Criminal Law Consolidation Act* 1935 (SA), s 354(1); Criminal Code (Tas), s 403(1); Criminal Code (WA), s 693(1).

27 *R v R H McL* [1999] 1 VR 746 at 779.

51 However, the power conferred by s 569(1) of the Act is a power to re-sentence the accused *de novo.* It is not a power merely to review the adequacy of the appellant's sentence following the quashing of convictions. Section s 569(1) declares that, where the section operates, the Court of Appeal may "pass such sentence in substitution therefor as it thinks proper and as may be warranted in law". If the Court of Appeal was entitled to invoke s 569(1), it was entitled to re-sentence the appellant.

52 The ordinary meaning of the words of s 569(1) appear to give the Court of Appeal the power to re-sentence the appellant. It had held that the appellant was "not properly convicted on some count ... of the indictment". That being so, the Court of Appeal was entitled to examine the remaining sentences and "either affirm the sentence[s] passed on the appellant at the trial or pass such sentence[s] in substitution therefor as it thinks proper". Given that the appellant does not complain that, if the Court of Appeal had power under s 569(1), it was wrong in concluding that the total remaining sentence of 8½ years was manifestly inadequate, or that it otherwise made an error, the equality of the sentences imposed by Judge Harbison and the Court of Appeal is not itself significant. It would seem, therefore, that the course taken by the Court of Appeal was authorised by s 569(1). However, the matter is not at large.

53 In *Ryan v The Queen*[28], this Court specifically considered the effect of s 569(1) of the Act, and the appellant asserts that the construction which this Court placed on the sub-section means that the Court of Appeal either had no power to do what it did or that it wrongly exercised its discretion. Accordingly, we turn to consider that case in detail.

Ryan v The Queen

54 In *Ryan*, the accused was presented for trial on a presentment containing two counts of trafficking in heroin and four counts of handling stolen goods. He was convicted on one count of trafficking and on the four counts of handling. He was sentenced to four years' imprisonment on the trafficking count and six months' imprisonment on each of the handling counts. The sentences on two of the handling counts were made cumulative on each other and on the trafficking sentence. An appeal to the Full Court of the Supreme Court of Victoria (the Court of Criminal Appeal) against the conviction for trafficking only was allowed. In reliance on s 569(1) of the Act, the Full Court (now the Court of Appeal) substituted terms of eighteen months imprisonment for each of the four

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28 (1982) 149 CLR 1.

handling counts. Two of the terms were to be cumulative and the other two were to be concurrent with the cumulative terms.

55 This Court held that s 569(1) did not authorise the Full Court to increase the sentences separately imposed on those counts which were not the subject of appeal to it. However, there were differences in the reasons for judgment of the members of the Court for so holding.

Stephen J

56 Stephen J said that s 569(1) did not apply "where the circumstances were such that the appellate court *could not determine the correctness of the conviction on the 'other counts'*"[29]. His Honour held that the handling counts had not been properly joined with the trafficking counts because there was little connection between the two. His Honour was of the view that "when there has been a misjoinder of counts and no appeal on the misjoined counts an appellate court will usually have no occasion to satisfy itself of the correctness of the convictions on those counts."[30] However, his Honour said that s 569(1) was applicable in circumstances such as those in *R v Lovelock*[31].

57 *Lovelock* was decided under the English equivalent to s 569(1). The accused in that case had been charged with attempted rape and indecent assault. As Stephen J described it, "[t]he conviction of the first count was quashed for want of evidence of any attempt to rape but the evidence amply supported the conviction on the second count."[32] His Honour said that *Lovelock* was a case in which there had been a proper joinder of counts, so that "the Court of Criminal Appeal, despite the absence of any appeal against conviction on the second count of indecent assault, could be left in no doubt but that that conviction was proper; it was readily able to and did conclude that Lovelock 'was properly convicted on the second count'."[33]

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29 *Ryan v The Queen* (1982) 149 CLR 1 at 9 (emphasis added).

30 *Ryan v The Queen* (1982) 149 CLR 1 at 7.

31 [1956] 1 WLR 1217; [1956] 3 All ER 223.

32 *Ryan v The Queen* (1982) 149 CLR 1 at 6-7.

33 *Ryan v The Queen* (1982) 149 CLR 1 at 7.

Aickin J

58 Aickin J was also of the opinion that the power conferred by s 569(1) could not be used in respect of convictions that were not before it. His Honour said[34]:

> "The opening phrase, 'if it appears to the Full Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment', cannot in my opinion apply where the Court of Criminal Appeal does not have before it for consideration the convictions on the other count or counts to which the sub-section refers. I am unable to see how it can appear to that Court that an appellant was properly convicted when the propriety of the conviction is not before it. The absence of an appeal by the accused is not a sufficient basis for an assumption that he was 'properly convicted'. *The words are however apt to apply to a case where the appeal is against conviction on two or more counts and will be applicable only where the appeal is successful on some but not all counts*". (emphasis added)

59 However, his Honour also said, in a comment with relevance to this case[35]:

> "If the accused were convicted on the new trial for trafficking in heroin and were still serving the sentences imposed by the Court of Criminal Appeal for handling stolen goods, s 478(1) of the *Crimes Act* would authorize the trial judge to impose a sentence to commence on the expiration of those sentences. In the light of those considerations it can seldom be appropriate to use s 569(1) of the *Crimes Act* in a case where a new trial has been ordered under s 568(2)."

Wilson J

60 Wilson J (with whose judgment Gibbs CJ agreed) said[36]:

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34 *Ryan v The Queen* (1982) 149 CLR 1 at 15.

35 *Ryan v The Queen* (1982) 149 CLR 1 at 14-15.

36 *Ryan v The Queen* (1982) 149 CLR 1 at 21.

> "It is only where the impact of a sentence is not confined to the conviction that is quashed that there is any occasion which calls for a power to affirm or make a substitution for that sentence. In a case, as in this case, where a separate sentence is imposed in respect of each count in an indictment on which there is a conviction, I do not think it is open to say that the sentence which is imposed directly on the conviction which is later quashed on appeal contains any element of survival because of some relationship to the remaining counts. In truth, there is no such relationship. Yet it is only that sentence which s 569(1) says can be affirmed or for which another sentence can be substituted. The sub-section does not authorize any interference with the sentences which have been separately imposed on counts not the subject of appeal."

Brennan J

61 Brennan J decided the case on the basis that the misjoinder of counts made it inappropriate for the exercise of the power under s 569(1). His Honour said[37]:

> "It is extremely unlikely that it would be right to exercise the power conferred by s 569(1) to adjust in the Full Court the sentence imposed at first instance on counts which ought to have been tried separately from the count upon which the appellant is found to have been not properly convicted. In my view, the present case was not a proper case for the exercise of the power. It was not a case where the sentence imposed on the conviction which was quashed was passed in respect of conduct connected with the conduct supporting the convictions which stand. It was not appropriate in the present case to exercise the powers conferred by s 569(1), for the Court increased the sentences upon convictions which were unconnected with the case before it and which could not have fallen for consideration had the presentment been regularly framed."

62 Although this passage contains the ratio of Brennan J's reasoning, he also made the following obiter comments[38]:

> "It was submitted further that it would be unjust for the Full Court of its own motion to increase a sentence in respect of a conviction against which neither the appellant nor the Crown has appealed. The sentence affirmed or substituted by the Full Court must plainly be a sentence which, after an appeal against conviction on one or more counts is

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37 *Ryan v The Queen* (1982) 149 CLR 1 at 24-25.

38 *Ryan v The Queen* (1982) 149 CLR 1 at 25.

> allowed, is supported by the conviction or convictions which stand; it cannot be the sentence in respect of the conviction or convictions which are quashed. Given a regular joinder of the counts, there is no injustice in increasing the sentence in respect of a conviction which stands if the increase is occasioned by the setting aside of the sentence which carried the appropriate penalty for conduct which constitutes either an element of the offence or a part of the series of offences for which the appellant stands convicted. Full justice is done to an appellant when the Full Court quashes a conviction on some count or part of the indictment on which he ought not to have been convicted; it goes beyond the requirements of justice to relieve him of the appropriate penalty for conduct for which he still stands convicted. The power to affirm the sentence or to substitute another sentence under s 569(1) is not needed when there are appeals against that sentence under s 567A or s 568. Section 569(1) must have an operation additional to that for which those sections provide."

63 In our opinion, although there was no unanimity of reasoning of a majority of Justices in *Ryan* sufficient to constitute a *ratio decidendi*, the comments of a majority of the Justices support the proposition that the Court of Appeal has power under s 569(1) to increase sentences for convictions which were not quashed by the Court of Appeal but were the subject of an appeal to it. Three of the five Justices (Stephen, Aickin and Brennan JJ) were of the view that, where there was a proper joinder of the counts in the indictment, and appeals against one or more convictions have succeeded and appeals against one or more convictions have failed, so that the Court of Appeal could satisfy itself that the appellant had been "properly convicted" on the latter counts, s 569(1) conferred power on the Court of Appeal to increase sentences on those counts. This was so even though there had been no appeal against the sentences on the counts where the appeals against conviction failed. In our opinion, this view of s 569(1) is correct. In the present case, therefore, the Court of Appeal had power to increase the sentences on the remaining convictions.

64 It is true that Wilson J said[39]:

> "[W]here a separate sentence is imposed in respect of each count in an indictment on which there is a conviction, I do not think it is open to say that the sentence which is imposed directly on the conviction which is later quashed on appeal contains any element of survival because of some relationship to the remaining counts."

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39 *Ryan v The Queen* (1982) 149 CLR 1 at 21.

But if his Honour intended to say that s 569(1) can never have operation where separate sentences are imposed on separate counts, and can only operate where one general sentence in respect of all counts is imposed, then in our respectful opinion he fell into error. In *Ryan*, three of the Justices pointed out that general sentences were almost never imposed in Victoria[40]. To confine s 569(1) to cases where such sentences had been imposed would leave no room in practice for the section to operate[41].

The relevance of a re-trial

65 In *Ryan*, Aickin J expressed misgivings about increasing the sentence in respect of the remaining counts when a new trial had been ordered[42]. So a question arises whether the discretion to exercise the power conferred by s 569(1) was properly exercised by the Court of Appeal having regard to the order for a new trial on four of the counts in the indictment.

66 By reason of his convictions in the present case, the appellant was a "serious sexual offender" within the meaning of s 16(3A) of the *Sentencing Act* 1991 (Vic) ("the Sentencing Act"). Section 16(3A) stated:

> "Every term of imprisonment imposed on a serious sexual offender by a court for a sexual offence or a violent offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term."[43]

67 If the appellant were found guilty after the re-trial of any of the counts on which the Court of Appeal quashed his convictions, there may be said to be some

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40 (1982) 149 CLR 1 at 4 per Stephen J, 13 per Aickin J, 25 per Brennan J.

41 *Ryan v The Queen* (1982) 149 CLR 1 at 25 per Brennan J.

42 (1982) 149 CLR 1 at 14-15.

43 The conclusion that this provision was the relevant provision depends first on the *Sentencing (Amendment) Act* 1993 (Vic), which introduced into the Sentencing Act the serious sexual offender provisions (including s 16(3A)), and secondly on the temporal limitation upon the operation of the provisions of the *Sentencing and Other Acts (Amendment) Act* 1997 (Vic), including the repeal (by s 7) of s 16(3A) of the Sentencing Act. The proceedings against the appellant commenced before the 1997 statute came into force.

question about what sentencing provisions apply[44]. No argument was directed to that issue and we express no view upon it. It is enough to note that both s 16(3A) and the provision which replaced it (s 6E) would require the sentencing judge to order that the sentences imposed on any such count be served cumulatively upon his current sentences unless some circumstance of the case called for the exercise of the discretion against doing so. That discretion is given by the phrase "unless otherwise directed by the court". Notwithstanding the possibility of the discretion being exercised in the appellant's favour, there is no doubt that he is at risk of having to serve longer sentences than he had to serve before his successful appeal. But it does not follow that the sentences imposed by the Court of Appeal constituted an injustice or incongruity or a wrongful exercise of discretion.

68 Given the criminality of the appellant, the sentences on the counts remaining were manifestly inadequate. The public interest required them to be increased. Contrary to the apparent view expressed by Aickin J in *Ryan*, we do not think that the Court of Appeal should refrain from using its power under s 569(1) of the Act merely because it has ordered a new trial on the remaining counts. To suggest that it should seems inconsistent with the presumption of innocence of the accused on the counts in respect of which he is to be re-tried.

69 Moreover, sentencing is not a matter of interest only to the prosecution and the appellant. The principal object of the criminal law is to protect the safety and property of the people and the State. Members of the public, as well as the prosecution, have a vital interest in ensuring that those found guilty of crimes receive the sentences which are appropriate to their criminality. If the Court of Appeal had not increased the remaining sentences and, for good reason, the prosecution should then have decided not to prosecute the charges in respect of which the verdicts of guilty had been set aside, the appellant would serve sentences for shorter periods than his criminality required. Such a result would be contrary to the policy of s 569(1) which is plainly intended to ensure that the remaining sentences reflect the criminality of an appellant who has had one or more, but not all, of his or her convictions quashed.

70 Section 569(1) of the Act gives the Court of Appeal the power, on its own motion, to increase sentences in cases where some convictions are quashed but other convictions on the same indictment stand. There is a clear legislative recognition that the public interest may require the remaining sentences to be increased whether or not the prosecution or, if it matters, the appellant, has appealed against those sentences. Given the apparent object of the section, the Court of Appeal must be free to impose on the appellant what it considers is the

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44 *Sentencing and Other Acts (Amendment) Act* 1997, s 33.

correct sentence, taking into account only those offences of which the appellant stands convicted at the time of sentencing. This is so irrespective of whether the Court of Appeal enters an acquittal or orders a new trial in respect of those charges where the convictions have been quashed. Nothing in s 569(1) indicates that the Court of Appeal must hold its hand because the appellant must face a new trial on one or more of the charges. In sentencing the appellant on the convictions that stand, the Court of Appeal is entitled to act on the basis that he is presumed innocent of the outstanding charges and to sentence him for what he has done in respect of the charges on which he stands convicted.

The re-trial

71 If the appellant is convicted on any count on the re-trial, it will be for the sentencing judge to determine whether the appellant should be given a sentence on that count that requires a total sentence longer than that which the Court of Appeal has given him. In determining that issue, the sentencing judge will have to consider whether the conduct involved in that conviction is part of the same course of criminal conduct which gave rise to the previous convictions. If it is, the sentencing judge will have to determine whether the totality principle requires that the appellant should not receive a sentence that is effectively longer than that already imposed by the Court of Appeal. The sentencing judge will also need to consider s 16(3A) (or s 6E, the provision which replaced it) of the Sentencing Act in determining the scope for the application of the totality principle, a point to which we will return later.

72 If the appellant is convicted on any count at the re-trial, the sentencing judge will also have to take into account another important factor in the sentencing process. Ordinarily but not invariably, a successful appellant should not receive a longer sentence after conviction on a re-trial than he or she received at the original trial[45]. If the sentencing judge at the re-trial thinks that the original sentence was manifestly inadequate, it is open to that judge in the exercise of the sentencing discretion to give a sentence higher than that imposed on the first occasion. But an exercise of discretion by a sentencing judge that increases the original sentence given to the accused is necessarily rare. That is because such an increase may be perceived, by the public and the accused, as containing a retributive element imposed because the accused had successfully appealed against his or her earlier conviction or sentence. If the raising of a sentence after

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45 *Gilmore* (1979) 1 A Crim R 416; *Williams v The Queen (No 2)* [1982] WAR 281; *R v Bedford* (1986) 5 NSWLR 711; *R v Chen* [1993] 2 VR 139; *Campbell v The Queen* (unreported, Federal Court, 11 September 1996); *R v Petersen* [1999] 2 Qd R 85.

a successful appeal became common, it might discourage appeals. Such a result would be contrary to the public interest, for an organised society has a vital interest in the proper administration of its criminal justice system. Rights of appeal are an important means of preventing the perpetuation of error in criminal trials.

73 If the appellant is convicted and receives a sentence that is made wholly or partly cumulative on his existing sentences, he will have the right to seek leave to appeal against that sentence. His rights in such circumstances will be no different than they would have been if he had obtained a re-trial on all counts of the indictment. If that had occurred and he was again convicted, he would then be at risk that the sentencing judge at that re-trial might impose sentences longer than those imposed at the first trial. Whether such sentences should stand would depend on what sentences were appropriate for his total criminality and on the fact that at his first trial the total effective sentence was 12 years.

74 It follows in our opinion that the appellant suffered no injustice when the Court of Appeal thought that it was necessary to increase the various sentences in the way that it did. The sentences in respect of those convictions were appropriate given the criminality involved. That was because Judge Harbison had reduced the sentences that were appropriate to each conviction in order to ensure that the totality of the appellant's sentences did not exceed what was appropriate having regard to his total criminality.

75 In modern times, s 569(1) of the Act is likely to have its most frequent operation in circumstances where the sentencing judge has compressed sentences by reason of the totality principle. There would be less occasion for the Court of Appeal to exercise its powers under that sub-section if sentencing judges imposed the sentence appropriate in respect of each conviction and then gave effect to the totality principle, where that principle did require a reduction of the cumulative effect of the sentences, by making concurrent any sentence or sentences that conflicted with the totality principle.

76 The need for judges not to compress sentences is especially important where the accused person is a "serious sexual offender" within the meaning of s 16(3A) of the Sentencing Act, and similar provisions. Section 16(3A) gives effect to a legislative policy that serious offenders are to be treated differently from other offenders. It was plainly intended to have more than a formal effect, which is the effect it would frequently have if its operation was subject to the full effect of the totality principle. Given the terms of s 16(3A), the scope for applying the totality principle must be more limited than in cases not falling within that section. The evident object of the section is to make sentences to which it applies operate cumulatively rather than concurrently. The section gives the judge a discretion to direct otherwise. But the object of the section would be

compromised and probably defeated in most cases if the ordinary application of the totality principle was a sufficient ground to liven the discretion. Since the relationship between s 16(3A) and the totality principle does not arise in this appeal, it is enough to say that sentencing judges need to be astute not to undermine the legislative policy inherent in s 16(3A) by applying the totality principle to the sentences as if that section (or s 6E which replaced it) was not on the statute book.

Procedural fairness

77 The appellant also complained of a denial of procedural fairness in the course taken by the Court of Appeal in dealing with his appeal, particularly with respect to the making of submissions concerning s 569(1) of the Act. The record shows, however, that he was given full opportunity to make his submissions with respect to the construction of that provision and the exercise of the power it confers. The claim that he was denied procedural fairness is not made out.

Conclusion

78 In our opinion, as in this case there was no allegation of misjoinder of counts and as there was an appeal to the Court of Appeal on the appellant's convictions on all counts, s 569(1) of the Act applied and the Court of Appeal was entitled, indeed we would say bound, to increase the appellant's sentences in the manner in which it did.

79 KIRBY J. This appeal concerns the lawfulness of the exercise by the Court of Appeal of Victoria of a statutory power to resentence an offender who succeeded, in part only, in an appeal against the conviction entered at his trial. In issue in the appeal is the scope of such power, the procedures by which it should be exercised and the considerations that must inform a new sentence when it is imposed by an appellate court.

The facts, sentence, appellate resentence and applicable legislation

80 The facts of this case are set out in the reasons of Gleeson CJ, Gaudron and Callinan JJ[46], as are the conclusions and reasons of the sentencing judge, Judge Harbison, who convicted and sentenced the appellant following his trial in the County Court of Victoria. Likewise, what happened in the Court of Appeal of Victoria[47] is explained by McHugh, Gummow and Hayne JJ[48], including the reasons for the substituted sentence which the Court of Appeal imposed on the appellant in light of its orders upholding, in part, the appeal against his conviction. The table set out in their Honours' reasons[49] graphically illustrates what occurred.

81 The appellant, by special leave, appeals to this Court complaining that although he ostensibly succeeded in his appeal (and was thus justified in law in bringing it), in substance he is now significantly worse off. He is exposed to a risk of retrial on four counts of the original presentment yet his effective custodial sentence on the remaining counts is exactly the same as it was. He argues, in effect, that a reasonable outsider might conclude, as he did, that the legal system had pretended to vindicate him but had retained the last laugh and effectively punished him additionally for his impudence in challenging its orders.

82 The terms of s 569(1) of the *Crimes Act* 1958 (Vic) ("the Crimes Act") are set out in the reasons of Gleeson CJ, Gaudron and Callinan JJ[50]. I will not repeat them. The heading to s 569 is "Powers of Court in special cases". Provision is made in the Crimes Act for the determination of appeals in "ordinary cases". An

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46 Reasons of Gleeson CJ, Gaudron and Callinan JJ at [2]-[9].

47 *R v R H McL* [1999] 1 VR 746. I shall assume that the Court may act in the appeal on the statement of agreed facts elaborated by counsel; cf *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 297-299; *Eastman v The Queen* (2000) 74 ALJR 915 at 956-966 [232]-[276]; 172 ALR 39 at 94-107.

48 Reasons of McHugh, Gummow and Hayne JJ at [47]-[49].

49 Reasons of McHugh, Gummow and Hayne JJ at [46].

50 Reasons of Gleeson CJ, Gaudron and Callinan JJ at [27].

"ordinary case" is one where, by leave, the convicted person appeals against sentence[51]. By an amendment introduced into the Crimes Act in 1970[52], the Director of Public Prosecutions may also appeal in a case where he or she considers that a different sentence should have been passed and is satisfied that an appeal should be brought in the public interest[53]. In respect of an appeal by the convicted person under sentence, or by the Director of Public Prosecutions, the Court of Appeal is empowered to impose a different sentence "whether more or less severe"[54]. These provisions make it clear that in appeals against sentence, the Court of Appeal is empowered to impose a "more severe" sentence. There is no precisely equivalent phrase in s 569(1).

83 The provisions of the *Sentencing Act* 1991 (Vic) ("the Sentencing Act") relating to "serious sexual offender[s]" should also be noted. Such provisions were amended with effect soon after the appellant was presented for trial in July 1997 by the substitution of s 6E for s 16(3A) of the Sentencing Act. However, there is no relevant difference. Each provision is designed to ensure that, save in the case where the sentencing judge exceptionally decides otherwise, "serious sexual offender[s]" convicted of further offences will ordinarily serve the sentence imposed for conviction of those further offences cumulatively upon earlier sentences[55].

Common ground

84 I should collect a number of matters of common ground so that they may be put to one side. First, it was accepted for the appellant that the formal preconditions for the exercise of the power conferred on the Court of Appeal by s 569(1) of the Crimes Act were satisfied. The argument about a lack of power to apply the sub-section was said to arise primarily upon a true construction of the meaning and operation of the sub-section and by virtue of there being a lack of sufficient connection between the sentence passed "in substitution" and the sentence passed on the appellant at trial.

85 Secondly, it was agreed that, if the Court of Appeal had not invoked s 569(1) of the Crimes Act, the result of affirming the sentences passed on the

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51 Crimes Act, s 568.

52 *Criminal Appeals Act* 1970 (Vic), s 2.

53 Crimes Act, s 567A.

54 In the case of an appeal by a prisoner, Crimes Act, s 568(4). In the case of an appeal by the Director of Public Prosecutions, Crimes Act, s 567A(4).

55 Sentencing Act, s 16(3A).

appellant at trial, in respect of those counts on which he had been properly convicted, would have been the imposition of a maximum term of imprisonment of eight and a half years. There was some dispute about the non-parole period which would then ordinarily have been fixed. There is no statutory ratio required between the two periods. It is within the discretion of the court sentencing the offender. The prosecution suggested that it would be of the order of five years.

86 Thirdly, it was agreed that, if the appellant were presented for retrial in relation to four counts of the original presentment, and if he were convicted on such counts, he would be liable to be sentenced in respect of such convictions as a "serious sexual offender". He would then have to be sentenced in accordance with s 6E of the Sentencing Act. Whilst there is a possibility that the appellant might not be retried for those offences, the issues of principle in this appeal have to be considered on the footing that such a course was within the contemplation of the orders which the Court of Appeal made. Although the judge of the second trial might order, if the appellant were convicted, that any new sentence should be served concurrently with any sentences still outstanding following the first trial, the Crown accepted that it could not be said that no greater sentence would be imposed if the appellant were convicted at a second trial. This was a proper concession.

87 The Parliament of Victoria has indicated its purpose that "serious sexual offender[s]" should ordinarily undergo cumulative sentencing for later sexual offences[56]. However, any delay in the retrial would diminish the time available for ordering that any sentences be served concurrently. It necessarily follows that, if the appellant were retried and convicted, the outcome of the retrial could potentially result in an increased custodial sentence consequent on his successful appeal to the Court of Appeal. It was that appeal alone that had attracted the power for which s 569(1) of the Crimes Act provides.

88 Fourthly, it was not disputed by the prosecution that, in the exercise of the power conferred by s 569(1) of the Crimes Act, the Court of Appeal was obliged to perform its functions with considerable care, especially where it had ordered a retrial on some counts. Necessarily, the outcome of the retrial would be unknown at the time of the resentencing. Moreover, it was accepted that the general principle to be observed in resentencing a person in consequence of a successful appeal (whether at a second trial or in an appellate court) was that such person ought not ordinarily to be worse off, in terms of sentence, as a result of having appealed successfully.

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56 Sentencing Act, s 16(3A) (since repealed). See now s 6E.

The issues

89 Three issues were presented by the arguments before this Court. They were:

1. Whether, in the circumstances of this case, s 569(1) of the Crimes Act empowered the Court of Appeal to pass a sentence in substitution for that imposed on the appellant by Judge Harbison.

2. Whether, if such power existed, the procedures adopted by the Court of Appeal before passing such sentence constituted a departure from the rules of procedural fairness or natural justice by which the Court of Appeal was bound to act before resentencing the appellant; and

3. Whether, if the Court of Appeal had the power to resentence the appellant and did not depart from procedural fairness or natural justice in the exercise of such power, such exercise nonetheless miscarried because the Court of Appeal had failed to have regard, or sufficient regard, to relevant sentencing principles in discharging its function in the circumstances. Specifically, the appellant submitted that, ordinarily, the sentence imposed in a first trial constitutes a "ceiling" for the total punishment to which an appellant is exposed in consequence of having successfully appealed against an original conviction and any sentence beyond that ceiling had to be justified by explicit reasons addressed to the point.

90 It is convenient to deal with the issues in this appeal in the foregoing order. In my opinion, the appellant fails in respect of the first two points argued. But he succeeds in respect of the third.

The power to resentence - history

91 The statutory provisions, of which s 569 of the Crimes Act is an example, must be understood against the background of the pre-existing law and practice. Appeal is a creature of statute[57]. Before the statutory rights of appeal in criminal matters existed it was extremely rare for a Court of Error to concern itself in matters of sentencing. The English practice to the nineteenth century was usually to impose a general sentence following conviction upon multiple counts[58]. If a

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57 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322 [72] fn 24 and the cases there cited; 160 ALR 588 at 609.

58 *O'Connell v The Queen* (1844) 11 Cl & Fin 155 at 269-270, 274-275, 303-304, 309-310 [8 ER 1061 at 1102, 1105, 1107, 1118, 1120] citing *Grant v Astle* (1781) 2 Doug 722 at 730 [99 ER 459 at 465-466].

Court of Error set aside conviction on some only of the counts of an indictment, it would sometimes inquire whether the general sentence previously imposed was legally sustained by the conviction on the remaining counts[59]. However, such a court had no power to order a retrial. Only if the appeal were successful on all counts would the accused have to be discharged[60].

92 In 1844, in *O'Connell v The Queen*[61], the House of Lords foreshadowed later sentencing practice by suggesting that, in cases of conviction on a multi-count indictment, each count should attract its own separate sentence. Their Lordships concluded that, where conviction on a number of counts of a multi-count indictment occurred, it was not always appropriate that the general sentence imposed on different premises should be sustained. Soon after this decision, the *Crown Cases Act* 1848 (UK)[62] was passed whereby, should a Court of Error reverse a judgment, it was competent for it "either to pronounce the proper judgment or to remit the record to the court below, in order that such Court may pronounce the proper judgment". This provision is obviously the source of the subsequent English enactment[63] which gave rise, in Australia, to the provisions of which s 569(1) of the Crimes Act is now, in Victoria, the modern equivalent[64].

93 The operation of the *Crown Cases Act* arose for consideration in 1851 in *Holloway v The Queen*[65]. That was a case where a prisoner had been convicted on an indictment containing nine counts. A Court of Quarter Sessions had imposed a general sentence that he be transported to the colonies. Explaining the operation of s 5 of the *Crown Cases Act*, Lord Campbell CJ said[66]:

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59 *O'Connell v The Queen* (1844) 11 Cl & Fin 155 at 262 [8 ER 1061 at 1102].

60 The right to order a retrial was enacted in the United Kingdom by the *Criminal Appeal Act* 1964 (UK). See *Ryan v The Queen* (1982) 149 CLR 1 at 11-12 per Aickin J.

61 (1844) 11 Cl & Fin 155 at 294-306 per Parke B, 351-388 per Denman L [8 ER 1061 at 1114-1118, 1135-1149]; cf *Castro v The Queen* (1881) 6 AC 229.

62 11 and 12 Vict c 78, s 5.

63 *Criminal Appeal Act* 1907 (UK), s 5.

64 The 1907 Act gave rise to the *Criminal Appeal Act* 1914 (Vic), s 5(1).

65 (1851) 2 Den 287 [169 ER 508].

66 (1851) 2 Den 287 at 295 [169 ER 508 at 511].

> "In the case of an indictment with some good and some bad counts, after a verdict for the Crown upon all the counts, the Court below ought to arrest the judgment on the bad counts, and pass sentence on the good counts. Should the Court below, however, have pronounced judgment generally, the Court of Error may now order judgment to be arrested on all the bad counts, and pronounce the proper judgment on all the good counts."

94 It was obviously assumed in the English case law – and in much Australian sentencing practice until more recent times – that the imposition of general sentences following conviction on several counts of a single indictment was a lawful practice[67]. However that may be, for a very long time it has not been the practice in Victoria[68]. Against the eventualities that can occur, it is not a good practice. It is not what happened in the instant case.

95 When the Victorian equivalent to the English legislation was enacted in the form of the *Criminal Appeal Act* 1914 (Vic), it was, in the manner of those days, virtually a copy of the *Court of Criminal Appeal Act* 1907 (UK). However, there was one important difference. This was explained by the Minister introducing the Bill into the Victorian Parliament, who said that the Bill was "practically a replica"[69] of the United Kingdom Act, except for an "important change" that would "give the Court power to direct a new trial"[70]. The current provisions of s 569(1) of the Crimes Act remain substantially the same as those enacted in 1914. The legislation applicable in the United Kingdom, on the other hand, has undergone a number of changes in the intervening years. By a provision introduced in 1967[71], s 5(1) of the *Criminal Appeal Act* 1907 (UK) was amended so that the power in the section to resentence "in respect of any count on which [an appellant] remains convicted" was rendered subject to s 4(2) of the

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67 The legality was questioned in *Ryan v The Queen* (1982) 149 CLR 1 at 4 per Stephen J; cf *R v Jolly* [1994] 1 VR 446 at 450; Warner, "General Sentences", (1987) 11 *Criminal Law Journal* 335.

68 *Bibaoui* (1996) 87 A Crim R 527.

69 Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 15 October 1913 at 1892 per Mr Mackey.

70 Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 15 October 1913 at 1893 per Mr Mackey.

71 *Criminal Justice Act* 1967 (UK), Sch 4, par 2.

Criminal Appeal Act 1966 (UK). A further provision introduced in 1967[72] amended s 4(2) of the *Criminal Appeal Act* 1966 (UK) to read as follows[73]:

> "Section 5(1) of the 1907 Act shall not authorise the Court of Appeal to pass any sentence such that the appellant's sentence on the indictment as a whole will, in consequence of the appeal, be of greater severity than the sentence (taken as a whole) which was passed at the trial for all offences of which he was convicted on the indictment."

96 One other later change to the template from which the provision in s 569(1) of the Crimes Act comes may be noted. In 1967, what had been an appeal against "the sentence" in s 3 of the *Criminal Appeal Act* 1907 (UK) was changed so that it was treated as an appeal against *any or all* other sentences passed in the same proceedings[74]. These changes, together with the introduction of the power to order a retrial, significantly altered the legislative background against which judicial pronouncements of the English courts must be understood.

97 For most of the twentieth century, there was no power in England to order a retrial on all or some counts of an indictment following a successful appeal. To the extent that the appellant succeeded, he or she was discharged from any further liability in respect of the subject matters upon which the appeal was upheld. Accordingly, in the rare consideration given in England to the equivalent to s 569(1) of the Crimes Act, no judicial thought had to be assigned to the possibility that, as a result of a retrial, further punishment might be imposed on the appellant. For this reason, in England and in those of its former colonies that adhered to its original template[75], such a prospect could be ignored. Any resentencing was confined to the remaining counts for which the conviction stood. From the beginning, this was not the case in Victoria or the other Australian jurisdictions. The possibility of retrial, conviction and the imposition of a further sentence was thus a contextual consideration relevant to the operation of provisions such as s 569(1) of the Crimes Act. It was applicable in the present proceedings.

98 Allowing that the statutory context for the application of the English provision was, from the start, different from the Australian context and, since 1967, that its exercise in England has been controlled by the statutory ceiling referred to, it is nonetheless striking that the provision came up for consideration

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72 *Criminal Justice Act*, Sch 4, par 35.

73 The amendments were consolidated in the *Criminal Appeal Act* 1968 (UK), s 4.

74 *Criminal Justice Act*, s 97(6).

75 Such as Ceylon. See *R v Edirimanasingham* [1961] AC 454.

so rarely. This was so although it must be assumed that many cases arose where a conviction was set aside on some only of the counts of an indictment so enlivening the power to resentence according to the broad view of that power maintained by the prosecution in these proceedings.

99 In 1939, where a conviction on certain counts was quashed by the English Court of Criminal Appeal and where conviction on other counts was affirmed, that Court considered that it was within its power to treat the appellant's notice of appeal "as if it had included an appeal against sentence"[76]. Doing so, the Court reduced the sentence to one proper to those counts only on which the appellant's conviction then rested[77].

100 In 1941, where a conviction of offences against the *Treachery Act* 1940 (UK) in wartime resulted in a sentence of death, the convictions on the two counts containing the capital charge were quashed on appeal. The English Court of Criminal Appeal then regarded itself as entitled, the verdicts of guilty on the non-capital counts remaining and the trial judge having imposed no sentence on these counts, to sentence the appellant to fourteen years penal servitude in respect of her conviction on those counts[78].

101 In 1956, the same Court, having quashed a conviction of attempted rape, proceeded to resentence the appellant in respect of a conviction of an offence of indecent assault. The Court substituted for the sentence of two years imprisonment (which it found "quite inadequate"[79]) its own sentence of preventive detention for six years. That was the same as the trial judge had imposed in respect of the conviction of the crime of attempted rape which the appellate court had set aside. In explaining the resentencing, Lord Goddard CJ said[80]:

> "The Court of Criminal Appeal, on quashing the conviction on count 1, will then have power to pass an adequate sentence for the conviction on count 2. . . . [A] sentence of two years' imprisonment for a horrible offence of this sort was quite inadequate . . . [T]he Court considers, therefore, it right to put into force the provisions of section 5(1) of the Criminal Appeal Act, and we shall pass a sentence which could have been

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76 *Hervey and Goodwin* (1939) 27 Cr App R 146 at 148.

77 *Hervey and Goodwin* (1939) 27 Cr App R 146 at 148-149.

78 *O'Grady* (1941) 28 Cr App R 33 at 40.

79 *Lovelock* (1956) 40 Cr App R 137 at 140.

80 *Lovelock* (1956) 40 Cr App R 137 at 140.

> lawfully passed on the count of indecent assault, and that is a sentence of preventive detention. The length of preventive detention might have been very great, but, considering that it is the first time that this section has been invoked, we will impose only the same length of preventive detention as the learned judge did of imprisonment on the first count."

The variation introduced in the sentence was thus given effect, although there was no appeal by the prisoner against his sentence and, at that time, no possibility of appeal by the Crown against such sentence. The statutory provision was invoked, apparently, on the Court's own motion.

102 There are other like cases in England where, following a successful appeal against conviction, a conviction on one or more counts has been set aside and a substituted sentence imposed which has had the effect of increasing a sentence fixed in that respect at trial[81]. Nevertheless, the cases are relatively few, the statutes different in the respects mentioned and the reports do not disclose whether the issues ventilated in this appeal were ever addressed to the English courts.

103 The only remaining decision in this series that should be mentioned is one of the Privy Council. In 1961, in *R v Edirimanasingham*[82], their Lordships had to consider the operation of the Court of Criminal Appeal Ordinance, 1938. In relevant respects, it was identical to the *Criminal Appeal Act* 1907 (UK). When the Court of Criminal Appeal of Ceylon quashed the prisoner's conviction of murder upon which he had been sentenced to life imprisonment, that Court concluded that it had no jurisdiction to pass appropriate sentences on the other two counts on which the jury's verdict of guilty stood undisturbed. In respect of those counts, the trial judge had passed no sentence on the prisoner. The Privy Council reversed this decision, holding that the statutory power of the appellate court extended in such a case to resentencing the prisoner[83]. In words relevant to the present circumstances, Lord Tucker, delivering the judgment of the Board, noted[84]:

> "It is not necessary to express any opinion as to whether or not the subsection warrants the court in increasing a sentence passed at the trial on

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81 See eg *Frost and Hale* (1964) 48 Cr App R 284 at 292.

82 [1961] AC 454.

83 [1961] AC 454 at 462. The Privy Council applied *O'Grady* (1941) 28 Cr App R 33.

84 [1961] AC 454 at 462.

some other count with regard to which there has been no appeal against sentence."

104 This was the state of English authority when the operation of s 569(1) of the Crimes Act came before this Court in *Ryan v The Queen*[85].

The power to substitute a sentence: *Ryan v The Queen*

105 In *Ryan*, the appellant stood his trial on a presentment containing two counts of trafficking in heroin and four of handling stolen goods. He was convicted on one count of trafficking and on the four counts of handling. In respect of the trafficking count, he was sentenced to four years imprisonment. On each of the handling counts, he was sentenced to six months imprisonment. The sentences on two of the handling counts were made cumulative on the other two handling counts. The other sentences were ordered to be served concurrently.

106 The Court of Criminal Appeal of Victoria allowed an appeal by the appellant against the conviction for trafficking. It quashed that conviction and ordered a new trial. It considered that, if the appellant had been sentenced on the four counts of handling in isolation from the sentence for trafficking, he would have received a greater effective sentence than twelve months imprisonment. In that respect, the case bears strong parallels to the conclusion reached by the Court of Appeal in the present matter. Substituted terms of eighteen months imprisonment for each of the four handling counts were imposed with two terms to be cumulative and the other two concurrent. In the result, the appellant was sentenced to an effective aggregate of three years imprisonment. Unlike the present orders, the substituted sentence in *Ryan* was less than the sentence imposed at trial.

107 The prisoner then appealed successfully to this Court. This Court unanimously held that s 569(1) of the Crimes Act did not entitle the Court of Criminal Appeal to increase the sentences on the handling counts. The reasoning of the participating judges differed. A majority, comprising Wilson J (with whom Gibbs CJ agreed) and Aickin J, so held on the footing that s 569(1) did not authorise interference with sentences separately imposed on counts which were not the subject of any appeal[86]. Stephen J concluded that the appellate court could not, within the terms of the sub-section, determine the correctness of a conviction on the "other counts" because they were not before the Court[87]. To

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85 (1982) 149 CLR 1.

86 (1982) 149 CLR 1 at 20 per Wilson J, 15 per Aickin J.

87 (1982) 149 CLR 1 at 9.

that extent, there was some common ground with the foregoing opinions. Brennan J took a wider view of the power of the appellate court. But he held that, in the circumstances, the counts of trafficking ought not to have been joined with those of handling[88]. Accordingly, it was not appropriate to increase the sentences on convictions which were unconnected with the appeal and which should not, therefore, have arisen for sentence if the presentment had followed the rules governing the regular framing of such documents.

108 It is, I think, a fair observation about *Ryan* that ascertainment of the ratio which it establishes is "not without its difficulties"[89]. In order to find the binding rule, it is necessary to consider the opinions of all of the participating judges, given that all of them concurred in the orders that the appeal be allowed and the sentences imposed by the trial judge in respect of the conviction on the handling charges should be restored[90]. The approach of Brennan J, founded on the impermissible combination of the counts of the presentment can, I think, be disregarded for immediate purposes. It was not a view taken by any other member of this Court. It is certainly irrelevant to the present proceeding where there is no contest that the counts included in the presentment against the appellant were lawfully and properly combined. Amongst the other members of the Court in *Ryan*, the critical consideration was the absence of an appeal initiating the jurisdiction of the Court of Criminal Appeal in respect either of the conviction of, or sentence for, the handling charges. For different reasons, this was viewed as disqualifying the appellate court from taking an initiative of its own in respect of the sentences on those matters.

109 I therefore agree with the analysis of Callaway JA in *R v Gibb*[91] that the sentence which may be either affirmed or replaced by a substituted sentence must be a sentence which has a direct relation to the conviction which has been quashed. His Honour cites[92] with approval the following statement of Wilson J in *Ryan*[93]:

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88 (1982) 149 CLR 1 at 24.

89 *R v R H McL* [1999] 1 VR 746 at 775.

90 See *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-419 for a discussion of the way in which to ascertain the binding rule of a judicial decision; cf (1947) 63 *Law Quarterly Review* 278; (1948) 64 *Law Quarterly Review* 28-31, 193-195.

91 [1997] 2 VR 576 at 581.

92 *R v Gibb* [1997] 2 VR 576 at 579.

93 (1982) 149 CLR 1 at 20.

> "If it relates exclusively to a conviction on a count in the indictment in respect of which there was no appeal, and is not itself the subject of appeal, there is no occasion to consider its adequacy with a view either to affirmation or substitution."

110 If this is the binding rule of *Ryan*, as I think it is, it has no direct applicability to the present case. Even after the present appellant was given leave to withdraw his appeal against sentence, there remained before the Court of Appeal an appeal generally against his conviction on all of the counts of the presentment. In this way, any decision in the present case does not involve either an application of, or departure from, a rule laid down in Ryan.

111 Nevertheless, the appellant argued that dicta of this Court in *Ryan* and elsewhere, combined with a proper analysis of the requirements of s 569(1) of the Crimes Act, lead to a conclusion, expanding the principle that *Ryan* establishes, that in a case such as the present, where no appeal against sentence was before the Court, it was beyond the power of the Court of Appeal to substitute the sentence as it had done in this case. That Court's sole authority, so it was argued, was to substitute a new non-parole period based upon the sentences in respect of the conviction of the appellant on those counts of the presentment which were not quashed as a result of the Court of Appeal's orders.

The power to substitute a sentence: arguments of the parties

112 The appellant's argument was that the holding in *Ryan* logically obliged a conclusion that, in the circumstances presented by his appeal, the Court of Appeal lacked the power under s 569(1) of the Crimes Act to pass the sentence on him which it did. The starting point for the appellant was the context in which the statutory power was to be exercised. It was a context in which the law recognised the "vested interest" which a litigant had in a judgment won at trial[94]. Once a matter in issue between parties had passed into judgment, the rights of the party defending, and relying on, that judgment were not to be taken away without proper cause, clearly established by law.

113 The second contextual consideration to which the appellant pointed was statutory. The power afforded to the appellate court in s 569(1) of the Crimes Act was to be exercised in a way harmonious with the other powers afforded by that Act, including those of altering a sentence ("whether more or less severe")

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94 *Whittaker v The King* (1928) 41 CLR 230 at 248; cf *Ryan v The Queen* (1982) 149 CLR 1 at 5 per Stephen J.

when the offender[95] or the Director of Public Prosecutions[96] places an issue in that regard before the Court. Where no party entitled to do so has presented that issue for determination, the powers of an appellate court will not needlessly be pushed into an area where the parties could have secured the Court's intervention, but have refrained from doing so[97]. In *Neal v The Queen*[98], a decision of this Court given soon after *Ryan*, the view was expressed that, now that the prosecution has a statutory right to appeal against sentence, the provisions empowering the appellate court to take its own initiative "may … be regarded as redundant, except perhaps in very special cases, and ... in practice those provisions are little used". It was remarked, for example, that[99]:

> "It is incongruous that where the prosecution does not consider a sentence inadequate the Court should take it upon itself to increase the sentence, thus assuming the role of adversary."

114 Against this background of principle and context, the appellant suggested that the power conferred by s 569(1) of the Crimes Act should be given a strict and limited operation, in harmony with the approach favoured in *Ryan* and *Neal*. The textual foundation for limiting the operation of the sub-section in a case such as the present was, it was submitted, to be found in the terms of s 569(1) in which the power was conferred: "or pass such sentence in *substitution* therefor as it thinks proper and as may be *warranted* in law" (emphasis added). The appellant urged that the act of "substitution" limited the substituted sentence imposed to one which could truly be said to be "in substitution". This required a restricted view of the power of resentencing. If it were otherwise, it would impose on an appellate court a most burdensome obligation of involving itself afresh in all of the detail of fixing a proper sentence, for it would have no power (as it does in the case of an appeal against sentence) to remit the resentencing to the court of trial[100]. The fact that this facility was not available to the appellate court under s 569(1) gave a further contextual clue, so it was argued, that the power was a limited one. It would only arise where there was a need to refix the non-parole period required by different residual aggregate sentences.

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95 Crimes Act, s 568(4).

96 Crimes Act, s 567A(4).

97 This is the point reserved by the Privy Council in *R v Edirimanasingham* [1961] AC 454 at 462.

98 (1982) 149 CLR 305 at 308 per Gibbs CJ.

99 (1982) 149 CLR 305 at 311 per Murphy J.

100 Crimes Act, s 568(5).

115 The appellant himself needed to invoke s 569(1) of the Crimes Act in order to secure a shorter non-parole period for the aggregate sentences on the convictions which were affirmed, for there was no equivalent power afforded by the Sentencing Act[101]. But the appellant suggested that the non-parole period, being "an integrated whole [that] was not separately imposed"[102], was in its nature analogous to a general sentence. He argued that other cases where s 569(1) of the Crimes Act would apply would include where a judge had passed no sentence in respect of particular counts. The requirement of a warrant in law signalled, so it was suggested, the limited function given to the appellate court. It restrained any temptation to engage in a total resentencing of the appellant according to the appellate court's own intuition. In these circumstances, the appellant submitted that the present was a case either where there was no power to resentence or where it was not proper for the exercise of the power leading to an increase of the sentences on convictions which were "unconnected with the case before it"[103].

116 In answer to these submissions, the respondent relied on the language of the sub-section, the series of English cases in which the sub-section had been widely construed and the absence of any attempt to cut down or restrict the power as it exists in the Crimes Act, despite numerous legislative opportunities to do so. The respondent argued that three textual considerations in the sub-section supported the construction which the Court of Appeal had adopted. The first was the choice which the Court had to make between either affirming the sentence passed or passing a substitute sentence. The prospect of having to "affirm" a sentence which was considered inappropriate, and either excessive or inadequate in the circumstances that had transpired, suggested that the alternative power of "substitution" was a real one, intended to be used where affirming would be inappropriate. A court would not be obliged to "affirm" a seriously erroneous sentence.

117 Secondly, the "sentence in substitution" referred to was the sentence in substitution for the one "passed on the appellant at the trial". This was to be read in the context of a case in which the sub-section is only attracted when the appellant has been "properly convicted on some other count or part of the indictment" but not on another "count" or "part of the indictment".

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101 Sentencing Act, ss 11, 13, 14.

102 *R v Gibb* [1997] 2 VR 576 at 581-582.

103 *Ryan v The Queen* (1982) 149 CLR 1 at 25 per Brennan J.

118 Thirdly, the prosecution argued that where, as in this case, the power and authority was imposed on a court, what was involved in the use of the verb "may" was not a discretion at large[104]. Rather, it was a statutory power or authority which the repository would be required to exercise in a lawful manner having regard to the purposes for which it has been conferred.

Conclusion: the power to substitute a sentence existed

119 In my view, the submissions of the respondent were correct on this point. One can accept to the full both the statutory and common law context in which the language of s 569(1) of the Crimes Act is to be read. One can accept that, especially where a retrial on certain counts has been ordered, the authority conferred by the sub-section will be exercised cautiously. Any substitute sentence warranted in law will take into account the possible significance of a retrial order. But the language of the sub-section and the need for it to operate in a wide range of circumstances argue against the gloss which the appellant sought to read into its terms. In some cases, indeed, not limited to the substitution of a different minimum term of imprisonment, the authority provided by the sub-section is beneficial and protective of the rights of an appellant[105]. Because the authority is conferred on a court, indeed on an appellate court of a superior court of record, it may be assumed that the authority will be exercised prudently. The record of its exercise, and the rarity of challenges to it, suggest that this is not a misplaced presumption. In the event of error in the exercise of the power, it is subject to the possibility of appeal to this Court.

120 Inherent in the logic of the appellant's argument on this point was the contention that the *only* circumstances where substitution for the overall sentence would be proper would be a case where the offender or the prosecution or both had brought an appeal against sentence. In the case of the prosecution, this is difficult to reconcile with the statutory duty to bring such appeals only where the Director of Public Prosecutions is convinced that it is necessary to do so "in the public interest"[106]. Appeals challenge orders, not, as such, the reasoning on which those orders rest[107]. It would be contrary to the public interest effectively to impose on the Director of Public Prosecutions obligations to bring appeals against sentence, even defensively, where there is no complaint about the

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104 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88, 97.

105 eg *Hervey and Goodwin* (1939) 27 Cr App R 146.

106 Crimes Act, s 567A(1).

107 See *Pearce v The Queen* (1998) 194 CLR 610 at 655 [134].

aggregate punishment imposed, simply to enliven the appellate power to substitute a different sentence.

121 I do not agree that the terms of s 569(1) of the Crimes Act contemplate that the appellate court will, where substitution of sentence is envisaged, be involved in a major task of resentencing. The nature and scope of the function is indicated by the court to which it is assigned, the way in which it arises and the character of the new sentence as a "substitute" for that passed on the appellant at trial. In appropriate circumstances, fresh materials can and should be received relating to any significant change that has occurred since the original sentence was imposed[108]. But, ordinarily, the appellate court would simply act on the materials relevant to sentence that were adduced at the trial. There is nothing in the language of the sub-section limiting it to the necessary refixing of a non-parole period.

122 There is an obvious inconsistency between the appellant's desire to read a limitation into the power afforded by the sub-section but to preserve for himself the benefits, under it, of the substitution of a new minimum term of imprisonment. At least in a case such as the present where it is possible for the appellate court to reach a conclusion, within the issues before it, as to those counts or parts of a presentment on which "the appellant has been properly convicted", its power and authority to affirm the sentence passed on the appellant at trial or pass another sentence in substitution, is that stated in s 569(1) of the Crimes Act. It is a large power. The first challenge of the appellant to the power of the Court of Appeal to act as it did therefore fails.

Procedural fairness in appellate substitution of a sentence

123 Without opposition, at the hearing before this Court, the appellant was permitted to add a ground of appeal complaining that the manner in which the Court of Appeal effectively increased his sentence constituted a departure from the requirements of procedural fairness. It was not contested that, in exercising the power conferred on it by s 569(1) of the Crimes Act, the Court of Appeal was obliged to accord to the appellant the basic requirements of fair procedure. What those requirements involve depends on the circumstances of the case[109].

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108 cf *Van de Worp v The Queen* [2000] WASCA 154 at [145] per Sheller AJ. There may be statutory or other limits on the use of such evidence to increase a sentence: see eg *Criminal Appeal Act* 1912 (NSW), s 12(1); *R v Cartwright* (1989) 17 NSWLR 243 at 257; *R v Henry* (1999) 46 NSWLR 346 at 366 [84].

109 *Kioa v West* (1985) 159 CLR 550 at 615; *J v Lieschke* (1987) 162 CLR 447; *Annetts v McCann* (1990) 170 CLR 596.

124 Where a power is exercised which derives, as s 569(1) of the Crimes Act does, from statute, the scope of the requirements of procedural fairness depends on the terms and presumed operation of the statute[110]. The duty to accord procedural fairness is concerned not with form, but with substance[111]. Central to the requirement in a context such as the present is the need to afford a person involved an effective opportunity to be heard before any substituted sentence is passed, and particularly where such sentence might carry the possibility of increasing that person's punishment.

125 For a long time, appellate courts in Australia have followed a practice of informing an appellant when the court has reached a tentative conclusion that, as a result of invoking the appellate process, the appellant stands in risk of a punishment more severe than that previously imposed[112]. The purpose of providing such a notice includes that of affording the appellant, in an appropriate case, the opportunity to consider withdrawing or seeking leave to withdraw the appeal or part of the appeal so as to avoid an outcome that could not have been contemplated in initiating the appeal. Additionally, such a notice gives the appellant the opportunity, by evidence and argument, to persuade the appellate court to change its tentative opinion. Support for viewing such a notice as included in the fair conduct of proceedings before an appellate court in Australia can be found in decisions of this Court[113].

126 Although the principle just stated applies more generally to appellate proceedings, it has special significance in a criminal appeal in which a tentative view is formed by the appellate court that, in its disposition of the appeal, a more severe punishment of the appellant might be called for. Because imprisonment is the most severe sanction known to the criminal law in Australia, the provision of notice will ordinarily apply with particular force where the appellate court is contemplating the substitution of a sentence of imprisonment for a non-custodial sentence[114] or an increase in custodial punishment[115]. In this regard, the content

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110 *Kioa v West* (1985) 159 CLR 550 at 633.

111 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 398.

112 *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 294-295; *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 400; *Brand v Parson* [1994] 1 VR 252 at 257.

113 See eg *Pantorno v The Queen* (1989) 166 CLR 466 at 473; cf *Neal v The Queen* (1982) 149 CLR 305 at 307 per Gibbs CJ.

114 *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 295-296.

115 *Brand v Parson* [1994] 1 VR 252 at 257.

of the requirement of procedural fairness is concerned with the effect on the punishment if it were altered[116]. Because the requirements of procedural fairness depend upon all the circumstances, the obligation has not settled into a rigid rule of law[117]. It does not oblige a court to spell out all of the detriments that may conceivably flow to an appellant[118]. At least where the appellant is legally represented and it is not apparent that such a representative has failed to appreciate a warning once given[119], it is not essential to express in fine detail what may follow if the appeal proceeds to finality. The content of the obligation of procedural fairness in such a case depends on the circumstances and the procedure by which the complaint concerning the want of procedural fairness is raised[120].

127 Nevertheless, the good practice which has long been followed in sentencing appeals in most courts of Australia, of alerting an appellant once the appellate court has formed a tentative view that the appeal might result in increased punishment, has now been endorsed as a proper standard by appellate decisions in several Australian jurisdictions. The principle has been accepted in New South Wales[121]. It has been followed in Victoria[122] and South Australia[123]. It can be taken as an accepted obligation imposed by the requirements of procedural fairness that due notice will be given to an appellant that an appellate court is contemplating a substantive increase in the punishment imposed upon him or her.

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116 *Fagioli v Ure* (1996) 84 A Crim R 504 at 507.

117 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393.

118 *Roos v Director of Public Prosecutions* (1994) 34 NSWLR 254.

119 *Muggia v District Court of New South Wales* (1995) 79 A Crim R 419.

120 eg by constitutional or prerogative-type relief which is exceptional and usually discretionary in nature: *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393.

121 *Reischauer v Knoblanche* (1987) 10 NSWLR 40 at 45-46; *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282; *Barendse v Comptroller-General of Customs* (1996) 93 A Crim R 210 at 221; *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 398; *Powick v Commissioner of Corrective Services* (1996) 87 A Crim R 565 at 568.

122 *Brand v Parson* [1994] 1 VR 252 at 257.

123 *Heal v Police* [1999] SASC 374; (1999) 204 LSJS 477.

128 Naturally, care must be observed in affording such a warning so that it is not, and does not appear to be, an indication of pre-judgment of the merits of the appeal signalled at a time before the appellant has had the opportunity of demonstrating these. Care should also be taken to avoid misinterpretation of the warning as a threat to dissuade an appellant from proceeding with a justifiable appeal against conviction. But although there are sometimes risks that a warning may be misinterpreted, a more serious potential injustice is done if the appellate court contemplates the imposition of a more severe punishment and does not draw this tentative view to the notice of the appellant for the two purposes that I have mentioned. Sometimes, in such circumstances, unpalatable decisions have to be made by an appellant. They may not be made at all if the appellant is not given a fair opportunity to do so.

129 In the present case, what happened is to be gathered from the statement of agreed facts, as elaborated without objection before this Court. In what occurred, I see no departure by the Court of Appeal from the requirements of procedural fairness, whether as stated in the authorities which I have mentioned or otherwise. In the context of the earlier information which led to the withdrawal of the appellant's appeal against his sentence, the later questions addressed to the parties by the Court of Appeal were perfectly proper. They were clear enough. This is not a case where the appellate court failed to signal the way in which its consideration of the issues was developing. On the contrary, exceptionally, the Court relisted the appeal for further oral submissions on the precise issue concerning the application of s 569(1) of the Crimes Act on the hypothesis which eventually provided the foundation for the application of the sub-section. The appellant was at that stage represented by senior counsel. It is said that the Court of Appeal would not (the matter then standing for judgment) have given leave to the appellant to withdraw the appeal. But this cannot be known as no application to that end was made.

130 As recorded, the Director of Public Prosecutions did not himself urge upon the Court of Appeal an effective increase in the appellant's punishment. He contented himself with simply drawing to the Court's notice the scope of its powers. He did so in terms which I have held to have been accurate. Once the parties were summoned back to the Court it is properly conceded for the appellant that an appreciation of the risk of proceeding with the appeal was inescapable. I therefore see no defect in the procedures observed by the Court of Appeal. It follows that the second attack on the substituted sentence which followed must be rejected.

The exercise of the power: the "ceiling" principle

131 I reach the third criticism of the course adopted by the Court of Appeal. The appellant contended that, in the circumstances, the Court of Appeal had no

power to resentence him as it did[124]. In this Court, that contention was not advanced in terms of a miscarriage of the discretion reposed in the Court of Appeal. Instead, it was submitted that the power or authority of that Court to act under s 569(1) of the Crimes Act, once found, had to be exercised by reference to relevant considerations. It was submitted that the Court of Appeal had failed to take into account one of these considerations or to explain this omission satisfactorily and in specific terms. Therefore, the exercise of its power and authority miscarried. If these premises could be established, it would either fall to this Court to re-exercise the power lawfully or to remit the matter to be redetermined by the Court of Appeal, taking into account the applicable considerations and giving explicit reasons for its decision on the point.

132 It is appropriate to start analysis of the principle which the appellant invoked by a reminder that the decisions of English and other courts on the point here in issue will be of little or no assistance because of the absence, until recently, of a power in an appellate court in that country to order the retrial of an accused person on a count or counts in respect of which a conviction has been quashed on appeal. Not only was this facility unavailable in England until 1964[125], but when, at last, it was provided, it was subject to a statutory control limiting a second sentence to one "not being a sentence of greater severity than that passed on the original conviction"[126]. There is no such statutory "ceiling" imposed on the exercise by the Court of Appeal of Victoria of the power afforded by s 569(1) of the Crimes Act. So the statutory context is different. The appellant, however, urged that, as with other fundamental principles lately expressed in statutory form (such as the imposition of a custodial sentence as a last resort)[127], the common law will fill the gaps in the legislation. The common law would require the Court of Appeal to exercise its power, if not limited to the "ceiling" as a matter of power, at least as obliged to consider the undesirability of exceeding that "ceiling", absent very strong reasons to the contrary. Alternatively, it would require that Court to explain any such omission with clear reasons.

133 The beginning of Australian authority relevant to the point may be traced to *R v Garrett* in the South Australian Court of Criminal Appeal[128]. That, like

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124 *R v R H McL* [1999] 1 VR 746 at 774.

125 *Criminal Appeal Act* 1964 (UK), s 1.

126 *Criminal Appeal Act* 1964 (UK), s 3(1).

127 See eg *Crimes Act* 1914 (Cth), s 17A.

128 (1978) 18 SASR 308. *Garrett* is discussed in Rinaldi, "Garrett", (1979) 3 *Criminal Law Journal* 121.

several of the cases which followed, involved the resentence of an offender found guilty and convicted at a second trial, an earlier conviction and sentence having been quashed following a first appeal. In *Garrett*, Hogarth ACJ and White AJ considered the proper approach to resentencing that should be observed by the judge at the second trial, following a second conviction of the appellant. According to their Honours[129], the second judge:

> "must approach the case as one coming before him *de novo*. It would be wrong for him to regard himself as in any way bound by what had occurred at the previous trial, or limited in the exercise of what after all is a discretionary power, the determination of what is a proper sentence".

Whilst conceding that the second judge might, to some extent, be assisted by the view taken by the first, their Honours concluded that "in the end" it was the second judge, and that judge alone, who was "responsible for deciding what is a proper sentence"[130].

134 This approach was accepted by the Court of Criminal Appeal of Victoria in *R v Emery*[131]. In that case, Young CJ (with whom Menhennitt and Jenkinson JJ agreed) said[132]:

> "It is notorious that one judge will take a different view of an offence and an offender from that taken by another judge. The mere fact that on a previous occasion, when sentencing for this offence, another judge passed a sentence which was less than the sentence which the applicant is now obliged to serve is no reason for this Court interfering in the sentence so passed."

135 There then occurred the decision of the Court of Criminal Appeal of New South Wales which, on this point, became the nub of the appellant's third argument. In *Gilmore*[133], an approach to the resentencing of an offender whose first conviction and sentence had been quashed was expressed by Street CJ (with the concurrence of Lusher J). In that case, at the first trial, the appellant had been

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129 (1978) 18 SASR 308 at 313.

130 (1978) 18 SASR 308 at 313.

131 Unreported, Court of Criminal Appeal of Victoria, 11 April 1979.

132 Unreported, Court of Criminal Appeal of Victoria, 11 April 1979 at 7 cited in *R v Chen* [1993] 2 VR 139 at 158.

133 (1979) 1 A Crim R 416.

sentenced on conviction to approximately eight years imprisonment[134]. The conviction was quashed and he underwent a new trial. At the latter trial, he was again found guilty and convicted. The presiding judge fixed a sentence of fourteen years imprisonment with a non-parole period of six and a half years[135]. The Court held that the head sentence passed at the first trial should ordinarily be regarded as a ceiling which should not be exceeded by the second trial judge. Street CJ explained why this was so, in terms which I would accept[136]:

> "The policy consideration underlying the specification of the upper limit on the sentence is twofold. In the first place, a person whose conviction is tainted in that the first trial was defective to an extent not capable of being saved by the proviso, should not, in fairness, be required to run any risk of suffering a heavier sentence on a new trial as a consequence of exposing on appeal the defective nature of the first trial. It is in the public interest in ensuring orderly and proper administration of the criminal law that defects in trials should be challenged and laid bare on appeal. As a corollary to this, it is wrong that any person should suffer ill-founded criminal judgment in consequence of a defective trial, and feel constrained to avoid exposing that defect lest on a new trial a heavier sentence be passed.
>
> In the second place, the passing of a heavier sentence on a new trial could be seen by the convicted person, as well, perhaps, by others in the community at large, as possibly importing some element of retribution by the machinery of criminal justice in consequence of the conviction on the first trial having been successfully overthrown. Any such impression would, of course, be groundless. But, at the same time, it is highly desirable to avoid any possible basis for permitting the operation of the system to be exposed to criticism of such a nature."

136 In his dissenting opinion in *Gilmore*, Begg J cited *Garrett* and *Emery*. He said he was "unable to find" the "principle of sentencing" referred to by the majority[137]. However, despite this dissent, the approach expressed by the majority in *Gilmore* is, I believe, a correct one. Moreover, it has become refined and generally accepted in other Australian jurisdictions. Absolutes in respect of sentencing or resentencing are rarely observed. Thus, it is trite to remember that, in a successful prosecution appeal against sentence, the appellate court does not

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134 (1979) 1 A Crim R 416 at 418.

135 (1979) 1 A Crim R 416 at 416-417.

136 (1979) 1 A Crim R 416 at 419-420.

137 (1979) 1 A Crim R 416 at 423.

regard itself as entitled to impose on the unsuccessful respondent a fresh sentence which consideration of the case might have justified at first instance. In such cases, it is common for moderation to be observed. The judges engaged in resentencing are controlled, to some extent, by any leniency previously afforded to the offender[138]. This approach is regularly adopted in sentencing appeals. In my view it is a correct one.

137 Following *Gilmore*, a similar issue arose in the Court of Criminal Appeal of Western Australia in *Williams v The Queen (No 2)*[139]. In that case, Burt CJ[140] accepted as an applicable principle an earlier observation of Jackson CJ in that Court[141] that "unless there is some strong ground there should not be a disparity passed between the sentences imposed upon persons convicted on the second occasion after a retrial compared with those that were imposed upon them on the first occasion". Burt CJ cited with approval the approach of Street CJ in *Gilmore*[142]. The other participating judges also endorsed the principles in *Gilmore*[143]. Nevertheless, the case before the Court was regarded as so extraordinary that it demanded the conclusion that the original sentence was inadequate and would have been set aside had it been the subject of an appeal. Accordingly, in that case, the new and higher sentence, as imposed at the second trial, was affirmed. The appeal against it was dismissed.

138 In *Bedford*[144], a few years later, Street CJ in the New South Wales Court of Criminal Appeal returned to what he had said in *Gilmore*. He made it plain that the decision left a measure of flexibility to the judicial officer engaged in sentencing an offender for the second time following the earlier quashing of the first conviction and sentence[145]:

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138 cf *R v Peterson* [1984] WAR 329 at 330-331; *R v Clarke* [1996] 2 VR 520 at 524.

139 [1982] WAR 281.

140 [1982] WAR 281 at 283.

141 In *Leary and Compt v The Queen* unreported, Court of Criminal Appeal of Western Australia, 18 August 1975 at 3.

142 [1982] WAR 281 at 283-284.

143 [1982] WAR 281 at 284 per Wickham J, 288 per Kennedy J.

144 (1986) 28 A Crim R 311.

145 (1986) 28 A Crim R 311 at 316-317 per Street CJ (Slattery CJ at CL and Brownie J agreeing).

> "Where the judge at the new trial considers that the circumstances of the case do call for a longer sentence he will not be absolutely fettered by the approach prima facie to be adopted. He is both at liberty, and indeed obliged, to give effect to his own assessment. It could be expected, however, that, if he did take the view that a longer sentence were called for than that passed at the first trial, then there would be a specific indication of the reasons leading him to this view."

139 In *R v Chen*[146], the Victorian Court of Criminal Appeal reverted to the problem. That Court saw *Bedford* as amounting to a drawing "back somewhat"[147] from the view expressed in *Gilmore*. However, their Honours expressly agreed with the way in which the Western Australian court had used the *Gilmore* reasoning in *Williams*[148]. They also agreed with the view stated in *Bedford* that, if a longer sentence were called for, the reasons given should specifically explain why a sentence longer than that passed at the first trial was required.

140 The rule of restraint which the foregoing cases demonstrate appears still to be the approach adopted by the Victorian courts[149]. It is not a rigid rule. But its foundation lies in the elementary attributes of a manifestly just system of criminal appeals that Street CJ explained in *Gilmore*. In a further case, *R v Petersen*[150], the Court of Appeal of Queensland, after analysis of the foregoing authorities, expressed the approach which emerges from twenty-five years of consideration of this issue in criminal appeals in Australia, in terms which I would adopt:

> "[w]here an offender is to be re-sentenced following a successful appeal and re-trial, the second sentencing Judge should start with the proposition that the offender ought, in general, not receive a harsher sentence than that imposed after the first trial. If minded to depart from that approach, he or she should consider the powerful policy considerations outlined above. Only if the second sentencing judge concludes that the earlier sentence was outside the appropriate range, or the facts as they appear at the time of the re-sentence are significantly different from those upon which the first sentence was based, should he or she impose a heavier sentence."

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146 [1993] 2 VR 139.

147 [1993] 2 VR 139 at 159.

148 [1993] 2 VR 139 at 160.

149 See eg *R v Bolton and Baker* [1998] 1 VR 692.

150 [1999] 2 Qd R 85 at 87.

141 What is the fundamental reason for this approach? It is to be found in the law's response to a form of double jeopardy. In *Pearce v The Queen*[151], I explained the notion in these terms:

> "[T]he principle that a person should not twice be placed in jeopardy for the same matter is a cardinal rule lying '[a]t the foundation of criminal law'. The rule has been explained as arising from a basic repugnance against the exercise of the state's power to put an accused person in repeated peril of criminal punishment.
>
> Legal relief against double jeopardy was known to the laws of ancient Greece and Rome. It was also known to ecclesiastical law. …
>
> In the law of England, the origins of the rule are sometimes traced to the conflict in the late Twelfth Century between the civil and ecclesiastical powers represented, respectively, by King Henry II and Archbishop Thomas à Becket."

Even God, according to scripture, observed a restriction on the second exercise of His powers[152].

142 Strictly speaking, the resentencing of an offender on a second occasion, whether at a retrial or in an appellate court, is not double jeopardy in its pure form, for the first jeopardy has been held to have miscarried in whole or part. But as a matter of practicality, it involves the subjection of the accused to a second legal proceeding, with a fresh endorsement of the conviction (itself a punishment) and a second imposition of punishment as a result. It is therefore appropriate, for the reasons which have been collected in the Australian cases, to approach the task of sentencing a person convicted for a second time (or resentencing a person because of disparities revealed by an appellate outcome) in the way explained in *Petersen*.

143 I realise that the cases in which the "ceiling" principle has hitherto been stated have involved appellate review of a second sentence following an earlier appeal which quashed the first conviction and sentence and ordered a retrial at which the offender was again convicted and sentenced. But in my view the principle is exactly the same where resentencing occurs in the appellate court because that court has upheld, in part, an appeal against conviction and disparities or anomalies in the resulting sentence must be corrected by that court. It is the same because what is involved is resentencing. That resentencing cannot

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151 (1998) 194 CLR 610 at 630-631 [73]-[75] (footnotes omitted).

152 See *Pearce v The Queen* (1998) 194 CLR 610 at 631 [74] citing I Nahum 9, 12 (King James Version); cf *Bartkus v Illinois* 359 US 121 at 152 (1959) per Black J.

erase completely the fact of the first sentence. It cannot eliminate entirely the species of double jeopardy that is involved. These considerations impose, at least as a starting point, a presumption of restraint and an obligation to explain any departure from such restraint. The same policy reasons lie behind these considerations as were identified in *Gilmore*. The appellant, entitled to succeed in an appeal against conviction, should not be restrained from appealing by a fear that the outcome will be, effectively, a heavier sentence. The appellant and the community should not be left with the impression, however unjustified, that the "machinery of criminal justice" has extracted retribution against an appellant who, by hypothesis, was justified in appealing.

144 There is an air of unreality in suggesting that the present appellant must await the outcome of what happens. He has been resentenced. He is entitled to complain if correct principles were not applied. Appellate courts do not surrender their supervision of such sentencing orders to the decisions of the Executive or the chance outcome of later events, including the timing of any later prosecution. The approach which I favour is not, in my view, inconsistent with the presumption of innocence[153]. It is true that the appellant has the benefit of this in the retrial. But he has the burden of an order for a new trial on several counts and that on top of what is effectively the same custodial sentence as he was serving when he "succeeded" in his appeal.

Conclusion: the exercise of the power of substitution miscarried

145 It is true that, when the Court of Appeal in the present case proceeded to exercise its powers under s 569(1) of the Crimes Act, it referred to considerations of totality and to proportionality and the controlling force which double jeopardy provides[154]. However, it did not refer to the starting point which the essential principle in *Gilmore*, and the cases since, mandate. Nor is there any reference in the reasoning of the Court of Appeal to the specific consideration which imposes a constraint on the exercise of the power to substitute a new sentence under s 569(1) of the Crimes Act and its equivalents. That consideration arises where the court has ordered the prisoner to be retried on some of the counts upon which formerly he or she was convicted. The constraint derives directly from the fact that the appellate court does not, and cannot, know: (1) whether the prosecution authorities will direct such a retrial; (2) if they do, when they will do so and when such trial will be had; (3) whether, if they do, the appellant will be convicted; and (4) what, if any, additional sentence the judge of the second trial will impose.

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153 Reasons of McHugh, Gummow and Hayne JJ at [68].

154 *R v R H McL* [1999] 1 VR 746 at 779.

146 In the present case, these were all live issues. By reason of the designation of the appellant as a "serious sexual offender", and by virtue of the statutory provisions that would govern a sentencing judge on a second trial, and the discretionary powers that such a judge would enjoy were such a trial held and the appellant convicted, the consideration of additional punishment could neither be put out of mind nor, in my view, ignored. Proper sentencing practice required that any effective increase in the appellant's sentence, in the exercise of the powers under s 569(1) of the Crimes Act, should be accompanied by specific reasons explaining why that exceptional course was justified. In the present case, no such specific reasons were given.

147 In so far as the Court of Appeal refers in its reasons to the constraint which the general principle of totality imposed on Judge Harbison, that consideration remains. If the sentence which her Honour imposed was seen by her (as she said) to be the maximum proper with respect to all of the appellant's original convictions and what was required to avoid a "crushing" sentence on the appellant, it is hard to see how the same considerations would not oblige at least some reduction of the total sentence when four of those convictions were quashed. Especially is this so because the appellant was also ordered to face a retrial in which, on conviction, his effective custodial sentence would probably have to be increased.

148 Because these considerations were not addressed in the reasons of the Court of Appeal and because they are important to the proper exercise of the power to impose a substituted sentence afforded by s 569(1) of the Crimes Act, it is my view that the resentencing of the appellant under that provision miscarried. The appeal must therefore, to that extent, succeed on the third argument.

149 It is not appropriate for this Court to re-exercise the powers of the Court of Appeal although that course has sometimes, exceptionally, been adopted[155]. The proper course is that of remitting the proceedings to the Court of Appeal so that it might approach the discharge of its power and authority under s 569(1) of the Crimes Act in a way that not only conforms to the practice of Australian appellate courts in like matters but does so manifestly, demonstrating by its reasons that it has had the proper approach clearly in mind.

Orders

150 The appeal should be allowed. Orders 5 and 6 of the orders of the Court of Appeal of Victoria should be set aside. The proceedings should be returned to the Court of Appeal so that that Court might re-exercise its powers under s 569(1) of the Crimes Act in accordance with the reasons of this Court.

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155 eg *Neal v The Queen* (1982) 149 CLR 305 at 309-310 per Gibbs CJ.