HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

CHRISTIN ROBERT DINSDALE APPELLANT

AND

THE QUEEN RESPONDENT

Dinsdale v The Queen [2000] HCA 54
Date of Order: 7 September 2000
Date of Publication of Reasons: 12 October 2000
P42/2000

ORDER

1. *Appeal allowed.*

2. *Orders of the Court of Criminal Appeal of Western Australia made on 2 February 1999 be set aside.*

3. *In place of those orders, order that the appeal to that Court is dismissed.*

On appeal from the Supreme Court of Western Australia

Representation:

A G Braddock for the appellant (instructed by Young & Young)

R E Cock QC with J A Girdham for the respondent (instructed by Director of Public Prosecutions (Western Australia))

CATCHWORDS

Dinsdale v The Queen

Criminal law – Sentencing – Crown appeals against sentence – Circumstances in which Court of Criminal Appeal should allow appeal against sentence and substitute its own sentence – Necessity to find and identify error before allowing appeal – Whether failure to do so in reasons of Court of Criminal Appeal.

Criminal law – Sentencing – Crown appeals against sentence – Circumstances in which judicial discretion to suspend sentence should be exercised – Whether power to suspend sentence is confined by reference wholly, mainly or specially to the effect on rehabilitation of the offender.

Criminal Code (WA), s 688.
Sentencing Act 1995 (WA), ss 39(2), 76.

1 GLEESON CJ AND HAYNE J. The appellant appeals from orders of the Court of Criminal Appeal of Western Australia (Kennedy, Pidgeon and Murray JJ) allowing a prosecution appeal against the sentence imposed on him in the District Court of Western Australia. The appellant had been indicted in the District Court on one count of sexual penetration of a child under the age of 13 years and one count of indecently dealing with that child. Both offences were alleged to have occurred on the same date and at the same place. The appellant pleaded not guilty but was convicted on both counts. The trial judge (Judge Viol) sentenced him to concurrent terms of suspended imprisonment (each term being of 18 months, suspended for 18 months).

2 The Court of Criminal Appeal allowed the prosecution appeal, set aside the sentence imposed by the trial judge on the offence of sexual penetration and in lieu, ordered that the appellant be sentenced to 30 months' imprisonment. The order for suspension of the term of imprisonment was set aside.

3 It is desirable to restate some propositions which are fundamental to criminal appeals but which may sometimes be obscured by the development of shorthand descriptions of what is done in particular cases. It is of the first importance to identify the jurisdiction which the Court of Criminal Appeal exercises, the power the Court is given, and the circumstances in which those powers may be exercised. In this particular case, the Court of Criminal Appeal of Western Australia was exercising jurisdiction given by s 687(1) of the *Criminal Code* (WA) to hear and determine a prosecution appeal against sentence brought pursuant to s 688(2). That latter sub-section provides:

> "An appeal may be made to the Court of Criminal Appeal on the part of the prosecution –
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> ...
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> (d) against any punishment imposed or order made in respect of a person convicted on indictment ..."

The powers of the Court of Criminal Appeal on such an appeal are prescribed by s 689(3), which provides:

> "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict or which may lawfully be passed for the offence of which the appellant or an accused person stands convicted (whether more or less severe) in substitution therefor as they think ought to have been passed and in any other case shall dismiss the appeal."

The task of the Court of Criminal Appeal was to determine whether there was error made in sentencing the accused, error being understood, in this context, as it was explained in *House v The King*[1]:

> "It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

4 Those principles apply both to Crown appeals based upon alleged inadequacy and appeals by offenders based upon alleged excessiveness.

5 The prosecution's notice of appeal to the Court of Criminal Appeal advanced four grounds:

> "1. The learned Judge erred in failing to pay proper regard to the principles of general deterrence and the need for condign punishment to protect children in the community.
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> 2. The learned Judge erred by making an order which failed to adequately reflect the seriousness of the offences and the Respondent's breach of a position of trust in relation to the complainant.
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> 3. The learned Judge erred in placing undue emphasis on factors personal to the Respondent.
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> 4. In the circumstances the sentence of 18 months suspended was so inadequate as to manifest error in the sentencing discretion."

Properly understood, the first three grounds seem to have been little more than particulars of the last. Thus, as was accepted in argument in this Court, the appeal to the Court of Criminal Appeal was based upon an allegation of manifest

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1 (1936) 55 CLR 499 at 505.

inadequacy rather than specific error. That is, the error assigned was of the third kind mentioned in *House v The King*. Only if this error was demonstrated was it open to the Court of Criminal Appeal to "pass such other sentence warranted in law ... in substitution"[2] for the sentence passed at trial.

6 Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion. A Court of Criminal Appeal is not obliged to employ any particular verbal formula so long as the substance of its conclusions and its reasons is made plain. The degree of elaboration that is appropriate or possible will vary from case to case.

7 In the present case, the reasons of the Court of Criminal Appeal contain no explicit statement of a conclusion that the sentence was manifestly inadequate. The respondent submitted that the Court's reasons must nevertheless be understood as revealing that the Court reached that conclusion.

8 The Court of Criminal Appeal acknowledged at the start of the reasons of Murray J (with which the other members of the Court agreed) that it must search for error of principle which caused the discretion of the sentencing judge to miscarry. The question whether the Court of Criminal Appeal is to be understood to have found such an error of principle must, no doubt, be answered by considering the reasons which the Court gave. It is not necessarily to be answered in the negative, however, simply because the reasons contain no explicit statement to that effect.

9 In this case, four facts must be borne in mind. First, the only issue agitated at the hearing of the appeal to the Court of Criminal Appeal was whether the sentence imposed by the trial judge was manifestly inadequate. Secondly, the appeal was allowed. Thirdly, the Court of Criminal Appeal resentenced the appellant to significantly more severe punishment than the trial judge had imposed. Lastly, the ground of appeal which was agitated before the Court of Criminal Appeal (manifest inadequacy) was a ground which did not require, or

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2 *Criminal Code* (WA), s 689(3).

even admit of, expansive elaboration of a process of reasoning which leads to its acceptance or rejection. Given these facts, we consider that the Court of Criminal Appeal must be understood to have concluded that the sentence imposed by the trial judge was manifestly inadequate. There is no other explanation consistent with the course of proceedings below, the Court's reasons and its orders[3].

10 Nevertheless, we consider that the reasons given by the Court of Criminal Appeal in resentencing the appellant reveal an error of principle which must necessarily have affected the conclusion which the Court reached about the inadequacy of the sentence passed at trial.

11 Section 39(2) of the *Sentencing Act* 1995 (WA) ("the Act") provides that a court sentencing an offender may impose no sentence and release an offender or it may pass any of six forms of sentence: conditional release order[4]; fine[5]; community based order[6]; intensive supervision order[7]; suspended imprisonment[8]; or imprisonment[9]. Section 39(3) provides that:

> "A court must not use a sentencing option in subsection (2) unless satisfied, having regard to Division 1 of Part 2, that it is not appropriate to use any of the options listed before that option."

Thus a court may not impose a term of imprisonment unless satisfied that it is not appropriate to use any of the other sentencing options given in the Act.

12 In considering the present matter, the Court of Criminal Appeal dealt first with the length of the term of suspended imprisonment which the trial judge had

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3 *CDJ v VAJ* (1998) 197 CLR 172 at 236 [186] per Kirby J. See also *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667 per Gibbs CJ; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259 per Kirby P.

4 *Sentencing Act* 1995 (WA), Pt 7.

5 Pt 8.

6 Pt 9.

7 Pt 10.

8 Pt 11.

9 Pt 13.

fixed in relation to the offence of digital penetration and only then turned to consider whether an order for suspension of imprisonment would be appropriate. In that regard, the Court said that:

> "The question then is whether the case is of a type which, notwithstanding [the] conclusion [that imprisonment is required], makes it appropriate in mercy, to aid a process of rehabilitation, or otherwise for good and sufficient reason, to order the suspension of service of the term."

The Court concluded that the offences committed by the appellant "were rightly found to be of sufficient seriousness to require the punishment of imprisonment to be imposed", but concluded that because "there was no rehabilitation process going on which merited the support of a suspended sentence" there was no reason shown which "dictated a merciful disposition of the case".

13 This inverts the order in which the statute requires a sentencing judge to consider matters. The sentencing judge must first decide the kind of punishment to be imposed. In this case that was understood as requiring a choice between imposing a term of suspended imprisonment and imposing imprisonment which the appellant would have to serve immediately. Only if satisfied that it is not appropriate to impose a term of suspended imprisonment may the judge impose a term of imprisonment which is to take effect immediately. The Court of Criminal Appeal considered how long a period of incarceration (immediate *or* suspended) the appellant's conduct warranted and then searched for reason "in mercy" to suspend that term. This is not what s 39(3) of the Act required. Nor was it required by either s 6(4) or s 76(2) of the Act. Section 6(4) provides:

> "A court must not impose a sentence of imprisonment on an offender unless it decides that –
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> (a) the seriousness of the offence is such that only imprisonment can be justified; or
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> (b) the protection of the community requires it."

Section 76(2) provides:

> "Suspended imprisonment is not to be imposed unless imprisonment for a term or terms equal to that suspended would, if it were not possible to suspend imprisonment, be appropriate in all the circumstances."

14 Sections 6(4) and 39(3) reflect the principle of sentencing that imprisonment is a punishment of last resort. Section 76(2) also reflects that principle, and the related consideration that committing a further offence during the period of suspension should not produce an unintended consequence.

15 No doubt, under s 6(4), a sentencing judge must determine whether imprisonment is warranted and, under s 76(2) must fix the length of the term which would otherwise be appropriate. Neither step must be allowed, however, to obscure the need to decide whether suspended imprisonment is an appropriate disposition of the matter. Only if it is decided that it is not appropriate may a court impose a term of immediate imprisonment.

16 Because the resentencing by the Court of Criminal Appeal was flawed, the sentence imposed by that Court cannot stand. But the error which the Court of Criminal Appeal committed in resentencing the appellant is an error which also reflects upon the opinion which the Court formed about the adequacy of the sentence imposed on the appellant. The adequacy of that sentence could not be judged except against the standards of sentencing that are set, in fundamentally important respects, by the Act. As we have said, the Act requires a court passing sentence to decide first whether a sentence of suspended imprisonment could properly be imposed, before deciding to impose a sentence of actual imprisonment. It follows that the adequacy of the sentence passed by a trial judge is not to be determined by looking first at the length of term of suspended imprisonment which was imposed and only then deciding whether, "in mercy", the prospects of the offender's rehabilitation were such that the sentence can be suspended. Adequacy principally depended, in the present case, upon whether suspended imprisonment was inappropriate.

17 Accordingly, not only was the resentencing of the appellant by the Court of Criminal Appeal flawed, its conclusion that the sentence imposed by the trial judge was manifestly inadequate was made under an evident misapprehension of applicable principle. It follows that the appeal to this Court should be allowed and the orders of the Court of Criminal Appeal set aside.

18 The sentence imposed on the appellant by the trial judge was undoubtedly merciful. Ordinarily, conduct of the kind committed by the appellant would merit immediate imprisonment for a significant period. While that is ordinarily the case, we do not accept that it is an invariable rule. We agree with Gaudron and Gummow JJ and with Kirby J that, in the circumstances of this case, the sentence passed at trial was not manifestly inadequate. The discretion to impose a suspended sentence is not confined by considerations relating to rehabilitation. These will often be significant, but there may be other relevant matters, of the kind taken into account by the trial judge in the present case. That being so, we joined in the orders which have earlier been pronounced.

19 GAUDRON AND GUMMOW JJ. We would allow the appeal and make orders in the terms proposed by Kirby J.

20 Section 688(2)(d) of *The Criminal Code* (WA) ("the Code") authorised an appeal by the prosecution to the Full Court of the Supreme Court of Western Australia sitting as the Court of Criminal Appeal[10] against any punishment imposed or order made in respect of the conviction of the appellant. There was no requirement for leave to appeal.

21 It is common ground that, in this case, the Court of Criminal Appeal was empowered by s 689(3) of the Code to quash the sentence passed at the appellant's trial and to pass the increased sentence it imposed upon him, without an order for its suspension, "if they [thought] that a different sentence should have been passed". Further, the respondent correctly accepted that the exercise of the powers conferred by s 689(3) was conditioned upon the formation of an opinion by the Court of Criminal Appeal, a process to which there applied the reasoning of this Court (with respect to an appeal against sentence brought directly to this Court under s 73 of the Constitution) in the joint judgment in *House v The King*[11]. To that we would add that this opinion of the Court of Criminal Appeal must be expressed as well as formed, so that, to adapt a statement by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[12], the essential ground or grounds for the formation of the opinion are articulated.

22 In the circumstances of the present case, the question for the Court of Criminal Appeal was whether the result reached by the trial judge had been "upon the facts … unreasonable or plainly unjust [so that] the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance"[13]. Was the sentence "manifestly wrong"?[14]

23 The power exercised by the trial judge had been that reposed by s 656 of the Code, conditioned by the principles set out in s 6 of the *Sentencing Act* 1995 (WA) ("the Sentencing Act"), and by consideration of the sentencing options spelled out in Pt 5 (especially s 39) and of the provisions for suspended

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10 See s 687(1) of the Code.

11 (1936) 55 CLR 499.

12 (1987) 10 NSWLR 247 at 280.

13 *House v The King* (1936) 55 CLR 499 at 505.

14 *House v The King* (1936) 55 CLR 499 at 505.

imprisonment in Pt 11 (especially ss 76 and 77). The text of ss 76 and 77, so far as presently relevant, is set out in the reasons of Kirby J.

24 We agree with Kirby J, for the grounds given by his Honour, that the reasons of the Court of Criminal Appeal do not disclose what it was that constituted error by the sentencing judge; whilst the opening paragraph of the reasons of the Court of Criminal Appeal state the need to find error causing the discretion of the trial judge to miscarry, the appellant was entitled to the articulation of what that error was and should not have been left to seek to infer the shortcomings of the reasons of the trial judge which warranted appellate intervention.

25 Because the Court of Criminal Appeal did not adequately disclose its reasons for the formation of the opinion required by s 689(3) of the Code, its orders must be set aside. In the circumstances of this appeal, the Court is in as good a position as the Court of Criminal Appeal to form an opinion in this matter and to exercise the discretionary authority which in point of legal theory the Court of Criminal Appeal failed to exercise[15].

26 We agree with Kirby J, again for the reasons his Honour gives, that the trial judge considered the range of relevant considerations. This was not a case for appellate intervention on the ground that no weight or insufficient weight had been given to relevant considerations, within the meaning of the authorities discussed by Gibbs CJ in *Mallet v Mallet*[16]. The sentence imposed by the trial judge was not "manifestly wrong" as being "manifestly inadequate". We also agree with Kirby J that the power to suspend given by s 76(1) of the Sentencing Act, which is limited by the criteria specified in s 76(2), (3), is not confined by reference wholly, mainly or specially to the effect the suspension would have on the rehabilitation of the particular offender.

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15 cf *CDJ v VAJ* (1998) 197 CLR 172 at 223.

16 (1984) 156 CLR 605 at 614.

27 KIRBY J. This appeal from the Court of Criminal Appeal of Western Australia[17] involved two central questions. The first concerned the role of a court of criminal appeal in an appeal against sentence, in this case by the Crown, and the need for such a court to express and identify error before allowing such an appeal and substituting a different sentence of its own. The second concerned the approach proper to the exercise of the judicial discretion to suspend a sentence of imprisonment[18].

28 On 7 September 2000, this Court announced its orders allowing the appeal, setting aside the orders of the Court of Criminal Appeal and in place of those orders, ordering that the appeal from the sentence imposed on the appellant be dismissed. What follows are my reasons for joining in those orders.

The facts

29 Mr Christin Dinsdale (the appellant) was a friend of the family of the complainant who, at the relevant time, was a girl of nine years. On an unknown date between December 1995 and January 1996, the complainant had stayed overnight in the appellant's home with the appellant's daughter, a girl of about the same age. The complainant stated that at some stage during the evening, whilst she and the appellant's daughter were watching television, the appellant pulled up her skirt, moved her underpants and inserted his thumb into her vagina. When the appellant asked her if she liked it, she said that she did not and the appellant stopped and walked away.

30 On the following afternoon, before the complainant returned to her home, she said that she and the appellant's daughter went into the appellant's bedroom. He offered to massage the girls who lay on the bed on their stomachs for this purpose. When he suggested that he should "look for blackheads", the appellant's daughter got off the bed and moved to another part of the room. According to the complainant, the appellant moved her underpants to one side and looked closely at her vagina.

31 The complainant first told her mother about the incidents in about March 1998. Soon after, the police were informed and the appellant was charged. He was tried before Viol DCJ and a jury in the District Court of Western Australia.

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17 *R v Dinsdale* unreported, Court of Criminal Appeal of Western Australia, 2 February 1999 ("CCA judgment").

18 In this case, under the *Sentencing Act* 1995 (WA), s 76.

32 The charges brought against the appellant comprised one count of sexual penetration of a child under the age of 13 years[19] and a second count of indecent dealing with a child under the age of 13 years[20]. The maximum sentence provided by law in respect of the first count was 20 years imprisonment[21] and in respect of the second count, 10 years imprisonment[22]. The appellant, when charged with the offences, denied his guilt. Both the complainant and the appellant gave evidence at the trial, as did the appellant's wife and a neighbour. On 24 September 1998, the jury found the appellant guilty on both counts. He was convicted. It thus fell to Viol DCJ to sentence him.

33 In the sentencing proceedings, Viol DCJ had available to him a victim impact statement made by the mother of the complainant. It described how the complainant had become withdrawn and unhappy until the disclosure was made[23]. His Honour also had before him character references from the appellant's wife and a family friend. The wife, in particular, asserted her continuing belief in her husband's innocence. She asked the judge to remember that he was not only sentencing the appellant but also his family.

34 The evidence disclosed that the appellant and his wife had three children, aged respectively 12, 10 and eight years. The appellant was employed by the local shire and ran a small business. He was accepted to be attentive to his family and industrious in his employment. He had one prior offence, in 1983 of a non-sexual character. Following the verdicts of the jury and his conviction, the appellant was remanded in custody for sentence on 2 October 1998.

The sentence

35 In passing sentence, Viol DCJ described the offences of which the appellant had been convicted. In recounting the matters that tended to emphasise the seriousness of the offences, Viol DCJ mentioned the following: (1) that the offences themselves were objectively serious, especially that relating to sexual penetration; (2) that the appellant had breached a position of trust, given that he was looking after the complainant; (3) that the appellant had exhibited no remorse; and (4) that the victim impact statement indicated that the complainant

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19 *Criminal Code* (WA), s 320(2).

20 *Criminal Code*, s 320(4).

21 *Criminal Code*, s 320(2).

22 *Criminal Code*, s 320(4).

23 See *Sentencing Act* 1995 (WA), s 24; *R v Pinder* (1992) 8 WAR 19 at 39-40.

had been affected by the offences and was, in his Honour's opinion, likely to have problems in the future.

36 As against these considerations, Viol DCJ listed a number of factors which tended to mitigate the punishment proper to the offences. These included: (1) the devastating effect which imposing a prison sentence would have on the appellant and his family; (2) the social stigma that would follow the conviction, quite apart from a prison sentence; (3) the absence of any prior convictions for offences of this kind and the fact that his last conviction had been many years earlier; and (4) the written testimonials deposing to the appellant's previous good character and personal qualities.

37 Notwithstanding these matters, Viol DCJ stated that in the serious circumstances of the offences, the imposition of a sentence of imprisonment was "unavoidable". He then turned to the submission put to him by counsel for the appellant that the term of imprisonment should be suspended. Of this submission, his Honour said, addressing the appellant[24]:

> "Some of the bases for taking this action are to further a rehabilitation process and whether it's possible to see whether there is any chance of ... reoffending. As to rehabilitation, this process has clearly been going on since the offences which occurred some 3 years ago. Your family and friends attest to your industry and to the general care of your family and your attitude to your family and friends and quite obviously there have been no offences committed to anyone's knowledge since that time.
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> As to the likelihood of reoffending, no-one of course can be sure of this, but as far as I can see from all the circumstances and information available, I doubt whether you will reoffend in this way again. I have had a chance to consider this matter and have decided that this is a case where any term of imprisonment should be suspended, and in full."

38 Viol DCJ thereupon sentenced the appellant to 18 months imprisonment in respect of his conviction on the first count. He suspended that sentence "in full". As to the conviction on the second count, he sentenced the appellant to 18 months imprisonment and ordered that it be served concurrently with the sentence imposed in respect of the first count. That term of imprisonment was also "suspended in full". He gave the appellant a warning as to the operation of the sentences so suspended that, if he were convicted of a relevant offence during the 18 months of their currency, he would be obliged to serve the sentence of

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24 Sentencing remarks, *R v Dinsdale* unreported, District Court of Western Australia, 2 October 1998 at 18-19.

imprisonment so imposed. In accordance with the sentence, the appellant was released from the custody in which he had been held whilst awaiting sentence.

39 It is important to consider the sentence so imposed in the context of the submissions put to Viol DCJ on behalf of the parties. Sentencing remarks should not be read in isolation. Ordinarily, as here, they respond to the submissions that are made. Those for the appellant emphasised the isolated nature of the offences. Whilst it was accepted that the appellant could not take advantage of evidence of remorse, having pleaded not guilty and maintained his innocence, it was submitted that the offences of which he was convicted were out of character for him. On the other hand, the prosecutor rejected the submission that a suspended sentence should be imposed. He submitted that a custodial sentence was necessary and should not be suspended. According to the prosecutor, the only proper way to reflect leniency was in the length of the custodial sentence.

40 Following the sentence imposed on the appellant, the Crown appealed to the Court of Criminal Appeal of Western Australia.

The decision of the Court of Criminal Appeal

41 The Court of Criminal Appeal upheld the Crown's appeal. It set aside the sentence of 18 months imprisonment for the offence of sexual penetration and in place of the sentence imposed by Viol DCJ, substituted, for that offence, a sentence of 30 months imprisonment. It left the sentence in respect of the second count standing and directed that it be served so that the aggregate sentence of imprisonment would be 30 months. The appellant was declared eligible for parole in respect of the term of imprisonment. The order for suspension of the service of the term of imprisonment was set aside. In the result, the appellant was returned to custody. The reasons for the orders of the Court of Criminal Appeal[25] were given by Murray J.

42 His Honour began with a reference to two considerations which controlled the Court of Criminal Appeal in what it might do[26]:

> "[T]his Court will be circumspect [in a Crown appeal] to ensure that the discretionary sentencing judgment of the court below is only upset in a clear case where that is required, not merely to correct a lenient sentence, but only where from the leniency or otherwise it appears that there has been an error of principle which has caused the discretion of the sentencing Judge to miscarry, and where it is seen to be necessary to

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25 Comprising Kennedy, Pidgeon and Murray JJ.

26 CCA judgment at 2 per Murray J.

> intervene to aid the consistency and certainty of the sentencing process and to avoid undue disparity. Even in such a case this Court will have regard to the fact that it is dealing with a discretionary judgment and, in choosing the sentence to be substituted for that passed by the sentencing Judge, it will have regard to the principle of double jeopardy so as to substitute a sentence towards the more lenient end of the range of proportionate sentences conceived to be available[27]."

43 After describing the offences of which the appellant had been convicted and accepting that they were "of a relatively minor nature when compared to others of the same types"[28], Murray J referred to the boldness of the appellant's conduct in the presence of his own daughter, the invasion of the person of the complainant and the fact that separate incidents were involved in the offences committed on different days. He set out the reasons of the primary judge for the orders that he had made and noted that the Crown's appeal was both against the length of the aggregate term of imprisonment imposed and the decision to suspend its service. He recorded the submission that Viol DCJ had placed "undue emphasis" on matters personal to the appellant[29].

44 Murray J then addressed the two issues which had been identified. As to the length of the term of imprisonment, he referred to another case of digital penetration of a young female complainant in *O'C*[30]. That case had also been decided by the Court of Criminal Appeal but prior to the availability of the power to suspend the serving of a sentence of imprisonment. A two year probation and a requirement of 150 hours of community service imposed at trial were there set aside and a term of 12 months imprisonment substituted, with eligibility for parole[31]. His Honour accepted that there were some differences in the two cases that meant that the sentence imposed in *O'C* could not be regarded as a "bench mark"[32] for the present case. He declined a submission of the Crown that the two offences should have attracted a cumulative sentence. Then, without either expressly finding an appealable error in the reasons of the primary judge or identifying precisely what such error was (for example the imposition of a

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27 *R v Peterson* [1984] WAR 329 at 330-331 per Burt CJ; *Leucus* (1995) 78 A Crim R 40 at 51-52 per Murray J.

28 CCA judgment at 4.

29 CCA judgment at 8.

30 (1989) 41 A Crim R 360.

31 (1989) 41 A Crim R 360 at 367.

32 CCA judgment at 10.

"manifestly inadequate" sentence), Murray J went on to dispose of the first of the arguments advanced in the appeal[33]:

> "Given the constraints arising out of the fact that this is a Crown appeal, I would allow the appeal thus far to the extent necessary to impose a sentence of 30 months imprisonment for the digital penetration offence ... I would not interfere with the order for the concurrent service of the two terms. I am persuaded of the need to intervene in this case, particularly having regard to the age of the child, the confidence with which the offences were committed, their impact upon the victim, the repetition of the conduct, the breach of trust involved, and the complete lack of remorse shown."

45 Having determined that an increase in the sentence of imprisonment was proper to the case, Murray J turned to the second issue, namely whether the sentence so imposed should be suspended, as had been ordered at trial. He referred to the authority of the Court of Criminal Appeal of Western Australia in *R v GP*[34] and quoted from his own reasons in that decision[35]:

> "[T]he circumstances of the case are such as to establish, the burden being on the offender, that there is a real prospect that the rehabilitation and reformation of the offender will be positively assisted by the making of an order of suspension or that there are special reasons why the court should be merciful."

46 In passing, Murray J noted a difference of view which had emerged in the same court in *R v Liddington*[36]. In that decision, whereas Malcolm CJ[37] and Steytler J[38] had affirmed that the primary purpose of suspending service of a sentence of imprisonment was rehabilitation or reformation of the offender, Ipp J had "expressed his conclusion more widely"[39]. Ipp J did not consider that suspension should "necessarily be used primarily to provide an inducement to the

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33 CCA judgment at 10-11.

34 (1997) 18 WAR 196 at 234.

35 CCA judgment at 11-12.

36 (1997) 18 WAR 394.

37 (1997) 18 WAR 394 at 396-399.

38 (1997) 18 WAR 394 at 406.

39 CCA judgment at 12.

offender to reform"[40]. Instead, he expressed the view that "[i]t should simply be used whenever the circumstances of the case are such that a suspended sentence would be the appropriate sentencing disposition"[41]. Whilst concluding that the use of suspended sentence was primarily confined as "an aid to rehabilitation", Murray J in the present case accepted that this was "by no means the sole purpose"[42] justifying its use. He acknowledged that, additionally, consideration could be given to whether such a course was "appropriate in mercy" or otherwise justifiable "for good and sufficient reason"[43]. Having so stated the principles, Murray J concluded thus[44]:

> "There was nothing to suggest what the likelihood of repetition might be except the passage of time between the commission of the offences and the trial. It was not possible to say that during that period a process of rehabilitation had been continuing. Up to and following his conviction it was evidently the case that the respondent continued to deny the commission of the offences. In those circumstances he was clearly not dealing with the causes of his commission of the offences. There is nothing to suggest whether or not in future his inhibitions might again break down so that he might re-offend if the opportunity presented itself."

47 As to a "merciful disposition", Murray J expressed the view that there were no reasons to support such an approach[45]:

> "If the respondent's otherwise good character could not sway the court from the view that for purposes of general deterrence imprisonment was required having regard to the seriousness of the offences, I can see no basis upon which that good character could sway the court from the imposition of imprisonment to be immediately served."

48 Following dismissal of the consideration of the impact of the punishment on the appellant's family, Murray J proceeded to his orders. He substituted the sentences of imprisonment, to be served immediately, as already set out.

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40 (1997) 18 WAR 394 at 401.

41 (1997) 18 WAR 394 at 401.

42 CCA judgment at 13.

43 CCA judgment at 13.

44 CCA judgment at 13.

45 CCA judgment at 14.

49 The appellant sought, and was granted, special leave to appeal to this Court. His grounds of appeal did not expressly complain about the severity of the substituted sentence imposed on him by the Court of Criminal Appeal in the exercise of its powers. Instead, his grounds complained that that Court had erred in allowing the Crown appeal, although no express or implied error of law or fact had been identified. He claimed that it had also erred in disturbing the order of suspension of the sentence of imprisonment, that order being within the discretion of the primary judge, not being flawed for lack of evidence of rehabilitation, and being founded on relevant considerations. Further, the appellant argued, the Court of Criminal Appeal had erred in attempting to prescribe too narrowly the circumstances relevant to a decision to suspend a term of imprisonment.

50 Although the appellant had been denied bail[46], on 13 June 2000, he was admitted to bail by order of this Court pending the determination of this appeal[47]. No consideration was given during argument to the power of this Court, by its order, to recommence the service of a custodial sentence which otherwise, according to its terms, had expired[48]. It was not disputed that, if the appellant failed in his appeal, he would have to serve the balance of the custodial sentence remaining when he was granted bail. In the event, it is not necessary to explore this question.

The applicable legislation

51 Several provisions of the legislation of Western Australia must be noticed. The first concerns the powers and functions of the Court of Criminal Appeal in an appeal. These are set out in s 688 of the *Criminal Code* (WA). The relevant parts of s 688 state:

> "(2) An appeal may be made to the Court of Criminal Appeal on the part of the prosecution –
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> ...
>
> (d) against any punishment imposed or order made in respect of a person convicted on indictment ...".

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46 Possibly for the reason noted in *Suresh v The Queen* (1998) 72 ALJR 769 at 781 [61]; 153 ALR 145 at 161. Note corrigendum 72 ALJR v.

47 By order of Callinan J on 13 June 2000.

48 cf *Whan v McConaghy* (1984) 153 CLR 631 at 636; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 464-465 [93]-[94], 487-492 [158]-[168].

52 In Western Australia, the prosecution does not require leave to appeal against sentence but may appeal as of right[49]. In such an appeal, the question for the Court of Criminal Appeal is whether "they think that a different sentence should have been passed"[50]. If that question is answered in the affirmative, the Court is required to substitute such sentence as "they think ought to have been passed"[51].

53 In 1995, the Parliament of Western Australia enacted the *Sentencing Act* 1995 (WA) ("the Act"). The early sections of the Act contain a number of general principles of sentencing[52], list a number of matters which are considered to be aggravating factors[53], and also state considerations to be regarded as mitigating factors[54]. Amongst the principles of sentencing expressed, the first is that the sentence imposed "must be commensurate with the seriousness of the offence"[55]. Also included is the general principle that a court "must not impose a sentence of imprisonment on an offender unless it decides that – (a) the seriousness of the offence is such that only imprisonment can be justified; or (b) the protection of the community requires it"[56].

54 By s 39 of the Act, provision is made for sentences that may be imposed on a natural person. A range of possible sentences is set out, beginning with the imposition of no sentence and ordering the release of the offender in s 39(2)(a) and increasing in severity to the imposition of suspended imprisonment and an order for the release of the offender under Pt 11 of the Act in s 39(2)(f). The imposition of a term of imprisonment in s 39(2)(h) is the sentence appearing last

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49 Leave of the court was previously required in Tasmania under the *Criminal Code* (Tas), s 401(2)(c): *Everett v The Queen* (1994) 181 CLR 295 at 299. However, that requirement for leave was repealed by the *Criminal Code Amendment (Appeals) Act* 1996 (Tas), s 4.

50 *Criminal Code*, s 689(3).

51 *Criminal Code*, s 689(3). See also *Anderson v The Queen* (1996) 18 WAR 244 at 246.

52 s 6.

53 s 7.

54 s 8.

55 s 6(1).

56 s 6(4).

in the sub-section, thereby reinforcing the position of this sentence as the punishment of last resort.

55 The power to suspend a sentence of imprisonment appears in s 76 of the Act which relevantly provides:

> "(1) A court that sentences an offender to a term of imprisonment, or to an aggregate of terms of imprisonment, of 60 months or less may order that the whole of the term or terms be suspended for a period set by the court; but not more than 24 months.
>
> (2) Suspended imprisonment is not to be imposed unless imprisonment for a term or terms equal to that suspended would, if it were not possible to suspend imprisonment, be appropriate in all the circumstances."

56 By s 77, the Act contains provisions on the effect of suspending a term of imprisonment. Relevantly, it states:

> "(1) An offender sentenced to suspended imprisonment is not to serve any part of the imprisonment that is suspended unless –
>
> (a) during the suspension period he or she commits an offence (in this State or elsewhere) the statutory penalty for which is or includes imprisonment; and
>
> (b) a court makes an order under section 80.
>
> (2) The suspension period begins on the day on which the sentence is imposed.
>
> ...
>
> (4) An offender who is sentenced to suspended imprisonment is to be taken to be discharged from the sentence at the end of the suspension period."

Appeals, Crown appeals and the requirement of error

57 The legal process before the Court of Criminal Appeal was, as described, an appeal. This is a creation of statute[57]. An appeal may take several forms, the

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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]; 160 ALR 588 at 609.

precise nature in a particular case depending upon the legislation in question[58]. Here, that legislation, by providing for an appeal, required the demonstration of error before the appellate court enjoyed the authority to disturb the decision subject to appeal. In *Lowndes v The Queen*[59], this Court remarked that:

> "a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. ... The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice."

58 The necessity to show error in such a case is fully accepted by courts deciding appeals against sentence[60]. Indeed, it is commonly referred to by the Court of Criminal Appeal of Western Australia[61]. Because the imposition of a sentence involves the exercise of judgment and evaluation upon which minds can differ, it bears close similarities to the making of a discretionary decision. Like such a decision, if properly imposed, a sentence will not be disturbed on appeal merely because the appellate court would have reached a different result had the responsibility of sentencing belonged to it[62]. As in the case of appellate review of a discretionary decision, a brake is imposed upon undue appellate disturbance of primary decisions (and unwarranted appeals seeking that relief) by the necessity to identify an error that justifies and authorises appellate intervention. Such an error may involve the adoption by the primary judge of an incorrect principle, giving weight to some extraneous or irrelevant matter, failing to give weight to some material considerations, or a mistake as to the facts[63].

59 As on appeal from discretionary decisions, it will sometimes not be possible to identify, with exactness, an error of the foregoing kind; yet the result that is challenged may be so manifestly unreasonable or plainly wrong that the

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58 *Fleming v The Queen* (1998) 197 CLR 250 at 258-260 [17]-[21]; cf *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA.

59 (1999) 195 CLR 665 at 671-672 [15].

60 See eg *R v Tait* (1979) 24 ALR 473 at 476; *Allpass* (1993) 72 A Crim R 561 at 562; *R v Clarke* [1996] 2 VR 520 at 522.

61 See eg *R v Shaharuddin* [1999] WASCA 229 at [2].

62 cf *House v The King* (1936) 55 CLR 499 at 504-505.

63 *House v The King* (1936) 55 CLR 499 at 505; *Cranssen v The King* (1936) 55 CLR 509 at 519-520; *Harris v The Queen* (1954) 90 CLR 652 at 655.

appellate court will be able to infer that, in some unidentified way, there has been a failure to exercise the power properly[64]. In appellate review of sentencing, it will commonly be the case that the appellate court's authority to intervene will derive from a conclusion that the resulting order is so disproportionate to the matter to which it relates as to afford the foundation for concluding that, in some way, the exercise of the powers of the primary judge has miscarried[65].

60 The existence of this residual basis for appellate intervention is well established. In fact, it is inherent in the provision by statute of a facility to appeal against sentence to a court of criminal appeal. It enables such a court to correct "idiosyncratic views"[66] of individual judges about punishment for particular crimes or types of crime and to replace a sentence that is manifestly disproportionate to the circumstances. Such disproportion can arise where the punishment imposed is considered to be plainly excessive. But it can also arise where such punishment is judged to be manifestly inadequate.

61 In *Everett v The Queen*[67], McHugh J observed that the jurisdiction to hear a Crown appeal against sentence is conferred on a court of criminal appeal "so that that court can ensure that, so far as the subject matter permits, there will be uniformity of sentencing" which is "of great importance in maintaining confidence in the administration of justice in any jurisdiction". Inadequate sentences, as his Honour pointed out, are, as much as excessive sentences, "likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes"[68]. In this sense, the power of courts of criminal appeal to set aside sentences judged to be obviously erroneous is an important attribute of the jurisdiction and powers of such courts. It permits them to discharge their statutory functions as Parliament contemplated.

62 For reasons of legal history and policy, the position of Crown appeals against sentence has long been regarded, in Australia and elsewhere, as being in a class somewhat different from that of an appeal against sentence by a convicted offender. When first introduced, Crown appeals were considered to cut across

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64 *House v The King* (1936) 55 CLR 499 at 505.

65 *Valentini and Garvie* (1980) 2 A Crim R 170 at 174; *Davey* (1980) 2 A Crim R 254 at 259-261.

66 cf *R v Osenkowski* (1982) 30 SASR 212 at 213 per King CJ; cf *R v P* (1992) 39 FCR 276 at 285.

67 (1994) 181 CLR 295 at 306.

68 (1994) 181 CLR 295 at 306.

"time-honoured concepts"[69] of the administration of criminal justice in common law legal systems. For this reason, it has sometimes been said that, as a "matter of principle"[70], such appeals should be a comparative rarity. The attitude of restraint reflected in such remarks has often been justified on the basis that a Crown appeal against sentence puts the prisoner in jeopardy of punishment for a second time, a feature that is ordinarily missing from an appeal, or application for leave to appeal, brought by those who have been sentenced[71]. The consequence is that where the Crown appeals, it is normally obliged to demonstrate very clearly the error of which it complains. The further consequence is that, where such demonstration succeeds, it is conventional for the appellate court to impose a substituted sentence towards the lower end of the range of available sentences[72]. This convention tends to add an additional restraint upon interference, given the strong resistance that exists against appellate "tinkering" with sentences.

The absence of a finding of error requires relief

63 Because the necessity to find and identify error to justify appellate disturbance of the sentence of the primary judge constitutes an important constraint on unwarranted appellate interference in sentencing, the absence in the reasons of Murray J of a clear finding of error, and identification of the content of such error, prima facie entitled the appellant to succeed in this appeal. It may be said to be unlikely that the Court of Criminal Appeal would have overlooked so elementary and fundamental a feature of the exercise of its jurisdiction. Although the same could have been said in *Lowndes v The Queen*, this Court attached significance to the omission in that case[73]. Indeed, the omission founded the orders of this Court allowing the appeal.

64 In the present instance, to avoid this conclusion, the Crown pointed to a number of considerations. First was the acknowledgment, expressed at the outset of Murray J's reasons, in orthodox terms, of the rules restraining appellate

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69 *Peel v The Queen* (1971) 125 CLR 447 at 452.

70 *Griffiths v The Queen* (1977) 137 CLR 293 at 310.

71 *Whittaker v The King* (1928) 41 CLR 230 at 248 per Isaacs J (diss); cf *R v Tait* (1979) 24 ALR 473 at 476-477; *Malvaso v The Queen* (1989) 168 CLR 227 at 234; *R v Grein* [1989] WAR 178 at 180; *Everett v The Queen* (1994) 181 CLR 295 at 299.

72 A consideration acknowledged in the CCA judgment at 2 by reference to *R v Peterson* [1984] WAR 329 at 330-331; cf *R v Clarke* [1996] 2 VR 520 at 522.

73 (1999) 195 CLR 665 at 678-679 [38].

interference in sentencing and particularly in the context of a Crown appeal. His Honour specifically acknowledged the need for demonstration that "an error of principle" had caused "the discretion of the sentencing Judge to miscarry"[74]. On this basis, it was argued, a minor rearrangement of the reasons, inserting this acknowledgment just prior to the conclusion allowing the appeal or before the concluding collection of reasons justifying that result, would have cured the defect.

65 I accept that reasons of busy courts of criminal appeal should not be scrutinised with a fine tooth comb to detect error. And that mere verbal infelicities in reasons should generally be ignored. But the point raised is important because it constitutes a significant protection to a prisoner against an over-ready appellate disturbance of the sentence imposed by the primary judge simply because of a difference of opinion about the correct sentence. Almost certainly, the primary judge will have had more time to consider the sentencing options and the punishment proper to the case than will a busy appellate court. Disturbance of that judge's disposition requires a careful indication of the error that has been made warranting that course. Otherwise, especially where intervention is apparently being justified on the basis of manifest error, it is all too easy for the mind to slip into impermissible reasoning. The complaint here was not of the failure of the appellate court to identify all of its reasons but of its failure to show that it had approached those reasons in the way required by law[75].

66 Considerations that reinforced this conclusion in the present appeal included some of general principle and some particular to the appellant. So far as principle was concerned, the obligation of the appellate court to state and identify the relevant error is important for the function which that court performs in setting standards to be observed by courts that are subject to its authority. Moreover, that obligation maintains the appellate court's proper role in the judicial hierarchy. Unless error is stated and demonstrated, the appellate court has no legal authority to substitute a sentence which by law belongs to the primary judge. Adhering to strictness in this matter is also a protection to the prisoner who may wish to be advised on rights of further appeal[76]. In the present case, the fact that the outcome of the orders of the Court of Criminal Appeal was not only to increase the appellant's custodial sentence, but also to remove the suspension of immediately serving it, made it doubly important that no significant defect of procedure or reasoning should appear in the record of the Court of Criminal Appeal. On the face of things, the appellant was therefore entitled to succeed on this point alone.

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74 CCA judgment at 2.

75 cf *CDJ v VAJ* (1998) 197 CLR 172 at 236-237 [186].

76 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 258-259.

67 However, the Crown also pointed to the fact that the sentence imposed by Viol DCJ was inconsistent with sentences imposed by the Court of Criminal Appeal in cases involving digital penetration of young complainants. Attention was drawn to three decisions of that Court in which sentences of imprisonment were imposed, to be served immediately, and other orders, including suspended custodial sentences, were set aside. The decisions in question were *O'C*[77], *R v GP*[78] and *R v Dickson*[79].

68 It is true that both by the applicable statute, and by the common law, a primary duty of judges on sentencing is to give due weight to the objective seriousness of the offence[80]. Cases of repeated offences against vulnerable young children by those who have the responsibility for their care or upbringing should be dealt with most seriously. Penetration, including digital penetration, is an invasion of the privacy and dignity of the child that will commonly call for a custodial sentence to be served. But there is no absolute rule. Each case must be judged on its own facts. The adoption of a blanket rule would itself be an error of sentencing principle. A discretion must be left to permit those with the responsibility of sentencing to take into account the peculiar circumstances of the case[81], any exceptional circumstances affecting the prisoner, and in some cases the prisoner's family[82], or some feature of the matter that reasonably arouses a judicial decision that a measure of mercy is called for in the particular case[83].

69 Accepting for the moment that the reasons of Murray J should be read to have included an express finding of error and a statement that the error of Viol DCJ was to impose a "manifestly inadequate" sentence, none of the considerations identified had escaped the primary judge's attention. Each of them (the age of the child, the circumstances of the commission of the offence, the impact on the victim, the repetition of the conduct, the breach of trust and lack of remorse) was expressly or implicitly referred to in Viol DCJ's reasons for

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77 (1989) 41 A Crim R 360.

78 (1997) 18 WAR 196.

79 Unreported, Court of Criminal Appeal of Western Australia, 23 April 1999.

80 *Dodd* (1991) 57 A Crim R 349 at 354.

81 *Allpass* (1993) 72 A Crim R 561 at 563.

82 See eg *Anderson v The Queen* (1996) 18 WAR 244.

83 *R v Osenkowski* (1982) 30 SASR 212 at 213; *R v Clarke* [1996] 2 VR 520 at 523; cf *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272 at 274.

sentence. Accordingly, it could not be said that the primary judge had erred in any of the ways that would ordinarily have justified appellate intervention.

70 The three earlier decisions of the Court of Criminal Appeal referred to by the Crown can each be distinguished on their facts because each of them related to aggravated factual circumstances. As well, so far as the case of *O'C* was concerned, as Murray J himself acknowledged, it was decided prior to the Act and thus disposed of under a different sentencing regime which did not include the option of "suspended imprisonment"[84].

71 In a matter of importance to the liberty of the appellant, the reasons offered by the Court of Criminal Appeal to justify the increase in his term of imprisonment (and removal of the suspension of that sentence) therefore failed to state and identify the error of the primary judge. Accordingly, that Court failed to demonstrate its authority to substitute a different sentence and omitted to provide convincing reasons to explain why the increased sentence, then imposed, was warranted in the circumstances of the case.

72 This Court was therefore obliged to consider whether the foregoing conclusions warranted the same outcome as the Court reached in *Lowndes v The Queen*[85]. Similar defects in the reasoning of the Court of Criminal Appeal in that case had led to the restoration by this Court of the sentence imposed by the primary judge. The appellant asked for that result in this appeal. The Crown argued that, if the essential defect demonstrated in the appeal was only an error of reasoning by the Court of Criminal Appeal, the proper disposition was for this Court to quash that Court's orders and to require the Court of Criminal Appeal to hear and determine the appeal to it as the law provides, guided by this Court's correction.

73 There were some attractions in taking that course. Doing so would have placed emphasis upon matters of substance and upheld the undoubted function of courts of criminal appeal in sentencing appeals to intervene in cases where manifest error in sentencing is demonstrated. However, for a number of reasons, I concluded that the proper remedy was that granted in *Lowndes v The Queen*. It would have been wrong for the appellant to be exposed to a third instance of jeopardy. No occasion for appellate intervention in proceedings conceded to be subject to the restraints normal to Crown appeals was warranted on the ground that the sentence imposed was manifestly inadequate. This conclusion was further reinforced by the appellant's arguments addressed to the error of disturbing the order suspending his prison sentence, to which I now turn.

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84 The Act, s 39(2)(f). See also Pt 11, esp ss 76, 77.

85 (1999) 195 CLR 665 at 679 [40]-[41].

The power to suspend sentences of imprisonment

74 The statutory power to suspend the operation of a sentence of imprisonment, although historically of long standing, is sometimes considered controversial[86]. The "[c]onceptual [i]ncongruity" involved in this form of sentence has been criticised[87]. It has been suggested that there is a temptation to use this option where a non-custodial order would have been sufficient and appropriate[88]. It has also been suggested that, despite the rhetoric, such sentences are seen by some not to constitute much punishment at all[89].

75 The statutory power to impose suspended sentences of imprisonment exists in Australia under federal law[90] and in every State and territory jurisdiction[91]. The power long existed in New South Wales[92]. It was abolished in that State in 1974 following the recommendation of an expert committee[93]. Subsequently, however, the Law Reform Commission of that State recommended restoration of this sentencing option[94]. It is a measure of the favour with which

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86 Bagaric, "Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments", (1999) 22 *University of New South Wales Law Journal* 535 ("Bagaric").

87 Bagaric (1999) 22 *University of New South Wales Law Journal* 535 at 538.

88 Bagaric (1999) 22 *University of New South Wales Law Journal* 535 at 541.

89 Great Britain, Home Office, *Crime, Justice and Protecting the Public*, (1990) Cm 965 at [3.20]-[3.21].

90 *Crimes Act* 1914 (Cth), s 20.

91 *Sentencing Act* (NT), s 40; *Penalties and Sentences Act* 1992 (Q), s 144; *Criminal Law (Sentencing) Act* 1988 (SA), s 38; *Sentencing Act* 1997 (Tas), ss 7, 24; *Sentencing Act* 1991 (Vic), s 27. See also *Crimes Act* 1900 (ACT), ss 556A and 556B.

92 *Crimes Act* 1900 (NSW), ss 558-560, 561-562 (repealed).

93 *Crimes and Other Acts (Amendment) Act* 1974 (NSW), s 13. See also New South Wales, Criminal Law Committee, *Proposed Amendments to the Criminal Law and Procedure*, (1973) at 15.

94 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, (1996) at 351-355.

suspended sentences of imprisonment are commonly viewed that this sentencing option was then restored as part of the law of that State[95].

76 Whatever the theoretical and practical objections, suspended imprisonment is both a popular and much used sentencing option in Australia[96]. Courts may not ignore the provision of this option because of defects occasionally involved in its use. Nonetheless, the criticisms draw attention to the need for courts to attend to the precise terms in which the option of suspended sentences of imprisonment is afforded to them and to avoid any temptation to misapply the option where a non-custodial sentence would suffice. They also emphasise the need to keep separate the two components of such a sentence, namely the imposition of a term of imprisonment, and the suspension of it where that is legally and factually justified[97].

77 In Western Australia, the "starting point"[98] for judicial analysis concerning the availability and suitability of a suspended sentence of imprisonment is the language of s 39(2) and s 76 of the Act. From s 39(2)(f) can be deduced the purpose of Parliament to afford "suspended imprisonment" as an option to be available in an appropriate case. It is there treated as the penultimate punishment in the hierarchy of sentencing options provided, just slightly lower in severity than the imposition of a term of imprisonment to be immediately served[99]. It is to be read with the injunction in s 6(4) restraining the imposition of a sentence of imprisonment and confining it to the punishment of last resort.

78 From s 76, it may be inferred that suspension of imprisonment is only to be available where, first, the court has concluded that sentence to a term of imprisonment is warranted and where the court imposes that sentence. Moreover, by s 76(1), it is not to be available where the term of imprisonment imposed, in aggregate terms, is more than five years. Within such limitations, the discretion apparently conferred on the court is expressed in very wide language. By s 76(1), a court "may order" suspended imprisonment. By s 76(2), it may not do so unless imprisonment for the term or terms equal to that

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95 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 12.

96 See Bagaric (1999) 22 *University of New South Wales Law Journal* 535 at 542-544 for a discussion of its use in Victoria.

97 Bagaric (1999) 22 *University of New South Wales Law Journal* 535 at 547; cf *van de Worp v The Queen* [2000] WASCA 154 at [128].

98 *R v Liddington* (1997) 18 WAR 394 at 396.

99 The sentence of imprisonment that is to be immediately served appears in s 39(2)(h). Par (g) was repealed.

suspended would, if it were not possible to suspend the sentence, be appropriate "in all the circumstances". Plainly, s 76(2) is designed to restrain the imposition of an artificial term of imprisonment, inflated with the object of giving an appearance of severe punishment although it is expected that this will not actually be carried into effect.

79 The common failure of Parliaments to state expressly the criteria for the suspension of a term of imprisonment has led to attempts by the courts to explain the considerations to which weight should be given and the approach that should be adopted[100]. The starting point, given emphasis by the terms of s 76(2), is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a "soft option" when the court with the responsibility of sentencing is "not quite certain what to do"[101].

80 The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without reoffending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to the law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrong-doing or even by offenders themselves[102]. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.

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100 *R v Liddington* (1997) 18 WAR 394 at 398-401.

101 *R v O'Keefe* [1969] 2 QB 29 at 32.

102 Bagaric (1999) 22 *University of New South Wales Law Journal* 535 at 544-549; cf *Dao v The Queen* unreported, Court of Criminal Appeal of Western Australia, 22 January 1999 at 6. Bagaric, at 548-549, reports on a United States survey of attitudes to 36 different penalties. All of the groups ranked the three suspended sentences of three years, 12 months and six months lower in order of severity than a fine of $500 and above a fine of $250: Sebba and Nathan, "Further Explorations in the Scaling of Penalties", (1984) 24 *British Journal of Criminology* 221 at 228.

81 A number of attempts have been made to resolve this tension and to provide guidance concerning the circumstances in which a sentence of imprisonment should be suspended. There is a line of authority in Australian courts that suggests that the primary consideration will be the effect such an order will have on rehabilitation of the offender[103], which will achieve the protection of the community which the sentence of imprisonment itself is designed to attain. But most such statements are qualified by judicial recognition that other factors may be taken into account[104]. The point is therefore largely one of emphasis.

82 It was accepted in argument that a detectable difference had emerged in the reasoning of judges constituting the Court of Criminal Appeal of Western Australia relevant to this subject[105]. On the one hand, some judges, like Murray J (including in the present case), consider that the primary purpose of a suspended sentence is "as an aid to rehabilitation"[106]. This view allows that mercy, in the circumstances of the particular case, might play a part along with other factors[107]. But the closest attention is to be given to how the exercise of the discretion to suspend the term of imprisonment would contribute to the rehabilitation of the offender.

83 On the other hand, other judges[108] have regarded it as impermissible effectively to confine consideration of whether to exercise the discretion to the question of rehabilitation of the offender. According to this second view, there is no warrant for holding that the decision on suspension should depend "only or largely on the prospects of rehabilitation, or contrition, or any other factor"[109]. Such considerations are accepted as relevant. But they are not determinative. They do not excuse those with the responsibility of sentencing of the obligation

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103 *R v Percy* [1975] Tas SR 62 at 74; *R v Causby* [1984] Tas R 54 at 67; *Davies v Deverell* (1992) 1 Tas R 214 at 220; *R v GP* (1997) 18 WAR 196 at 234; *R v Liddington* (1997) 18 WAR 394 at 398-399, 406.

104 See eg *R v Liddington* (1997) 18 WAR 394 at 399, 406.

105 *R v Liddington* (1997) 18 WAR 394 at 396 per Malcolm CJ.

106 CCA judgment at 13.

107 CCA judgment at 13-14.

108 Such as Ipp J in *R v Liddington* (1997) 18 WAR 394 at 401 and McKechnie J in *O'Brien v Ritchie* unreported, Supreme Court of Western Australia, 17 March 1999 at 7.

109 *R v Liddington* (1997) 18 WAR 394 at 401 per Ipp J.

to consider all of the circumstances. Obviously, it is desirable that this difference of judicial opinion should be resolved. Whilst it remains unresolved, there is a risk that the outcome of appeals concerning suspended sentences of imprisonment might depend upon the constitution of the court rather than the application of an accepted principle.

The error of confining the discretion to suspend imprisonment

84 In my view, to limit the exercise of the discretion to suspend a sentence of imprisonment by reference wholly, mainly or specially, to the effect which suspension would have on rehabilitation of the offender would constitute an error. There is nothing in the grant of the power, as expressed in the applicable legislation, to justify confining its availability in such a way. Had the legislature intended to limit the discretion to suspend by reference to such a consideration, it could have done so. This consideration is particularly relevant to the Western Australian legislation, which amounts to a recent endeavour to collect all the main principles of sentencing in a statute of general application.

85 Moreover, the scheme of the legislation, and the two steps which s 76(1) and (2) of the Act requires, suggest, as a matter of construction, that the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term[110]. This means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender. It would be surprising if the legislation were to warrant, at the second step, concentration of attention only on matters relevant to the offender, such as issues of the offender's rehabilitation and the court's mercy[111]. On the contrary, the structure and language of s 76(2) of the Act support the view that what is required by a proposal that a term of imprisonment should be suspended is reconsideration of "all the circumstances". This necessitates the attribution of "double weight" to all of the factors relevant both to the offence and to the offender – whether aggravating or mitigating – which may influence the decision whether to suspend the term of imprisonment[112].

86 Adopting this approach, then, permits attention to be given not only to the circumstances personal to the offender but also to the objective features of the

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110 Thomas, *Principles of Sentencing*, 2nd ed (1979) at 244-245; *R v P* (1992) 39 FCR 276 at 285.

111 cf *R v Shueard* (1972) 4 SASR 36 at 43; *R v Prindable* (1979) 23 ALR 665 at 669; *Davey* (1980) 2 A Crim R 254 at 259-260.

112 *R v Liddington* (1997) 18 WAR 394 at 402 per Ipp J.

offence. These may, in a particular case, outweigh the personal considerations of rehabilitation and mercy. They may require that the prison sentence be immediately served, despite mitigating personal considerations. This approach is consonant with the recognition in jurisdictions other than Western Australia of the "complete discretion"[113] which, subject to the statute, the primary judge has in suspending a sentence of imprisonment. In other States, it has been considered undesirable to attempt to circumscribe the language of the statute by reference to supposed formulae, particular considerations or any other gloss[114].

87 The approach which I favour also appears more consistent with what has recently occurred in Western Australia where factors quite distinct from the rehabilitation of the offender or mercy in the particular case have influenced the suspension order made or confirmed[115]. Requiring the primary judge, asked to suspend a sentence of imprisonment, to consider anew all of the relevant circumstances both reinforces the two-step approach which the statute mandates and facilitates a desirable flexibility in sentencing options that permits, in a particular case, the exploration of alternatives to immediate custodial punishment[116].

88 It is true that Murray J, giving the reasons of the Court of Criminal Appeal in the present matter, acknowledged that there were purposes other than rehabilitation that might justify the use of suspended imprisonment in a case such as the present. However, in keeping with views which he, and some other members of the Court of Criminal Appeal, had expressed in earlier decisions, it is plain that his attention was mainly and specially addressed to the question of the appellant's rehabilitation. In this, with respect, the focus which he adopted was too narrow. The primary judge, on the other hand, had looked at the matter more broadly. He was obviously influenced in his decision about suspension by the prospects of rehabilitation on the part of the appellant, which he regarded as promising. But he also appears to have been influenced by all the circumstances and information available, including the nature of the particular offence, the low likelihood of the appellant's reoffending, and the impact which a prison sentence, immediately served, would have on the appellant and his family. The primary judge also mentioned the "social stigma" which necessarily followed the conviction, quite apart from a prison term. In my view, all of these were

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113 *Davey* (1980) 2 A Crim R 254 at 262.

114 cf *R v Wacyk* (1996) 66 SASR 530 at 534; *Police v Cadd* (1997) 69 SASR 150 at 169.

115 See eg *R v Shaharuddin* [1999] WASCA 229; *van de Worp v The Queen* [2000] WASCA 154.

116 cf *Griffiths v The Queen* (1977) 137 CLR 293 at 330.

considerations available and proper to the decision of whether or not to suspend the term of imprisonment.

89 The Act obliged the primary judge, in the second step, to reconsider and give renewed attention to all the circumstances of the case. This is what I take Viol DCJ to have done. No occasion therefore arose for appellate intervention in the primary judge's discretion or the order which he made suspending service of the sentence of imprisonment.

Conclusion and orders

90 In its reasoning and in its resulting orders, both in respect of the increase in the term of imprisonment imposed on the appellant and in setting aside the order for suspension of service of that term, the Court of Criminal Appeal erred. Accordingly, I favoured orders allowing the appeal, setting aside the orders of the Court of Criminal Appeal of Western Australia, and in place of those orders, ordering that the appeal to that Court be dismissed. On 7 September 2000, this Court made orders in those terms and I joined in those orders.