HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

VINCENT GERARD RYAN APPELLANT

AND

THE QUEEN RESPONDENT

Ryan v The Queen [2001] HCA 21
3 May 2001
S248/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales dated 2 March 1998 and in place thereof, remit the matter to that Court for sentencing in accordance with the reasons for judgment of this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

P A Johnson SC with D Jordan for the appellant (instructed by Carroll & O'Dea)

A M Blackmore with R D Ellis for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions)

CATCHWORDS

Ryan v The Queen

Criminal law – Sentencing – Sexual offences against children – Where appellant disclosed a large number of offences to police – Whether disclosure entitled appellant to a significantly discounted sentence – Whether the likelihood of disclosed offences being otherwise discovered should have been assessed.

Criminal law – Sentencing – Use of character in the sentencing process – Whether the appellant's otherwise good character entitled him to some leniency.

1 McHUGH J. This appeal is brought against an order of the Court of Criminal Appeal of New South Wales dismissing an appeal against sentences imposed in the District Court of New South Wales. The appeal raises three issues:

- **Disclosure of previously unknown offences**. The appellant was a priest who had abused his position of trust by sexually assaulting young boys over a long period of time. A large number of the offences became known to the police only because the appellant disclosed them. The appellant claims that the sentencing judge erred in the sentencing process by failing to assess the likelihood of these disclosed offences being otherwise discovered. He also claims that, by reason of the disclosure, he was entitled to a significant discount from the sentences otherwise appropriate but that the sentencing judge failed to give him a significant discount. Did the Court of Criminal Appeal err in holding that the learned judge had made no error in respect of the appellant's disclosure of offences?

- **Good character**. The sentencing judge held that, except for the offences, the appellant was a man of unblemished character and reputation. The appellant claims that the learned judge erred in holding that the appellant's unblemished character and reputation did not entitle him to any leniency whatsoever. The judge said that unblemished character was something that was expected of a priest. Did the Court of Criminal Appeal err in holding that the sentencing judge made no error in giving no leniency for good character?

- **Manifestly excessive sentence**. The appellant claims that his sentence was manifestly excessive having regard to the correct principles of sentencing. But no argument was addressed to the issue. The ground of appeal referring to it was apparently intended to assert that the sentence would have been less if the judge had given a significant discount for disclosing offences and if he had given credit for otherwise good character.

2 In my view, the learned judge did not err in respect of the disclosure issue but he erred in respect of the character issue because the appellant was relevantly of good character and was entitled to some leniency because of his otherwise good character. It follows that the Court of Criminal Appeal erred in dismissing the appellant's appeal against his sentence. The matter must be remitted to that Court for further consideration. It is therefore strictly unnecessary to deal with the manifestly excessive sentence ground. There is in my opinion, however, no substance in that ground in so far as it is taken to mean that the length of sentence was by itself manifestly excessive. If I had been in favour of otherwise dismissing the appeal, I would have revoked the order of special leave in respect of this ground.

The factual background

3 In May 1996, the appellant pleaded guilty in the District Court of New South Wales to, and was sentenced for, certain sexual offences involving under age males. However this sentence, which was imposed by Rummery DCJ, is not the subject of this appeal.

4 As a result of publicity surrounding the sentence, further victims of the appellant came forward and made statements to the authorities. On 27 August 1996, a police officer interviewed the appellant in relation to the new allegations. The appellant admitted that the allegations were true. He also disclosed further offences which had not been known to the police previously.

5 In September 1997, the appellant pleaded guilty in the District Court of New South Wales before Nield DCJ to the offences involved in these new matters. He pleaded guilty to:

- nine counts of indecent assault[1],
- three counts of sexual intercourse with a person under the age of 16 years knowing that he was not consenting[2],
- one count of gross indecency[3],
- one count of indecency[4].

He asked Nield DCJ to take into account 39 additional offences.

6 Nield DCJ sentenced the appellant to 16 years' imprisonment, with a minimum term of 11 years. It is this sentence that is the subject of this appeal.

The disclosure issue

7 The appellant submitted that Nield DCJ erred in not extending to him a significant added element of leniency for his disclosure of previously unknown offences. He contended that the Court of Criminal Appeal also erred in not recognising the error of Nield DCJ in this regard.

---

1 s 81 of the *Crimes Act* 1900 (NSW) (since repealed).

2 s 61D of the *Crimes Act* 1900 (NSW) (since repealed).

3 s 78Q of the *Crimes Act* 1900 (NSW).

4 s 61O of the *Crimes Act* 1900 (NSW).

8 In his sentencing remarks, Nield DCJ said:

> "After being spoken to by police following his having been dealt with for offences of sexual abuse of young boys, he admitted to police his abuse of the further complainants and he told police of the names of all of his victims whose names he could remember, *thereby disclosing offences of which police were unaware, and may not have become aware. The Crown's case against him in relation to many of his victims rests solely on his admissions to police.* His admissions show his desire to make a complete disclosure of his conduct. *These things go to his credit, show his contrition and entitle him to a discount in punishment*." (emphasis added)

9 Later, Nield DCJ noted that the "advantageous features" of the case included, inter alia, "the prisoner's admissions to police, including admissions of offences of which police did not know".

10 In this Court, the appellant contended that Nield DCJ's error had manifested itself in two ways. First, his Honour erred because he did not "engage in a process of assessing the degree of likelihood of the guilt being discovered by law enforcement authorities as well as guilt being established against the person accused". Second, his Honour erred because, although he had said that the appellant was entitled to a "discount in punishment" because of the disclosures, he did not state or hold that the appellant was entitled to "a significant added element of leniency"[5].

11 The appellant argues that *R v Ellis*[6] holds that a plea of guilty entitles a convicted person to an element of leniency in sentence, the degree of which may vary, but that the disclosure of previously unknown offences entitles the accused to a considerable degree of leniency. In *Ellis*, Street CJ (with whom Hunt and Allen JJ agreed) said[7]:

> "When the conviction follows upon a plea of guilty, that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. *Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable*

---

5 *R v Ellis* (1986) 6 NSWLR 603 at 604.

6 (1986) 6 NSWLR 603; cf s 23 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) which was not applicable to the appellant's sentence and which effectively replaces the *Ellis* principle.

7 (1986) 6 NSWLR 603 at 604.

> *element of leniency should properly be extended by the sentencing judge.* It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.
>
> The leniency that follows a confession of guilt in the form of a plea of guilty is a well recognised part of the body of principles that cover sentencing. Although less well recognised, because less frequently encountered, *the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned*." (emphasis added)

12 Thus, according to *Ellis*, the degree of leniency to be shown for the disclosure of unknown offences will vary according to (1) the likelihood that the offences would have been discovered by the authorities; and (2) the likelihood that the offences could have been proven beyond reasonable doubt in a court without the disclosure.

13 But the sentencing remarks of Nield DCJ show that he considered both factors. His Honour said that the police "may not have become aware" of the offences that the appellant disclosed. His Honour also said that "[t]he Crown's case against him in relation to many of his victims rests solely on his admissions to police". That is, without the appellant's admissions to the police, the Crown had no case. That being so, there is no substance in the appellant's first argument regarding the disclosure of unknown offences.

14 The appellant also argued that Nield DCJ erred in not stating that he had given or in failing to give the appellant "a significant added element of leniency". Nield DCJ did not use the phrase "significant added element of leniency" in his sentencing reasons but he did give the appellant a "discount in punishment".

15 The appellant's argument based on the trial judge's failure to indicate that he was giving the appellant "a significant added element of leniency" reflects a misunderstanding of the use that can properly be made of statements by judges in other cases. Judgments are not to be read as if they were Acts of Parliament. In *Broome v Cassell & Co Ltd*[8], Lord Reid pointed out that it is not the function of judges "to frame definitions or to lay down hard and fast rules". Their function is "to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive". The statement in *Ellis* that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element

---

8 [1972] AC 1027 at 1085.

of leniency" is a statement of a general principle or perhaps more accurately of a factor to be taken into account. It is not the statement of a rule to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.

16 The appellant argued that in any event Nield DCJ should have given him a greater discount than that which his Honour gave. The appellant's "entitlement" to a greater discount than that given cannot be based on a failure to take into account either of the material considerations referred to in *Ellis*. Nield DCJ took both elements into account. And the appellant has not asserted or identified any other error of sentencing principle by Nield DCJ which the Court of Criminal Appeal failed to correct. The appellant's argument amounts to no more than a complaint that, in the particular circumstances of this case, the sentence was "manifestly excessive", this being the other side of the argument that the "discount" was too small. I agree with Hayne J, for the reasons that his Honour gives, that this argument must fail.

17 In addition, Nield DCJ adjusted the length of sentence downwards in accordance with the totality principle[9]. It follows that any discount was downgraded proportionately. Sentencing is not a mechanical or mathematical process[10]. For that reason, attempting to quantify a percentage discount is apt to lead to error in the exercise of the sentencing discretion.

The good character issue

18 The appellant contended that Nield DCJ erred in holding that he was entitled to no leniency whatsoever by reason of the evidence concerning his "character, reputation, positive works and achievements" and that the Court of Criminal Appeal erred in not finding error by Nield DCJ in this regard.

19 Nield DCJ discussed the evidence relating to the appellant's "character, reputation, positive works and achievements" in two sections of his Honour's sentencing reasons. After noting that the appellant held a position of trust which he had abused, his Honour said:

---

9 See eg *Postiglione v The Queen* (1997) 189 CLR 295 at 308.

10 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; *AB v The Queen* (1999) 198 CLR 111 at 120-123 [13]-[19] per McHugh J, 156 [115] per Hayne J.

"I appreciate that, to other priests, and to others within his congregation, the prisoner was a good man who did positive things and who achieved much. This is shown by [various testimonials]. But *whatever he had done and achieved, he is not a good man*. The prisoner is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult. And for what? For his own sexual gratification, without thought or concern for the feelings or the sexual development of his victims. How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered to be a good man? I accept that to some people there is good in everyone, but *I cannot see any good in the prisoner*." (emphasis added)

20 When his Honour came to deal with the factors personal to the appellant, he said:

"His capacity, speaking generally, as a priest was well recognised and well received, as shown by the testimonials ...

He is well liked and well respected by some people, as shown by those testimonials.

Except for the subject offences, and the other offences of sexual abuse against young boys for which he was dealt with by his Honour Judge Rummery, all of which were committed during the period 1972 to 1993, *he was a man of unblemished character and reputation*. But an unblemished character and reputation is something expected of a priest. *His unblemished character and reputation does not entitle him to any leniency whatsoever*." (emphasis added)

21 The Court of Criminal Appeal found no error in this approach. Gleeson CJ (with whom Cole JA and Levine J agreed) said:

"In a circumstance where the essence of the criminality of the conduct of an offender is abuse of a position of trust, it is ordinarily not of great assistance to the offender to observe that he occupied a position of trust. The offences committed by the present appellant were only made possible by the trust that was reposed in him in connection with the pursuit of his priestly vocation. *I agree with Nield DCJ, that, in the circumstances of the present case, the high reputation previously enjoyed by the appellant in the community, the trust and confidence reposed in him by parents and by church authorities, and the effective performance by him of certain important aspects of his vocation, were not themselves matters which warranted the extension of significant leniency* when it came to punishing him for the offences to which he pleaded guilty." (emphasis added)

22 Although Gleeson CJ said that he agreed with Nield DCJ that the appellant's good works did not warrant the extension of "*significant* leniency" to the appellant, Nield DCJ had held that the appellant was not entitled to "*any* leniency whatsoever" for his good works.

The use of character evidence in the sentencing process

23 It is necessary to distinguish between the two logically distinct stages concerning the use of character in the sentencing process. First, it is necessary to determine whether the offender is of *otherwise good character*. When considering *this* issue, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Because that is so, many sentencing judges refer to the offender's "previous" or "otherwise" good character.

24 If an offender's character was determined by reference to the offences for which he or she is being sentenced, he or she would seldom be "of good character". I hesitate to say "never" because in *Ziems v The Prothonotary of the Supreme Court of NSW*[11] Kitto J thought that the circumstances giving rise to the conviction of a barrister for manslaughter did not "warrant any conclusion as to the man's general behaviour or inherent qualities"[12]. His Honour also thought that the conviction was "not inconsistent with the previous possession of a deservedly high reputation"[13]. Indeed, contrary to other members of this Court, Kitto J said that the barrister should not be suspended from practice while he was undergoing his gaol sentence[14].

25 Second, if the offender is of otherwise good character, it is necessary to determine the weight that must be given to that mitigating factor. If an offender is of otherwise good character, then the sentencing judge is *bound* to take that into account in the sentence that he or she imposes. The weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances.

Did Nield DCJ find the appellant was of good character?

26 When Nield DCJ discussed the appellant's character generally, he said that he could not "see any good in the prisoner". That is, his Honour appears to have held that the appellant was not a person of good character. When he came to deal

---

11 (1957) 97 CLR 279.

12 (1957) 97 CLR 279 at 299.

13 (1957) 97 CLR 279 at 299.

14 (1957) 97 CLR 279 at 300.

with the circumstances of the appellant, however, his Honour approached the matter differently. He said that the appellant was "a man of unblemished character and reputation", but he said that this did not entitle him to "any leniency whatsoever". That is, Nield DCJ appears to say that the appellant was otherwise a person of good character, but that in the circumstances his Honour would give no weight whatsoever to that good character.

Was the appellant relevantly of good character?

27 As Gleeson CJ observed in *R v Levi*[15]:

> "[T]here is a certain ambiguity about the expression 'good character' [in the sentencing context]. Sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community."

28 In *Melbourne v The Queen*, I said[16]:

> "In its strict sense, character refers to the inherent moral qualities of a person or what the New Zealand Law Commission has called '*disposition* - which is something more intrinsic to the individual in question'[17]. It is to be contrasted with reputation, which refers to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person[18]."

I noted that the common law has not always drawn a distinction between character and reputation in the criminal context[19] and that in the criminal law "a person is regarded as having either a good character or a bad character"[20].

29 In the trial context, an accused's "good character" may be relevant because it may tend to prove that the accused is unlikely to have committed the crime in

---

15 Unreported, Court of Criminal Appeal of New South Wales, 15 May 1997 at 5.

16 (1999) 198 CLR 1 at 15 [33].

17 Preliminary Paper 27, *Evidence Law: Character and Credibility* (1997), par 99 (emphasis in original).

18 *Plato Films Ltd v Speidel* [1961] AC 1090 at 1138 per Lord Denning.

19 (1999) 198 CLR 1 at 15 [33].

20 (1999) 198 CLR 1 at 15 [34].

question[21], as committing the offence would have been "out of character". In the sentencing context, however, being of otherwise good character may in some circumstances suggest that the prisoner's actions in committing the offence for which he or she is being sentenced were "out of character" and that he or she is unlikely to re-offend. For that purpose, the absence of previous convictions is usually regarded as evidence of good character. On the other hand, many previous convictions suggest that the offence for which sentence is being passed was not an "uncharacteristic aberration"[22].

30 Another, but less articulated, reason for considering "good character" in the sentencing context appears to involve the idea that a "morally good" person is less deserving of punishment for a particular offence than a "morally neutral or bad" person who has committed an identical offence. Walker and Padfield have described as "remarkable"[23]:

> "… cases in which the court is influenced by meritorious conduct which has nothing to do with the offence. Men have had prison terms shortened because they have fought well in a war, given a kidney to a sister, saved a child from drowning or started a youth club. Such cases are interesting because they seem to result from two assumptions: (i) that offenders are being sentenced not for the offence but for their moral worth; and (ii) that moral worth can be calculated by a sort of moral book-keeping, in which spectacular actions count for more than does unobtrusive decency. This can be illustrated by the ambivalent remarks of the [English Court of Appeal] in *Reid* (1982) 4 Cr App Rep (S) 280:
>
> > 'While this Court would not usually interfere with a sentence because the defendant had committed an act of bravery, we think that if the Recorder had known about this incident it may well be that he would have formed a different view of the appellant: he might have come to the conclusion that the appellant was a much better and more valuable member of society than his criminal activities had led him to suppose'."

31 Notwithstanding the "remarkable" rationale for taking into account a prisoner's otherwise good character, at common law it is an established mitigating factor in the sentencing process. What makes a person of otherwise

---

21 *Melbourne v The Queen* (1999) 198 CLR 1 at 16 [36].

22 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477.

23 Walker and Padfield, *Sentencing: Theory, Law and Practice*, 2nd ed (1996) at 53-54 (footnotes omitted).

"good character" will necessarily vary according to the individual who stands for sentence. It is impossible to state a universal rule.

32 In this case, if the offences for which the appellant was being sentenced by Nield DCJ are ignored in determining the otherwise good character factor, as they should be as a matter of principle, and if the offences for which sentence was passed by Rummery DCJ are also ignored, as Nield DCJ thought was appropriate, then the appellant was "of good character" both in the negative and positive sense. Other than the offences before Rummery DCJ, he had no prior convictions. He had been gainfully employed for many years. In the course of that employment he had done much "good work", including visiting the sick and the elderly at home and at work. His good work and otherwise kind nature were referred to in several references put before Nield DCJ. As his Honour said, absent both sets of offences, the appellant had an "unblemished character and reputation".

Did Nield DCJ err by not giving the appellant *any* leniency whatsoever because of his otherwise good character?

33 Sentencing is not a mathematical process[24]. Various factors have to be weighed. The otherwise good character of the prisoner is one of them. It is a mitigating factor that the sentencing judge is bound to consider. But the nature and circumstances of the offences for which he or she is being sentenced is a countervailing factor of the utmost importance. The nature of the offences for which the appellant was being sentenced meant that his otherwise good character could only be a small factor to be weighed in the sentencing process.

34 First, there were multiple offences involving repeated acts committed over a number of years[25]. They were not isolated incidents which might be said to be out of character. Second, the appellant was, as his counsel conceded before Nield DCJ, leading a double life. Over many years, the appellant was doing "good works" while he was committing grave offences. This contradiction indicates that the appellant's otherwise good character was a minor factor to be weighed[26]. Third, the appellant committed the offences in the course of his

---

24 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46].

25 See eg *Hermann* (1988) 37 A Crim R 440 at 448; *Phelan* (1993) 66 A Crim R 446 at 448.

26 In several decisions, including *R v Levi* (unreported, Court of Criminal Appeal of New South Wales, 15 May 1997 at 4) and *R v Petchell* (unreported, Western Australian Court of Criminal Appeal, 16 June 1993 at 10), Courts of Criminal Appeal have said that the fact that the offences were committed in secret should, of

(Footnote continues on next page)

priestly duties and it was as a priest that he did the "good works" which are at the heart of his claim of good character. This reduces the weight that ought to be given to his otherwise good character. Fourth, and related to the third point, the offences involved breaches of trust.

35 Given these circumstances, Gleeson CJ was correct when he said that the appellant was not entitled to *significant* leniency because of his otherwise good character. However, Nield DCJ gave the appellant *no* leniency whatsoever for his otherwise good character. He was entitled to some leniency for his otherwise good character. That being so, the Court of Criminal Appeal should have allowed the appeal and re-sentenced the appellant. In re-sentencing the appellant, some weight should be given to the appellant's otherwise good character.

Summary

36 In considering a prisoner's good character when sentencing, the court must distinguish two logically distinct stages. First, it must determine whether the prisoner is of otherwise good character. In making this assessment, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Second, if a prisoner is of otherwise good character, the sentencing judge must take that fact into account. However, the weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances of the case.

37 In this case, once the offences before Nield DCJ and Rummery DCJ are excluded, the appellant was of otherwise good character. He was entitled to some leniency because of that good character.

Sentencing principles

38 In his judgment, Kirby J has referred to some of the factors relevant to the sentencing of persons such as the appellant and both his Honour and Callinan J have referred to the need for sentencing judges to keep in mind the publicity and opprobrium that accompanies conviction for certain offences. The discussion by Callinan J is of general application, but part of the discussion by Kirby J deals with the sentencing of persons such as the appellant. Undoubtedly, the whole issue of the correct approach in sentencing and dealing with paedophiles like the appellant is of great importance[27]. Sooner or later, it will have to be addressed by

---

itself, mean that less weight should be given to a prisoner's otherwise good character.

27 See for example Bifulco, Brown and Adler, "Early Sexual Abuse and Clinical Depression in Adult Life", (1991) 159 *British Journal of Psychiatry* 115; Mullen,

(Footnote continues on next page)

this Court. But at no stage of the present proceedings before they reached this Court was there any issue concerning the correct principles for sentencing paedophiles. Moreover, in this Court, there were only perfunctory references to the issue. As a result, as Kirby J said in another case[28], they "were not explored in argument with the elaboration that would make this case a suitable one for general remarks" about them. Because that is so, the case is an unsuitable vehicle for determining the principles or considerations relevant in sentencing paedophiles.

39 Given the issues litigated by the parties, any attempt to lay down principles for the guidance of judges sentencing paedophiles is premature and may lead to confusion and doubts on the part of sentencing judges as to how they should approach the sentencing process in a case such as the present. I see no inconvenience in refusing to determine, at this stage, what principles should be applied or considerations taken into account in sentencing paedophiles. On the other hand, I see great advantages in doing so only when the Court has a case before it where the relevant sentencing issues are raised and explored by the parties in argument after calling expert evidence throwing light on all aspects of this complex social problem. But, given the general remarks of Kirby J and Callinan J concerning sentencing, it is proper that I should mention that in my opinion views different from those suggested by each of their Honours are open.

Sentencing considerations in paedophile cases

40 Whether or not paedophilia is an "underlying condition" – and it appears not to be a psychiatric illness – it is by no means clear that a paedophile should be punished "less severely than would be appropriate for a series of wilful and completely unconnected offences"[29]. If two men commit similar offences against children – one because he was a paedophile and the other for sexual gratification – I doubt that the general public would see any difference in the two cases. Indeed, the public view – which cannot be disregarded if courts are to maintain

---

Martin, Anderson, Romans and Herbison, "Childhood Sexual Abuse and Mental Health in Adult Life", (1993) 163 *British Journal of Psychiatry* 721; Pettigrew and Burcham, "Effects of Childhood Sexual Abuse in Adult Female Psychiatric Patients", (1997) 31 *Australian and New Zealand Journal of Psychiatry* 208; Figueroa, Silk, Huth and Lohr, "History of Childhood Sexual Abuse and General Psychopathology", (1997) 38 *Comprehensive Psychiatry* 23; Bauman, "The Sentencing of Sexual Offences against Children", (1998) 17 *Criminal Reports* (5th) 352.

28 *AB v The Queen* (1999) 198 CLR 111 at 150 [102].

29 Reasons of Kirby J at [128].

the confidence of the community – may be that the paedophile should get the heavier sentence of the two because he is more likely to re-offend. There is certainly judicial authority for that view. In *Channon v The Queen*[30], Brennan J, then a member of the Federal Court, said:

> "An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period."

41 In *Veen v The Queen [No 2]*[31], a majority of this Court referred to the fact that an offender may have a condition that makes him or her a danger to society because of the propensity to re-offend. But the majority noted that, although the condition may be said to diminish his or her "moral culpability for a particular crime", it is a double-edged sword. The protection of society is a material factor in fixing an appropriate sentence[32]. As a result, a person suffering from that condition may not only be disentitled to receive any reduction in sentence because of that condition but the need to protect society may require a longer sentence than would otherwise be the case. As Mason CJ, Brennan, Dawson and Toohey JJ said in *Veen [No 2]*[33]:

> "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime *merely* to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence." (emphasis added)

For that reason, in *Veen [No 2]*, this Court saw no error in principle when the prisoner was given a life sentence substantially because of the need to protect society from his homicidal impulses.

42 Persons experienced in dealing with paedophiles appear to have widely differing views about sentencing them. One author, an Assistant Crown Attorney, writing in 1998, suggested that "[a] diagnosis of paedophilia should be

---

30 (1978) 20 ALR 1 at 4.

31 (1988) 164 CLR 465 at 476-477.

32 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473.

33 (1988) 164 CLR 465 at 473.

an aggravating factor with respect to sentencing"[34]. She argued that, "[b]y stressing the paedophile's sexual attraction to children, the criminal justice system is sexualizing the crime and ignoring the violence inherent in it"[35]. Her article was a call for longer sentences for paedophiles. There is no doubt that the effects, physical and psychological[36], on many child victims of sexual offences are appalling. Dr Bill Glaser, who is a Consultant Psychiatrist to a sex offender program in Victoria, says[37]:

> "[F]or a large number of victims, there are the consequences of brutal and forced sexual penetration including bruising, tears to the perineal area, venereal disease and other infections and urinary tract problems. Immediate psychiatric concerns include a wide variety of behavioural and emotional problems, such as sleep disturbance, nightmares, compulsive masturbation, precocious sex play, disturbed relationships with peer groups and parents and regression of behaviour such as loss of toilet training skills."

43 The need to deter other paedophiles from committing offences also points to longer sentences for paedophiles than for others who commit sexual offences against children. Traditionally, courts assume that sentences containing an element of general deterrence are effective[38]. They frequently impose sentences sufficiently lengthy to deter prisoners and others from committing similar offences in the future[39] although the propriety of doing so has been criticised by

---

34 Bauman, "The Sentencing of Sexual Offences against Children", (1998) 17 *Criminal Reports* (5th) 352 at 366.

35 Bauman, "The Sentencing of Sexual Offences against Children", (1998) 17 *Criminal Reports* (5th) 352 at 369.

36 Bifulco, Brown and Adler, "Early Sexual Abuse and Clinical Depression in Adult Life", (1991) 159 *British Journal of Psychiatry* 115; Mullen, Martin, Anderson, Romans and Herbison, "Childhood Sexual Abuse and Mental Health in Adult Life", (1993) 163 *British Journal of Psychiatry* 721; Pettigrew and Burcham, "Effects of Childhood Sexual Abuse in Adult Female Psychiatric Patients", (1997) 31 *Australian and New Zealand Journal of Psychiatry* 208; Figueroa, Silk, Huth and Lohr, "History of Childhood Sexual Abuse and General Psychopathology", (1997) 38 *Comprehensive Psychiatry* 23.

37 Glaser, "Paedophilia: The Public Health Problem of the Decade", in Australian Institute of Criminology, *Paedophilia: Policy and Prevention* (1997) 4 at 7-8.

38 *Yardley v Betts* (1979) 22 SASR 108 at 112 per King CJ.

39 *R v Radich* [1954] NZLR 86 at 87; *R v Williscroft* [1975] VR 292 at 298-299.

the Australian Law Reform Commission[40]. In *R v Stuckless*[41], Abella JA of the Ontario Court of Appeal thought that issues of general deterrence were relevant in cases of paedophilia. Abella JA said[42]:

> "Pedophilia is an explanation, not a defence. Society is entitled to protection no less from pedophiles than from those who sexually abuse children without this tendency. General deterrence is a concept which seeks, in part, to protect the public by signalling, through imprisonment, a potential consequence to others of the condemned conduct. There is no basis for concluding that it has, or ought to have, a reduced role in the sentencing of pedophiles."

44 Other persons, experienced in dealing with paedophiles, take a very different view. Dr Glaser thinks that, rather than imposing lengthy terms of imprisonment, it may be time to consider the imposition of long-term reviewable community-based sentences[43]. Under these sentences "much of the average paedophile's sentence may need to be spent in a non-custodial setting, in a supervised hostel environment with appropriate treatment conditions and restrictions on his movements". It would seem likely that Dr Glaser would favour sentences in many cases that were no longer than necessary to treat the offenders concerned. Mr John Nicholson SC, an experienced Public Defender, also thinks that a non-punitive disposition with treatment is a better solution in many cases than a general policy of gaol sentences for those who sexually assault children[44].

45 Whether these suggestions can be reconciled with traditional sentencing principles, however, is debatable. What is open to a legislature to do is not necessarily open to courts or judges who must act in accordance with established principles and who do not have authority to invent new and independent principles that do not fit with the existing body of principles and precepts. The established principles, recognising that punishment for crime serves a number of purposes, reflect competing factors and policies. They include the need to punish

---

40 Australian Law Reform Commission, *Sentencing*, Report No 44, (1988), par 37.

41 (1998) 17 CR (5th) 330.

42 (1998) 17 CR (5th) 330 at 347 [54].

43 Glaser, "Paedophilia: The Public Health Problem of the Decade", in Australian Institute of Criminology, *Paedophilia: Policy and Prevention* (1997) 4 at 11.

44 Nicholson, "Defence of Alleged Paedophiles: Why do we need to bother?", in Australian Institute of Criminology, *Paedophilia: Policy and Prevention* (1997) 44.

the offender, to protect society, to deter others and to rehabilitate and reform the offender[45]. Arguably, the suggestions of Dr Glaser and Mr Nicholson SC are not easily reconciled with those principles.

46 Thus, the existing principles require many sentences to be retributive in nature, a notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment. The "persistently punitive" attitude of the community towards criminals[46] means that public confidence in the courts to do justice would be likely to be lost if courts ignored the retributive aspect of punishment. In the middle of the 20th century, the need for sentences that were conducive to the rehabilitation of the prisoner was much emphasised. Less attention was then paid to the retributive aspect which was often ignored by an embarrassing silence. But under the notion of giving the offender his or her "just deserts", the retributive aspect has re-asserted itself in recent years[47]. In the case of offences by paedophiles, it is currently the most important factor in the sentencing process because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long term effects on their victims[48]. According to current community standards, it is proper that paedophiles should be severely punished for their crimes.

47 Sentencing principles in this country have emphasised the need to protect the community by imposing sanctions that reduce crime by removing the offender from contact with the general population and by deterring the offender and others from committing offences – the so-called "reductive" justification for prison sentences. The need to protect the community is also particularly important in cases of paedophilia. Even if long sentences do not deter offenders or others with similar inclinations, such sentences at least have the effect of putting paedophiles in a place where they cannot harm children for the time being.

48 Sentencing principles have also emphasised the need for the sentence to be proportional to the circumstances of the offence. This Court has referred to it as a "fundamental principle"[49]. It is the reason why, in the absence of legislative

---

45 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476.

46 *R v Dole* [1975] VR 754 at 769.

47 Warner, *Sentencing in Tasmania* (1991) at 250.

48 Glaser, "Paedophilia: The Public Health Problem of the Decade", in Australian Institute of Criminology, *Paedophilia: Policy and Prevention* (1997) 4 at 7.

49 *Chester v The Queen* (1988) 165 CLR 611 at 618.

authority, courts have no power to impose sentences of preventive detention[50]. If that power existed, it might justify detaining paedophiles until some court or institution was satisfied that they were no longer a danger to children. Since the power does not exist, the protection of society can only be a material factor and not the decisive factor in sentencing paedophiles.

49 No sentencing principle or factor is decisive in every case. The purposes of punishment vary from offender to offender and from crime to crime[51]. Consequently, a principle or factor that will dominate in one case may be of secondary importance in another. The judicial task is to pass such sentence as is appropriate in all the circumstances of the case[52] having regard to the body of sentencing principles.

50 The fact that judges do not have a free hand in sentencing but must apply established principles does not mean, of course, that they cannot try new solutions or methods conforming with those principles. But their capacity to do so is often limited by the failure or inability of the Executive government to provide the facilities and institutions which would enable those solutions and methods to be carried out. This is a factor of some importance in sentencing paedophiles. It is a factor that must bear on the formulation of principles or guidelines concerning the sentencing of paedophiles. The evidence of Dr Westmore, who examined the appellant, suggests that at least in New South Wales appropriate "psychological or psychiatric" treatment "in the prison setting remain limited and restricted at this time".

51 Dr Glaser asserts that "[m]ost offenders are long-term recidivists"[53] and that, without treatment, they invariably offend again. It seems highly desirable, therefore, that treatment should be an integral part of the sentencing regime for offenders. Indeed, it may well be that rehabilitation rather than retribution should be the most important factor in sentencing paedophiles. But if treatment is not feasible in most cases, long term sentences may be the only means by which the judges can satisfy the public desire for retribution and the need to

---

50 *Veen v The Queen* (1979) 143 CLR 458.

51 *R v Kane* [1974] VR 759 at 764-766; *R v Williscroft* [1975] VR 292 at 299; *R v Holder* [1983] 3 NSWLR 245 at 270; *R v Young* [1990] VR 951 at 955.

52 *R v Young* [1990] VR 951 at 954.

53 Glaser, "Paedophilia: The Public Health Problem of the Decade", in Australian Institute of Criminology, *Paedophilia: Policy and Prevention* (1997) 4 at 7. See also Miller, "Detection and Reporting of Child Sexual Abuse (Specifically Paedophilia): A Law Enforcement Perspective", in Australian Institute of Criminology, *Paedophilia: Policy and Prevention* (1997) 32 at 37.

protect children from the harm that paedophiles invariably inflict on their victims. Any formulation of principles or factors for sentencing paedophiles would need to take account of the facilities for and the means of treating paedophiles, the extent to which they will submit to and are receptive to treatment, and the success rate of such treatment.

Public opprobrium as a sentencing factor

52 It may be, as Kirby and Callinan JJ suggest[54], that factors such as public opprobrium and a permanent and public stigma entitle a convicted person to a lesser sentence than otherwise would be the case. But, at the moment, I am not convinced that that is so.

53 First, it would seem to place a burden on the sentencing judge which would be nearly impossible to discharge. The opprobrium attaching to offences varies greatly from one offender and one offence to another. How a judge could realistically take such a matter into account is not easy to see. Whether or not public opprobrium will attach to an offence and, if so, to what extent, will depend on the individual, his or her position and reputation in society, whether and when the offender will return to the community where the offence occurred and the nature of the publicity, if any, that the conviction receives. In the case of long sentences, taking into account the impact of public opprobrium or stigma would seem an impossible exercise and almost meaningless. In addition, taking public opprobrium or stigma into account would seem to favour the powerful and well known over those who were lesser known. I see no reason why the well known individual should get a lesser sentence than the person who is hardly known in his or her community.

54 No doubt it is legitimate to take into account many matters that are personal to the offender and that will have consequences on that person's future life[55]. It is legitimate, for example, to take into account that the conviction will result in the offender losing his or her employment or profession or that he or she will forfeit benefits such as superannuation[56]. But I am not convinced at the moment that public opprobrium is to be treated as equivalent to the loss of a job or similar personal or financial loss.

55 Second, the worse the crime, the greater will be the public stigma and opprobrium. The prisoner who rapes a child will undoubtedly be subject to

---

54 Reasons of Kirby J at [123]; reasons of Callinan J at [177].

55 *Richards* (1980) 2 Cr App R (S) 119.

56 *R v Wright (No 2)* [1968] VR 174 at 180.

greater public opprobrium and stigma than the prisoner who rapes an adult person. But, without the benefit of a full argument on the issue, I do not see why the objectively appropriate sentence for raping a child should be reduced by reason of any public opprobrium or stigma that the prisoner might suffer.

Conclusion

56 Nothing I have said about sentencing paedophiles or the weight to be given to the publicity and opprobrium accompanying conviction is intended to or could be definitive. Nor are my remarks intended to be an exhaustive discussion of these issues. And, since they were not made in deciding a litigated issue, they are not binding on any judge or magistrate. My remarks are simply intended to indicate that other views, beside those propounded by Kirby J and Callinan J, respectively, are open.

57 Moreover, I think that, in any event, it is unlikely that any single case would be sufficient to enable the Court to lay down firm principles of general application. Common law principles are usually the inductive product of the rules and holdings from a number of cases. As Dean Roscoe Pound has said[57]:

> "You cannot frame a principle with any assurance on the basis of a single case. It takes a long process of what Mr Justice Miller used to call judicial inclusion and exclusion to justify you in being certain that you have hold of something so general, so universal, so capable of dealing with questions of that type that you can say here is an authoritative starting point for legal reasoning in all analogous cases."

58 Dean Pound went on to contrast the formulation of principles with the formulation of rules[58]:

> "A single decision as an analogy, as a starting point to develop a principle, is a very different thing from the decision on a particular state of facts which announces a rule. When the court has that same state of facts before it, unless there is some very controlling reason, it is expected to adhere to the former decision. But when it gives [sic] further and endeavors to formulate a principle, *stare decisis* does not mean that the first tentative gropings for the principle ... are of binding authority."

---

57 Pound, "Survey of the Conference Problems", (1940) 14 *University of Cincinnati Law Review* 324 at 330.

58 Pound, "Survey of the Conference Problems", (1940) 14 *University of Cincinnati Law Review* 324 at 330-331.

59 For the present, in my opinion, sentencing judges in paedophilia cases or other cases giving rise to public opprobrium would be well advised to follow the conventional course of imposing such sentence as is appropriate in all the circumstances of the case, bearing in mind the general body of established sentencing principles.

Order

60 The appeal should be allowed. The judgment of the Court of Criminal Appeal of New South Wales should be set aside. The matter should be remitted to the Court of Criminal Appeal for the appellant to be sentenced in accordance with these reasons.

61 GUMMOW J. Section 5(1)(c) of the *Criminal Appeal Act* 1912 (NSW) ("the Act") authorised an appeal against sentence with the leave of the Court of Criminal Appeal. That Court granted leave. For the appeal then to have succeeded, it would have been necessary, in accordance with s 6(3) of the Act, for the Court to have formed the opinion that a less severe sentence (or, in this case, sentences) was warranted in law and should have been passed. The Court of Criminal Appeal dismissed the appeal and, in this Court, the appellant submits that, in doing so, it fell into error by reason of its failure to detect in various respects errors by the sentencing judge.

62 This Court has stressed the discretionary elements involved in the sentencing process and emphasised that it will not interfere with the decision of intermediate appellate courts in cases such as this case unless there be disclosed an error of principle affecting the sentence or unless it was manifestly excessive[59]. The error may appear in what the sentencing judge said or the sentence itself may be so excessive as to manifest such error[60].

63 The relevant facts are described by Callinan J. The appellant urges that proper credit was not given him for his disclosure of a very substantial number of offences otherwise unknown to the authorities. I agree with the reasons given by Callinan J for rejecting that ground of appeal. However, I differ with respect to the second ground. Here the appellant complains that there was an error in principle in sentencing him "on the basis that evidence of character, reputation, positive works and achievements entitled him to no leniency whatsoever". In my view, there was no error of principle in the approach taken by the sentencing judge.

64 It is necessary first to outline what is involved here in the notion of "good character". In cases of federal offences, s 16A(2)(m) of the *Crimes Act* 1914 (Cth) requires the court to consider the character of the person to the extent it is known to the court and is relevant. Here, the appellant had pleaded guilty to offences under New South Wales statute law and there is no applicable statutory provision respecting the significance to be attached to "good character" by the sentencing judge.

65 One begins, as a matter of the general law, with the statement of principle by Deane J in *Veen v The Queen [No 2]* in which his Honour said[61]:

---

59 *Lowe v The Queen* (1984) 154 CLR 606 at 608-609, 621-622; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478.

60 *R v Tait* (1979) 24 ALR 473 at 476.

61 (1988) 164 CLR 465 at 491.

> "It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors – such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence – will point to what is the appropriate sentence in all the circumstances of the particular case."

That list of factors was not intended to be exhaustive. Abuse of authority or trust is normally an aggravating factor[62].

66 In our judgments in *Melbourne v The Queen*[63], McHugh J and I discussed the use of evidence of "good character" as relevant or probative in the determination of proof of guilt. We distinguished the public estimation or repute of a person as something which may not correspond with that person's essential or intrinsic nature.

67 Where these issues arise at the stage of sentencing, particular considerations apply. The "cardinal rule" is said to be that, whilst "good character" may operate in mitigation, "bad character" cannot operate in aggravation because a person is not to be punished or punished again for crimes other than that for which sentencing is passed[64]. This rather assumes that "bad character" is measured by criminal behaviour alone.

68 On the other hand, "good character" is treated as relevant to the sentencing process for various reasons. For example, where the offence is an isolated lapse representing human frailty or the offence is one of strict liability, to a person valuing a good reputation the mere fact of conviction may be a punishment. "Good character" in such a case also may indicate the capacity of the person to appreciate the censure inherent in the outcome of the criminal process and may suggest that repetition of the criminal conduct is unlikely[65].

69 The present case was quite different. The offences were repeated over some 20 years and the victims were numerous. The appellant used his apparent good character to assist in the commission of the offences, yet now seeks to have

---

62 *Halsbury's Laws of England*, 4th ed (Reissue), vol 11(2), §1189.

63 (1999) 198 CLR 1.

64 *R v McInerney* (1986) 42 SASR 111 at 113.

65 Ruby, *Sentencing*, 4th ed (1994) at 186; Ashworth, *Sentencing and Criminal Justice*, 3rd ed (2000) at 141.

it used in his favour on penalty[66]. The appellant had been placed by his church in a position of trust and influence respecting the children in question. That trust and influence sprang from his authority among the faithful to whose religious needs he ministered and the education of whose children he superintended. The law regards the advancement of many religious purposes as being for the public benefit and expresses that regard in, for example, the principles respecting charitable trusts, and, indeed, in s 116 of the Constitution[67]. But the law also treats with caution the exercise of religious influence, for fear of its abuse. Observations of Lindley LJ are relevant here. His Lordship said that "the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful"[68]. That power and danger were manifested in the conduct of the appellant in this case.

70 The crucial passages in the remarks of the sentencing judge are set out in the reasons of Hayne J. It was open to the sentencing judge to conclude that the good works upon which the appellant relied in partial discharge of his office of trust and influence were liable wholly to be displaced by the malign exercise of the power of his religious office. No error of principle is disclosed to attract appellate intervention. Accordingly, the Court of Criminal Appeal was correct in dismissing the appeal against sentence.

71 In his submissions, the appellant does not rely upon any third ground. He does not direct particular attention to the circumstance that the offences were committed by him against young persons and complaining that the sentencing process had miscarried by reason of his classification as a "paedophile". The absence of such a further ground is not surprising, given the conduct of the case at trial and in the Court of Criminal Appeal. No evidence was led bearing upon the derivation and contemporary meaning of the term "paedophile" and the condition which it identifies in popular and clinical usage and upon their significance for the sentence to be imposed upon the appellant.

72 Upon neither ground of appeal that is before this Court did the Court of Criminal Appeal err in dismissing the appeal against sentence.

73 The appeal should be dismissed.

---

66 cf *R v Spiller* [1969] 4 CCC 211 at 214.

67 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 160.

68 *Allcard v Skinner* (1887) 36 Ch D 145 at 183; this passage was adopted and applied by McLelland J in *Quek v Beggs* (1990) 5 BPR [97405] at 11,765.

74 KIRBY J. This appeal comes by special leave from a judgment of the Court of Criminal Appeal of New South Wales[69]. That Court, whilst granting leave to appeal, dismissed an appeal of Vincent Gerard Ryan ("the appellant") from a sentence imposed upon him by Nield DCJ[70].

75 The appeal requires consideration of two complaints of specific error on the part of the sentencing judge. The first of these was that the sentencing judge failed to provide a "considerable element of leniency"[71] to the appellant who had confessed to a number of offences. This was so although it was unlikely that the appellant's guilt of those offences would have been known, still less established, except for his confession. The second concerned the approach of the sentencing judge to evidence about the appellant's past good character and conduct. In particular, the appellant complained about the judge's statement that his proved "unblemished character and reputation does not entitle him to any leniency whatsoever"[72]. In addition to these two grounds of specific error, the appellant relied upon a general ground of appeal that the sentence imposed upon him was "manifestly excessive".

76 The appellant's sentence followed his pleas of guilty to a large number of sexual offences against pre-pubescent boys. The appellant was described, in a psychiatric and a psychological report[73] and in the courts below[74], as a paedophile. Whereas formerly cases involving such offenders were relatively infrequent in Australian courts[75], in recent times (as the experience of this Court

---

69 *R v Vincent Gerard Ryan* unreported, Court of Criminal Appeal of New South Wales, 2 March 1998 ("Appeal judgment").

70 *R v Vincent Gerard Ryan* unreported, District Court of New South Wales, 26 September 1997 ("Remarks on sentencing").

71 *R v Ellis* (1986) 6 NSWLR 603 at 604 per Street CJ, Hunt and Allen JJ agreeing. See also *AB v The Queen* (1999) 198 CLR 111 at 155-156 [113]-[114] per Hayne J.

72 Remarks on sentencing at 12.

73 Report of Dr Bruce Westmore, forensic psychiatrist, exhibit "I" in the sentencing proceedings at 2-3; report of Dr Bryan Gray, consultant psychologist, exhibit "II" in the sentencing proceedings at 1-2.

74 Remarks on sentencing at 14; appeal judgment at 1 per Gleeson CJ.

75 cf McConaghy, "Paedophilia: A Review of the Evidence", (1998) 32 *Australian and New Zealand Journal of Psychiatry* 252 at 253-254.

itself reflects[76]), cases involving sexual offences, or alleged sexual offences, against children and young persons have become much more common[77]. So far as the grounds of appeal and the circumstances allow, this appeal presents an opportunity to consider some aspects of the sentencing of such offenders. Relevant considerations were also mentioned in *AB v The Queen*[78].

The offences and the sentencing judge's reasons

77 The basic facts are set out by Callinan J[79]. Nield DCJ's reasons explain how he came to the sentence of 16 years penal servitude imposed on the appellant, comprising a minimum term of 11 years and an additional term of five years. Nield DCJ set out a history of the proceedings and a description of the offences to which the appellant had pleaded guilty. He identified the serious breach of trust that was involved because the young boys had come into contact with the appellant in his capacity as a priest. He then added the following observations which afford a context for the appellant's complaints about the approach which Nield DCJ took to his sentence[80]:

> "The prisoner had sworn a vow of celibacy when he became a priest and he breached his vow, although I appreciate that there might be a nice argument about the extent of a vow of celibacy.
>
> The prisoner, *as a priest*, had accepted the teachings of his church and he sinned against those teachings.

---

76 See eg *Crofts v The Queen* (1996) 186 CLR 427; *Jones v The Queen* (1997) 191 CLR 439; *KBT v The Queen* (1997) 191 CLR 417; *Gipp v The Queen* (1998) 194 CLR 106; *AB v The Queen* (1999) 198 CLR 111; *McL v The Queen* (2000) 74 ALJR 1319; 174 ALR 1; *Dinsdale v The Queen* (2000) 74 ALJR 1538; 175 ALR 315; *Crampton v The Queen* (2000) 75 ALJR 133; 176 ALR 369; *Re Patterson; Ex parte Taylor*, High Court of Australia, 7 December 2000, transcript of proceedings; *Doggett v The Queen*, High Court of Australia, 15 February 2001, transcript of proceedings.

77 cf Wood, "Criminal Law Update: Court of Criminal Appeal", (1999) 4 *The Judicial Review* 217. At 227, Wood CJ at CL in the Supreme Court of New South Wales observes that: "It is fair to say that this kind of case now occupies a great deal of the time of the Court of Criminal Appeal".

78 (1999) 198 CLR 111.

79 Reasons of Callinan J at [161]-[169].

80 Remarks on sentencing at 9-10 (emphasis added).

> The prisoner, *as a priest*, accepted an obligation to minister to those within his congregation, including the children, and he failed to meet his obligation.
>
> The prisoner, *as a priest*, had undertaken a responsibility to give counsel and to provide guidance to those who were altar boys and servers and he rejected his responsibility."

78 The fact that the appellant was a priest was a consideration relevant to sentencing. That fact explained the circumstances of trust in which the appellant made contact with the boys against whom he committed his offences. However, in my opinion, a reasonable observer (and the appellant) might be excused for concluding, from the foregoing remarks, that the appellant was being punished for offences (including sinning) which he had committed *as a priest*. There are other passages in Nield DCJ's reasons in which he refers to the appellant's status as "a Catholic priest"[81].

79 The appellant's church has its own bodies, and its own canon law, for dealing with the appellant "as a priest"[82]. Adding to the appellant's punishment, as such, because he was a priest or because he was a sinner or had broken his priestly vows[83] would, in my view, amount to error. The ground of appeal to which that error would relate is that by which the appellant complains that the sentence imposed on him was "manifestly excessive" in its result. To the extent that extraneous considerations are referred to in judicial reasons for sentence, they may lend support to a complaint of manifest excess of punishment. However, because this consideration was not the subject of a complaint of specific error, I will pass on.

80 Nield DCJ's remarks in relation to the appellant's disclosure of previously unknown criminal conduct form a sounder basis for the appellant's complaints in this appeal. In this context, his Honour said of the appellant[84]:

> "[H]e told police of the names of all of his victims whose names he could remember, thereby disclosing offences of which police were unaware, and may not have become aware. The Crown's case against him in relation to

---

81 Remarks on sentencing at 11.

82 cf Ballotta, "Losing its Soul: How the Cipolla Case Limits the Catholic Church's Ability to Discipline Sexually Abusive Priests", (1994) 43 *Emory Law Journal* 1431 at 1443-1446.

83 Remarks on sentencing at 9-10.

84 Remarks on sentencing at 12-13.

> many of his victims rests solely on his admissions to police. His admissions show his desire to make a complete disclosure of his conduct. These things go to his credit, show his contrition and entitle him to a discount in punishment.
>
> He pleaded guilty to all of the charges at the earliest appropriate opportunity. His guilty pleas have saved the State the time and costs of a committal hearing and a trial, they have relieved his victims of the need to relive the sorry episode in their lives, and they show his contrition. His guilty pleas go to his credit and entitle him to a discount in punishment."

81 Nield DCJ reviewed statements made about the appellant by character witnesses. His Honour's observations in this respect gave rise to another of the appellant's complaints[85]:

> "I appreciate that, to other priests, and to others within his congregation, the prisoner was a good man who did positive things and who achieved much. ... But whatever he had done and achieved, he is not a good man. The prisoner is a man who preyed upon the young ... And for what? For his own sexual gratification, without thought or concern for the feelings or the sexual development of his victims. How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered to be a good man? I accept that to some people there is good in everyone, but I cannot see any good in the prisoner."

82 After this passage of the judge's reasons there followed a lengthy section containing numerous denunciatory remarks ("debasing", "degrading", "wicked", "abhorrent", "almost beyond belief", "enormity")[86]. However, Nield DCJ acknowledged that, save for the similar offences for which the appellant had earlier been sentenced by Rummery DCJ, there was nothing in the appellant's past relevant to sentencing. Indeed, he was well liked and well respected by many people. Nield DCJ concluded, with emphasis inherent in the repetition[87]:

> "Except for the subject offences ... he was a man of unblemished character and reputation. But an unblemished character and reputation is something expected of a priest. His unblemished character and reputation does not entitle him to any leniency whatsoever."

---

85 Remarks on sentencing at 10.

86 Remarks on sentencing at 11-12.

87 Remarks on sentencing at 12.

83 Nield DCJ proceeded to express an opinion that the appellant did not regard his conduct as wrong[88]. This was said notwithstanding the pleas of guilty and the apparently uncontradicted acknowledgment by the appellant of his wrongdoing and harm to the boys concerned, recorded in one of the psychiatric reports[89] and in his confession to police. His Honour attributed his assessment in this regard to a general opinion which he held that "paedophiles do not see such conduct as wrong"[90].

84 After correctly referring to the principle of totality[91], the additional harshness of the punishment that would ensue because the appellant would probably have to serve his sentence in protective custody and the significance of general deterrence, Nield DCJ came to his conclusion about the total sentence appropriate to the criminality disclosed[92]. He reduced the aggregate sentence otherwise considered appropriate (17 and a half years, with a minimum term of 13 years one month two weeks) to 16 years with a minimum term of 11 years. However, he did this by reason of the fact that the imprisonment imposed by him on the appellant would have to be served following the completion of the four year term fixed by Rummery DCJ.

The decision of the Court of Criminal Appeal

85 The reasons of the Court of Criminal Appeal, rejecting the appellant's appeal, were given by Gleeson CJ (with whom Cole JA and Levine J agreed without separate reasons). So far as concerned the complaint that the sentencing judge had given insufficient weight to the consideration that the appellant had disclosed "unknown criminal conduct"[93], that Court suggested that Nield DCJ had acknowledged this consideration[94]:

---

88 Remarks on sentencing at 13.

89 Report of Dr Bruce Westmore, forensic psychiatrist, exhibit "I" in the sentencing proceedings at 2-3.

90 Remarks on sentencing at 14.

91 As to which, see *Postiglione v The Queen* (1997) 189 CLR 295 at 307-309, 340; *R v M (CA)* [1996] 1 SCR 500 at 531; Ruby, *Sentencing*, 4th ed (1994) at 44-47.

92 Remarks on sentencing at 15.

93 Appeal judgment at 3.

94 Appeal judgment at 4.

> "It is clear that the learned judge took into account in favour of the appellant his disclosure of offences which were not otherwise known to the authorities, and gave him credit for that."

86 Before this Court, the appellant argued that this reasoning did not respond to his submission. According to the appellant, giving "credit" and "favour" was not the applicable sentencing principle. The complaint was that the "considerable" leniency referred to in *R v Ellis* had not been accorded to him and that, therefore, his first objection to the resulting sentence remained unanswered.

87 The Court of Criminal Appeal dismissed the appellant's second argument concerning Nield DCJ's rejection of the evidence about the appellant's character and good works. The passage in that Court's reasons on this point is set out in the reasons of Callinan J[95]. The appellant argued that, in this respect too, that Court had failed to deal with his submission. His complaint was not that Nield DCJ had omitted to extend "significant leniency" but that he had declined to extend "any leniency whatsoever"[96]. He had done so despite uncontradicted evidence of acts of kindliness and social utility on his part completely outside his position of trust in relation to the boys whom he had abused.

88 In response to the complaint that the sentence was manifestly excessive, the Court of Criminal Appeal observed that the sentence imposed on the appellant by Nield DCJ was, in its opinion, "in line"[97] with sentences imposed for similar offences involving similar offenders. Reference was made, in this regard, to *Ridsdale*[98] and *R v AB*[99]. The latter case was later to be the subject of the successful appeal to this Court[100]. To that extent, the concluding remarks of the Court of Criminal Appeal rested, in part, on a premise now requiring qualification.

---

95 Reasons of Callinan J at [172].

96 Remarks on sentencing at 12.

97 Appeal judgment at 5.

98 (1995) 78 A Crim R 486.

99 Unreported, Court of Criminal Appeal of New South Wales, 7 July 1997.

100 *AB v The Queen* (1999) 198 CLR 111.

Sentencing appeals in the High Court

89 This Court has said many times that sentencing is not a mechanical function but one that involves intuition and judgment[101]. Generally speaking, the appellate consideration of sentences, challenged as being excessive or too lenient, must be left to courts of criminal appeal or their equivalent. This Court is not a court of ordinary sentencing review. I adhere to what I said in this regard in *Postiglione v The Queen*[102].

90 However, where appropriate, this Court will intervene in cases in which a specific error is shown in the reasons supporting the sentence or where the sentence itself is such as to demonstrate a manifestly unreasonable or erroneous exercise of the sentencing function that requires correction in order to avoid a serious miscarriage of justice[103]. The reports of decisions of this Court, and its annual reports, attest to the greater attention given by the Court in recent years to issues of criminal law, including, where appropriate, sentencing principles[104]. Under the Constitution, such matters are not outside the appellate supervision of this Court. Nevertheless, it is obvious that something more than a complaint that a sentence is too high or too low is needed to attract the intervention of this Court and a grant of special leave.

Substantial allowance for acknowledging unknown crimes

91 I turn to the specific errors which, in my opinion, are demonstrated in the reasons of the sentencing judge which the Court of Criminal Appeal failed to detect and correct. The first of these is that the sentencing judge failed to make *substantial* allowance for the appellant's acknowledgment of offences that were otherwise unknown to the authorities.

92 Clearly, it is in the public interest that the law should encourage offenders to acknowledge, and bring to official notice, offences not previously known to

---

101 *Lowe v The Queen* (1984) 154 CLR 606 at 610; *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]; cf *Engert* (1995) 84 A Crim R 67 at 68; *R v M (CA)* [1996] 1 SCR 500 at 528.

102 (1997) 189 CLR 295 at 337.

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

104 Contrast *Whittaker v The King* (1928) 41 CLR 230 at 249 and *White v The Queen* (1962) 107 CLR 174 at 176 with *Veen v The Queen* (1979) 143 CLR 458 at 467, 488, 492, 497. *Veen* is noted in (1979) 3 *Criminal Law Journal* 222 and Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (Interim), (1980) at 261-262.

the authorities. In part, this interest derives from the saving of costs in the investigation and prosecution of criminal offences. In part, it is because it helps to improve the clear-up rate for crimes and vindicates the public process of punishing and deterring crime. These considerations were referred to in *AB v The Queen*[105].

93 The applicable public interest also includes a growing concern of modern criminal law and practice with a consideration that is of particular relevance to a case such as the present. I refer to enlarged attention to the position of the victims of crime. A confession by an offender allows a victim a public vindication. In the particular matter of serial criminal offences against children and young persons, a confession by the offender may also facilitate the provision, where appropriate, of community assistance to the victim or the payment of compensation and an extension of greater family understanding and support. Medical reports tendered in the appellant's sentencing proceedings indicated that some of the persons abused by him as boys were considered, years later, still to be in need of psychiatric treatment[106].

94 Unless persons such as the appellant are encouraged to bring unreported cases to notice, the likelihood is that, in the great majority of instances, such crimes will not be reported. They will therefore go unpunished. Accordingly, both from the point of view of society and of the victims of crime, there are strong reasons of policy why the law should encourage offenders to make full confessions. It should certainly not discourage them. Encouraging a full confession may also be an important first step in securing help for, and counselling of, the offender. This is, likewise, one of the objectives of criminal punishment and thus of judicial sentencing.

95 In *R v Ellis*[107] it was said that a "considerable" or "significant added" element of leniency is required in sentencing an offender in respect of offences disclosed that were otherwise unknown to the authorities. It is true that it was accepted in that case that the precise extent of that element will "vary according to the degree of likelihood of that guilt being discovered ... [and] guilt being established" against the person concerned[108]. But take the present case as an

---

105 (1999) 198 CLR 111 at 132 [55] per Gummow and Callinan JJ, 149 [100] of my own reasons.

106 Such a position is not uncommon and may sometimes result in a cycle of such criminality: Dhawan and Marshall, "Sexual Abuse Histories of Sexual Offenders", (1996) 8 *Sexual Abuse: A Journal of Research and Treatment* 7.

107 (1986) 6 NSWLR 603 at 604 per Street CJ.

108 (1986) 6 NSWLR 603 at 604.

illustration. Many victims later named by the appellant had not come forward earlier. This was despite local publicity and the widespread knowledge that inferentially would have followed the earlier proceedings before Rummery DCJ. These facts tend to suggest that most of the offences to which the appellant confessed would not have come to light at all but for his confession. This inference is reinforced, in part, by the difficulties which police experienced in securing statements from most of the persons named by the appellant in his confession. In the sentence imposed on the appellant by Nield DCJ, the greater part of the minimum term of incarceration concerned offences against persons that were previously unknown to the authorities. Of those persons, most were either not found or did not make any statement to police. Therefore, in respect of the offences against those persons, the appellant's conviction and punishment effectively rested on his own admissions alone.

96 It follows that, in the words of McHugh J in *AB v The Queen*[109], the appellant was entitled to "*considerable* leniency because of his confession". The sentencing judge did not express matters in those terms. Instead, the appellant's confession was simply considered in the context of the "discount" to which a prisoner is ordinarily entitled for a guilty plea. There was no reference to *R v Ellis*. There was no indication that "*considerable*" or "*significant added*" leniency was allowed. The Court of Criminal Appeal did not suggest that there had been a reference to the particular consideration of "leniency because of his confession". Neither in the reasoning of the sentencing judge, nor in the resulting sentence, do I consider that the principle in *R v Ellis* was applied. It follows that, on the face of things, a specific error of sentencing principle has occurred which the appellant identified and the Court of Criminal Appeal failed to correct.

97 To say this is not to fall into a mistake of ascribing to the words of Street CJ in *R v Ellis*, or of McHugh J in *AB v The Queen*, a rigid or inflexible application. However, words represent images that conjure up ideas. The words "*significant*" and "*considerable*" are adjectives of degree. Prima facie a large deduction in sentence is appropriate in such a case. Otherwise, the judges concerned, when they expressed the applicable rule, could have used lesser adjectives, such as "modest" or "minimal" or perhaps the ever enigmatic "appropriate". For a long time now it has been the law – correctly in my view – that a "significant" discount should be given in a case such as the present. That is the law that should have been applied in the sentencing of the appellant[110].

---

109 (1999) 198 CLR 111 at 126 [27] (emphasis added).

110 The discount is "significant" to distinguish this class of case from the ordinary one in which a plea of guilty is entered, entitling the accused to have that fact taken into account in mitigation of punishment: *Siganto v The Queen* (1998) 194 CLR 656 at 663-664 [22]-[23].

98 Lawyers often boast that, for the common law, even an hour of liberty lost without full lawful justification is intolerable. Where a difference between "credit", on the one hand, and "*considerable*" or "*significant added*" leniency, on the other, may amount, in practical terms, to an increased loss of liberty not of hours but of months or years, there is no reason, in my respectful view, to decline appellate correction. This Court should uphold the appellant's appeal on this ground. He is entitled to a "considerable" or "significant" deduction in the sentence otherwise applicable by reason of his bringing to the notice of the authorities offences which were not previously known and which, but for his confession, would probably have remained unknown.

Evidence of character should not have been dismissed

99 Because the appellant must be resentenced and because this Court cannot perform that function, it is appropriate that I should also express my views on the second ground of specific error relied on by the appellant. A further reason for doing so is that, upon this ground, there is a majority in this Court. It will therefore constitute the legal principle for which this decision stands as binding authority.

100 Nield DCJ's statement that the appellant's unblemished character and reputation did not entitle him "to any leniency whatsoever"[111] amounted to a specific sentencing error. With respect, read with the earlier statement ("I cannot see any good in the prisoner"[112]) the remark disclosed an erroneous approach to the use, in sentencing, of evidence about the character of the prisoner. The error involved viewing the appellant in a one-dimensional way.

101 It is important to distinguish the use of evidence of good character during a contested trial as a matter, when available, relevant to the determination of whether or not the accused is guilty of the offence[113] and the use of evidence of character tendered at the sentencing stage. The latter is received to show that, although the offender has been convicted, he or she has nonetheless done things and earned a reputation that redounds to the offender's credit when the imposition of a criminal sentence is under consideration.

102 The rules governing the receipt of evidence pertaining to good character at the foregoing stages in a criminal trial are quite distinct. This is because their

---

111 Remarks on sentencing at 12.

112 Remarks on sentencing at 10.

113 *Melbourne v The Queen* (1999) 198 CLR 1 at 16 [35] per McHugh J.

purposes are different. It is a mistake of principle to confuse them. In the trial the evidence of character relevant to the issue of guilt is subject to various restrictions and consequences. The evidence of good conduct, or of matters which reveal redeeming features of the offender's character, tendered as relevant to sentencing will rarely, if ever, be discarded as immaterial to the sentencing function. The evidence may sometimes be disbelieved. It may sometimes be overridden by the objective seriousness of the offences or by countervailing evidence or by other considerations. But it is a mistake in sentencing to treat such evidence as irrelevant to the task at hand. This second error, therefore, also requires correction by this Court. For me, it affords an additional ground for upholding the appellant's appeal. On resentencing, the appellant would be entitled to have evidence of his good character, otherwise than in relation to the facts proved or inherent in his convictions, given appropriate weight.

103 The prosecution submitted that the "character" of the appellant was only that of a person who misused his vocation as a priest for his own sexual gratification. It argued that the "necessity for the appellant to be a good priest went hand in hand with his obvious desire to continue the inappropriate sexual contacts that he was having with young children". It was even hinted that an adolescent encounter with another boy, three years older than himself, recorded in a history in a psychiatric report, had "apparently led to [the appellant's] sexual focus being limited to young boys" and that this, occurring as it did before his entry into training for the priesthood, might actually have led him to that vocation in order to secure improper access to young children. In my opinion, any such suggestion was fanciful. It was unsupported by the evidence.

104 It is true that the appellant's abuse of his position of trust with many young boys effectively made it impossible to give weight to his proper performance of priestly duties in respect of other boys and young persons during the 30 years before his offences came to police notice. However, that still left many different activities which redounded to the appellant's credit. There was uncontradicted evidence before Nield DCJ concerning such activities.

105 I will not recount that evidence at length. But some of it should be mentioned in order to explain my reasons for holding that a second specific error of sentencing principle has been established and that to require resentencing has a practical utility. Thus, Fr D O'Hearn described the appellant's "care and support to the elderly in regular visitations to them in their homes" and his "particular support to families in crisis, either through death, divorce or emotional hardship". Fr A Stace wrote of the "understanding and compassion [the appellant] showed couples whose marriages were [shaky]". Sr Patricia Egan described him as "a very gifted and committed pastoral leader in other areas of his life". Fr F J Coolahan mentioned his charitable activities. The Vicar General of the diocese, Fr W Burston, whilst condemning the betrayal of trust on the part of the appellant and recounting the shock caused by the appellant's "criminal and immoral behaviour", stated that having known the appellant for a long time he

had "come to see that he has good qualities too". Many people, he wrote, had benefited from the appellant's ministry. He concluded that it "would be tragic if the good he has done were lost sight of in the situation that he is in at present".

106 In addition to such statements by fellow religious, there were statements by parishioners who indicated full knowledge of the appellant's offences and condemned those offences. However, they also expressed a willingness to stand by him and to attend the sentencing proceedings because of their respect for the good that he had done for them and others. Typical of these was a statement by one parishioner who recorded the appellant's "special compassion for people suffering bereavement". Another told of his support to her late husband when he had been terminally ill. Another described his support to him and his family during a bereavement and his hope that the appellant "may return to community life to share his many great gifts with those in need". Another told of his visit to the appellant in prison and of his satisfaction that the appellant understood the wrongs that he had done.

107 Against the background of such evidentiary materials, it is, with great respect, impossible to sustain the conclusion of the sentencing judge that the appellant was not entitled to "any leniency whatsoever" for his previously unblemished character and reputation. Yet three substantive reasons were suggested to support the sentencing judge's approach.

108 First, it was said that the appellant was a priest, and that a good reputation was therefore to be expected[114]. Such an approach, if valid, would deny persons who happen to be priests (or in equivalent occupations) the benefit to which all other persons in our community coming before a court for sentence are entitled, namely to rely on evidence relevant to their character and past conduct and to bring such evidence to account so that the sentencing judge considers them as a whole person and not solely under the shadow of their crimes. Such an approach would equalise the cruel, slothful, indifferent or impenitent offender with one who can demonstrate conduct over many years, in other aspects of life, that reveals positive qualities. If such considerations were not taken into account at all, as matters personal to the offender at the time of sentencing, it would mean that a significant part of the evidence normally tendered as relevant to sentencing would have to be excluded simply because of the appellant's vocation as a priest. As this is not the law, it provided, with respect, no basis for the rejection by Nield DCJ of the relevance of evidence about the appellant's general character in this case.

---

114 Remarks on sentencing at 12.

109 Secondly, it was said that there was, in fact, no good at all in the appellant deserving of consideration at the time of sentencing[115]. With respect, this assessment completely fails to respond to the uncontested statements of witnesses who knew the appellant, knew of his offences, and provided their statements so that their experience concerning the appellant could be taken into account at such an important time by the judge who had the responsibility of sentencing him.

110 Unless a statute or some other law requires the contrary, sentencing of offenders always involves consideration both of matters relevant to the offence and matters relevant to the offender. In Canada, these are commonly called "offence factors" and "'offender' considerations"[116]. In Australia, they are sometimes described (inaptly in my view) as the "objective" and "subjective" considerations. To ignore totally evidence relevant to the latter because of a general assessment that the appellant was not, globally speaking, a good man or had committed serious crimes, involves a departure from basic sentencing principle. Even in the case of offences against vulnerable children and young persons over an extended period, as here, a proper evaluation of all matters relevant to the sentencing function required that some weight be given to the evidence of character that stood to the appellant's credit. By dismissing that evidence out of hand, and refusing to give it any weight at all, the sentencing judge erred.

111 Thirdly, it was said, most especially in the Court of Criminal Appeal, that in a case such as the present, "significant leniency" could not be given for good works done in pursuance of the appellant's priestly vocation because of the revelation that, for so long and with so many, the appellant had abused the trust which came with that vocation[117]. It is true that it is sometimes stated that, in cases of prolonged criminal activity, a previously demonstrated, or assumed, good character is of less importance than in other cases[118]. However, the character witnesses called for the appellant recounted their specific knowledge of the type of offences of which he was convicted, the prolonged period of offending involved and the fact that many boys had been the victims of the offences. Despite this, each witness adhered to the opinion that, in identified aspects of his life, the appellant had acted in ways that deserved consideration when a full assessment of his character and of the matters personal to him was being considered by the sentencing judge.

---

115 Remarks on sentencing at 10.

116 *R v Stuckless* (1998) 17 CR (5th) 330 at 339 per Abella JA.

117 Appeal judgment at 6.

118 *Hermann* (1988) 37 A Crim R 440 at 448.

112 A sentencing judge might conclude that the objective criminality of the offences, and the imperative need to give priority to general and specific deterrence in a case such as the present, meant that less weight could be given to such evidence in the appellant's case than in different circumstances, with different offences involving different victims over a different period of time. In a particular case, a sentencing judge might even come to a conclusion that no "significant leniency"[119] could be given to such evidence when all considerations relevant to sentencing were assessed. However, the judge could not justify a complete refusal to attach any significance whatever to such character evidence. Rejection of the evidence as irrelevant to sentencing was therefore a second specific error. It ought to have been corrected by the Court of Criminal Appeal. The failure to do so, in my opinion, also requires the intervention of this Court.

Sentencing serial offenders: general considerations

113 *Evidentiary foundations*: The foregoing represents my response to the appellant's grounds of appeal raising specific error. There remains, however, the appellant's general complaint that the sentence imposed on him was manifestly excessive for reasons which do not specifically appear. As he must be resentenced, his remaining complaint arguably presents residual questions of a more general character concerning the sentencing of persons, like the appellant, convicted of serial sexual offences against minors.

114 Such offenders constitute a significant cohort of prisoners appearing for sentence before Australian courts. The issue of how the courts should approach such sentences was raised during the special leave application and on the appeal. Concerning that issue there is a large body of judicial, academic and scientific material available both in Australia and overseas. Some of it (but not a great deal) was referred to in argument. Experience suggests that the particular aspects of sentencing offenders like the appellant are rarely, if ever, supported by appropriate evidence or extended argument[120]. This fact bears out a frequent complaint about the criminal justice system that it concentrates its energies on the trial and tends to lose steam when it turns to the task, at least as important, of sentencing those who are convicted[121].

---

119 Appeal judgment at 6.

120 In *Veen v The Queen* (1979) 143 CLR 458 at 464, 494 and 498 comment was made on the unsatisfactory features of the "meagre" and "inadequate" material available to the sentencing judge, given the heavy sentence which the appellant faced. That case was by no means unique or even atypical.

121 Morris, "Sentencing Convicted Criminals", (1953) 27 *Australian Law Journal* 186 at 187, 196-197.

115 In an appeal in which there is an appropriate evidentiary foundation concerning a prisoner's condition of paedophilia, its origins, prognosis and chances of treatment or successful management, grounds of appeal specific to that issue, and argument on the legal and scientific literature that is available, it will be appropriate for a sentencing judge, a court of criminal appeal and this Court to explore in detail the general approach proper to sentencing such offenders. This is not such a case. However, within the complaint raised by the appellant's ground alleging that his sentence is "manifestly excessive", it is permissible, I think, to raise three considerations that in my opinion warrant further reflection.

116 *Defining terms*: In the courts below, as I have stated, the appellant was described as a paedophile. That was the uncontradicted evidence. It was not contested by him. Indeed he admitted that his sexual attraction was towards pre-pubescent children, specifically boys. He denied any sexual interest in adults, male or female. Specifically, he denied to his psychiatrist, Dr Westmore, that he was "homosexual or gay". He said that he had no sexual attraction to men and that his "focus on ... boys intensified and continued" at high school. Generally speaking, this meant that the appellant lost interest in the boys as they grew to puberty. The question arises as to what, if any, significance attaches to the appellant's condition in this regard.

117 Courts must uphold the law which treats sexual offences against children and young persons as extremely serious crimes, particularly where (as is often the case) such offences involve breaches of trust and responsibility on the part of those who had such young persons in their care. However, there are three considerations that may be relevant to sentencing such offenders:

1) the need to avoid the actuality or appearance of punishing them because they are paedophiles, as distinct from punishing them for their offences;

2) the need to keep in mind, in a general way, the fact that the publicity and special opprobrium common to such convictions may add significantly to the actual punishment suffered by the prisoner in respects that should be given weight in fixing the judicial punishment that is required in the case; and

3) the need to consider the common elements of the offences, if any, that are proved and whether these help to explain (although not to justify) the conduct of the prisoner in the multiple instances proved.

118 *Denunciation and impartiality*: A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct.

The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law"[122]. In the case of offences against children, which involve derogations from the fundamental human rights of immature, dependent and vulnerable persons[123], punishment also has an obvious purpose of reinforcing the standards which society expects of its members.

119 It is natural, where the victims of such offences are young, and subjected to wrongful sexual conduct by a person in authority over an extended period, that judges performing the function of sentencing will share the sense of anger and shock that exists in society in respect of such offences. However, I agree with Hayne J that, so far as possible, emotions must be put aside[124]. Otherwise the offender, and society, may be left with a belief that judicial emotion and prejudice against the offender, rather than proper factual and legal analysis of the offences, lies behind the sentence that is imposed.

120 By these observations, I do not suggest that judicial reasons for sentence, or any other judicial statements, must lack colour or entirely avoid verbal flourishes. However, the denunciation of unlawful conduct, contemplated as a purpose of criminal punishment and judicial sentencing, would seem to me to involve, substantially, the denunciation inherent in the punishment itself. In the present case, from the tenor of the sentencing judge's remarks, the appellant might arguably have been entitled to conclude that he was being additionally punished because he was a paedophile and a priest. Such an approach, if established, would constitute a specific error of sentencing. If an appellant wished to rely upon it, he or she would ordinarily have to raise it as a particular ground of appeal. However, unless judicial emotions are kept in check the danger exists that the judge may impose a manifestly excessive sentence, as the appellant claims happened to him.

121 Nield DCJ correctly recognised that it was likely that the appellant would be kept on protection "because other prisoners hold child sexual offenders in contempt"[125]. It is notorious that such prisoners are sometimes subjected to serious, even fatal, violence in custody and afterwards. In my respectful opinion,

---

122 *R v M (CA)* [1996] 1 SCR 500 at 558 per Lamer CJ.

123 Martin, "Justice for Victims? – The Sentencing of Public Trust Figures Convicted of Child Sexual Abuse: A Focus on Religious Leaders", (1994) 32 *Alberta Law Review* 16 at 32.

124 Reasons of Hayne J at [134].

125 Remarks on sentencing at 13.

it is undesirable that the language used by judges in their remarks on sentencing such offenders should add to the dangers which persons such as the appellant face[126]. In this respect, the remarks of Rummery DCJ, when sentencing the appellant, were a model of restraint. They were confined substantially to relevant legal and factual analysis.

122 Putting emotion to one side is the best way that the justice system has devised for avoiding both the appearance and actuality that extraneous considerations have entered the sentencing process. This may well be particularly relevant to sentencing offenders convicted of multiple offences against minors because of the specially heavy demand which that task places upon judicial dispassion and professionalism.

123 *Public opprobrium*: I agree with Callinan J[127] that in sentencing a prisoner such as the appellant, account might properly be taken of the particular features to which such a prisoner is exposed, including the additional opprobrium, adverse publicity, public humiliation and personal, social and family stress which he suffered. Thus, in resentencing the present appellant, it might be appropriate to fix a custodial sentence proper to his case taking into consideration, in a general way, the extent to which the appellant is now publicly identified as a paedophile as a result of the criminal proceedings taken against him. Where this occurs, the stigma will commonly add a significant element of shame and isolation to the prisoner and the prisoner's family. This may comprise a special burden that is incidental to the punishment imposed and connected with it. If properly based on evidence, it could, in a particular case, be just to take such considerations into account in fixing the judicial punishment required.

124 *A common factor*: The appellant pleaded guilty to, and was sentenced for, multiple offences. Through all the offences, however, ran a common thread. Each offence was a manifestation, impermissible and criminal, of the appellant's paedophilia.

125 After volunteering the many additional offences for which he was sentenced by Nield DCJ, the appellant, in his recorded interview with police, said:

> "[M]y whole life has been confused. … I never grew up and … the only relationship I ever had was as a young child with another boy masturbating. And that was the only thing that ever happened. It must sound so crazy to, to normal people. That's what the psychologist helped

---

126 cf *Witness v Marsden* (2000) 49 NSWLR 429 at 431-432, 458-459.

127 Reasons of Callinan J at [177], [186].

> me to understand and I never understood. I remember you asked me once how could I sleep at night? Well, I've never been at peace. But I, I didn't know anything else in life that could give meaning except to be close to these people".

126 The appellant's paedophilia is an explanation for his sexual attraction to young persons. It is not a defence to the criminal conduct in which he engaged[128]. However, depending on the evidence or other material available to the sentencing judge, it might be appropriate, in sentencing such an offender, to consider the common cause of his multiple offences as that cause is relevant to evaluating the totality of his wrongdoing. Doing this might allow a court, sentencing him, to view his actions in context by reference to a major contributing cause of his offending, if not *the* major cause of it.

127 A conventional way of avoiding excess of punishment and of reflecting overall criminality[129], where a number of criminal acts are seen as connected in a relevant way, is to provide that the sentences imposed should be served (in whole or part) concurrently rather than cumulatively[130]. Such orders may be reviewed on appeal[131]. Where strong common elements linking criminal acts are accepted, it can sometimes be an error of principle, in determining punishment, to ignore that fact or to give undue weight to the separate acts involved. Although this well-established judicial practice (sometimes now regulated by legislation[132]) is not exactly analogous to the consideration I have mentioned, there are certain similarities of principle. Each views the individual offences in their context, by reference to relevant linkages. That context and those linkages are not confined to temporal ones. Depending on the evidence and the issues in a case, similar questions might arise in sentencing a person whose behaviour is affected by schizophrenia, mental retardation, established drug addiction, kleptomania, paedophilia or like contributors to multiple offending.

128 It has been said that "[r]etribution requires that a judicial sentence properly reflect the moral blameworthiness of [the] particular offender"[133].

---

128 *R v Stuckless* (1998) 17 CR (5th) 330 at 347.

129 *R v Murray* [1980] 2 NSWLR 526 at 537.

130 cf *R v Ryan* [1977] 1 NSWLR 320 at 322.

131 See eg *Hayes v The Queen* (1967) 116 CLR 459 at 463.

132 See eg *Sentencing Act* 1989 (NSW), ss 5, 9; *R v Close* (1992) 31 NSWLR 743; *R v Arnold* (1993) 30 NSWLR 73.

133 *R v M (CA)* [1996] 1 SCR 500 at 558 per Lamer CJ.

Where serial criminal offences manifest a common underlying condition which is properly proved, for example one giving rise to a "compulsive sexual syndrome"[134], it would seem arguably appropriate in sentencing to take the underlying condition into account[135]. That condition might suggest that the particular instances of criminal offending are to be viewed as connected. In such a case, depending on the evidence and the issues, it might be proper to punish the offender less severely than would be appropriate for a series of wilful and completely unconnected offences[136].

129 Protection of the public is an important consideration in sentencing. However, normally, it is a consideration that arises incidentally to the achievement of other sentencing objectives. Save for a few statutory exceptions[137], preventive detention is not an available sentencing option in Australia[138]. It was not available in the present matter. In the ordinary case, therefore, the punishment imposed judicially must be proportionate to the individual features of the offences proved and to the considerations personal to the particular offender. These facts require that the sentencing judge must normally adjust the sentence to the circumstances of the case. In this respect, judges fulfil an important and complex function. They do not surrender that function to the purely retributive desires of some members of the public.

130 In sentencing the appellant, the discharge of the judicial function would appear to have necessitated some appropriate attention to his paedophilia. It

---

134 Fox, "The Compulsion of Voluntary Treatment in Sentencing", (1992) 16 *Criminal Law Journal* 37 at 46.

135 cf *McCracken* (1988) 38 A Crim R 92 at 96-97; Fox, "Sentencing a compulsive paedophile: Shame file or science?", (1991) 65 *Law Institute Journal* 523 at 525 where such cases are described as presenting a challenge to the "[c]lassical theory" of the nature of recidivism.

136 *R v Hammond* [1997] 2 Qd R 195 at 199-200.

137 *R v Johnstone* (1945) 70 CLR 561; *R v White* (1968) 122 CLR 467; *Chester v The Queen* (1988) 165 CLR 611 (habitual offenders legislation); *Lowndes v The Queen* (1999) 195 CLR 665 (indefinite imprisonment orders); see also *Veen v The Queen* (1979) 143 CLR 458 at 470, 495 (life imprisonment).

138 *South Australia v O'Shea* (1987) 163 CLR 378 at 385, 414, 420 (at pleasure detention legislation); cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *R v Moffatt* [1998] 2 VR 229 at 255 per Hayne JA; *Lowndes v The Queen* (1999) 195 CLR 665 at 679 where indefinite imprisonment orders, available by legislation in that case, were described as involving a "serious and extraordinary step".

seems to have been an important factor that helped to explain why a person, otherwise of good character, acted in the criminal way that the appellant did. It was, in a sense, the glue that bound together his personality and his unlawful conduct. In my respectful view, it deserved more attention than it received in the courts below, both by way of evidence and submissions.

131 At the least, this is a consideration that should, in my opinion, be examined further by sentencing judges and courts of criminal appeal in the future. Principles might then be developed by judges using analogous reasoning and building upon the existing body of sentencing law. That greater attention is required to the particularities of sentencing offenders such as the appellant can scarcely be denied given the large number of such cases now coming before Australian courts.

Orders

132 I agree in the orders proposed by McHugh J.

133 HAYNE J. Sentencing an offender is a very difficult task. It requires consideration and balancing of many different and often conflicting matters. The offender's conduct can excite strong emotional responses: anger, disgust, revulsion, horror. The offender's personal history, which all too often is a history of deprivation, can excite sympathy. Often enough the sentencer is left wondering whether society has failed to protect and look after those who, it turns out, were most in need or most at risk.

134 Sentencing a man who publicly dedicated his life to his religious calling as priest, but who, for his own selfish sexual purposes, has debauched the youngest and most vulnerable of those whom he professed to serve, is particularly difficult. Emotions which his conduct may evoke must be put aside. Sympathy for the offender's victims cannot be allowed to cloud the sentencer's vision.

135 The issue to which most attention must be given in this appeal is whether, in fixing the sentences to be passed upon a former priest for sexual offences committed against children whom he met and befriended in the course of his priestly duties, a sentencer *must* ameliorate the sentences otherwise to be imposed on the offender on account of his having performed his other priestly duties with evident devotion and compassion. It is plain that, in this case, the sentencing judge (Judge Nield) did not. The Court of Criminal Appeal found no error in this regard. That conclusion was correct.

136 As was said in *Pearce v The Queen*[139]:

> "Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision[140]. It is, then, all the more important that proper principle be applied throughout the process."

It is because sentencing, being discretionary, admits of no single "correct" answer, that the task of intermediate appellate courts, on an appeal against sentence, is to examine whether the appellant makes good the allegation that the sentencer made an error of principle, not whether they agree with the sentence imposed. In a case of the present kind where, so far as is now relevant, the appellant alleged specific error, rather than error inferred from manifest excess of sentence[141], the question is not whether the particular factor to which attention is directed *might* have been taken into account by the sentencer differently. It is whether the sentencer was *bound* to take that matter into account differently.

---

139 (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ.

140 cf *House v The King* (1936) 55 CLR 499.

141 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

That is why the central question in the present matter is whether the sentencer was *bound* to ameliorate the sentence to be passed on the appellant on account of the way in which the appellant had performed other parts of his priestly duties.

137 In this case, there was a great deal of evidence before the sentencing judge that the appellant had, apart from the treatment of the many young boys whom he had used for his sexual gratification, been an attentive, compassionate, and devoted pastor of the people of his church. As the sentencing judge said in his sentencing remarks:

> "His capacity, speaking generally, as a priest was well recognised and well received … He is well liked and well respected by some people … Except for the subject offences, and the other offences of sexual abuse against young boys for which he was dealt with by his Honour Judge Rummery, all of which were committed during the period 1972 to 1993, he was a man of unblemished character and reputation."

The sentencing judge said that he appreciated that "to other priests, and to others within his congregation, the prisoner was a good man who did positive things and who achieved much".

138 Plainly, however, the sentencing judge put these matters wholly to one side in fixing the sentence he did. He said that

> "whatever [the appellant] had done and achieved, he is not a good man. The [appellant] is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult. And for what? For his own sexual gratification, without thought or concern for the feelings or the sexual development of his victims. How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered to be a good man? I accept that to some people there is good in everyone, but I cannot see any good in the [appellant]."

Later in his sentencing remarks, the judge said that "[the appellant's] unblemished character and reputation does not entitle him to any leniency whatsoever".

139 The sentencing judge did not refer (as had the judge who dealt with the appellant in the previous year for other offences) to the fact that, in 1975, there had been complaints to church and school authorities about the appellant. It seems that, on questioning by the Monsignor, then acting as Bishop of the diocese, the appellant admitted some of the allegations. He was told to seek counselling and did so in Melbourne. He had one interview with a priest whom he believed to be a psychologist or psychiatrist. Despite being told in this

interview that he should seek further help, the appellant did not do so. He continued to offend.

140 Of the 14 counts for which he stood for sentence before Judge Nield and which give rise to the present appeal, seven were alleged to have occurred after 1975, and thus after his activities had been discovered, and he had been told that they must stop and that he needed to seek treatment. He also admitted 39 other offences. Some of these, too, were committed after 1975. Overall, Judge Nield dealt with the appellant on the basis that, apart from the offences for which he had been previously sentenced, he admitted 53 offences against 28 victims aged between six and 14 years. Apart from two offences in 1987 and 1991, all were committed between 1972 and 1984.

141 The remarks made on sentencing are the only medium which a sentencer has available to convey to the offender, the offender's victims, the public, and any appellate court, that proper principle has been applied. Sentencing remarks are therefore not to be seen or understood as merely fulfilling some ritualistic purpose. They are reasons for decision. But it is precisely because sentencing remarks are not to be understood as mere ritual incantations that care must be taken before concluding that the rejection, as irrelevant, of matters put forward in mitigation of sentence reveals error of principle. To hold that a particular subject must *always* find a place in sentencing remarks may tend to reduce the remarks to a ritual incantation and obscure the importance of the reasoning which the remarks reflect. Attention must always be directed to the reasoning adopted by the sentencing judge. In a case like this, then, the question is *why* a particular subject is said to be relevant.

142 Almost invariably, any plea in mitigation of sentence will refer to good things that the offender has done. Sometimes it seems that anyone who can be found to speak well of the offender will have been asked to do so, whether by provision of a written reference or by giving oral evidence. Often enough, material of this kind is said to demonstrate that the offender is "otherwise" or "previously" of "good character" and that this is a matter in mitigation of sentence.

143 There are statements to be found in decided cases which might be taken to suggest that the previous "good character" of an offender is a matter which a sentencing judge must take into account in fixing a sentence[142]. Such statements

---

142 See, for example, *Smith* (1982) 7 A Crim R 437 at 442 per Starke J: "… in circumstances of this nature, a convicted person is entitled to call in aid his good character and is entitled to have the court give it the greatest weight". See also statutory provisions such as *Crimes Act* 1914 (Cth), s 16A(2)(m); *Sentencing Act* 1991 (Vic), s 5(2)(f); *Criminal Law (Sentencing) Act* 1988 (SA), s 10(1)(l); *Penalties and Sentences Act* 1992 (Q), s 9(2)(f); *Sentencing Act* (NT), s 5(2)(e);

(Footnote continues on next page)

must not, however, be misunderstood or divorced from the context in which they are made. In particular, they must not be understood as invariably requiring a sentencing judge to use in mitigation of the sentence which otherwise would be imposed any and all material which demonstrates that an offender has done good things in the past, or made particular contributions to society or its members. Statements of the kind to which I have referred are almost always (and rightly) hedged about with qualifications[143]. Indeed, it is sometimes suggested that good character is of little or no relevance to sentencing for some kinds of offence[144] or where repeated offences have taken place over a long time[145]. No absolute rule of general application can be adopted. There are several reasons why that is so.

144 First, and most obviously, is the proposition from which any consideration of sentencing must begin, namely, that it is not a mathematical process. Metaphorical references to "credit", "discount", or the like, must therefore not be taken literally. Secondly, what has become known as the "two-stage" process of sentencing, in which a prima facie sentence is identified and then adjusted up or down according to the influence of particular factors, is a process which leads to error[146]. What the sentencer must do is instinctively synthesise the various competing factors. Thirdly, and no less importantly, the one-dimensional view of "character" from which some common law rules of evidence proceeded[147] can no longer be accepted without qualification[148]. Nor can reputation any longer be

---

Crimes Act 1900 (ACT), s 429A(1)(k). For present purposes, it is relevant to note that there is no comparable New South Wales provision.

143 So, in *Smith*, Starke J went on to say (1982) 7 A Crim R 437 at 442: "What weight it will have depends, of course, on the character of the offence committed."

144 See, for example, with respect to drug couriers: *R v Leroy* [1984] 2 NSWLR 441 at 446-447.

145 *Hermann* (1988) 37 A Crim R 440 at 448 per Lee J, cf at 443 per Kirby ACJ; *Saffron (No 3)* (1988) 39 A Crim R 123 at 125; *Vougdis* (1989) 41 A Crim R 125 at 130, 131 per Campbell J; *Phelan* (1993) 66 A Crim R 446 at 448 per Hunt CJ at CL; *Sopher* (1993) 70 A Crim R 570 at 573.

146 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476-477 per Mason CJ, Brennan, Dawson and Toohey JJ. See also *AB v The Queen* (1999) 198 CLR 111 at 121-122 [15]-[17] per McHugh J.

147 *R v Rowton* (1865) Le & Ca 520 [169 ER 1497].

148 *Melbourne v The Queen* (1999) 198 CLR 1.

thought to be a safe and certain guide to all aspects of a person's character[149]. Fourthly, like so many factors to which a sentencer may refer, the fact that an offender has done good things in the past, or has been well reputed in the community, may, Janus-like, wear two aspects. The fact that this offender was, to outward appearances, a devoted Minister to his adult parishioners is admirable. But the appellant was able to secure the trust of his victims and their parents because he was thought to be worthy of respect. Is his assiduous attention to his adult parishioners relevant to sentence? If it is, does it make his crimes less, or more, worthy of punishment? The appellant's contention is that it *must* be seen as mitigating. But that is not so, and it is not so because it fails to recognise that character and reputation may intersect with the purposes of criminal punishment in more than one way.

145 As I have pointed out, the "character" and reputation of an offender will ordinarily have many disparate elements. None of those elements can be seen as inevitably and invariably tending in aggravation or mitigation of sentence. The art of the advocate may be to place those features in one light rather than another, and to do so by application of descriptions such as "good character" or "unblemished reputation". But the task of the sentencer requires consideration of what the offender did, and why, as well as who the offender is, and requires consideration of the particular purposes for which sentence is to be imposed. There will be many competing strands of information which are available to be taken into account.

146 As was said in the majority's reasons in *Veen v The Queen [No 2]*[150]:

> "… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. *They are guideposts to the appropriate sentence but sometimes they point in different directions.* And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one

---

149 *Melbourne v The Queen* (1999) 198 CLR 1 at 15-16 [33]-[35] per McHugh J, 24-27 [64]-[71] per Gummow J, 54-55 [150] per Hayne J; cf *R v Rowton* (1865) Le & Ca 520 [169 ER 1497].

150 (1988) 164 CLR 465 at 476-477 per Mason CJ, Brennan, Dawson and Toohey JJ.

> which tends towards a longer custodial sentence, the other towards a shorter." (emphasis added)

147 In the present case, the sentencing judge noted that the appellant had done good things and, despite the conduct for which he then stood for sentence and for which he had previously been sentenced, the appellant was still thought of well by those who wrote on his behalf. It was, however, open to the judge to conclude, as he obviously did, that the wrong that the appellant had done wholly displaced these matters from *any* effect on the sentence to be imposed in this case, where the offending occurred over many years, and much weight was to be given to considerations of denunciation and general deterrence as well as to questions of community protection.

148 Only because the appellant had worked with his adult parishioners in the way he had, was he afforded the trust, respect, and position in the community which were essential to continuing his wrong doing. Viewed in that way, the material which he now says the sentencing judge was bound to treat as mitigating would not go in mitigation of sentence. Indeed, that material could be seen as revealing the extent of the breach of the trust which the appellant was bound to, and did, seek to foster in his parishioners.

149 The flaw in the appellant's argument can be identified in two other ways. First, by referring to the appellant's "good character in other respects" it is assumed, not only that those "other respects" are relevant to the sentencing task confronting the judge, but also that those "other respects" are not wholly outweighed by the wrong which the appellant did. Both assumptions are wrong. His assiduous discharge of other aspects of his priestly calling is no more relevant to this sentencing task than it would be relevant to say of a fraudulent solicitor who had stolen clients' trust funds that he or she was a skilled and careful conveyancer. Moreover, there must come a point where the "bad" outweighs the "good" in the sentencing process. This appellant had, despite his calling, despite complaint, reproof, and advice to seek help, continued to prey upon those whom the sentencing judge correctly referred to as "the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult". This was not a case in which the offender had had a momentary lapse in an otherwise good and blameless life. He had committed many offences over a very long time. Those features could rightly be held to render reference to the good opinion in which he was held by some irrelevant to the sentencer's task. They are features which reveal that it is artificial to speak of the appellant as being "otherwise" of good character.

150 The same point can be made in a second way. The error alleged is an error of omission from the sentencing balance. That is, it is suggested that justice was not done to this appellant because he was treated more harshly than he should have been. At once, then, it is seen that the allegation is based on making some comparison. But what is the case with which the comparison is to be

drawn? Attempting to identify it reveals the unreality of the exercise which speaking of the appellant as being "otherwise" of good character would require of the sentencer. Presumably the hypothetical comparison is with the case of a priest who was not as assiduous or attentive to his adult parishioners as was the appellant. Whether such a priest could have had the reputation and position in the community which the appellant did may be a difficult, and in the end irrelevant, question. Even if he could, the hypothetical offender's lack of attention to his people should not properly lead to some harsher sentencing of him than the punishment which must be imposed on this appellant.

151 The Court of Criminal Appeal made no error in rejecting the appellant's contention of error below.

152 A second issue was raised in the appeal to the Court of Criminal Appeal and to this Court. Here it was said that the Court of Criminal Appeal should have found that the sentencing judge did not take sufficient account of the fact that the appellant was sentenced for offences of which the authorities would not have known had the appellant not confessed to them. It is enough to say of this complaint that, as the Court of Criminal Appeal pointed out, the sentencing judge referred specifically to this matter as going to the appellant's credit, showing his contrition and entitling him to a discount in punishment. There is no substance in this contention.

153 The fact that the sentencing judge made no express reference to *R v Ellis*[151] (to which he was referred in the course of the plea) and did not use an epithet like "considerable" or "significant" when referring to the credit he gave on this account does not demonstrate error. Error could be discerned only if it could be seen that the sentence imposed was excessive. It is then important to recall that this Court is not able, save in the clearest case, to determine that a sentence is excessive if only because "this Court is not regularly engaged either in sentencing offenders or in reviewing the merits of sentences"[152]. I agree with and adopt what was said by Kirby J in *Postiglione v The Queen*[153]:

> "The restraints which authority and legal principle impose upon courts of criminal appeal and their equivalents are even more severe when it comes to this Court. It will not grant special leave to appeal against a

---

151 (1986) 6 NSWLR 603.

152 *AB v The Queen* (1999) 198 CLR 111 at 150-151 [103] per Kirby J, citing *Neal v The Queen* (1982) 149 CLR 305 at 323 per Brennan J and *Postiglione v The Queen* (1997) 189 CLR 295 at 336-337 per Kirby J.

153 (1997) 189 CLR 295 at 337.

> sentence, still less allow an appeal, merely because the sentence appears to be excessive, including on the ground of disparity, when considered with a sentence which is arguably comparable. As the *Judiciary Act* 1903 (Cth) (s 35A) indicates, the authority and practice of the Court[154] and the necessities imposed by its workload and composition require, it cannot, and should not, fulfil a general function of re-scrutinising sentencing decisions of appellate courts."

154 In his reasons for judgment, Kirby J refers to some general considerations about the sentencing of offenders like the appellant. There was no evidence or debate about them in the courts below and, there being no ground of appeal directed to issues of this kind, there was little, if any, debate about them in this Court. (A ground of appeal alleging manifest excess of sentence is insufficient to raise issues of specific error.)

155 Describing an offender as a paedophile has not, hitherto, been seen in this Court, or in other courts in Australia, as going in mitigation of sentence. Whether the appellant can be described as a "paedophile" depends upon what is meant by that term. It is far from clear whether the appellant used it of himself in a colloquial or technical sense. If it is a term which is to be used with a technical meaning, the content of the term, and the reasons for its application in a particular case, are matters for evidence. More importantly, the use of the word, whether with or without a technical meaning, must not be permitted to hide the consequences which are alleged to flow from the fact of its application.

156 If it is to be said to be relevant to the task of a sentencing judge to know that the term "paedophile" can be used in relation to an offender, the immediate questions are how and why is that relevant. It is *not* enough to say that it is an "explanation" of his conduct or a "cause" of his offending. Those statements assert a relationship between the "condition" or "state" of "paedophilia" and the offender's conduct which is not demonstrated by the bare fact of its application. Moreover, it is far from clear that the relationship between a "condition" or "state" of "paedophilia" and an offender or his conduct will generally go in mitigation of sentence. If, on examination of the particular offender's circumstances, it is demonstrated that the offender is likely to re-offend, the likelihood of re-offending might ordinarily be thought to go in aggravation, not mitigation. For my part I tend to doubt that general considerations of the kind mentioned by Kirby J arise in sentencing an offender like the present appellant. That is, I tend to doubt the utility of seeking to classify a particular offender who stands for sentence as a paedophile or not. At all events, such issues do not arise in this case.

---

154 *Lowe v The Queen* (1984) 154 CLR 606.

157 I agree substantially with what McHugh J has said about the relevance to the sentencing process of the opprobrium in which an offender may be held. As I said at the start of these reasons, sentencing an offender requires consideration and balancing of many different and often conflicting matters. What the offender did and why, and who the offender is, will be central to that task. If those matters provoke a particular reaction towards the offender by society at large, or a section of it, they are matters which the sentencer has already considered. Society's reaction to them neither adds to nor detracts from their significance in the sentencing process. If, by contrast, the reaction of society to the offender is not based in such considerations but is, for example, based in emotional responses to the offender or the offender's actions, they are matters which a sentencer should not take into account in mitigation of sentence. There is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.

158 The appeal should be dismissed.

159 CALLINAN J. The appellant raises three principal issues in this appeal: whether there was error by the primary judge in not giving credit to the appellant in his sentence for his character, reputation, positive works and achievements; whether there was error on the part of the sentencing judge in the way in which he dealt with the appellant's prior convictions; and, whether there was a failure to give an appropriate discount for the appellant's voluntary disclosure of further offences unknown to the relevant authorities.

160 The appeal is against the decision of the Court of Criminal Appeal of New South Wales of 2 March 1998, dismissing an appeal against sentence of the appellant[155].

Facts

161 The appellant pleaded guilty before Nield DCJ in the District Court of New South Wales to 14 counts of sexual offences against 12 young boys with respect to whom he was, as a Catholic priest, in a position of authority and special trust. The offences were committed in the Newcastle area over a period of about 20 years. The ages of the victims at the times of the offences ranged from 6 to 14 years. The appellant also asked that 39 additional offences of a similar kind be taken into account. Those additional offences involved some of the victims the subject of the counts in the indictment, and a further 16 victims.

162 In relation to each of the offences, the sentencing judge accepted the facts as set out in the summary of facts and the statements of the complainants. They included the fondling of genitalia, masturbation and fellatio. Although there were two occasions in which the appellant asked complainants to participate in anal intercourse, there was no anal penetration of any of the complainants. There was, however, one occasion on which the appellant had a complainant rub his penis between the buttocks of the appellant.

163 The victims were boys in his congregation, some of whom were altar boys or servers, and all of whom attended Catholic primary schools within the appellant's area of supervision. The appellant was trusted and respected by the complainants and clearly had abused that trust and respect.

164 In consequence of his pleas of guilty, the appellant was sentenced by Nield DCJ to a total effective sentence of 16 years comprising a minimum term of 11 years and an additional term of 5 years, to commence on 23 May 2000.

---

155 *R v Ryan* unreported, Court of Criminal Appeal of New South Wales, 2 March 1998.

165 The appellant had been dealt with earlier (30 May 1996) by Rummery DCJ for 20 similar offences. On that occasion he was sentenced to imprisonment for a total of 6 years with a minimum term of 4 years and an additional term of 2 years. The sentences imposed by Nield DCJ were made cumulative upon the sentences imposed by Rummery DCJ. Accordingly, the appellant was sentenced to a total effective period of 22 years penal servitude to date from 23 May 1996.

166 The earlier sentencing proceedings and a subsequent unsuccessful appeal had been accompanied by considerable publicity. Following that publicity, three men, who, as children had been victims of the appellant many years before, came forward and provided information to the police. When the police interviewed the appellant, who was by that time in custody, he made admissions concerning the new allegations, and, in addition informed the police of a large number of other offences and victims. There was no evidence that any of these additional victims whose particulars were volunteered by the appellant had proposed to come forward to the police.

167 Nield DCJ said that the appellant's admissions of previous undisclosed crime went to his credit, showed his contrition and entitled him to a discount in punishment. His Honour did not identify the extent of the discount extended to the appellant on account of his disclosures.

168 A number of testimonials were tendered at the hearing but Nield DCJ observed that the appellant's unblemished character and reputation did not entitle him to any leniency whatsoever. Specifically his Honour said:

> "His capacity, speaking generally, as a priest was well recognised and well received … He is well liked and well respected by some people … Except for the subject offences, and the other offences of sexual abuse against young boys for which he was dealt with by his Honour Judge Rummery, all of which were committed during the period 1972 to 1993, he was a man of unblemished character and reputation. But an unblemished character and reputation is something expected of a priest. His unblemished character and reputation does not entitle him to any leniency whatsoever."

169 His Honour stated that the appellant's conduct towards the complainants was debasing, degrading, wicked and abhorrent, to be almost beyond belief, deserving strong condemnation and salutary punishment to bring home to the appellant the enormity of his conduct and to stand as a warning to others who may think of preying upon children for sexual gratification. His Honour said that "he is not a good man" and that "I cannot see any good in the prisoner".

Court of Criminal Appeal of New South Wales

170 The appellant appealed against sentence to the Court of Criminal Appeal on the grounds that the sentence was, in the circumstances, gross and excessive and that the judge did not take into account, or failed to give proper weight to the subjective features of the case.

171 The Court of Criminal Appeal (Gleeson CJ, Cole JA and Levine J) was of the view that the sentences imposed were severe, but the objective criminality involved in the behaviour was very great. The appeal was dismissed.

172 Gleeson CJ, with whom Cole JA and Levine J agreed, stated that[156]:

> "When the combined effect of the sentences is considered, and due allowance is made not only for the subjective considerations referred to in the passage quoted above, but also for the circumstance that the sentences were not to commence until the year 2000, nevertheless it seems to me that the sentences imposed in this case were in line with the sentences imposed for similar offences involving similar offenders. I refer in particular in that regard to *R v Ridsdale*[157]; *R v AB*[158]; *R v Hill*[159] and *R v RWC*[160].
>
> …
>
> In a circumstance where the essence of the criminality of the conduct of an offender is abuse of a position of trust, it is ordinarily not of great assistance to the offender to observe that he occupied a position of trust. The offences committed by the present appellant were only made possible by the trust that was reposed in him in connection with the pursuit of his priestly vocation. I agree with Nield DCJ, that, in the circumstances of the present case, the high reputation previously enjoyed by the appellant in the community, the trust and confidence reposed in him by parents and by church authorities, and the effective performance by him of certain important aspects of his vocation, were not themselves

---

156 *R v Ryan* unreported, Court of Criminal Appeal of New South Wales, 2 March 1998 at 5-6.

157 (1995) 78 A Crim R 986.

158 Unreported, Court of Criminal Appeal of New South Wales, 7 July 1997.

159 Unreported, Court of Criminal Appeal of New South Wales, 7 July 1992.

160 Unreported, Court of Criminal Appeal of New South Wales, 4 August 1994.

matters which warranted the extension of significant leniency when it came to punishing him for the offences to which he pleaded guilty."

Grounds of appeal

173 The substantial grounds of appeal in this Court are as follows:

"(a) The Court of Criminal Appeal erred in concluding that the overall sentence imposed upon the [appellant] was not manifestly excessive having regard to the relevant matters to be taken into account for the purpose of sentence.

(b) …

(c) The Court of Criminal Appeal erred in assessing that the learned Sentencing Judge took into account or gave sufficient credit to the [appellant] for the [appellant's] very substantial disclosure of offences which were not otherwise known to the authorities.

(d) …

(e) The Court of Criminal Appeal erred by totally excluding from consideration evidence of the [appellant's] character, reputation and positive works and achievements.

(f) The Court of Criminal Appeal erred in giving no or no sufficient weight to the public policy consideration that offenders should be encouraged to make confessions of unknown offences and that substantial credit should be given to offenders who make very substantial confessions of this type.

(g) …"

The relevance of good character in this case

174 It is convenient to deal with ground (e) first. It is well settled that whilst bad character will not operate to increase a sentence, good character may operate to reduce the sentence which the facts of the crime would otherwise attract[161]. In some cases good character has even been held to be so significant a factor as to require the imposition of a non-custodial penalty in lieu of a term of imprisonment[162]. In exercising a sentencing discretion, less weight has been

---

161 *R v McInerney* (1986) 42 SASR 111 at 113 per King CJ.

162 See, for example, *Smith* (1982) 7 A Crim R 437.

given to previous good character in circumstances in which the offence is not an isolated act. When the crime or crimes are part of a prolonged course of criminal activity, less weight will usually be given to the apparent good character and record of an accused. In *Hermann*[163], an appeal against a sentence imposed on a man of apparent good character, who had sexual intercourse with his step-daughter on a number of occasions over a period of three years, Lee J (with whom McInerney J agreed; Kirby ACJ dissenting) said[164]:

> "So far as the question of good character is concerned, it has been pointed out in other cases that, where the event is not an isolated one, it is difficult for the court to give a great deal of consideration to an accused's 'previous good character', for the truth of the matter, as the evidence has disclosed, is that whilst appearing to have a good character and others believing so, he has over a lengthy period been committing a heinous crime on a helpless child. To give to an applicant's so-called 'previous good character' much weight in such circumstances is to give an appearance that the court is conceding to a parent or person in loco parentis or within the family unit some right to use a child for sexual pleasure at will. Of course, when the offence is an isolated one, the matter of the good character of the applicant as a factor in mitigation may be given a much greater degree of significance."

175 Similarly, it has also been said that good character is of less weight when a series of crimes are deliberately and carefully planned and executed[165].

176 The rule that good character is a mitigating factor in sentencing may also be qualified in the case of persons who abuse high public office to commit offences, or use their good character to increase the prospects of successfully completing the crime. In *Jackson and Hakim*[166], an appeal against a sentence for the crime of conspiring to accept bribes for the early release of prisoners committed by a Minister for Corrective Services, Lee J said[167]:

---

163 (1988) 37 A Crim R 440.

164 (1988) 37 A Crim R 440 at 448.

165 *R v Morley* [1985] WAR 65.

166 (1988) 33 A Crim R 413.

167 (1988) 33 A Crim R 413 at 436-437. Finlay J agreed with Lee J, and Street CJ at 434 regarded the credit for many years of public service as "utterly tarnished", but added, "he nevertheless is entitled to call it in aid".

> "But as was pointed out in [*R v*] *Farquhar*[168] the good character of a person holding high office who commits a crime relating to the performance of his office cannot form a basis for the same mitigation of sentence as in the case of an ordinary citizen committing crime, for the public is entitled to expect that those who are placed in high office will necessarily be persons whose character makes them fit to hold that office … The holding of such office may indeed bring distinction to him personally but, from the point of view of sentence, it is not a matter which can advance the respondent any more than if he had been some hardworking person carrying on a menial occupation."

177 In my opinion the statement in this form is too strict and too unqualified but I will deal with that aspect a little later. Statements that I have quoted provide very helpful guidelines and principles, but few of them can be applied categorically. Of course the abuse of an office to commit a crime is greatly to be deplored but the crime of a person occupying an office of some prominence will often attract much greater vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced. When these consequences are attracted they should not be ignored by the sentencing court. So much was conceded, and in my view, properly so by the respondent. To ignore such matters would be as unjust to a prominent person as it would be, in the case of a person in a menial position, to ignore disadvantages to him peculiar to his position, such as a likely greatly reduced, if not utterly destroyed capacity on release from prison, to find any remunerative employment at all. Nor do I think that the appellant should be disqualified from obtaining a credit for good character because such good character as he possesses has been gained in otherwise diligently doing his duty as a priest. Not everyone in a calling performs it as well or as diligently as another or other persons in it. One who does conscientiously perform his or her duty is entitled to the benefit of his or her reputation and character for so doing. And to acknowledge that some occupations, such as, perhaps, nursing, teaching, the clergy and the armed services, may attract well-motivated men and women and give them special opportunities to perform public service is not to disparage or demean others.

178 Here the appellant had, for a long time, done many good works. Much of the shine of these was taken off by his gross misconduct in abuse of his office, but not all of it. Character is not, as has been observed, a one-dimensional feature of any person[169]. There is no reason why a priest who had conducted himself diligently and helpfully in other respects over many years, and has earned a good character in those respects, should not be treated somewhat

---

168 Unreported, Court of Criminal Appeal of New South Wales, 29 May 1985.

169 *Melbourne v The Queen* (1999) 198 CLR 1 at 16 [35] per McHugh J.

differently from a priest who has not conducted himself so as to earn a good character, but had committed the same offences as this appellant. The sentencing judge made it clear that he would disregard entirely the appellant's good works. He did so in strong, indeed understandably strong language, but without perhaps the detachment that his role required. His Honour refused even to find good character at all. So to hold was, in my opinion, wrong, and to fail to take some account of the appellant's good character otherwise was an error of principle calling for correction by the Court of Criminal Appeal.

The prior convictions of the appellant

179 There is no doubt that the prior record of a prisoner is relevant to the determination of a sentence together with other issues as to character. The appellant's previous convictions were relevant, but, in the absence of statute, they cannot lead to the imposition of a penalty that is disproportionate to the gravity of the instant offences. It has long been the practice for courts to receive evidence of antecedents and the character of a person found guilty of a criminal offence and to punish repeat offenders more severely[170] than those who have not been previously convicted[171]. There are however limits on the extent to which this can be done: "It is trite law that a man is not to be sentenced on his record."[172]

180 In *Veen v The Queen [No 2]*[173], this Court confirmed that previous convictions cannot justify a sentence longer than is appropriate to the gravity of the current offence, in order either to extend the period of protection to society from the risk of recidivism by the offender, or, to act as a general deterrent[174].

181 In *Veen [No 2]*, Mason CJ, Brennan, Dawson and Toohey JJ discussed the relevance of prior criminal history in the following way[175]:

> "[T]he antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty

---

170 *R v Morris* [1914] St R Qd 210; *R v Aston [No 2]* [1991] 1 Qd R 375.

171 *Grayson v The King* (1920) 22 WALR 37.

172 *R v Clark* (1972) 4 SASR 30 at 35.

173 (1988) 164 CLR 465.

174 Applied in *R v Aston [No 2]* [1991] 1 Qd R 375.

175 (1988) 164 CLR 465 at 477-478.

which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell*[176]. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

182 Wilson J said[177]:

"In my view the proper benchmark of an appropriate sentence is determined by reference to the objective features of the crime; *matters personal to an offender, including any record of previous convictions and also the likelihood of any potential threat to the community, are relevant only to the question whether the case admits of any leniency being shown to the offender.*" (emphasis added)

183 In *Baumer v The Queen*[178] (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ) this Court held that the manner in which the trial judge had approached the sentencing task was open to question in two respects. The Court said[179]:

"We have already referred to his Honour's observation that 'the literally appalling record' of the applicant increased the seriousness of the offence. If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree

---

176 [1970] AC 642 at 650.

177 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 488; see also at 491 per Deane J, 496 per Gaudron J.

178 (1988) 166 CLR 51.

179 (1988) 166 CLR 51 at 57-58.

> of leniency then, of course, such a remark would be understandable and unobjectionable. It would clearly be wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence. Similarly, his Honour's observation that people with the propensity of the applicant to continue to commit driving offences must be 'kept away' for the protection of the public is open to misunderstanding … *Apart from mitigating factors*, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence." (emphasis added)

184 Neither the sentencing judge nor the Court of Criminal Appeal erred, in my opinion, in the way in which they dealt with the prior convictions of the appellant in this case. Viewed objectively the offences here were bound to attract long sentences, and there is no reason to believe that the courts below did other than pay close regard to them, and not to the previous crimes in and for the fixing of the periods of imprisonment.

Voluntary disclosure

185 The appellant also submitted that Nield DCJ failed to give due weight to the appellant's voluntary disclosure of offences other than those with which he had been charged. But Nield DCJ did state that the appellant's admissions entitled him to a "discount in punishment". The Court of Criminal Appeal observed that Nield DCJ had taken into account in favour of the appellant his disclosure of offences and "gave him credit for that". The appellant submitted however that he should have been given an identifiable, more substantial discount than the small unquantified one that in reality he must have been given by the sentencing judge. The appellant relied on *R v Ellis*[180] in which the Court of Criminal Appeal said that voluntary confessions should lead to a "significant added element of leniency". The fact is that in this case the sentencing judge did make it clear that he would have imposed a greater sentence but for the disclosures made. For myself I do not think good reason will always exist for an abstention from stating the quantum of such a discount. In a case in which it is one of relatively few relevant "subjective factors" it may be helpful to do so, and should not interfere with the intuitive process that sentencing involves. Not to identify the discount or credit for disclosure will not generally provide a ground for appeal however and certainly does not do so here.

Orders

186 In my opinion the appeal should be allowed. The case should be remitted to the Court of Criminal Appeal for that Court to deal with the appellant's appeal,

---

180 (1986) 6 NSWLR 603 at 604 per Street CJ, with whom Hunt and Allen JJ agreed.

taking into account all relevant factors, including the need for credit to be given for the appellant's good works, character and reputation, and any special disapprobation, distress, and stress arising out of his conviction whilst he was the holder of a prominent position, in the full awareness that it was his exploitation of that position that enabled him to commit the crimes that he did. I would so order.