HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, CALLINAN AND HEYDON JJ

ROBERT JOHN STRONG APPELLANT

AND

THE QUEEN RESPONDENT

Strong v The Queen [2005] HCA 30
15 June 2005
S152/2004

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with G A Bashir for the appellant (instructed by Legal Aid Commission of New South Wales)

G E Smith SC with D M L Woodburne for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Strong v The Queen

Criminal law – Sentencing – Habitual criminal – Re-determination of sentence – Appellant sentenced for primary offences of stalking and intimidation – Appellant pronounced habitual criminal and sentenced to further concurrent term of imprisonment under the *Habitual Criminals Act* 1957 (NSW) ("the Act") – Sentences overturned by Court of Criminal Appeal (NSW) – Appellant re-sentenced for primary offences and as an habitual criminal – Whether whole sentence must be re-determined where one component of that sentence has miscarried – Whether appellate court required to determine for itself whether to pronounce appellant habitual criminal – Whether in doing so appellate court is exercising its own jurisdiction and powers – Whether appellate court made such determination – Whether appellate court correctly upheld sentencing judge's pronouncement of the appellant as habitual criminal – Whether appellate court's approach conformed to scrupulously thorough procedures for additional orders of preventative detention under the Act.

Words and phrases – "habitual criminal".

Habitual Criminals Act 1957 (NSW), ss 4 and 6.

1 GLEESON CJ. The appellant, who has a long criminal history, pleaded guilty to a number of offences, including stalking and intimidating a young woman. The primary judge, Freeman DCJ, imposed sentences involving a total of 8 years' imprisonment, with a non-parole period of 6 years. Later, acting under the *Habitual Criminals Act* 1957 (NSW) ("the Act"), he pronounced the appellant to be an habitual criminal and imposed a sentence of 14 years' imprisonment under the Act. This was to commence on the same day as the first of the other sentences.

2 The Court of Criminal Appeal[1] allowed appeals both against the sentences for the substantive offences and the sentence imposed under the Act. It re-sentenced the appellant, reducing the sentences substantially. In a further appeal to this Court, the appellant contends that the Court of Criminal Appeal erred in law in one respect in the way in which it dealt with the appeal concerning the application of the Act. The point of law which constitutes the basis of the ground of appeal to this Court was not argued in the Court of Criminal Appeal. The members of the Court of Criminal Appeal addressed the grounds of appeal before that Court, and responded in their reasons for judgment to the arguments advanced on behalf of the appellant. There was a division in the Court of Criminal Appeal, but it did not turn upon the point that has been argued in this Court. Unsurprisingly, the reasoning of the members of the Court of Criminal Appeal does not specifically address that point.

3 In the Court of Criminal Appeal, counsel for the appellant, in support of both the application for leave to appeal against the sentences imposed for the substantive offences and the application for leave to appeal against the decision of Freeman DCJ under the Act, relied upon fresh evidence. That evidence took the form of psychiatric reports prepared following the proceedings before Freeman DCJ and, in one case, prepared between the first and second days of the hearing in the Court of Criminal Appeal. Sully J, with whom Dunford J agreed, found error in the reasoning of the primary judge in sentencing for the substantive offences. The nature of that error is not presently relevant. Accordingly, and appropriately, he saw it as the Court of Criminal Appeal's function to re-sentence the appellant for the substantive offences, and, in doing so, took into account, and made detailed reference to, the fresh evidence. He concluded that leave to appeal against the sentences should be granted, that the sentences imposed by Freeman DCJ should be quashed, and that different sentences involving lesser terms should be imposed. Sully J then turned to consider the matter of present relevance, that is to say, the decision made by Freeman DCJ under the Act. There were two elements of that decision: the pronouncement that the appellant was an habitual criminal; and the fixing of a sentence of imprisonment under the Act.

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1 *R v Strong* (2003) 141 A Crim R 56 (Sully and Dunford JJ, Buddin J dissenting).

4 There were nine grounds of appeal in relation to the decision under the Act. Grounds 1, 2, 3, 4, 5 and 7 have no bearing on the present appeal. Ground 6 was that Freeman DCJ "erred in the exercise of his discretion to make a pronouncement, and in passing sentence under [the Act], by failing to take into account the [appellant's] subjective circumstances." That ground was dismissed primarily for the reason that Freeman DCJ did not fail to take into account the appellant's subjective circumstances.

5 Grounds 8 and 9 were as follows:

> "8. The sentence passed under [the Act] was excessive in all the circumstances.
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> 9. On the basis of the fresh evidence as to mental disorder, the pronouncement of the [appellant] as an habitual criminal and the consequent sentence were not warranted in law."

6 Sully J concluded that there had been "an ultimate miscarriage" in the decision of Freeman DCJ under the Act and "that [the Court of Criminal Appeal] must do what it properly can do by way of correction." He then proposed that the appellant should be re-sentenced under the Act, and that there should be a substantial reduction of the sentence that had been imposed by Freeman DCJ, from 14 years to 8 years.

7 What Sully J said about the two elements of the primary judge's decision is set out in the reasons of Callinan and Heydon JJ. The whole of what he said in that respect must be understood, both in the light of the grounds of appeal and the arguments he was addressing, and in the light of his conclusion that the sentencing discretion of the primary judge under the Act had miscarried. His references to the weight to be given to a sentencing judge's exercise of discretion reflected the way the appellant's case was presented in the Court of Criminal Appeal. In the end, however, Sully J held that there had been discretionary error in sentencing, and that the Court of Criminal Appeal was obliged to intervene.

8 The appellant now complains that Sully J was wrong to deal with the matter upon the basis that the Court of Criminal Appeal was constrained by the principles stated in *House v The King*[2]. The appellant submits to this Court that, having quashed the sentences imposed by Freeman DCJ on the substantive offences, the Court of Criminal Appeal was obliged to consider afresh both aspects of the decision under the Act, that is to say, the pronouncement and the sentence.

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2 (1936) 55 CLR 499.

9 It is apparent that, just as he had taken the fresh evidence into account in sentencing for the substantive offences, Sully J also took it into account in sentencing under the Act. He said:

> "The effect of what I would favour by way of re-sentencing on the substantive matters means that the [appellant] will serve 5 years in custody; and, if not granted parole, 7 years in custody. He cannot be released, therefore, before October 2005; and possibly October 2007. A concurrent sentence, passed pursuant to the Habitual Criminals Act, of 8 years, would extend until October 2008, the period of the appellant's detention. A sentence of that order, with such consequences, is in my opinion justly proportioned to the circumstances of the [appellant's] case. The [appellant's] condition is, by any reasonable reckoning, a difficult and troubling one. It requires careful and sensitive on-going monitoring and treatment. The [appellant], however he might be released back into the general community, will need some very careful ongoing supervision. The effect of the sentence passed pursuant to the Habitual Criminals Act will give the relevant authorities some added flexibility in assessing whether, and when, and upon what basis, the [appellant] is to be returned into the general community. It might very well be that, in due course, it will be obvious that the only fair way of dealing with the [appellant] is by taking steps, if it is possible to do so, to have him dealt with as some kind of forensic patient pursuant to the relevant mental health legislation. No doubt matters of that character cannot be rushed; but, if there is to be purely preventive detention at all of the [appellant], then it must be a matter of course that the period of such purely preventive detention is to be the minimum which the evidence suggests will be sufficient to enable the Corrective Services authorities, and the Prison Medical authorities to deal in a properly humane fashion with this [appellant]."

10 From a reading of the whole of his reasons, it is obvious that the references in that passage to the evidence included references to the fresh evidence. It will also be observed that, on the basis of that evidence, Sully J regarded the sentence he proposed under the Act as the minimum period required for the protection of the public.

11 I accept that, having concluded that the sentencing by Freeman DCJ for the substantive offences was affected by error, and that the Court of Criminal Appeal should intervene to re-sentence for those offences, the Court of Criminal Appeal was entitled and obliged to re-consider both elements of the decision under the Act[3]. The proceedings, however, were conducted in the ordinary

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3 cf *McGarry v The Queen* (2001) 207 CLR 121.

manner of adversarial litigation, and the reasons of Sully J reflected, and responded to, the grounds of appeal and the arguments put before him. His references to *House v The King* are to be understood in that context. Furthermore, although the appeal was presented and argued on the basis that the principles in *House v The King* were relevant, Sully J considered that, even allowing for the appellate restraint dictated by those principles, this was a case where intervention was appropriate. His acknowledgment of the experience of the primary judge was made in the course of giving reasons for a decision substantially to alter the sentence imposed.

12 I am not able to accept as a serious possibility that the assumed constraints of *House v The King* resulted in an inappropriate reluctance on the part of Sully J to consider for himself the first element of the decision under the Act. There are two reasons for this. First, the justification for using the Act to deal with the difficult and dangerous situation created by the appellant's threats to his victim, and to a number of other women, was clearly considered and is reflected in the passage quoted above. The idea that Sully J might have isolated the question of the length of the sentence from the question of the propriety of the pronouncement (that is, of invoking the provisions of the Act for the protection of the public) is far-fetched. Secondly, Sully J said that he agreed with Freeman DCJ's decision to pronounce the appellant to be an habitual criminal. He said that Freeman DCJ's decision that the statutory pre-conditions had been established, and that there was "every good reason from the viewpoint of the protection of the public, to pronounce and sentence accordingly", was in his opinion correct. The nature and extent of the need for protection of the public by applying the Act in this case was built into the new sentence that was imposed, and the reasons given for that sentence.

13 In my view, it is sufficiently clear, from his endorsement of the primary judge's decision to apply the Act, from the reasons he gave for his conclusions as to the appropriate outcome under the Act, and from his references to ground 9 and the fresh evidence, that Sully J's refusal to set aside the pronouncement of the appellant as an habitual criminal was not merely the result of appellate restraint in interfering with a discretionary judgment, but was the result of a personal judgment, formed after hearing and taking into account evidence that was not before the primary judge, that the protection of the public required such a pronouncement. By reason of the way in which the case was presented and argued, Sully J in parts of his reasons employed the language of *House v The King*. In other parts of his reasons, he employed the language of independent appraisal of the situation in the light of new information. He did not refer to the point now in issue, because it was never argued. Furthermore, as he approached the decision under the Act, it was not material to the outcome. It would have made no difference to his final conclusion.

14 The appeal should be dismissed.

15 McHUGH J. The issue in this appeal is whether the Court of Criminal Appeal of New South Wales erred by failing to re-determine whether the appellant should be pronounced an habitual criminal under the *Habitual Criminals Act* 1957 (NSW). The appellant contends that the judgment of that Court shows that it disallowed his appeal against the pronouncement by treating that appeal as an appeal against a discretionary judgment. He submits that, after the Court of Criminal Appeal set aside the sentences that led to him being pronounced an habitual criminal, it should have itself determined whether such a pronouncement was required.

16 In my opinion, the argument of the appellant is correct. The appeal must be allowed and the matter remitted to the Court of Criminal Appeal to determine whether that Court should pronounce the appellant an habitual criminal and, if it does, what additional sentence should be imposed on him.

Statement of the case

17 The District Court of New South Wales sentenced the appellant to four years imprisonment for the offence of intimidation and five years for the offence of stalking. He was given a total non-parole period of six years. At a further hearing, the District Court pronounced the appellant an habitual criminal holding that he was "now and will continue to be a threat to the community, certainly for the foreseeable future". As a result of making the pronouncement, the District Court sentenced the appellant as an habitual criminal to 14 years imprisonment, a term that was to be served concurrently with the sentences for the intimidation and stalking offences.

18 Subsequently, the Court of Criminal Appeal allowed an appeal against the sentences for intimidation and stalking. A majority of the Court re-sentenced the appellant to three years imprisonment for the intimidation offence and four and a half years imprisonment for the stalking offence with a non-parole period of five years. The Court also gave the appellant leave to appeal against the pronouncement that he was an habitual criminal but dismissed his appeal against that pronouncement. The Court (by majority) also granted leave to appeal against the sentence as an habitual criminal and re-sentenced the appellant to a term of eight years imprisonment in respect of the pronouncement.

19 Subsequently, this Court granted special leave to appeal from the order of the Court of Criminal Appeal on the following ground:

> "The majority of the Court of Criminal Appeal (the Court) erred in approaching the appeal against the pronouncement and sentence under the *Habitual Criminals Act 1957* (the Act), upon the basis that the Court, applying the principles identified in *House v The King* (1936) 55 CLR 499, was constrained by the decision of the primary judge, whereas the Court, having upheld the appeal against sentence, was obliged to address

itself, afresh, to the questions arising for determination under s 4 of the Act."

The Court of Criminal Appeal erred by failing to determine for itself whether the appellant should be pronounced an habitual criminal

20 In determining the appeal against the pronouncement, Sully J, giving the judgment of the majority in the Court of Criminal Appeal, said[4]:

> "As to those grounds, the correct starting point is the proposition that his Honour, in pronouncing and sentencing pursuant to the *Habitual Criminals Act*, was exercising discretionary powers. The contrary was not contended at the hearing before this Court.
>
> That being so, it is trite that this Court will not interfere with the primary Judge's exercise of those discretions unless it is plain that they have miscarried; the relevant guiding principles being set out by the High Court of Australia in *House v The King*[5].
>
> I do not believe that there is any ambiguity in the learned primary Judge's reasoning. His Honour was convinced, plainly, that the applicant presented as a very dangerous man, whose antecedents suggested that he was a recidivist with, at best, very slender prospects of future rehabilitation; and, as such, a present and likely future threat to women. His Honour deduced, correctly as I respectfully think, that the Act having been invoked, the statutory pre-conditions had been established; and there was, thereupon, every good reason from the viewpoint of the protection of the public, to pronounce and sentence accordingly.
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> I am wholly unpersuaded that his Honour's discretion to pronounce, miscarried. The more difficult question is whether the sentence which his Honour thereupon imposed was, to borrow from *House* '*... upon the facts ... unreasonable or plainly unjust*' so as to justify appellate intervention '*... on the ground that a substantial wrong has in fact occurred*'." (emphasis added)

21 This passage shows to the point of certainty that the majority judges in the Court of Criminal Appeal decided the appeal against the pronouncement as an habitual criminal on the basis that it was an appeal against a discretionary judgment. The judgment of the District Court on the pronouncement issue was, of course, a discretionary judgment. But with great respect, what the learned

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4 *R v Strong* (2003) 141 A Crim R 56 at 81 [96]-[99].

5 (1936) 55 CLR 499 at 504, 505 per Dixon, Evatt and McTiernan JJ.

judges of the Court of Criminal Appeal overlooked was that, upon setting aside the sentences for the substantive offences of intimidation and stalking, the pronouncement and sentence under the *Habitual Criminals Act* had to be set aside.

22 Section 4(1) of the *Habitual Criminals Act* provides:

> "When any person ... is convicted on indictment and has on at least two occasions previously served separate terms of imprisonment as a consequence of convictions of indictable offences ... then if the judge before whom such person is so convicted is satisfied that it is expedient with a view to such person's reformation or the prevention of crime that such person should be detained in prison for a substantial time, the judge may, in addition to passing sentence upon such person for the offence of which the person is so convicted, pronounce the person to be an habitual criminal and shall thereupon pass a further sentence upon the person in accordance with the provisions of section 6."

23 Section 6 of that Act provides:

> "(1) The judge who, pursuant to the provisions of section 4, has pronounced a person to be an habitual criminal, shall pass a sentence of imprisonment upon such person for a term of not less than five years nor more than fourteen years.
>
> (2) Any sentence of imprisonment being served by any such person at the time the person is pronounced to be an habitual criminal shall be served concurrently with the sentence imposed pursuant to the provisions of subsection (1)."

24 The terms of s 4(1) of the Act make it impossible to divorce the pronouncement of a person as an habitual criminal from the sentence for the offence which leads to the pronouncement. First, the pronouncement is conditional upon and "in addition to passing sentence upon such person for the offence of which the person is so convicted" ("the primary offence"). Second, if the conviction on the primary offence is set aside, the condition upon which the pronouncement operates no longer exists. It is not a tenable view of the section that the pronouncement can stand although the conviction for the primary offence is set aside. Third, the need for a pronouncement and consequential mandatory sentence cannot be separated from the length and type of sentence imposed for the primary offence. Any sentence including the primary sentence that is "being served by any such person at the time the person is pronounced to be an habitual

criminal shall be served concurrently with the sentence imposed pursuant to the provisions of subsection (1)."[6]

25 There is much to be said for the view that, when the sentence for the primary offence is set aside, the pronouncement is automatically set aside. But, independently of that consideration, the primary sentence and the pronouncement are so closely connected that, as a matter of principle, an appellate court that sets aside the primary sentence must also set aside the pronouncement and the mandatory sentence that follows it. There can be few, if any, cases where an appellate court, having concluded that an integer of a sentence has miscarried, can refuse to determine afresh the other integers of the sentence. That was the view of this Court in *McGarry v The Queen*[7] where the Court had to consider a primary sentence and an indefinite sentence in legislation where separate provisions governed appeals in respect of each sentence. The *Sentencing Act* 1995 (WA) empowered a "sentencing judge, if the relevant conditions are met, to '*order* the offender to be imprisoned indefinitely' and to do so '*in addition to* imposing the term of imprisonment for the offence'."[8] In that context, this Court said that "[a]n order for indefinite imprisonment is, then, a part of the sentence which is imposed (just as much as, in other cases, will be a parole eligibility order, or an order suspending the imprisonment)."[9] Consequently, the Court held that, if the sentencing discretion in respect of the primary sentence miscarried, the term of indefinite imprisonment also miscarried. In a joint judgment, five members of the Court[10] said:

> "The *Criminal Code* (WA) makes separate provision for appeals to the Court of Criminal Appeal against an order for indefinite imprisonment (s 688(1a)(a)) and against any other sentence (s 688(1a)(b)). The former lies as of right; the latter lies only with the leave of the Court of Criminal Appeal. That might be thought to suggest that two appellate processes had been engaged in the present case – one concerning the order for indefinite imprisonment and the other concerning the nominal sentence. Even if that were so, it should not obscure the fact that the decision to make an order for indefinite imprisonment, and the decision fixing the nominal sentence, form part of a single sentencing decision.

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6 *Habitual Criminals Act* 1957 (NSW), s 6(2).

7 (2001) 207 CLR 121.

8 (2001) 207 CLR 121 at 126 [7] (emphasis in original).

9 (2001) 207 CLR 121 at 126 [7].

10 Gleeson CJ, Gaudron, Gummow and Hayne JJ and myself: (2001) 207 CLR 121 at 126 [8]-[9].

It follows that if an appellate court concludes that the sentencing judge's discretion miscarried in fixing the nominal term of imprisonment, the whole of the sentence imposed by the sentencing judge, including the order for indefinite imprisonment, should be set aside and the appellate court would then be obliged itself to re-sentence the offender."

26 We went on to say[11]:

"The question would not be, as the Court of Criminal Appeal appears in this case to have thought it to be, whether it had been *open* to the sentencing judge to make the order for indefinite imprisonment which had been made. The sentencing discretion being shown to have miscarried, there was no occasion or need to consider whether it could be separately demonstrated that the sentencing judge's discretion to make an order for indefinite imprisonment had miscarried. It was for the Court of Criminal Appeal to pass such other sentence as ought to have been passed."

27 It follows from the principle for which *McGarry* is an authority that the pronouncement that the appellant was an habitual criminal was part of the sentencing decision for which he was imprisoned. Consequently, when the Court of Criminal Appeal set aside the sentences for intimidation and stalking, it was required to set aside the pronouncement and determine afresh whether a pronouncement should be made. Setting aside and re-considering the pronouncement was no different in principle from the action of the Court of Criminal Appeal in setting aside the non-parole periods imposed by the District Court and imposing new non-parole periods for the primary offences.

28 Counsel for the Crown contended that for three reasons the approach of this Court in *McGarry* was inapplicable to appeals under the *Habitual Criminals Act* 1957. First, under s 3(a) of the *Habitual Criminals Act* 1905 (NSW), a declaration that a person was an habitual criminal was "part of the sentence" imposed on that person. In contrast, under the *Habitual Criminals Act* 1957, the pronouncement and sentence is no longer declared to be part of the one sentence. Under the 1957 Act, the sentence imposed in respect of the pronouncement is "a further sentence" that is imposed "in addition to" the sentence for the primary offence[12]. Second, s 4(2) of the *Habitual Criminals Act* 1957 provides that, in certain circumstances, a judge may declare a person an habitual criminal after the person has been convicted by a Magistrate. Counsel for the Crown contended that this meant that the substantive offence and the pronouncement are imposed separately and not as part of a single sentence or decision. He also pointed to different rights of appeal in relation to the substantive sentence imposed by the

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11 (2001) 207 CLR 121 at 126 [9] (emphasis in original).

12 *Habitual Criminals Act* 1957 (NSW), s 4(1).

Magistrate and the pronouncement and further sentence of the judge. Third, as in *R v Roberts*[13], an offender may appeal only against the pronouncement or consequential sentence and not the sentence for the primary offence. In such cases, only the pronouncement or the mandatory sentence imposed in respect of the pronouncement is before the Court of Criminal Appeal.

29 None of these considerations, in my opinion, makes inapplicable the principle for which *McGarry* is an authority. First, the omission of the 1957 Act to declare that the sentence following the pronouncement is "part of the sentence" is not decisive. It is the sentencing decision – not the individual sentences – that attracts the *McGarry* principle. That principle does not cease to be applicable because there are separate sentences. In *McGarry* itself, the indefinite sentence was "in addition to imposing the term of imprisonment for the offence"[14]. Second, for the same reason, the provisions of s 4(2) dealing with pronouncements following convictions before a Magistrate do not affect the applicability of the *McGarry* principle. If the conviction before the Magistrate were set aside in separate proceedings, it could not be contended that the pronouncement of and the sentence for being an habitual criminal must stand. Third, the fact that an appeal may be brought only against the pronouncement or the consequential sentence is a matter of no present relevance. It says nothing as to whether the Court must set aside the pronouncement when the primary sentence is set aside.

30 Accordingly, the Court of Criminal Appeal erred when it declared that it was "wholly unpersuaded that [the District Court's] discretion to pronounce, miscarried."[15] With great respect to those who hold the contrary opinion, the error of the Court of Criminal Appeal cannot be dismissed because – if it was the case – the argument put by the appellant in this Court was not put to the Court of Criminal Appeal. The error of the Court of Criminal Appeal constituted a miscarriage of justice in the technical sense of that term. It denied the appellant the right to have his appeal decided according to law. As a result, the appellant has been denied the judgment of the Court of Criminal Appeal on a matter that affected his liberty and his reputation.

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13 [1961] SR (NSW) 681.

14 *Sentencing Act* 1995 (WA), s 98(1).

15 (2003) 141 A Crim R 56 at 81 [99].

Order

31 The appeal must be allowed. The order of the Court of Criminal Appeal must be set aside and the matter remitted to that Court to determine the appellant's appeal against the pronouncement that he is an habitual criminal.

32 KIRBY J. This is an appeal from a judgment entered, by majority[16], by the New South Wales Court of Criminal Appeal[17]. The issue, presented by the sole ground upon which special leave to appeal was granted, is whether that Court erred in the disposition of the appeal against the pronouncement and sentence of the sentencing judge, made under the *Habitual Criminals Act* 1957 (NSW) ("the Habitual Criminals Act"). Specifically, it is whether it did so having regard to the appellate court's functions under the *Criminal Appeal Act* 1912 (NSW) ("the Appeals Act").

33 The majority of the Court of Criminal Appeal treated the proceedings that challenged the primary judge's pronouncement under the Habitual Criminals Act as contesting the exercise of a discretionary power and hence as governed by the principles stated by this Court in *House v The King*[18]. Their Honours declared that they were unpersuaded that the primary judge's exercise of discretion to make the pronouncement under the Habitual Criminals Act had miscarried[19].

34 In this Court, the appellant contends that, in the circumstances, the Court of Criminal Appeal was obliged (but failed) to discharge its *own* functions of resentencing, including in respect of the proceedings under the Habitual Criminals Act. Upon this footing, the deference paid by the majority to the discretion of the sentencing judge was misplaced, justifying the intervention of this Court.

35 The appellant's arguments are correct. Consistency with an unbroken line of authority in this Court, obliging the "regular and scrupulously thorough" observance of procedures mandated by statutes authorising preventive punishment for repeat offenders[20], applies in these proceedings to require that the appeal be allowed. The application of the Habitual Criminals Act should be considered afresh on new materials that are now available.

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16 Sully J (Dunford J concurring); Buddin J dissenting in part.

17 *R v Strong* (2003) 141 A Crim R 56.

18 (1936) 55 CLR 499 at 504-505. See (2003) 141 A Crim R 56 at 81 [97]-[99].

19 (2003) 141 A Crim R 56 at 81 [99].

20 *Thompson v The Queen* (1999) 73 ALJR 1319 at 1322-1323 [18]; 165 ALR 219 at 224. See also *Chester v The Queen* (1988) 165 CLR 611; *Lowndes v The Queen* (1999) 195 CLR 665; and *McGarry v The Queen* (2001) 207 CLR 121.

The facts

36 Mr Robert Strong ("the appellant") is an Aboriginal man, now aged forty-six years. He was reared within Aboriginal communities near Armidale in northern New South Wales. He grew up "in depressed economic and social circumstances and lacked normal family life and consistent role models"[21]. He suffers from intellectual disabilities. He worked briefly in a sheltered workshop; but has spent most of his life unemployed or in prison. His condition was described by Sully J in the Court of Criminal Appeal as involving "a sad picture of … a person whose real psychiatric problems are superimposed upon a background of economic and social disadvantage, and upon a history of drug abuse"[22].

37 Prior to the events of 2000 resulting in the present proceedings, the appellant had been convicted of serious offences in 1977 and 1983, connected with sexual assaults upon women. For these, the appellant was sentenced to lengthy periods of imprisonment. He served the full sentence on each occasion, without release to parole[23]. Although he was released in April 1996, following the completion of the sentence for the 1983 offences[24], in January 1997 he was again sentenced to imprisonment for six months on a charge of indecent assault of a female. In January 1998, he was again arrested for an offence of stalking a female victim and sentenced to imprisonment[25]. It was whilst in prison for the lastmentioned offence that he began writing sexually suggestive letters to a woman with whom he had had no relationship and who, following his release, became the subject of unwanted further attention.

38 The letters to the lastmentioned victim formed the basis of the substantive charge of intimidation[26] subsequently presented against the appellant. After his release from prison, the appellant began following and watching this victim. He moved to live opposite her home and shouted abusive and sexually suggestive statements of love for her, knowledge of which, when they came to her attention,

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21 Report of T H Trembath, Parole Officer (August 1979) in evidence before the sentencing judge.

22 (2003) 141 A Crim R 56 at 72 [68].

23 (2003) 141 A Crim R 56 at 89 [118].

24 (2003) 141 A Crim R 56 at 89 [118].

25 (2003) 141 A Crim R 56 at 59 [5].

26 Contrary to the *Crimes Act* 1900 (NSW), s 562AB.

caused the victim fear and anxiety. This conduct became the basis of the substantive charge of stalking[27].

39 In September 2000, an apprehended violence order was served on the appellant requiring him to appear at the Armidale Local Court[28]. The appellant did not appear. He left Armidale. He was quickly apprehended in Enmore, a suburb of Sydney. Upon his apprehension, he was found to be in possession of a 15 cm serrated blade knife. In addition to the charges of intimidation and stalking, the appellant faced allegations of offensive language[29] and being in custody of a knife in a public place[30].

40 The appellant pleaded guilty to the substantive offences in the Local Court on 22 November 2000. He was committed for sentence in the District Court pursuant to s 51A of the *Justices Act* 1902 (NSW). When he came for sentence before the sentencing judge (Freeman DCJ) at Armidale he adhered to his pleas[31]. The sentencing judge convicted the appellant. In respect of the offence of intimidation, he sentenced him to four years imprisonment with a non-parole period of three years. In respect of the charge of stalking, he sentenced the appellant to five years imprisonment with a non-parole period of three years. The sentencing judge took into account the allegations of using offensive language and being in unlawful custody of a knife[32]. His Honour made the sentences partly cumulative and partly concurrent. This course resulted in sentences for the substantive offences of eight years imprisonment, with a non-parole period of six years.

41 There the matter might have rested but for an application made to the sentencing judge in June 2001 in Sydney for an order pronouncing the appellant an habitual criminal pursuant to the Habitual Criminals Act and for the imposition of a further concurrent sentence under that Act[33]. That application

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27 Contrary to the *Crimes Act* 1900 (NSW), s 562AB.

28 (2003) 141 A Crim R 56 at 61 [8].

29 Contrary to the *Summary Offences Act* 1988 (NSW), s 4(1)(b). It appears that the appellant was charged under this provision even though it did not exist at the time of the alleged offence: see reasons of Callinan and Heydon JJ at [106]-[108].

30 Contrary to the *Summary Offences Act* 1988 (NSW), s 11C(1).

31 (2003) 141 A Crim R 56 at 58 [4].

32 In accordance with the *Crimes (Sentencing Procedure) Act* 1999 (NSW), ss 32, 33.

33 (2003) 141 A Crim R 56 at 62 [18]-[19].

was dealt with on a collection of documents which the prosecution provided to the sentencing judge in advance of the supplementary hearing. No further evidence was called for either party, whether oral or documentary[34]. The sentencing judge, for reasons that he then published, upheld the prosecution application. He pronounced the appellant to be an habitual criminal under the Habitual Criminals Act. He sentenced him to the maximum term of imprisonment provided by that Act, namely fourteen years, to date (as the other sentences had done) from the day on which the appellant had been taken into custody in Enmore, 4 October 2000.

The decision of the Court of Criminal Appeal

42 *Unanimous finding of error*: The appellant made an application for leave to appeal pursuant to the Appeals Act. The application contested what Sully J (who gave the reasons of the majority in the Court of Criminal Appeal) described as the "substantive offences"[35]. But it also challenged the pronouncement that the appellant was an habitual criminal under the Habitual Criminals Act; and the sentence imposed under the latter Act, pursuant to that pronouncement[36].

43 The Court of Criminal Appeal was unanimous that the appellant had established error under the third ground of appeal relating to the sentences for the substantive offences[37]. It held that the sentencing judge had erred in refusing to discount the sentence imposed for the stalking offence, given that the appellant had promptly pleaded guilty to that offence. At the least, it was held, the appellant was entitled to "a proper utilitarian discount" for that plea[38].

44 This conclusion required that the appellant be resentenced by the Court of Criminal Appeal. It thus became unnecessary (as Sully J pointed out[39]) to consider separately in the appeal an additional ground of objection to the substantive sentences. This was[40] that, on the basis of fresh evidence as to a

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34 (2003) 141 A Crim R 56 at 62 [22].

35 (2003) 141 A Crim R 56 at 63 [27] (heading).

36 (2003) 141 A Crim R 56 at 73-74 [72].

37 (2003) 141 A Crim R 56 at 68 [50] per Sully J (Dunford J agreeing at 83 [104]; Buddin J agreeing at 83 [107]).

38 (2003) 141 A Crim R 56 at 68 [51] per Sully J.

39 (2003) 141 A Crim R 56 at 69 [61].

40 Ground 6: (2003) 141 A Crim R 56 at 69 [60].

mental disorder suffered by the appellant, the original sentences were not warranted in law or were manifestly excessive in the circumstances. The fresh evidence arose out of the tender before the Court of Criminal Appeal of substantial recent evidence of the opinions of psychiatrists concerning the appellant's mental condition.

45 That evidence, which was described by Sully J[41], was potentially important in two respects. First, it updated the psychiatric and psychological evidence that had been placed before the sentencing judge in the form of reports prepared between 1979 and 1996. Although those reports had been supplemented by one of Mr Philip Nolan, psychologist, of February 2001, it was common ground that the latter report had not been placed before the sentencing judge at the time of the sentencing for the substantive offences[42].

46 Mr Nolan's 2001 report was subsequently made available to the sentencing judge in connection with the application under the Habitual Criminals Act. However, as Buddin J observed, "[i]ts utility must have been limited by the fact that it was not prepared for that ... purpose"[43]. For example, in his report of 2001, Mr Nolan did not have the full details of the offences or access to all of the prior expert reports. Moreover, his report did not address the question presented by that Act. No report was ordered by the sentencing judge from the probation and parole service, despite the language of s 9 of the Habitual Criminals Act.

47 Secondly, the new psychiatric reports were potentially important for the proceedings under the Habitual Criminals Act because, as Sully J was to point out, in reviewing and incorporating extracts from them, they revealed an important development in the thinking of Dr Stephen Allnutt, a specialist forensic psychiatrist. This was to the effect that the appellant could, by 2002, have been recognised as suffering "symptoms of psychosis" that met the recognised legal criteria for a "mental illness"[44]. A question was therefore presented as to whether the appearance of such an illness might call for treatment and/or management of the appellant's case in the future under mental health legislation, rather than further punishment within the criminal justice system, including under the Habitual Criminals Act. Ultimately, Sully J was to voice recognition of this problem[45]. However, having regard to his conclusions, it was

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41 (2003) 141 A Crim R 56 at 70-72 [63]-[68].

42 (2003) 141 A Crim R 56 at 90 [119] per Buddin J.

43 (2003) 141 A Crim R 56 at 90 [119].

44 (2003) 141 A Crim R 56 at 71 [65].

45 (2003) 141 A Crim R 56 at 82 [101].

recognition to be given effect only in the context of the penal regime for which the Habitual Criminals Act provides.

48 Having concluded that the sentencing for the substantive offences had miscarried, Sully J proceeded to what he saw as the first task of the appellate court. This was to grant leave to the appellant to appeal against both of the sentences imposed upon the appellant for his substantive offences; to quash those sentences; and to proceed to a resentence in respect of the two convictions[46].

49 *Dissenting proposal for remitter*: In dissent as to this course, Buddin J concluded that the recognition that it had become necessary for the Court of Criminal Appeal to intervene, presented squarely the question of how it should do so in disposing of the appellant's case in that Court[47]. Under the Appeals Act, the options before that Court, so far as the disposition of the appeal against sentences for the substantive offences was concerned, included, for itself, to "pass such other sentence" (being one "more or less severe [as] warranted in law"[48]) or to remit the resentencing to the court of trial for determination[49].

50 In the ultimate, having regard to what he saw as the connected issues of the application for leave to appeal against the pronouncement that the appellant was an habitual criminal[50] and the additional sentence of imprisonment imposed in consequence of that pronouncement[51], Buddin J decided that the correct order to be made was to grant leave to appeal; to allow the appeals against the substantive sentences, the pronouncement under the Habitual Criminals Act and the sentence passed in consequence of that pronouncement; to set those dispositions aside and to order the remitter of the entire resentencing of the appellant to the District Court[52].

51 Buddin J's reasons for concluding that remitter for resentence was the appropriate course were (1) the initial failure to provide the sentencing judge with up-to-date psychiatric or psychological assessments of the appellant,

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46 (2003) 141 A Crim R 56 at 82-83 [103].

47 (2003) 141 A Crim R 56 at 83 [107].

48 Appeals Act, s 6(3).

49 Appeals Act, s 12(2).

50 Habitual Criminals Act, s 4(1).

51 Habitual Criminals Act, s 6(1).

52 (2003) 141 A Crim R 56 at 96-97 [147].

relevant to the determination of the overall punishment of the appellant[53]; (2) the developing understanding of the appellant's psychiatric condition, reinforced by reports of attempted suicide in custody on the appellant's part[54] (a problem not uncommon amongst Aboriginal prisoners[55]); (3) the affidavit of the appellant's counsel who had appeared on the original sentencing proceedings in the District Court seeking to explain the reasons for failing to seek an adjournment of the application under the Habitual Criminals Act by reference to her concern about the effect of further delay and uncertainty on the appellant's suicidal state[56]; (4) the exceptional nature of orders to be made under the Habitual Criminals Act[57]; (5) the importance of the "fresh" or "new" evidence about the appellant's underlying mental health which had not been available to the sentencing judge; (6) the inevitable inter-relationship of the sentences for the substantive offences and any dispositions under the Habitual Criminals Act[58]; (7) the "draconian" consequences for the appellant of any order made under the Habitual Criminals Act[59]; (8) the novelty of the application made in the appellant's case under the Habitual Criminals Act (no prior such application having been made since the 1970s[60]); (9) the repeated insistence by this Court upon special care in the imposition of such additional sentences of preventive detention[61]; (10) the lack of a pre-sentence report concerning the appellant upon which the Court of Criminal Appeal could proceed to its own sentence[62]; (11) the passage of two years following the original pronouncement under the Habitual Criminals Act and the need to afford the prosecution a proper opportunity to test the fresh psychiatric evidence proffered for the appellant[63]; and (12) the advantage that remitter would

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53 (2003) 141 A Crim R 56 at 90 [119]-[120].

54 (2003) 141 A Crim R 56 at 90 [121].

55 Australia, Royal Commission into Aboriginal Deaths in Custody, (1991) (J H Wootten et al, Royal Commissioners).

56 (2003) 141 A Crim R 56 at 90 [122].

57 (2003) 141 A Crim R 56 at 91-92 [126]-[130].

58 (2003) 141 A Crim R 56 at 92-93 [131]-[133].

59 (2003) 141 A Crim R 56 at 94 [135].

60 (2003) 141 A Crim R 56 at 93-94 [134].

61 (2003) 141 A Crim R 56 at 94-95 [136].

62 (2003) 141 A Crim R 56 at 95 [139].

63 (2003) 141 A Crim R 56 at 95 [138].

afford to both parties by preserving to them any future entitlement that they might wish to appeal against orders made under the Habitual Criminals Act, in the light of the new and more satisfactory materials[64].

52 *Majority approach to resentencing*: The majority (Sully J and Dunford J) were not convinced by the foregoing analysis. Because of the limited ground of appeal allowed in this Court, we are not, as such, deciding whether the circumstances that arose in the punishment of the appellant for his admitted offences warranted the approach adopted by the majority (including dismissal of the appeal against the pronouncement under the Habitual Criminals Act and resentencing to a shorter term under that Act) or by Buddin J (involving remitter of the entire task of resentencing, including under the Habitual Criminals Act, to the District Court). In deciding between those respective courses, the judges constituting the Court of Criminal Appeal were exercising powers of a discretionary character, vested in that Court by the Appeals Act. Unless the appellant could demonstrate error in the approach of the majority, this Court would not interfere in that disposition, even if it considered that the course favoured by Buddin J was the preferable one.

53 The suggested error, relied upon by the appellant, is said to have arisen in the passages in the reasons of Sully J in which his Honour stated that the sentencing judge "in pronouncing [that the appellant was an habitual criminal under the Habitual Criminals Act] and sentencing pursuant to [that Act] was exercising discretionary powers", the exercise of which an appellate court will not interfere with "unless it is plain that they have miscarried"[65].

54 In that connection, Sully J referred to the well-known treatment of the review of discretionary decisions in *House v The King*[66]. His Honour then went on[67]:

> "I do not believe that there is any ambiguity in the learned primary Judge's reasoning. His Honour was convinced, plainly, that the applicant presented as a very dangerous man, whose antecedents suggested that he was a recidivist with, at best, very slender prospects of future

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64 (2003) 141 A Crim R 56 at 96 [142] referring to *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661 at 664-665. See also *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 276-280.

65 (2003) 141 A Crim R 56 at 81 [96]-[97].

66 (1936) 55 CLR 499 at 504-505.

67 (2003) 141 A Crim R 56 at 81 [98]-[99].

> rehabilitation; and, as such, a present and likely future threat to women. His Honour deduced, correctly as I respectfully think, that the Act having been invoked, the statutory pre-conditions had been established; and there was, thereupon, every good reason from the viewpoint of the protection of the public, to pronounce and sentence accordingly.
>
> I am wholly unpersuaded that his Honour's discretion to pronounce, miscarried."

55 In his reasons, Sully J proceeded to consider, within the limits of *House v The King*, whether appellate intervention was justified in respect of the maximum sentence that had been imposed by the sentencing judge under the Habitual Criminals Act. He held that it was. He therefore concluded that the appellant should have leave to appeal against both the pronouncement and the sentence imposed under the Habitual Criminals Act. The appeal against the pronouncement was nonetheless dismissed. However, the sentence under the Habitual Criminals Act was substantially reduced. In effect, the resentence under that Act, favoured by the majority, enlarged the appellant's aggregate sentence of imprisonment by only one year, although, because not subject to reduction for parole[68], it removed the possibility of earlier release on parole previously allowed by the revised sentences for the substantive offences.

56 *The emerging question*: The question in this appeal is therefore whether, in the foregoing approach, the majority of the Court of Criminal Appeal erred (1) by failing for themselves to consider the questions arising for determination under s 4 of the Habitual Criminals Act and (2) by deferring inappropriately to the exercise by the primary judge of his powers under that Act, so far as that exercise resulted in the pronouncement that the appellant was an habitual criminal in accordance with that Act.

The law of habitual criminals

57 *Early English and Australian laws*: The common occurrence of repeat offending has produced many legislative attempts to deal with the problem. In 1871, the United Kingdom Parliament enacted the *Prevention of Crimes Act* affording, in England, a statutory regime for the additional punishment of habitual criminals. Legislation of a like kind was quickly enacted in Australia for the same purpose, namely to provide a power to judges to impose additional punishment in sentencing as a deterrence against repeat offending, to protect the

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68 Habitual Criminals Act, s 7 ("Governor may direct habitual criminal's release").

public and to respond to the presumed existence of an identifiable "criminal class"[69].

58 In New South Wales this approach led to the enactment of the *Habitual Criminals Act* 1905 (NSW)[70]. That Act permitted a judge, in specified circumstances, to declare a person convicted of identified offences "an habitual criminal"[71]. Following such a declaration, the person so "declared" could be detained "at the expiration of his sentence" during the pleasure of the Executive[72]. The detention was under conditions of confinement requiring the person "to work at some trade or avocation", being "offered facilities for selling or otherwise disposing of the products of his labour"[73]. It was left to the Executive, having determined that the "habitual criminal is sufficiently reformed, or for other good cause", to release the prisoner on licence[74]. Male and female habitual criminals were to be kept apart[75] and alcoholic liquor prohibited in their places of confinement[76]. The essential object of the system was said to be two-fold: to protect the public and to afford the habitual criminal the opportunity for reform[77].

59 *The 1957 NSW Act*: This legislative scheme was eventually viewed as a failure both in England and in Australia. In 1948, the *Criminal Justice Act* in England repealed the previous legislation[78]. It substituted a regime that, in turn,

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69 (2003) 141 A Crim R 56 at 83-84 [108] per Buddin J citing New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996) at 233-234 [10.19].

70 Similar legislation was adopted in other Australian States: *R v White* (1968) 122 CLR 467 at 470 (a case concerning the *Habitual Criminals Act* 1870 (SA), re-enacted with amendments in *Criminal Law Consolidation Act* 1935 (SA), s 319(1)(b)). Like legislation was enacted in New Zealand: *R v Steele* (1910) 29 NZLR 1039; *R v Ehrman* (1911) 31 NZLR 136.

71 s 3(a).

72 s 5.

73 s 6.

74 s 7.

75 s 10.

76 s 11.

77 *R v Stanley* [1920] 2 KB 235 at 240-241.

78 *Prevention of Crime Act* 1908 (UK).

became the model for the Act invoked in the appellant's case. That Act, the Habitual Criminals Act, adopted by the State Parliament of New South Wales in 1957, consciously followed the later English Act. It did so on the basis that the judiciary had resorted to the 1905 Act, mistakenly but *bona fide*, particularly in the case of juvenile offenders, as a means of ensuring that prisoners would receive training in a trade[79]. This, the Minister declared, had not been the intention of that Act. He quoted Dr Norval Norris's description of an habitual criminal as "one who possesses criminal qualities inherent or latent in his mental constitution (but who is not insane or mentally deficient); who has manifested a settled practice in crime; and who presents a danger to the society in which he lives (but is not merely a prostitute, vagrant, habitual drunkard or habitual petty delinquent)"[80].

60 It was for that reason that the Habitual Criminals Act was enacted in New South Wales to follow the reforms adopted by the English Act of 1948[81]. In accordance with the stated purpose, the Habitual Criminals Act treated the pronouncement of the person to be "an habitual criminal" as a separate judicial act. It was one to be made on the specified preconditions and not (as such) "part of the sentence of such person"[82]. The preconditions and the incidents of the pronouncement were tightened in 1957. It remained in the discretion of the judge, if "satisfied that it is expedient with a view to such person's reformation or the prevention of crime that such person should be detained in prison for a substantial time"[83]. The discretion so to order was intended to be a real one. As this Court explained in *R v White*[84], it was not a power to be exercised where,

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79 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 March 1957 at 4071.

80 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 March 1957 at 4070.

81 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 March 1957 at 4073. Provisions for preventive detention for repeat offenders exist in other States and Territories of Australia. These include *Sentencing Act* 1991 (Vic), ss 18A-18P; *Penalties and Sentences Act* 1992 (Q), s 163; *Criminal Law (Sentencing) Act* 1988 (SA), s 23; *Sentencing Act* 1995 (WA), s 98; *Sentencing Act* 1997 (Tas), s 19 and *Sentencing Act* (NT), s 65.

82 *Habitual Criminals Act* 1905 (NSW), s 3(a).

83 Habitual Criminals Act, s 4(1).

84 (1968) 122 CLR 467.

"notwithstanding a person has three convictions or more, he is not really an habitual criminal"[85].

61 *Disuse and proposed repeal*: For various reasons, from the 1970s, the Habitual Criminals Act, and statutes like it in other jurisdictions, fell into disuse in Australia. In the *Australian Criminal Reports* series, which began in 1979, there is not a single case involving the application of the Habitual Criminals Act. In part, this may have reflected changing attitudes of prosecutors and in part the view of judges that the assumptions, procedures and consequences of such legislation had been overtaken by later sentencing developments. A similar change had occurred in respect of the somewhat analogous provisions of the *Inebriates Act* 1912 (NSW) and its equivalents. In proposals for the reform of the law of sentencing as late as 1996, the New South Wales Law Reform Commission recommended the repeal of the Habitual Criminals Act, a development noted by Buddin J[86].

62 The Law Reform Commission recorded that the Office of the Director of Public Prosecutions at that time was in favour of repeal of the Habitual Criminals Act and that already the Act had "fallen into disuse"[87]. Nevertheless, the Act was not repealed. It remains part of the law of the State. Over the last decade, in the way of these things, there has been a revival in Australian law of notions of preventive detention for "the protection of the public"[88]. This has been given effect in legislation providing for lengthy mandatory imprisonment for repeat offenders[89]; additional sentences of indefinite detention[90]; and specific legislation

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85 (1968) 122 CLR 467 at 472 per Barwick CJ, 478 per Menzies J (McTiernan, Kitto and Taylor JJ agreeing with Menzies J).

86 (2003) 141 A Crim R 56 at 83 [108] citing New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996) at 233-234 [10.19].

87 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33, (1996) at 136-137 noted by Buddin J (2003) 141 A Crim R 56 at 84 [109].

88 (2003) 141 A Crim R 56 at 81 [98]. See also *White* (1968) 122 CLR 467 at 471.

89 See eg *Criminal Code Amendment Act (No 2)* 1996 (WA), enacting a new s 401 of the *Criminal Code* (WA). Northern Territory laws to like effect were repealed in 2001 by the *Sentencing Amendment Act (No 3)* 2001 (NT), *Juvenile Justice Amendment Act (No 2)* 2001 (NT) and other cognate laws. See Neal and Bagaric, "After Three Strikes – The Continued Discriminatory Impact of the Sentencing System Against Indigenous Australians: Suggested Reform", (2002) 26 *Criminal Law Journal* 279 at 280.

90 Under the *Criminal Code* (WA), s 662 later *Sentencing Act* 1995 (WA), s 98 considered in *Chester* (1988) 165 CLR 611. See also *Lowndes* (1999) 195 CLR

(Footnote continues on next page)

addressed to certain long-term prisoners[91]. So long as such laws are constitutionally valid[92], when they are invoked (as here) it is the duty of courts to uphold them and of sentencing judges to apply them in accordance with their language and purpose. In the present appeal, no challenge was raised to the constitutional validity of the Habitual Criminals Act.

63 *Invocation of the 1957 Act*: The respondent defended the confirmation of the order pronouncing the appellant an habitual criminal under the Habitual Criminals Act. It supported the approach of the majority in the Court of Criminal Appeal. The respondent emphasised the separate character of that order as shown by the terms of the Habitual Criminals Act (particularly when contrasted with legislation of other States and when read in the light of the specific provision for a separate appeal against the pronouncement contained in the Appeals Act[93]). The respondent submitted that the pronouncement under the Habitual Criminals Act was a distinct and severable penal disposition and was so treated by the majority who had therefore correctly given deference to the discretionary content of the decision of the sentencing judge that sustained the pronouncement.

64 In so far as the Court of Criminal Appeal was obliged, once it granted (as it did) leave to appeal from the pronouncement by the sentencing judge, to reconsider for itself the appropriateness of that pronouncement, the respondent argued that such reconsideration had been sufficiently discharged by the majority. In his reasons, before pronouncing the appellate orders, Sully J had set forth the new and additional medical evidence concerning the appellant. He therefore had that evidence in mind when reaching his conclusion[94] that the pronouncement that the appellant was an habitual criminal in accordance with the Habitual Criminals Act should be confirmed.

665; *Thompson* (1999) 73 ALJR 1319; 165 ALR 219; *McGarry* (2001) 207 CLR 121.

91 Such legislation was considered in *Baker v The Queen* (2004) 78 ALJR 1483; 210 ALR 1 dealing with the *Sentencing Act* 1989 (NSW), s 13A; and in *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519; 210 ALR 50 considering the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q).

92 Such as the *Community Protection Act* 1994 (NSW) considered in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

93 s 5E.

94 (2003) 141 A Crim R 56 at 81 [98].

65 The respondent also laid emphasis upon the statement in the reasons of Sully J that, the Habitual Criminals Act having been invoked, the sentencing judge had deduced "correctly as I respectfully think" that the statutory preconditions had been established[95]. It was said that this phrase sufficiently indicated separate and fresh consideration by the majority in the Court of Criminal Appeal of the correctness of the pronouncement under the Habitual Criminals Act in this case.

66 *Errors of the appellate approach*: For three reasons, I cannot agree with this analysis. Those reasons derive from: (1) the necessary inter-relatedness of the pronouncement made under the Habitual Criminals Act and the sentences imposed on the appellant for the substantive offences[96]; (2) the requirement of the appellate court, in the circumstances that had arisen, to exercise its *own* powers under the Appeals Act, freed of the discretionary judgment of the sentencing judge; and (3) the necessity, repeatedly emphasised by this Court in analogous circumstances, for a scrupulous and thorough observance of procedures established by law before orders such as a pronouncement under the Habitual Criminals Act are made. I will explain these considerations in turn.

The inter-connectedness of the pronouncement and sentences

67 *Justification of appellate orders*: In an attempt to demonstrate that the pronouncement that the appellant was an habitual criminal under the Habitual Criminals Act was separate from the sentences for the substantive offences that were held to have miscarried, the respondent emphasised various textual indications that this was so. These included the omission in the 1957 Act of the reference that had previously appeared to the effect that the declaration that a person was an habitual criminal was "part of the sentence of such person"[97]; the provision in the Habitual Criminals Act reserving the pronouncement to a judge of the Supreme Court or District Court, if a magistrate has imposed the qualifying sentences for the substantive offences[98]; and the provision of the

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95 (2003) 141 A Crim R 56 at 81 [98].

96 The decision to make the order of preventive imprisonment and to fix a substantive sentence together "form part of a single sentencing decision". See *McGarry* (2001) 207 CLR 121 at 126 [8].

97 *Habitual Criminals Act* 1905 (NSW), s 3(a); cf *R v Roberts* [1961] SR (NSW) 681 at 687.

98 Habitual Criminals Act, s 8(2).

Appeals Act separately affording an appeal to the Court of Criminal Appeal by a person pronounced to be an habitual criminal under the Habitual Criminals Act[99].

68 These provisions and the distinct character of the pronouncement order can be acknowledged. However, such considerations do not disjoin the pronouncement under the Habitual Criminals Act from the punishment of the offender for the substantive offences. It could scarcely be so, given that it is the one person who stands for sentence and in respect of whom those with the responsibility of imposing punishment proper to the circumstances must act, keeping in mind the way the separate punishments inter-relate as a totality. In fact, Sully J was conscious of that inter-relationship[100]. He showed this in the manner in which (and purposes for which) he adjusted the additional sentence of imprisonment imposed under the Habitual Criminals Act. It would be a serious mistake to derive from the legislative history of that Act and its language any conclusion that the pronouncement under the Habitual Criminals Act, and the additional sentence that will follow it, were divorced from the substantive sentences.

69 *The orders evidenced error*: There are express textual reinforcements for this conclusion. Most importantly, the pronouncement under the Habitual Criminals Act is to be made "*in addition to* passing sentence upon such person for the offence of which the person is so convicted"[101]. Moreover, where the pronouncement is made, the judge is thereupon empowered to "pass a *further* sentence upon the person in accordance with the provisions of section 6"[102]. Under that section[103] any sentence of imprisonment being served by such a person "shall be served *concurrently* with the sentence imposed pursuant to the [Habitual Criminals Act]". The statutory requirement of concurrence denies any suggestion that the pronouncement and the sentence under the Habitual Criminals Act and the sentences for the substantive offences are disconnected.

70 This conclusion is still further reinforced by the concession, properly made by the respondent, that, in the event that an appeal against the conviction for the substantive offences were to succeed, the pronouncement under the

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99 Appeals Act, s 5E. The provisions of the Western Australian law considered in *McGarry* are similar. See *McGarry* (2001) 207 CLR 121 at 124-126 [4], [7], [8]. They provide for a separate appeal against the determination.

100 (2003) 141 A Crim R 56 at 82 [101].

101 Habitual Criminals Act, s 4(1) (emphasis added).

102 Habitual Criminals Act, s 4(1) (emphasis added).

103 Habitual Criminals Act, s 6(2) (emphasis added).

Habitual Criminals Act (and the sentence passed pursuant to that pronouncement) could not stand. They would have to be quashed. This would be so irrespective of whether the prisoner had appealed separately against the pronouncement under the Habitual Criminals Act, pursuant to the provisions in that respect made by s 5E of the Appeals Act.

71 It follows that, in so far as the majority in the Court of Criminal Appeal treated the pronouncement under the Habitual Criminals Act as wholly separate from the findings of error affecting both the sentences for the substantive offences committed by the appellant and the sentence that followed the pronouncement under the Habitual Criminals Act, they erred.

72 The pronouncement under the Habitual Criminals Act could not be treated as divorced from the errors earlier found by the Court of Criminal Appeal. When those errors were identified, they afforded a reason obliging the discharge of the pronouncement by the appellate court and the fresh reconsideration by that court *ab initio* of whether such a pronouncement should, or should not, be made. It may be that Sully J recognised this, to some extent, because the majority granted leave to the appellant to appeal against the pronouncement under the Habitual Criminals Act. However, an error then occurred in disposing of the appeal pursuant to such leave by reference to the discretion of the sentencing judge.

The appellate court's exercise of its own powers

73 *Erroneous approach of deference*: Once errors of sentencing were found (as they were) in the "concurrent" sentences for the substantive offences committed by the appellant and under the Habitual Criminals Act, the orthodox application of *House v The King*[104] obliged the majority of the Court of Criminal Appeal to appreciate that the original exercise of discretionary powers had miscarried. In respect of the substantive offences, the judge had "act[ed] upon a wrong principle" in the treatment of the appellant's plea of guilty.

74 As well, in considering the pronouncement under the Habitual Criminals Act and the concurrent sentence under that Act, the sentencing judge had "not take[n] into account some material consideration". In fixing the additional concurrent sentence at the maximum allowed by the Habitual Criminals Act, the sentencing judge had reached a conclusion "upon the facts [that was] unreasonable or plainly unjust". Moreover, he did not have available to him the additional "fresh" or "new" evidence tendered to the Court of Criminal Appeal suggesting a diagnosis, for the first time, of a recognised mental illness.

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104 (1936) 55 CLR 499 at 504-505.

75 In such circumstances, it was, with respect, erroneous for the majority of the Court of Criminal Appeal to pay deference, as they did, to the discretion of the sentencing judge. That discretionary decision had been shown to be legally flawed. This being so, unless it could be sustained by reference to other and different matters of consideration available to the appellate court, that court's duty was clear. It was to set aside the order and either resentence the appellant for itself, including in respect of the pronouncement, or remit the sentencing to the District Court to be carried out afresh. In *McGarry*, this Court said[105]:

> "[I]f an appellate court concludes that the sentencing judge's discretion miscarried in fixing the nominal term of imprisonment, the whole of the sentence imposed by the sentencing judge, including the order for indefinite imprisonment, should be set aside".

The legislation in that case is, it is true, different in some respects from the Habitual Criminals Act. However, the fundamental principle is the same.

76 *Separate and independent powers*: In deciding the proper course in the circumstances, the material considerations for the exercise of the powers of the Court of Criminal Appeal were not the discretion of the sentencing judge and its exercise by him but the type of considerations that Buddin J identified in his reasons for the order of remitter[106]. By allowing themselves to be diverted by the reference to the discretionary character of the order of pronouncement instead of addressing the considerations presented by the circumstances of necessary resentencing, the majority in the Court of Criminal Appeal erred in the exercise of their own powers. In the language of *House v The King*, they allowed "extraneous or irrelevant matters to guide or affect [them]"[107].

The necessity for scrupulously thorough procedures

77 *The rule of scrupulous care*: In so far as there is any doubt at all about the foregoing, it should be resolved in this appeal in a way consistent with the unbroken authority of this Court on the approach to be taken to legislation such as the Habitual Criminals Act.

78 In *White*, in 1968 this Court unanimously stressed the confinement of orders under legislation such as the Habitual Criminals Act to cases *really* requiring them[108]. It emphasised the substantial content of the discretionary

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105 (2001) 207 CLR 121 at 126 [9].

106 See above these reasons at [51].

107 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

108 (1968) 122 CLR 467 at 472, 478. See also *R v Riley* [1973] 2 NSWLR 107.

power to make such orders and hence the importance of making them only where a consideration of all the circumstances warranted it.

79 In relation to somewhat different legislation, but also providing for preventive detention, this Court has repeatedly stated that the powers conferred "should be confined to very exceptional cases where the exercise of the power is demonstrably necessary"[109]. In *Lowndes v The Queen*[110], the Court unanimously affirmed the approach of Hayne JA in the Court of Appeal of Victoria in *R v Moffatt*[111] to the effect that, the power being exceptional, the exercise of the power could only be warranted by exceptional circumstances. This was also the approach taken in *McGarry*[112]. It led the majority of this Court in that case to insist that full details of the offender's past conduct should be provided to the sentencing judge under conditions that afforded the person affected a proper opportunity to meet the prosecution's case[113]. That did not happen in the present appellant's case.

80 The respondent argued that these earlier cases were distinguishable. It is true that the Habitual Criminals Act and the legislation considered in the authorities just mentioned, other than *White*, are different. The Habitual Criminals Act does not provide for indefinite detention. It provides for concurrent and not consecutive sentences. It is enlivened by different considerations. However, what is common is the exceptional addition to the punishment normal to proved offences; the consequent risk of disproportion between the immediate crime and its punishment; and the added punishment "for the purpose of extending the protection of society from the recidivism of the offender"[114].

81 The foregoing are the considerations that led in *Chester v The Queen*, *Thompson v The Queen*[115], *Lowndes* and *McGarry* to this Court's insistence upon

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109 *Chester* (1988) 165 CLR 611 at 618.

110 (1999) 195 CLR 665 at 670-671 [11].

111 [1998] 2 VR 229 at 255.

112 (2001) 207 CLR 121 at 132 [29], [31], 141-144 [60]-[67].

113 (2001) 207 CLR 121 at 132 [30].

114 *Chester* (1988) 165 CLR 611 at 618 citing *Veen v The Queen* (1979) 143 CLR 458 at 467, 468, 482-483, 495; *Walden v Hensler* (1987) 163 CLR 561; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472-474, 485-486.

115 (1999) 73 ALJR 1319 at 1319-1320 [2], 1322-1323 [18]; 165 ALR 219 at 220, 224.

serious, individual and scrupulous attention by the judiciary in every case where such exceptional legislation is invoked. Those considerations led me in *Thompson*[116] to say:

> "Where there was any possibility that an order of indefinite imprisonment might be made, it was essential that the procedures observed should be regular and scrupulously thorough and that the materials, including the pre-sentence reports, should be as adequate and complete as fairness to the prisoner required."

82 In a sense, the importance of basing orders under the Habitual Criminals Act upon up-to-date and complete materials concerning the prisoner, the subject of an application for a pronouncement under that Act, is reflected in the provisions of s 9 of the Act. That section requires that, before sentencing any person under the provisions of the Habitual Criminals Act, a judge "shall consider any report in respect of such person that may be obtained by such judge from the Adult Probation Service".

83 *Inadequacy of original materials*: When regard is had to the materials that were placed before the sentencing judge, before the pronouncement that the appellant was an habitual criminal in accordance with the Habitual Criminals Act, their inadequacy is immediately apparent. There was no pre-sentence report at all as envisaged by the statute. All but one of the medical reports predated 1996. The more recent psychologist's report, which was at least included in the proceedings under the Habitual Criminals Act (although omitted in the earlier sentencing proceedings), was incomplete when regard was had to the later reports, including of Dr Allnutt, that suggested diagnosis of an identifiable mental illness. These new reports, which were available to the Court of Criminal Appeal, cast serious doubt on the adequacy and sufficiency of the materials placed before the sentencing judge. The sentencing judge expressed the opinion, on the basis of the reports tendered to him, that the "prisoner does not suffer from a mental illness". This was a conclusion that he repeated, indicating the importance that he attached to that evidentiary consideration.

84 The unsatisfactory character of the original proceedings, so important for the liberty of the appellant, is also demonstrated by the complete absence of evidence on the appellant's own behalf. The only explanation for this appeared in the reference to concern that any delay would increase the appellant's anxiety and suicidal feelings[117]. The affidavits of the appellant in the Court of Criminal Appeal were important for consideration of the appropriateness of a

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116 (1999) 73 ALJR 1319 at 1322-1323 [18]; 165 ALR 219 at 224 (footnote omitted).

117 (2003) 141 A Crim R 56 at 90 [122].

pronouncement under the Habitual Criminals Act. They included reference to the strict custodial conditions in which the appellant was kept; the provision of continuous medication; and the effect of the latter namely that it "calms me down and stops me hearing voices. I feel better than I did before."[118] Such evidence, if accepted, could warrant a conclusion that the circumstances of the appellant had changed, so long as he was medically supervised and maintained his medication[119]. The excuse for the defects in the materials before the sentencing judge, whilst understandable, does not justify the even greater anxiety and the sense of serious injustice as is caused by such an inadequate presentation of the case under the Habitual Criminals Act.

85 In these circumstances, the majority of the Court of Criminal Appeal erred, in light of the materials before them, in concluding that discretionary considerations stood in the way of their reopening the pronouncement under the Habitual Criminals Act and considering afresh whether such pronouncement should be made. With all respect to everyone involved at first instance, the proceedings, and the materials in them, left much to be desired. No doubt that was because of their novelty. But the outcome was seriously flawed. It had draconian potential for the appellant, now and in the future. The only proper solution was one of reconsideration *ab initio*. This the majority failed to order because of their erroneous belief that the discretionary character of the original disposition presented an obstacle to the discharge of their function in that regard.

86 There was no such obstacle. The inter-related character of the concurrent sentences means that errors had been shown that obliged the Court of Criminal Appeal to reconsider the entire sentencing of the appellant for itself. It was required to do so, in the circumstances, with the benefit of the new or fresh evidence. That evidence was significant. It was corrective of the inadequacies of the proceedings at first instance.

87 *Preventive imprisonment and discrimination*: Preventive detention laws, triggered by previous convictions, have a tendency to fall more heavily in their operation upon minority and indigenous populations. This has proved true in the United States of America as in Australia and doubtless elsewhere[120]. The

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118 (2003) 141 A Crim R 56 at 72 [68].

119 *R v Griffin* (1969) 90 WN (Pt 1) (NSW) 548 at 550, 551.

120 Neal and Bagaric, "After Three Strikes – The Continued Discriminatory Impact of the Sentencing System Against Indigenous Australians: Suggested Reform", (2002) 26 *Criminal Law Journal* 279 at 284-285; Stolzenberg and D'Alessio, "'Three Strikes and You're Out': The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates", (1997) 43 *Crime and Delinquency* 457.

discriminatory impact of the preventive detention sentencing laws upon Australian Aboriginals has been called to notice[121]. This Court, and the Court of Criminal Appeal, should ensure that no such defect is left unrepaired where, as here, the correction is available and is required by resentencing that complies with the law[122].

88 As to the contention that the majority did give separate and explicit consideration to the pronouncement under the Habitual Criminals Act, there is ambiguity on the face of the majority's reasons that leaves me in serious doubt[123]. It is true that Sully J observed that the sentencing judge "correctly as I respectfully think" had held that the statutory preconditions had been established. However, before the appellate court proceeded to make the pronouncement and to impose the additional sentence that followed, important considerations of judgment and discretion had to be weighed by that court. They are not reflected in the review of the pronouncement by the majority of the Court of Criminal Appeal. The references to *House v The King* and to the discretion of the primary judge were misplaced once the sentences for the substantive offences were quashed, fresh evidence was received and considered on appeal and the matter fell for new determination by the Court of Criminal Appeal itself. Especially was that so because the sentencing judge's opinions, as could be seen, were based on incomplete, out-of-date and wholly inadequate materials.

89 It is possible that, upon a reconsideration of the application under the Habitual Criminals Act, with the provision and examination of up-to-date psychiatric and psychological reports and such "subjective" materials as could be provided for the appellant, the result will be the same. The final order favoured by the majority in the Court of Criminal Appeal significantly reduced the concurrent sentence to be imposed under the Habitual Criminals Act, such that it

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121 United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, CERD/C/304/Add.101 (19 April 2000) at [16]. See Neal and Bagaric, "After Three Strikes – The Continued Discriminatory Impact of the Sentencing System Against Indigenous Australians: Suggested Reform", (2002) 26 *Criminal Law Journal* 279 at 283.

122 International, regional and national principles of human rights law also impose restrictions on the imposition of additional sentences of preventive detention to ensure proportionality to the circumstances of the case: see *Winterwerp v The Netherlands* (1979) 2 EHRR 387; *Johnson v United Kingdom* (1997) 27 EHRR 296; *R v Swain* [1991] 1 SCR 933; *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2001] 2 AC 19 at 38.

123 (2003) 141 A Crim R 56 at 81 [97]-[99]; cf reasons of Gleeson CJ at [11]-[13].

involved no more than the addition of one year's imprisonment to the total revised sentence imposed on resentencing for the substantive offences. However, where there is doubt about the regularity and adequacy of the procedures involved, the grave consequences for the present and future of the pronouncement and additional sentence under the Habitual Criminals Act require that the procedures be carried out again. The attention of the judicial mind will then be given specifically and manifestly to the materials said to justify such an exceptional order. No other approach is consistent with the authority of this Court and with legal principle.

90 *Conclusion: fresh resentencing*: The observance of proper procedures, on clearly adequate and up-to-date materials, is the standard that this Court has demanded in the past. The Habitual Criminals Act itself suggests the need for a pre-sentence report in such cases and this the sentencing judge did not receive. Nor did he have any evidence from the appellant himself who stood at risk of a most serious order having exceptional consequences for liberty. This Court should not depart from its consistent requirement of scrupulous care in cases of such a kind. No lesser standard should be applied.

The "wretched" features of this case

91 *The prisoner's "wretched plight"*: It follows from the foregoing that I disagree with the reasons of the majority. I disagree with Gleeson CJ[124] because, once it is accepted that the pronouncement under the Habitual Criminals Act miscarried, the making of consequential orders was wholly the responsibility of the appellate court, exercising its own powers. It had to reach its own conclusion on the new materials, not evaluate whether the primary judge, on the imperfect materials before him, was right or wrong in his decision. References to the decision of the sentencing judge on this issue show that the majority in the Court of Criminal Appeal took into account a consideration irrelevant to the proper discharge of their function. That error demands correction.

92 I disagree with Callinan and Heydon JJ that this Court should refuse to answer the questions presented by the ground upon which special leave was granted[125]. I do not regard that course as justified. Reference by their Honours to the appellant's "wretched plight"[126] does not, with respect, find reflection in a like sensitivity to the unsatisfactory way in which the appellant's original sentencing occurred. It had its own "wretched" features, as I have shown.

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124 Reasons of Gleeson CJ at [11]-[13].

125 Reasons of Callinan and Heydon JJ at [111].

126 Reasons of Callinan and Heydon JJ at [112].

93 It is abundantly clear that the Court of Criminal Appeal received fresh evidence in the appellate hearing. The up-to-date psychiatric reports were not before the sentencing judge deciding the application under the Habitual Criminals Act. But they were referred to by Sully J. No formalistic point was raised against the mention of those materials, viz that they were irrelevant to the appellate issues having regard to the grounds filed. It is clear that the experienced counsel appearing in the appeal relied on them to support the appeal, and unsurprisingly so[127].

94 The concession by counsel in the Court of Criminal Appeal that the sentencing judge was exercising discretionary powers was rightly made[128]. No one doubts that the pronouncement invokes the exercise of discretionary powers. But as I have demonstrated, that fact was not determinative, as the majority thought. To deny a "wretched" prisoner the full protection of the law in respect of the imposition of serious additional punishment, important for his liberty, on the ground that no application was made to amend his grounds of appeal in this Court[129] is unacceptably formalistic. In my view, no such amendment is required. The issue argued for the appellant is wholly within the ground upon which leave was granted.

95 *Formalistic impediments to liberty*: Moreover, as this Court held in *Gipp v The Queen*[130] and *Crampton v The Queen*[131], such formal points do not succeed when a matter affecting liberty is still current within the Judicature and pressed in argument. I remind myself that this appeal does not involve a civil claim concerned with civil remedies. It is one that involves the liberty of a human being. This Court has hitherto been vigilant against error in such cases. This is not a time to falter.

96 It cannot be suggested that the point argued in this Court was withheld or down-played in the Court of Criminal Appeal for tactical reasons such as might warrant rebuffing the argument now if it has merit[132], as in my view it does.

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127 Given ground 9 and the contents of the new evidence; cf reasons of Callinan and Heydon JJ at [118].

128 Reasons of Callinan and Heydon JJ at [116].

129 Reasons of Callinan and Heydon JJ at [119].

130 (1998) 194 CLR 106 at 116 [23]-[24], 153-154 [134]-[136], 161 [164]-[165].

131 (2000) 206 CLR 161 at 171-172 [12]-[14], 184 [52], 185 [57], 206-207 [122], 216-217 [155]-[156].

132 *Gipp* (1998) 194 CLR 106 at 161 [165] per Callinan J.

Correctly, the respondent, representing the Crown, did not press such a formal objection upon this Court. If it was ever raised, I would reject it. If it was not, it would be unworthy for the Court to allow it to govern the outcome of the appeal.

97 Although it is inherent in my reasons that I find error on the part of the majority in the Court of Criminal Appeal, I agree that their Honours were conscious that mistakes had happened in the original sentencing process and sought to approach the appeal with proper sensitivity. We are not here to defend that Court from epithets deployed in appellate rhetoric. It can be fully accepted that that Court's functions are difficult and onerous. However, this Court's function is to uphold the law, to give effect to the relevant legislation, to apply settled legal doctrine and to adhere to the Court's own consistent approach in such cases. In the ultimate, that is all that counsel for the "wretched" appellant sought, and correctly so. The appellant, no less than any other person, is entitled to the benefit of such arguments.

98 *The result was not inevitable*: Nor can it be said that the pronouncement made under the Habitual Criminals Act should be upheld, despite the errors at first instance and mistakes on appeal, because such an order was inevitable and because there is no chance of a different outcome[133]. No notice of contention was filed for the respondent in this Court asserting that argument. Nor was it advanced at the hearing of the appeal. The more serious the consequence, now and in the future, of the pronouncement under the Habitual Criminals Act, the more important is it that it should be made by the judges only after proper process, based on proper materials, reviewed on appeal with a proper application of the appellate court's powers. That was not done in this case. No formal reasons should be permitted to withhold from the appellant the remedies that would normally follow. Many reasons of legal authority, principle and policy uphold the right of the appellant to relief and resentencing.

Orders

99 The appeal should be allowed. Orders 2, 3, 4 and 5 of the orders made by the Court of Criminal Appeal of New South Wales in respect of the proceedings against the appellant under the *Habitual Criminals Act* 1957 (NSW) should be set aside. In lieu thereof, the proceedings should be remitted to that Court for determination consistently with these reasons.

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133 Reasons of Callinan and Heydon JJ at [129]; cf reasons of Gleeson CJ at [13].

CALLINAN AND HEYDON JJ.

Background

100 Counsel for the appellant described his client as a 45 year old Aboriginal man who had spent almost his entire adult life in incarceration; who as an adult had spent no more than two years out of gaol in any one period; who was socially and economically deprived; and who was diagnosed at various times with borderline retardation, mental and personality disorders, and eventually with mental illness.

101 He was charged with two offences contrary to s 562AB of the *Crimes Act* 1900 (NSW), namely stalking and intimidation ("the *Crimes Act* offences"). The conduct alleged involved making repeated and alarming proposals of a sexual relationship to a woman scarcely known to the appellant. These experiences must have been very distressing for her: she gave extensive evidence about how they had worried, shocked and scared her[134]. The appellant was also charged with two offences contrary to the *Summary Offences Act* 1988 (NSW) ("the summary offences"). One involved offensive language, and was related to the *Crimes Act* offences. The other concerned an unrelated matter to do with custody of a knife in a public place. The appellant pleaded guilty in the Local Court to the *Crimes Act* offences and was committed for sentence in the District Court pursuant to s 51A of the *Justices Act* 1902 (NSW), as it then was[135].

102 Sentencing proceedings relating to the *Crimes Act* offences were conducted before Freeman DCJ on 20 February 2001. The appellant also admitted guilt of the summary offences and Freeman DCJ took them into account on the sentence for the stalking offence.

103 In relation to the offence of intimidation, the appellant was sentenced to four years imprisonment, with a non-parole period of three years. On the stalking offence, taking into account the summary offences, Freeman DCJ sentenced the appellant to the maximum sentence of five years, with a non-parole period of three years, cumulative on the non-parole period of the sentence for intimidation. The effective overall sentence was thus one of eight years with a non-parole period of six years.

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134 *R v Strong* (2003) 141 A Crim R 56 at 63-64 [29]-[34].

135 The *Justices Act* was repealed by the *Justices Legislation Repeal and Amendment Act* 2001 (NSW), with effect from 7 July 2003.

104 On 29 June, in response to a Crown application under the *Habitual Criminals Act* 1957 (NSW) ("the Act"), Freeman DCJ pronounced the appellant to be an habitual criminal, and sentenced him to 14 years imprisonment, the maximum possible. This sentence was to be served concurrently with the sentences for the substantive offences.

105 An appeal by the appellant to the Court of Criminal Appeal against the sentences for the substantive offences succeeded[136]. The majority (Sully and Dunford JJ; Buddin J dissenting) re-sentenced the appellant to three years imprisonment for the offence of intimidation. On the offence of stalking, taking the summary offences into account, they sentenced him to four and a half years imprisonment with a non-parole period of two and a half years imprisonment. Since the first sentence was to date from 4 October 2000 and the second to commence on 4 April 2003, the effective overall sentence for the substantive offences was seven years with a non-parole period of five years. The majority granted leave to appeal against the pronouncement of the appellant as an habitual criminal, but dismissed the appeal. However, they also granted leave to appeal against the further sentence, upheld the appeal, quashed the sentence, and re-sentenced the appellant to eight years imprisonment[137].

A curious aspect of the proceedings

106 It is convenient at this point to identify a curious aspect of the proceedings. Freeman DCJ signed a certificate stating that he had taken the offensive language charge into account on the sentence for the stalking offence, which appears at the end of the "Form 1" required at that time by s 32 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) and reg 5(1) of the Crimes (Sentencing Procedure) Regulation 2000 (NSW). According to the certificate, the offence charged was that of offensive language contrary to s 4(1)(b) of the *Summary Offences Act* 1988 (NSW). At the date of the alleged offence, 3 September 2000, there was no s 4(1)(b). In its 1988 form, the *Summary Offences Act* did contain a s 4(1)(b), and s 4(1) provided:

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136 *R v Strong* (2003) 141 A Crim R 56.

137 The appellant cannot be released before the expiration of the further sentence under the Act – ie the full period of eight years – as no non-parole period is available in respect of that sentence: s 54 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). Hence the reduction in the non-parole period in relation to the sentences for the substantive offences had no effect on the overall time the appellant was required to spend in prison, but may be relevant to any exercise of the Governor's discretion under s 7 of the Act to release the appellant on a licence.

"A person shall not –

(a) conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school; or

(b) use offensive language in or near, or within hearing from, a public place or a school."

The maximum penalty was six penalty units or imprisonment for three months. Section 4 was repealed by the *Summary Offences (Amendment) Act* 1993 (NSW), with effect from 23 January 1994. Offensive conduct, the subject of the former s 4(1)(a), was dealt with in a new s 4, which relevantly provided:

"(1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school.

Maximum penalty: 6 penalty units or imprisonment for 3 months.

(2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language."

Offensive language, the subject of the former s 4(1)(b), was dealt with in a new s 4A. Section 4A(1) provided:

"A person must not use offensive language in or near, or within hearing from, a public place or a school.

Maximum penalty: 6 penalty units."

107 It can be seen that the new s 4A dealt with offensive language in a different manner from the old s 4 – the sanction of three months imprisonment was repealed.

108 Although the charge sheet is silent on the point, the apparent inference which flows from the Form 1 is that Freeman DCJ took into account an offence, punishable by imprisonment, which was not known to the law, rather than a different offence, not punishable by imprisonment, which was known to the law. That inference is supported by a Police Form P139B, by the Court of Criminal Appeal's description of the offence[138], and by the appellant's written submissions to this Court. If that inference is correct, the proceedings below were unsatisfactory in that respect. However, neither party drew attention to the point, and, in particular, the appellant did not rely on it.

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138 *R v Strong* (2003) 141 A Crim R 56 at 58 [4].

The ground of appeal

109 Special leave to appeal was granted on the following ground:

> "The majority of the Court of Criminal Appeal (the Court) erred in approaching the appeal against the pronouncement and sentence under [the Act], upon the basis that the Court, applying the principles identified in *House v The King*[139], was constrained by the decision of the primary judge, whereas the Court, having upheld the appeal against sentence [for the substantive offences], was obliged to address itself, afresh, to the questions arising for determination under s 4 of the Act."

110 That ground raises questions as to the construction of ss 4 and 6 of the Act.

111 In our opinion it is not desirable to answer those questions, because the appeal can be disposed of without doing so.

The grounds of appeal in the Court of Criminal Appeal

112 In the Court of Criminal Appeal the appellant was represented by senior and junior counsel experienced in criminal law. In relation to the appeals against the sentences, those counsel advanced precisely drafted and specific grounds of appeal – six for the sentences relating to the substantive offences, nine for the sentence under the Act. Sully J (with whom Dunford J agreed) dealt with them seriatim in a judgment which was not only lengthy, but, with respect, careful and sensitive to the appellant's wretched plight. It is necessary to set out only three of the grounds relied on in relation to the Act:

> "6. His Honour erred in the exercise of his discretion to make a pronouncement, and in passing sentence under [the Act], by failing to take into account the [appellant's] subjective circumstances.
>
> …
>
> 8. The sentence passed under [the Act] was excessive in all the circumstances.
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> 9. On the basis of the fresh evidence as to mental disorder, the pronouncement of the [appellant] as an habitual criminal and the consequent sentence were not warranted in law."

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139 (1936) 55 CLR 499.

113 The "fresh evidence" referred to comprised evidence not available to Freeman DCJ, being two reports of one specialist forensic psychiatrist, and one report of another who had been the appellant's treating psychiatrist.

The taking of an additional point

114 In the course of dealing with the appeal against the sentences for the substantive offences, Sully J quoted some passages from, and analysed, the three fresh reports.

115 In rejecting par 6 of the grounds of appeal in relation to the pronouncement and sentence under the Act, Sully J did not deal with the fresh evidence, but only with expert material available to Freeman DCJ, particularly a psychological assessment that had been sought by the appellant's then legal advisers. This is not surprising, since ground 6 was limited to material available to Freeman DCJ.

116 When he came to deal with grounds 8 and 9, Sully J said (emphasis added)[140]:

> "Grounds 8 and 9 are, in my opinion, the grounds upon which any appeal against [the Act] pronouncement and sentence either stands or falls.
>
> As to those grounds, the correct starting point is the proposition that his Honour, in pronouncing and sentencing pursuant to [the Act], was exercising discretionary powers. *The contrary was not contended at the hearing before this Court.*
>
> That being so, it is trite that this Court will not interfere with the primary Judge's exercise of those discretions unless it is plain that they have miscarried; the relevant guiding principles being set out … in *House v The King* …
>
> I do not believe that there is any ambiguity in the learned primary Judge's reasoning. His Honour was convinced, plainly, that the [appellant] presented as a very dangerous man, whose antecedents suggested that he was a recidivist with, at best, very slender prospects of future rehabilitation; and, as such, a present and likely future threat to women. His Honour deduced, correctly as I respectfully think, that the Act having been invoked, the statutory pre-conditions had been established; and there was, thereupon, every good reason from the

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140 *R v Strong* (2003) 141 A Crim R 56 at 81-82 [95]-[100].

> viewpoint of the protection of the public, to pronounce and sentence accordingly.
>
> I am wholly unpersuaded that his Honour's discretion to pronounce, miscarried. The more difficult question is whether the sentence which his Honour thereupon imposed was, to borrow from *House* '… upon the facts … unreasonable or plainly unjust' so as to justify appellate intervention '… on the ground that a substantial wrong has in fact occurred'.
>
> I am reluctant to differ from as experienced a trial Judge in criminal cases as his Honour. I have to say, however, that I cannot see how, allowing for every proper apprehension about this [appellant], it was a sound exercise of the relevant sentencing discretion to impose the statutory maximum penalty in a range as broad as that of 5 to 14 years. I think that there has been an ultimate miscarriage, and that this Court must do what it properly can do by way of correction."

117 Sully J then proceeded to explain how he arrived at the orders he proposed in substitution for those of Freeman DCJ.

118 In the quoted passages, Sully J does not explicitly consider the "fresh evidence as to mental disorder" referred to in ground 9. Counsel for the appellant, in the course of argument before this Court, said that the appellant's "only point" was that expressed in the ground of appeal on which special leave was granted. But he nonetheless drifted into complaint about this. That complaint should not be treated as a reason for allowing the present appeal, for two reasons.

119 First, it formed no part of the ground of appeal in respect of which special leave to appeal was granted. No application to amend was made.

120 Secondly, the following circumstances must be borne in mind. The appeals were argued before the Court of Criminal Appeal on two days, 5 December 2002 and 14 March 2003. On the latter day, judgment was reserved, and subsequently delivered on 8 May 2003. The third of the three fresh reports was dated 11 March 2003 – three days before the resumed hearing. The Crown did not oppose the reception of the "fresh evidence" on the application for leave to appeal against the pronouncement and the imposition of a sentence of 14 years imprisonment[141]. The reports were considered and carefully analysed in relation to the appellant's successful appeal against the sentences for the substantive offences. Although Sully J made no reference to the "fresh evidence" in

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141 *R v Strong* (2003) 141 A Crim R 56 at 92 [131].

considering ground 9, it is unthinkable that it was not in his mind, and was not taken into account, in that regard.

Was the ground of appeal now relied on put to the Court of Criminal Appeal?

121 When complaint is made of the handling by intermediate courts of appeal (and trial courts) of proceedings before them, it is imperative to keep steadily in mind what it was that those courts were asked to determine. It is unfair for appellants to criticise them for failing to deal with what they were not asked to deal with. Subject at least to the need to prevent possible miscarriages of justice in criminal cases, appellants who make criticisms of that kind face serious obstacles in having those criticisms accepted.

122 The ground of appeal relied on in this Court does not appear in the grounds of appeal relied on in relation to the Act in the Court of Criminal Appeal.

123 As appears from the part of Sully J's reasons for judgment emphasised in the quotation set out above, his Honour was apparently not conscious of any argument that, if the sentences for the substantive offences were to be set aside, the Court of Criminal Appeal should proceed to reconsider the pronouncement and sentence under the Act afresh, without any need to identify an error in Freeman DCJ's discretionary judgment on that subject.

124 Although the appellant was represented in this Court by the same junior counsel as appeared in the Court of Criminal Appeal, different senior counsel appeared. He was not able to assure the Court that the ground now relied on had been put to the Court of Criminal Appeal.

125 Further, there is no trace in Buddin J's reasons for dissenting from the majority of the Court of Criminal Appeal that the ground relied on was put to that Court.

126 In these circumstances, it is plain that the ground now being relied on is being raised for the first time in this Court.

127 That background should be borne in mind while considering the appellant's argument to this Court that the Court of Criminal Appeal, by not acting on the legal position reflected in the ground of appeal relied on in this Court, "utterly misconstrued the position", took up a stand having only a "flawed … justification", and "very clearly and very openly disclosed … reasoning [which] demonstrates error." The argument was that although the Court of Criminal Appeal altered the further sentence passed consequent on the pronouncement, it failed to consider for itself whether the pronouncement should be made: "they did get it right in part, but by an accident, as it were." Counsel

spoke of a "grievance we have about the way in which we were dealt with in the Court of Criminal Appeal." The grievance was that: "we have been deprived of an opportunity to have persuaded the Bench that there should not have been a pronouncement." Another way in which the appellant's position was put in the course of oral debate was that the Court of Criminal Appeal had "telescope[d] the process", "surrendered the exercise of … discretion" to pronounce the appellant an habitual offender to the sentencing judge because it "had donned these limiting spectacles", had "put the blinkers on", had "put weights in the saddle that should not have been there", and was wrongly "looking down a lens which has a filter".

128 However, there is no point in this Court considering the ground of appeal which was belatedly relied on unless the failure of the Court of Criminal Appeal to do so can be said to have created the risk of a miscarriage of justice.

129 Even if the Act is to be construed as the appellant contends, and even if the Court of Criminal Appeal ought to have proceeded in accordance with that construction, there is no chance that the outcome would have been different. The appellant says that what the Court of Criminal Appeal should have done, once it decided to interfere with the sentence for the substantive offences, was to consider for itself whether to make a pronouncement and sentence pursuant to s 4 of the Act. What it actually did was to reject the contention that there was any error in the making of the pronouncement, either in the light of the materials before Freeman DCJ or in the light of the fresh evidence, while finding error in the sentence imposed. The considerations which led it to those conclusions included the length and seriousness of the appellant's record, which revealed him "to be a repeat offender in connection with sex-related offences"; the serious nature of the *Crimes Act* offences, with their impact on the victim; the need to protect society against the appellant; the seriousness of the appellant's mental problems "as a person whose real psychiatric problems are superimposed upon a background of economic and social disadvantage, and upon a history of drug abuse"; and the fact that, in the view of the sentencing judge, a view plainly shared by the majority of the Court of Criminal Appeal, the appellant was "a very dangerous man, whose antecedents suggested that he was a recidivist with, at best, very slender prospects of future rehabilitation; and, as such, a present and likely future threat to women."[142] There was ample evidence to support these points. Counsel for the appellant accepted that if the appeal succeeded and a process of re-sentencing proceeded according to the law as he submitted it to be, "it may be [that] the same outcome in substance will be achieved". Had the Court of Criminal Appeal proceeded in the manner urged, that possibility must

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142 *R v Strong* (2003) 141 A Crim R 56 at 63-65 [29]-[36], 67 [47], 70-72 [63]-[68] and 81 [98].

be regarded as a certainty. There is no reason to conclude that those considerations would have led it to any other conclusion if, instead of proceeding in the way it did, it had proceeded in the way advocated by the appellant.

130 The majority of the Court of Criminal Appeal were "wholly unpersuaded that [the sentencing judge's] discretion to pronounce … miscarried"[143]. While there may be cases of the same general kind as the present in which the point of construction relied on by the appellant may have led to a different result in the Court of Criminal Appeal, this case, taking account of its particular circumstances, is not one of them.

131 For these reasons, no risk of a miscarriage of justice existed in consequence of the Court of Criminal Appeal having proceeded as it did.

132 There is therefore no point in considering what the correct construction of the Act is, since whatever it is, it could not improve the position of the appellant.

Order

133 The appeal should be dismissed.

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143 *R v Strong* (2003) 141 A Crim R 56 at 81 [99].