

HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

AB

APPELLANT

AND

THE QUEEN

RESPONDENT

AB v The Queen [1999] HCA 46
9 September 1999
S151/1998

ORDER

1. *Appeal allowed.*
2. *Set aside order 2 of the orders of the Court of Criminal Appeal of New South Wales and in lieu thereof allow the appeal to that Court.*
3. *Remit the matter to the Court of Criminal Appeal of New South Wales to be dealt with in accordance with these reasons.*

On appeal from the Supreme Court of New South Wales.

Representation:

C A Porter QC with P Byrne SC and E H Pike for the appellant (instructed by Greg Walsh & Co)

T L Buddin SC and A M Blackmore for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AB v The Queen

Criminal law – Sentence – Principles – Offences not forming the basis of extradition – Extradition law – Confession and non-insistence on rule of speciality – Whether sentencing Court required to have regard to the public interest in the accused's confession and non-insistence on rule of speciality.

Appeal – Sentence for criminal offences – New ground added in appeal to High Court – Ground not expressly taken at first instance or in Court of Criminal Appeal – Whether ground could or should be allowed – Whether materials before lower courts, relevant to ground, sufficiently raised point of law for consideration in High Court.

Extradition Act 1988 (Cth), s 42.

- 1 McHUGH J. In this appeal, the appellant seeks to set aside an order of the Court of Criminal Appeal of New South Wales upholding sentences in respect of 67 offences against school children who were under his care and control. Thirteen of the offences involved sexual intercourse; 46 involved indecent assaults, seven involved acts of indecency and one involved an act of gross indecency. The offences did not reflect the true extent of the appellant's criminality. In some cases, the charges were simply representative of many offences committed against the same child.
- 2 The appellant, who was a Marist Brother teacher at the relevant time, was sentenced to 18 years imprisonment with a minimum term of 13½ years. He contends that the sentence was manifestly excessive. But his principal contention is that the trial judge failed to give sufficient weight to the fact that, of the 67 charges, prosecution in respect of 39 of them was made possible only because, after he had been extradited to Australia, he "expressly waived his rights under the Extradition Treaty" to return to the United States without these 39 charges being laid against him.
- 3 Waiver of his extradition rights was not a ground that the appellant relied on before the sentencing judge or in the Court of Criminal Appeal. Indeed, it seems likely that no one suggested to the learned sentencing judge that the appellant was able to be prosecuted for the 39 offences only because he had "waived" his rights or even that he had "waived" rights which he had. Nor could such a claim have been made.
- 4 The appellant had no relevant rights to waive. In so far as there were any relevant rights, they belonged to the United States government which had agreed to the appellant's extradition on the original 28 charges. The most that can be said for the appellant is that he facilitated prosecution of the 39 offences because he co-operated with the prosecuting authorities by making a full confession of the offences and perhaps by instructing his solicitor to make and forward to the United States of America an affidavit that the appellant wished to be dealt with for offences other than those for which he was extradited. We know from a Document of Consent (which was not before the sentencing judge or the Court of Criminal Appeal and which probably should not have been before us¹) that the affidavit was required by the United States authorities in order to determine whether it and other documents "provided sufficient evidence to support a waiver of the rule of special[i]ty" by that country in this case.

1 *Mickelberg v The Queen* (1989) 167 CLR 259.

The Extradition Treaty and Protocol

- 5 A Treaty on Extradition between the United States of America and Australia was signed at Washington on 14 May 1974 ("the Treaty"). By a Protocol done at Seoul on 4 September 1990 ("the Protocol"), the Treaty was amended. Relevantly, Art XIV of the Treaty, as amended by the Protocol, provided:

"(1) A person extradited under this Treaty may not be detained, tried, or punished in the requesting State except for:

- (a) the offence for which extradition is granted ...
- (c) any offence for which the executive authority of the requested State consents to the person's detention, trial or punishment. For the purposes of this subparagraph, the requested State may require the submission of the documents specified in Article XI."²

- 6 Pursuant to Art XIV(1)(c) of the amended Treaty, by a note dated 17 October 1996, "from the Embassy of Australia", Australia requested "the United States Government's consent to the prosecution and sentencing of [AB] on 39 charges related to offenses for which he was extradited in April 1996." The United States

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- 2 Article XI of the Treaty (as amended by the Protocol) specifies the relevant documents. Section (2) specifies:

- "(a) documents, statements, or other types of information which describe the identity and probable location of the person sought;
- (b) a description of the conduct constituting the offence;
- (c) a statement of the law describing the essential elements of the offence for which extradition is requested; and
- (d) a statement of the law describing the punishment for the offence and the law relating to the limitation of legal proceedings."

Section (3) specifies:

- "(a) a copy of the warrant or order of arrest issued in the requesting State for the arrest of the person for the offence;
- (b) a copy of the charging document, if any; and
- (c) a description of the facts, by way of affidavit, statement, or declaration, setting forth reasonable grounds for believing that an offence has been committed and that the person sought committed it."

3.

gave its consent. The Document of Consent, which is dated 5 November 1996, states inter alia:

"The Government of the United States has concluded that the documents submitted with the Embassy's note provided sufficient evidence to support a waiver of the rule of special[i]ty in this case."

- 7 One of the documents there referred to may have been an affidavit sworn by Mr Walsh, the solicitor for the appellant, on 28 October 1996, which was some days after the date of the Embassy's note. The relevant parts of the affidavit are as follows:

"COMMONWEALTH OF AUSTRALIA)
STATE OF NEW SOUTH WALES)
EXTRADITION ACT 1988)

...

1. I am a solicitor of the Supreme Court of New South Wales.

...

3. I say that upon the return to New South Wales of [AB], I was retained by him as his solicitor in respect of his prosecution by the New South Wales authorities for those offences for which his extradition was granted.

4. I say that subsequent to being retained by [AB], he disclosed to me that he had committed a number of other counts of sexual assault involving other persons.

5. I say that at the time of receiving those instructions relating to the other counts, [AB] made it quite clear to me, that he was desirous of disclosing these matters to the investigating police and prosecuting authorities.

...

7. I say that I disclosed to both Detective Sergeant [Magann] and Miss Pheils the nature of my instructions.

8. As a result of those discussions I am informed and verily believe that Detective Sergeant W J [Magann] attended the Long Bay Gaol Complex on Saturday 25th May 1996 and at that time [AB] disclosed to Detective Sergeant [Magann] a number of other offences and further that my client then participated in an electronically recorded interview.

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9. I say that at the various times that I attended upon [AB] in respect of the issue of the disclosures of these additional offences, I gave advice to [AB] that in respect of any offences which occurred in the State of New South Wales, that he would in all likelihood be charged with those offences, and further that these additional charges would be likely in all the circumstances of the case to be such that a Judge may sentence [AB] to a lengthier term of imprisonment.
10. I disclosed that notwithstanding the advice that I gave to [AB] it has been his most adamant instructions to me that he wished to disclose these matters to the investigating police and prosecuting authorities and have all of these matters taken into account by the sentencing Judge.
11. I am aware from the discussions that I have had with Miss Pheils that the authorities in the United States of America have sought this Affidavit from me, and I have executed same on the basis that I am informed that it will be forwarded to the authorities in the United States of America in relation to the additional charges in respect of which [AB] now wishes to plead also guilty."

Neither waiver nor co-operation in obtaining consent to prosecution was an issue before the judge

- 8 The evidence does not disclose what documents were sent to the United States. However, the Document of Consent makes it clear that documents accompanied the Embassy's note dated 17 October 1996. Probably, they contained the evidence relied on to support the 39 charges and would have included a transcript of the appellant's electronically recorded confession. The last paragraph of Mr Walsh's affidavit indicates that, after receiving the Embassy note and documents, the United States government wanted confirmation *from him* that the appellant wanted to plead guilty to the post-extradition charges and realised the consequences of doing so. The evidence does not disclose whether the United States government would have given its consent without this affidavit being forwarded to them. Nor does the evidence disclose whether Mr Walsh prepared this affidavit at the specific request of the appellant or under his general authority to act on the appellant's behalf and ensure that all offences were dealt with at the one time. Indeed, the evidence does not reveal whether the appellant was even aware that the consent of the United States government was required before he could be prosecuted on the additional 39 charges.
- 9 The reason that the evidence does not disclose matters that now seem important is that neither "waiver" nor facilitating the obtaining of consent to the prosecution of the 39 charges was an issue at the sentence hearing. The only document relevant to the consent of the United States government that was before the sentencing judge was the affidavit of Mr Walsh. After the close of the prosecution case on sentence, Mr Walsh, who appeared for the appellant before the sentencing judge,

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tendered the affidavit dated 28 October 1996 as one of a number of documents relied on in support of the appellant's plea. The transcript described the affidavit as that "which relates to the circumstances of post-extradition offences that was required by the American authorities". The transcript reveals nothing as to what was said when it was tendered. The judge did not have the Document of Consent or the Embassy note and its accompanying documents. Moreover, it seems certain that he was never referred to the Treaty or the Protocol. Given the absence of relevant documents, the argument before the judge and subsequently before the Court of Criminal Appeal and the terms of the sentencing judge's detailed reasons, it also seems likely that he was not informed as to how or why the United States consented to the prosecution of the additional 39 offences. It is indeed far from certain that the judge was ever told that under the Treaty the United States had to give its consent. The only material suggesting that he might have been informed about this issue is the transcript note set out above. The affidavit of Mr Walsh appears to have been used only to support a submission that the appellant had co-operated with the authorities and was fully contrite.

- 10 It is not surprising therefore that in his reasons for sentence the judge made no mention of "waiver" or that the co-operation of the appellant and his solicitor was or might have been crucial in obtaining the consent of the United States government to the prosecution of the 39 post-extradition charges. However, his Honour did say of those charges:

"That misconduct, with one possible exception, would fairly clearly not have come to light had the prisoner not made these volunteered admissions and he is entitled, accordingly, to have his sentence on those matters discounted generously in accordance with the principles enunciated in *R v Ellis*^[3]."

- 11 The learned sentencing judge certainly seems to have given a generous "discount" in respect of the non-extradition offences. Although 39 of the offences were non-extradition offences, only 3½ years of the 13½ year minimum term is attributable to those offences. It is difficult to believe, therefore, that the sentencing judge would have imposed any lesser head or minimum term sentence because of the fact that, without the appellant's co-operation, consent would not have been given and he would not have been charged with any of the 39 offences. That in itself is probably sufficient ground for rejecting the appellant's principal ground of appeal. But in my opinion the appeal on that ground faces more formidable hurdles.

- 12 The appellant's claim assumes that he is entitled to a sentencing "discount" for his confessions of the non-extradition offences *and* a further "discount" because he had co-operated in obtaining the consent of the United States government to the prosecution of the 39 offences. That claim also assumes that the reasons that called

for a "discount" in respect of the appellant's volunteered confessions of those offences are significantly different from the reasons that would call for a "discount" in respect of the co-operation in obtaining the consent. Even then, the claim could have validity only if sentencing was a process that involved a notional sentence which is then increased or reduced arithmetically according to individual factors relevant to the offence and the accused person.

The two-tiered approach to sentencing is erroneous

- 13 In *R v Raggett*⁴, Kearney J took the view that the correct approach to sentencing is to determine the sentence that is objectively appropriate for the offence and then discount it for mitigating factors. However, such an approach attempts to give the process of sentencing a degree of exactness which the subject matter can rarely bear. The better view of the sentencing process is that expounded in *R v Williscroft*⁵ where the Full Court of the Supreme Court of Victoria declared that:

"ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination."

- 14 Many, probably the large bulk of, sentences reflect compromises between conflicting objectives of sentencing. One objective is to impose a sentence that reflects adequate punishment for the culpability of the convicted person, having regard to the community's view concerning the need for retribution, denunciation, deterrence, community protection and sometimes vindication. Another objective is to impose a sentence, with or without conditions, that will further the public interest by encouraging and not discouraging the convicted person to renounce criminal activity and to re-establish himself or herself as a law-abiding citizen. Still another objective is that the sentence should reflect an allowance for those circumstances, personal to the convicted person, which call for mitigation. These objectives and others have to be achieved within a conceptual framework that requires that there should be parity between sentences, that the sentence should be proportional to the circumstances of the crime and that, where more than one sentence is involved, the total sentence should not exceed what is appropriate for the overall criminality of the convicted person.
- 15 The two-tiered approach of determining an objective sentence and then adjusting it is in conflict with the discretionary nature of the sentencing process.

4 (1990) 101 FLR 323 at 334-335; 50 A Crim R 41 at 52.

5 [1975] VR 292 at 300. See also *R v Holder* [1983] 3 NSWLR 245 at 270 and *R v Young* [1990] VR 951 at 955.

Discretionary judgments require the weighing of elements, not the formulation of adjustable rules or benchmarks. The two-tiered approach is also in conflict with the statements of principle in *Veen v The Queen [No 2]*⁶ where Mason CJ, Brennan, Dawson and Toohey JJ said:

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

- 16 To adopt a two-tiered approach to sentencing by beginning with an objectively determined sentence which is then arithmetically adjusted to take account of various factors is also a process which is plainly unsuited to the sentencing process in many cases. No doubt, where the circumstances of the offence are such that a heavy jail sentence is clearly required, the judge may make a notional or provisional assessment of the appropriate sentence and adjust it accordingly. But even in these cases - where punishment, deterrence and protection dominate the process - such an approach almost always invites error. Statutory exceptions aside, the task of the judge "is to pass such sentence as in all the circumstances relating to the offence and to the offender is that which he regards as the appropriate sentence."⁷ If the judge first formulates an objectively determined sentence, he or she has only relied on part of the relevant circumstances and has effectively allowed that part of the circumstances to dominate the sentencing process. Worse still, there is a danger that the objectively determined sentence will be formulated by reference to abstractions derived from the circumstances, rather than by reference to the concrete facts of the case. Instead of sentencing this embezzler, with this history, for taking this amount in these circumstances, consciously or unconsciously, the judge may determine the objective sentence by what is perceived to be appropriate for an embezzler who has taken a large (or small) amount of money in breach of trust. Abstraction replaces the convicted person's circumstances in determining the appropriate sentence.

6 (1988) 164 CLR 465 at 476-477.

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

- 17 Moreover, in most cases, the two-tiered approach is not only unsuitable but one that cannot realistically be followed in practice. I doubt, for example, whether many judges or magistrates who defer sentence first work out an objectively determined sentence and then "adjust" or "discount" that sentence by deferring passing sentence. Nor do I think it likely that the judge or magistrate who suspends a sentence first fixes an objective sentence, discounts it for the circumstances of the convicted person, then "discounts" it again by suspending the sentence. Rather the judges or magistrates instinctively synthesise the various elements of the case into a conclusion that the case is one calling for a deferred or suspended sentence.
- 18 The factors bearing on a sentence will vary from case to case. Frequently, they will point in different directions. The task of the sentencing judge or magistrate is not to add and subtract from an objectively determined sentence but to balance the various factors and make a value judgment as to what is the appropriate sentence in all the circumstances of the case. In *R v Rushby*⁸, Street CJ said, correctly in my opinion, that the "determination in any given case of the appropriate sentence involves an adjudicative balancing of a number of differing and not entirely consistent elements." No doubt at the conclusion of the process, the judge will check the sentence against other comparable sentences and may feel compelled to adjust the sentence up or down. But that is quite different from beginning with an "objectively" determined sentence.
- 19 I would therefore reject the contention, implicit in the appellant's argument, that the sentencing judge should have further discounted the head and minimum terms imposed because the appellant's conduct was a causative factor in obtaining the consent of the United States to his prosecution on the 39 additional charges. If the judge's attention had been drawn to that fact, it would have been one more of the many circumstances which he had to weigh. Error in the sentencing process did not necessarily occur because the judge did not mention that the appellant's conduct was a causal factor in obtaining consent to his prosecution or, as the appellant would have it, that he had waived his rights. The judge was not asked to take into account the fact, if it be the fact, that the appellant had co-operated in obtaining the consent from the United States authorities. The most that can possibly be said for the appellant is that the judge did not take into account a consideration that might have been relevant in the sentencing process if his attention had been drawn to it. Does that mean that his sentencing discretion has miscarried?

Did the sentencing judge improperly exercise his discretion?

- 20 The *Criminal Appeal Act* 1912 (NSW) does not specify the grounds upon which the Court of Criminal Appeal can set aside a sentence. Section 5(1)(c) of that Act simply provides that a person convicted on indictment may appeal

8 [1977] 1 NSWLR 594 at 597.

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"with the leave of the court against the sentence passed on the person's conviction." Section 6 which specifies the grounds of appeal against conviction is not applicable to a sentence appeal. However, because a sentence involves a discretionary judgment, a convicted person must be able to appeal on any ground which the appellate courts have recognised as invalidating a discretionary judgment. In *House v The King*⁹, Dixon, Evatt and McTiernan JJ explained the principles upon which an appellate court will interfere with a discretionary judgment. Their Honours said:

"It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

21 Here the only matter that could relevantly justify interfering with the sentencing judge's discretion is that he has not taken into account "some material consideration" because he did not take into account the circumstance that the appellant had co-operated in obtaining the consent of the United States government to his prosecution. But how can the learned judge be guilty of having failed to take that consideration into account? He was not asked to do so. The consent issue was not even the subject of evidence before him. Neither the Document of Consent nor the Embassy's note and supporting documents were in evidence. It seems clear that the judge was not referred to the Treaty or the Protocol, and he would have needed to have had a detailed knowledge of the Treaty and the Protocol before Mr Walsh's affidavit could even have put him on inquiry as to how the United States came to give its consent to laying the further charges. It is possible that Mr Walsh explained to the judge how and why he came to make his affidavit of 28 October 1996 and the history of obtaining the consent of the United States authorities. But the evidence before us fails to reveal what occurred in respect of obtaining that consent.

22 In my opinion, it is impossible to conclude that the learned trial judge erred by failing to exercise his sentencing discretion properly. He was not asked to take into account the fact, if it be the fact, that the appellant had co-operated in obtaining the consent of the United States.

The course of the proceedings did not result in any miscarriage of justice

23 Furthermore, once what is involved in the issue of obtaining consent is properly understood, I think that it is impossible to conclude that either the head sentence or the minimum term would have been different if the judge had directed

9 (1936) 55 CLR 499 at 505.

his mind to the consent issue. Once it is understood that the appellant had no extradition rights to waive, the case bears a very different complexion from that which Mr Chester Porter QC, for the appellant, sought to put on it in this Court. All that we know from the evidence is that the appellant wanted to clear the slate, so to speak. He gave Mr Walsh the "most adamant instructions ... that he wished to disclose these matters to the investigating police and prosecuting authorities and have all of these matters taken into account by the sentencing Judge." To achieve that end, he made a full confession about incidents of which the prosecution was unaware. We do not know whether at the time that he made that confession either he or his solicitor was aware that the consent of the United States authorities was required. Indeed, we do not know whether the appellant knew that, until he was released from the extradition charges, he could not be prosecuted with the other offences without the consent of the United States government. His record of interview with Detective Sergeant Magann occupies 69 pages of the appeal book. It contains no mention of the need to obtain the consent of that government.

24 No doubt by 28 October 1996 Mr Walsh had become aware of the fact that the consent of the United States was required if his client's "adamant instructions" were to be carried out. But it would be unsafe to conclude from the making of the affidavit on that date that Mr Walsh made it with the express instructions of the appellant. The appellant wanted to clear up all the outstanding offences. Mr Walsh, as his solicitor, had a general authority to take all steps necessary to achieve that object. That authority extended not only to arranging the taking of the confessions but to the taking of every step necessary to achieve the object of clearing the slate. Making the affidavit without informing the appellant would be no more a breach of that general authority than disclosing to "Sergeant [Magann] and Miss Pheils the nature of my instructions." Perhaps Mr Walsh specifically sought instructions from the appellant before making the affidavit. We do not know. Given the nature of Mr Walsh's instructions and the appellant's objective, Mr Walsh was not required to seek a specific authority from the appellant before he made the affidavit. Moreover, as appears from par 11 of his affidavit, the United States authorities wanted *him* and not the appellant to make the affidavit, no doubt because they wanted to be sure that, despite the confessions, the appellant wished to have the new charges dealt with at the same time as the extradition charges.

25 All that the evidence shows is that, with one possible exception, the misconduct involved in the 39 offences would not have come to light without the appellant's confessions and that those confessions and his solicitor's affidavit facilitated the obtaining of the consent of the United States to the prosecution of those charges. Given the appellant's electronically recorded confessions, it may well be the case that the United States government would have given its consent without Mr Walsh's affidavit. But whether it would or would not have done so is not decisive in determining what sentence the appellant would have received *if the judge had been directed to the co-operation issue*. What is critical *on that hypothesis* is what the appellant's confessions reveal about his contrition and

whether, given the need for consent, they served the public interest to a greater extent than is the case when a criminal confesses to an offence of which the prosecuting authorities are unaware.

- 26 Once it is understood that the appellant had no extradition rights to waive, this case is no different from any other case where a person confesses to a crime about which the prosecuting authorities know nothing. It is no different from a confession to perjury, the prosecution of which is prohibited by statute without the consent of the Attorney-General. In both cases, the confessional evidence results in a prosecution when consent is given. In both cases, obtaining the consent of a third party is a necessary condition of the prosecution. But that is the only factor that distinguishes them from any case where a person confesses to a crime of which the prosecuting authorities are unaware. No doubt the confessions are causally connected with the obtaining of the consent. They lead to the giving of consent and to prosecution. Where consent is not required, the confession leads directly to prosecution. But it is the prosecution, not the giving of a consent, that is material. The case might be different where an accused person has to consent to the prosecution. But that was not the case here, although the argument for the appellant was conducted as if his consent was required and had been given by the making of the confession and the forwarding of Mr Walsh's affidavit.
- 27 The appellant was therefore not entitled to any more leniency than any person who confesses to a crime about which the authorities know nothing. His desire to have all offences dealt with by the same judge simply set in train a course of events that led to him confessing to 39 other offences, to the obtaining of the consent of the United States and to him being prosecuted for those offences. His solicitor's affidavit may have facilitated the obtaining of consent from the United States government. But consent may have been given without it. We do not know whether the appellant was aware of the affidavit or the need to obtain the consent. The appellant was entitled to considerable leniency because of his confession. He was not entitled to any leniency because his confession led the United States to waive its rights and consent to prosecutions based on that confession. That would be to give him two benefits when he was entitled to only one.
- 28 The learned judge took into account that by his confession the appellant had brought about his prosecution in respect of the 39 additional offences. The judge was not required nor entitled to give additional leniency for the fact that the consent of the United States authorities was required to that prosecution. No miscarriage of justice has occurred even if, as seems nearly certain, the experienced solicitor who appeared for the appellant before the sentencing judge did not suggest that the appellant should be treated more leniently because of the giving of consent by the United States authorities.

Manifestly excessive sentence

- 29 On any view, the sentence imposed on the appellant was severe. The learned sentencing judge said that "[i]t might be thought that this is an overly harsh sentence, indeed there are murderers in this State who get off with less." Severe though the sentence undoubtedly was, so was the criminality of the appellant. Two judges of the Court of Criminal Appeal (Gleeson CJ and Sperling J) thought that the sentence was not manifestly excessive, one (Grove J) thought that it was. Although Sperling J was critical of two findings of fact by the trial judge, he did not think "that the length of the sentence [was] attributable in any material degree" to these findings.
- 30 Only in the most exceptional case would it be right for this Court to allow an appeal on the ground that the sentence is manifestly excessive. The judges of the Courts of Criminal Appeal and intermediate Courts of Appeal hear large numbers of sentence appeals each year. Their members often include sentencing judges. The collective experience of the Courts of Criminal Appeal and Courts of Appeal ordinarily far exceeds the experience of members of this Court as to what is a proper sentence for a particular offence in a particular State or Territory. When no material error of principle or fact has occurred in the sentencing process, this Court should be slow to substitute its value judgment for that of the appellate courts of the States and Territories. That being so, and given the extent and duration of the appellant's conduct, I am unable to conclude that this sentence is so manifestly excessive that it requires the intervention of this Court.
- 31 Finally, I would point out that this is another case where an appellant asks this Court to set aside an order of a Court of Criminal Appeal on a ground that was not raised in the court of first instance or in the Court of Criminal Appeal. In *Gipp v The Queen*¹⁰, Hayne J and I expressed our doubts whether this Court has jurisdiction to set aside such an order where the ground relied on in this Court had not been raised until the case reached this Court. I continue to have those doubts, notwithstanding the failure of the respondent in this case to raise any jurisdictional obstacle to the hearing of the appeal.

Order

- 32 The appeal should be dismissed.

10 (1998) 194 CLR 106 at 127-129.

GUMMOW AND CALLINAN JJ.

Facts and proceedings in the courts below

33 This is an appeal against the severity of a sentence imposed upon the appellant for 67 offences committed by him against 15 children over a period of about a decade. The appellant's principal submission is that he was entitled to a "generous discount", because he volunteered information to the police about numerous other offences with which he was not initially charged and which were not the subject of extradition proceedings in the United States which resulted in his extradition to Sydney.

Facts

34 The appellant is a 48 years old man who was, until March 1987, a teaching Marist Brother at various schools. He had joined the order in 1968 when he was 17 years old.

35 The offences of which the appellant was convicted, and in relation to which he pleaded guilty, were all committed against children, all of whom were under his care or control as a teacher, and all of whom were then between the ages of nine and 11 years of age. Each of the offences was of a sexual nature. More particularly, there were 13 offences of sexual intercourse, 46 of indecent assault, seven acts of indecency and one of gross indecency. The appellant submits that it is relevant that none of the offences involved penile penetration. The first offence was committed in about Easter of 1976, and the last, in 1987. While it is not necessary to elaborate further on the particular details of them, it is clear that they involved grave breaches of trust on the part of the appellant, and produced, as the trial judge noted, "deep-seated long-lasting, if not permanent, psychological damage" in the victims.

36 Information regarding the offences came to the attention of the police in this way. In 1989, two complaints were made about the appellant to the Campbelltown police. Statements were taken and preliminary enquiries were made. Within days of the taking of those statements, the appellant fled to Chicago in the United States. We use the word "fled" because it seems that the appellant was aware of the complaints before he left the country, and that his departure was precipitated by them.

37 The appellant successfully evaded apprehension for some time: he was "on the run" in North America for several years.

38 Whilst he was living in North America the appellant voluntarily underwent treatment, after diagnosis of an obsessive-compulsive personality disorder and immature personality traits.

39 The appellant's treatment appears to have had some success. He left the Order of the Marist Brothers and obtained employment. He married in 1992. There is no evidence that the appellant re-offended after leaving Australia in 1989.

40 In 1995, the appellant's evasion of the authorities ended with his arrest in the United States. Although he resisted extradition, once orders in that regard were made, he co-operated fully with the police. In a long and detailed record of interview, he not only made full and frank confessions in respect of all 28 offences with which he was at that point charged, but also volunteered information about 39 additional offences. None of these 39 additional offences formed the basis for his extradition, and accordingly it may not have been possible, without more, for him to be charged with them on his arrival in Australia (see s 42 of the *Extradition Act* 1988 (Cth)¹¹).

11 Section 42 provides:

"Where an extraditable person in relation to Australia is surrendered to Australia by a country (other than New Zealand), the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia or, in a case where the person was surrendered to Australia for a limited period, has been returned to the country:

- (a) be detained or tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:
 - (i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or
 - (ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be; or
- (b) be detained in Australia for the purposes of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the surrender of the person to Australia, other than any other offence in respect of which the country that surrendered the person to Australia consents to the person being so detained and surrendered."

- 41 Section 42 embodies that rule of international practice known as "the speciality rule"¹². In *Barton v The Commonwealth* Barwick CJ said¹³:

"The co-operation of nations in the surrender of fugitives from justice is a most important aspect of international life. With ease of travel and greater facility in communication, offenders against the law of a country can readily remove themselves from that country and not only escape the consequences of their own wrong-doing but, by that escape, weaken the administration of justice in that place. Important features of international co-operation in the surrender of fugitives have developed over the years, but perhaps mostly during and since the nineteenth century. Reciprocity in extradition has become central to the surrender of fugitives. Some definitions of extradition include reciprocity as a necessary element of its description. The exclusion of political offenders and of a country's nationals from the reach of extradition has become a usual feature. But, perhaps most importantly, the limitation of the area of extradition to the more serious crimes has developed and, as well, what has come to be termed 'the speciality', namely, the assurance to the country surrendering the fugitive that the surrendered person will only be dealt with in the requesting country for the crime in respect of which his surrender was sought and given."

- 42 Although the appellant was advised by his solicitor that his disclosure of the information relating to the further offences would be likely to result in a lengthier term of imprisonment, he insisted on making it to the police. The trial judge was of the view that the additional offences "fairly clearly" would not have come to light had the appellant not volunteered the information.

- 43 The appellant was charged with those further offences and pleaded guilty to each of them. He was sentenced by Freeman DCJ on 8 November 1996, who, after considering the nature of each offence and the subjective factors presented on behalf of the appellant, imposed a head sentence of 18 years on the appellant. The minimum term imposed was 13 and one half years. After allowing for his incarceration in the United States, the appellant will be eligible for parole on 14 February 2009. In his sentencing remarks the primary judge said that he had given the appellant:

"full benefit, so far as [he was] able to, of his pleas, of his contrition, of his steps towards rehabilitation, of his need for protection".

12 See *Trimbole v The Commonwealth* (1984) 155 CLR 186 at 190; *Zoeller v Attorney-General* (1987) 16 FCR 153 at 160-161.

13 (1974) 131 CLR 477 at 483.

44 His Honour the trial judge explained why he imposed the sentence that he did in this way:

"It might be thought that this is an overly harsh sentence, indeed there are murderers in this State who get off with less. It is difficult to compare across the scale of criminality. But so many victims, over such a long period of time, in circumstances so staggering as those in which the prisoner engaged for his own self-gratification, stand him out from the crowd. ...

Only the actual punishment will serve to deter him and of course it is necessary that the punishment visited upon this man, uniquely placed as he was to debauch little children, should carry a message to others who may be tempted to despoil the children of this community. These courts will do their duty to protect our children and punish those who would use them as sexual objects."

45 The appellant appealed against the severity of his sentence to the Court of Criminal Appeal of New South Wales. The Court (Gleeson CJ, Sperling J; Grove J dissenting) dismissed the appeal. Sperling J (with whom Gleeson CJ agreed) discussed a number of cases to which the appellant referred as showing that the sentence imposed in the present case was manifestly excessive. Perhaps the most comparable of them was the case of *R v Ridsdale*¹⁴. There, a parish priest had long before apprehension committed a multiplicity of offences similar to those of the appellant. There had been no further offence for about 12 years. He had pleaded guilty to all offences. A sentence of 18 years, which the Victorian Court of Criminal Appeal refused to disturb, was imposed there.

46 It was the view of Sperling J that *Ridsdale* was relevant to show that a sentence as heavy as that imposed on the appellant "[was] not without precedent in Australia for sexual offences against children". It was his Honour's conclusion that the sentence imposed in the present case was not out of step with an established pattern of sentencing in similar cases.

47 The approach of the Court of Criminal Appeal focussed upon the "special" relationship between the appellant and his victims; that is, the "pervasive care and control of a teacher". Sperling J then discussed *R v Barrett*¹⁵, another case of serious sexual abuse of young children in which the offender was sentenced to a minimum term of seven and a half years with an additional term of two and a half

14 (1995) 78 A Crim R 486.

15 Unreported, New South Wales Court of Criminal Appeal, 3 March 1997.

years. His Honour distinguished the present case from *Barrett* in the following way:

"Disgraceful as this conduct was, it does not compare in order of criminal responsibility with sexual offences committed by a school teacher, particularly a teacher at a religious school who is a member of a religious order. The element of authority and control is lacking. The element of trust of the same kind is lacking."

48 Grove J, in dissent, thought that while this sentence could be assessed as being within the appropriate range, although at the upper end of the range, it was an appropriate sentence for the criminality involved objectively viewed.

49 This was qualified however, by this important statement:

"[I]f [the sentence] were to remain undiscounted it would virtually have set at nought the subjective case made out on the applicant's behalf."

50 These subjective considerations were the appellant's plea of guilty, which not only saved the necessity of a trial, but also removed any need for the victims to give evidence; the fact that the appellant had not re-offended for 10 years; the appellant sought, and successfully completed, a rehabilitation programme which appears to have had success; the appellant had, as much as possible, however ultimately inadequate such expressions might be, expressed remorse to the victims; and, he had at all times since he arrived in Australia, co-operated with the police.

The appeal to this Court

51 In this Court the appellant points particularly to one paragraph in the reasons for judgment of Sperling J as disclosing error of principle. This is the paragraph:

"It might be asked what more the applicant could have done to show genuine contrition if it existed, once he was brought back to Australia to face trial. The answer might be that there was nothing he could do. Be that as it may, his admissions and the disclosure of other offences could not, in the circumstances, constitute persuasive evidence of any such contrition."

52 The submission is that his Honour treated the appellant's confession to the offences for which he was not extradited and his knowing waiver of his rights in that regard as being relevant only to a question whether he was truly contrite or not, and not to other matters of public interest to which the Court should have had regard. Those matters are that child complainants would be spared the ordeal of a trial and cross-examination; the importance to children that the truth of their allegations has been vindicated; the State has been spared the trouble and expense of a long trial or trials and further extradition proceedings; and the desirability and

public interest in the encouraging of the full revelation of all criminality by any extraditable persons and the waiving by them of their extradition rights.

53 In our opinion consideration need only be given in this Court to the last two of these matters because we are not satisfied that on a careful reading of the whole of the reasons for judgment of Sperling J his Honour regarded the sentencing judge as not having given weight to the other matters.

54 The sentencing judge's reasons do not refer to the public interest in the confession and waiver of the appellant's extradition rights. It does seem to be the case that neither before the sentencing judge nor the Court of Criminal Appeal was the point articulated nearly as clearly as it should have been. However, in our opinion the point was sufficiently raised in both proceedings. A detailed affidavit as to the circumstance of the waiver and the legal advice tendered to the appellant by his solicitor was filed and before the Courts. The fact of the waiver was raised as a matter of some importance by the appellant's counsel on both occasions although its significance in the public interest was not. Unfortunately therefore the matter was not given relevance and the weight owed to it in the sentencing remarks of the primary judge. And in the reasons of Sperling J in the Court of Criminal Appeal reference to the waiver of any rights to resist extradition for the other offences is narrowly and specifically confined to its relevance on the issue of contrition in the following passages.

"Having been brought back to Australia involuntarily, the applicant promptly confessed to all the matters with which he was charged and volunteered information in relation to a considerable number of further offences.

That was not persuasive evidence of contrition either. By then, the weight of the case against him was overwhelming; there was no reasonable prospect that so many children might be disbelieved. And as to the matters disclosed by the applicant, it was by no means unlikely that they would have come to light in any event."

55 In our opinion the public interest in the waiver by the appellant is a relevant matter to which the sentencing Court and the Court of Criminal Appeal should have had regard. The significance of the confession to the offences not the subject of any charge and the waiver of extradition rights in respect of them do have the important public interest implications to which we have referred. In recent times there have been at least two instances of the expenditure of considerable sums of public money and resources in attempting to extradite, ultimately unsuccessfully,

persons charged with serious offences in this country¹⁶. Experience shows that it is a practical impossibility for extradition proceedings out of Australia to be conducted without the assistance and actual involvement of Australian lawyers and officials with attendant expense, inconvenience and delay. The Court of Criminal Appeal should reconsider the appeal to it taking into account these matters.

- 56 We would allow the appeal. Order 2 of the orders of the Court of Criminal Appeal of New South Wales should be set aside. In place of that order, it should be ordered that the appeal to that Court be allowed. The matter should be remitted to the Court of Criminal Appeal to be dealt with in accordance with this judgment.

16 Proceedings in Ireland for the extradition of Robert Trimbole in October 1984: see *Trimbole v The Commonwealth* (1984) 155 CLR 186; proceedings in Spain for the extradition of Christopher Skase in March 1994: see *Re Skase* (1991) 32 FCR 212 at 216-217; *Re Skase; Ex parte Donnelly* (1992) 37 FCR 509 at 509-511.

57 KIRBY J. In this appeal from orders of the Court of Criminal Appeal of New South Wales¹⁷, the appellant, AB¹⁸, complains about the sentence imposed upon him for serious sexual offences against minors.

58 As presented to the Court of Criminal Appeal, the appellant's complaint was confined to objections that the sentence imposed on him was "manifestly excessive" and "too severe"¹⁹. The grounds in the initial application to this Court repeated that complaint and contended that the Court of Criminal Appeal had erred in failing to uphold it²⁰. However, during the hearing of the application for special leave, a specific ground of objection to the approach both of the sentencing judge (Freeman DCJ) and of the Court of Criminal Appeal was identified. This was the failure of the courts below to refer to, consider, and to make specific allowance for what was described as the appellant's waiver of his rights under extradition law. By the rule of speciality applicable under that body of law, the appellant could have resisted prosecution for, and conviction of, crimes disclosed by him after his return to Australia which fell outside the offences for which extradition to Australia by the United States had been granted.

59 In this Court, without objection by the Crown, the appellant was permitted to add a specific ground of appeal explicitly raising this extradition point. It became the main focus of argument. The appellant did not abandon his complaint that the sentence was manifestly excessive, to such a degree as would invite the exceptional intervention of this Court. But he suggested (as is sometimes asserted in such cases²¹) that the manifest excess of the sentence, when analysed, did not need to be left to a judicial inference, drawn from a consideration of all of the facts. It could be demonstrated as having arisen, in part at least, from the failure of the sentencing judge to take into account (or sufficiently into account) a specific mitigating factor to which he made no reference²². He argued that the error of the Court of Criminal Appeal was, in turn, demonstrated by the failure of the majority

17 *R v AB* unreported, Court of Criminal Appeal (NSW), 7 July 1997 (Sperling J, with whom Gleeson CJ agreed; Grove J dissenting) ("Appeal judgment").

18 The use of the pseudonym was ordered by Freeman DCJ. It was continued in the Court of Criminal Appeal and by this Court.

19 Grounds of application for leave to appeal to the Court of Criminal Appeal, pars 1 and 2.

20 Grounds 2(a), 2(d) of appeal to the High Court as originally filed.

21 For example *R v Winchester* (1992) 58 A Crim R 345 at 350.

22 *R v Bond* (1990) 48 A Crim R 1 at 8.

to discern that the sentence imposed was manifestly excessive and to notice the failure of the sentencing judge to make particular reference to the extradition point.

- 60 The Crown disputed both arguments. It submitted that, in any case, whatever the defects of the reasoning below, the resulting sentence was not such as to warrant disturbance by this Court. On the way to the consideration of these contentions, a question is raised as to the extent to which, in this Court, the appellant should be permitted to rely on the extradition point, given that it was not explicitly relied upon at first instance or in the Court of Criminal Appeal, at least in the form that it took by the time it was advanced before this Court.

Offences, complaints and extradition

- 61 The appellant was born in 1951 into a family described as "uncommunicative", in which sex was "not on the family agenda for discussion"²³. He was later to assert that he had been molested in adolescence by two teachers²⁴. At the age of 17, he entered the Marist Brothers Order of the Roman Catholic Church and was trained as a primary school teacher. He began teaching in 1970. He continued in that vocation until 1987 at schools mainly in New South Wales but also in Queensland and the Australian Capital Territory. In the middle of 1987 he was transferred to non-teaching duties in Sydney.

- 62 In August 1989 two female former students made complaints to police concerning sexual offences committed against them by the appellant whilst they were his pupils. About a week after these complaints were made, the appellant left Australia. By arrangements made by his Order, he entered an institution in Ontario, Canada, for seven months. That institution provides assessment and treatment of church personnel experiencing problems with alcohol and sexual abstinence. The appellant was diagnosed as manifesting paedophilia as well as other personality disorders and traits. In 1991, still in North America, the appellant left the Marist Brothers Order. He successfully undertook university studies and in 1992 he was employed as an "administrative headmaster" in a college in St Louis, Missouri in the United States of America. Later in the same year, the appellant married his present wife.

- 63 Meanwhile, in Australia, more former pupils of the appellant came forward and made complaints to the police. Prior to the appellant's extradition complaints had been made, in all, by six such pupils: four female and two male. In August 1992 application was made on behalf of Australia to the United States for the extradition of the appellant to New South Wales, there to stand trial for

23 Appeal judgment at 39 per Sperling J.

24 Although Freeman DCJ noted that this assertion was not only very belated but that it was at odds with what he had said during psychiatric therapy in the United States.

specified offences involving sexual abuse of minors. The application was made pursuant to the extradition treaty between the United States and Australia²⁵. That treaty was later amended by a protocol signed in 1990. The treaty, so changed, was brought into effect as part of the domestic law of Australia by the Extradition (United States of America) Regulations (Amendment) 1992.

- 64 The United States acceded to the request made on behalf of Australia. The appellant was arrested in August 1995. After a magistrate determined that he was eligible for extradition, he sought application for habeas corpus in the United States courts. That relief was eventually denied. On 26 April 1996, the appellant was delivered by United States marshals for extradition to Australia. The order for delivery specified that he was charged with "16 counts of sexual intercourse without consent with a child under age 16 years; 16 counts of indecent assault on a child under age 16 years; 4 counts to incite acts of indecency with a child under age 16 years, all contrary to various sections of the NSW Crimes Act 1900". The specified offences were later the subject of 28 counts of the indictment filed against the appellant. They related to the six complainants who had come forward to that time. Because those complainants, and the offences against them, were the subject of the extradition application, they were described in the courts below as the "pre-extradition" group of offences. The offences in the "pre-extradition" category included acts of the appellant in touching the victim, undressing him or her, digital penetration, cunnilingus and causing the victim to masturbate the appellant. There were no counts of penile penetration either of the female or male pupils.

Post-extradition confession and "waiver"

- 65 The six pupils whose complaints gave rise to the "pre-extradition" charges were not the only pupils in the appellant's care who were the subject of his sexual misconduct. After the appellant returned to Australia, he informed his solicitor that he desired to disclose a number of other instances of sexual offences involving pupils other than the six complainants then known. The solicitor later swore an affidavit, for purposes which will be described, that he had been retained by the appellant "for those offences for which his extradition was granted". The solicitor went on to state that the appellant had disclosed to him that he had committed a number of other offences and that he wished to disclose those matters to "the investigating police and prosecuting authorities". The solicitor stated that he had advised the appellant that he would, in all likelihood, be charged with the offences which had occurred in New South Wales and might be sentenced to a lengthier term of imprisonment in respect of them. Notwithstanding this advice, the appellant was "adamant" that he wished to disclose the matters and to have all of them "taken into account by the sentencing Judge".

25 Treaty on Extradition Between the United States of America and Australia, signed at Washington in 1974 and entered into force 8 May 1976.

66 The appellant underwent interrogation by officers of the New South Wales Police at the prison in Sydney where he was held pending his trial. In his interview, he disclosed that sexual offences against pupils had begun in 1976 with a male student, AC, followed by a series of further offences involving named male pupils, AS, MH, MO, MS, PW and WT, all aged between 10 and 12 years. The offences involved invitations of the boys into the appellant's private room, and touching, rubbing and masturbating them or causing them to masturbate the appellant. Some offences occurred in the classroom. A further group of offences acknowledged by the appellant occurred between 1983 and 1987 involving a pupil, MC, 10 years old at the first offence and 15 at the last. Another series of offences, in 1985, involved 10 offences against a male pupil, RB, then aged 10 years. In all, 39 offences against nine different pupils were admitted in what were described as the "post-extradition" group of offences ("the post-extradition offences"). The prosecuting authorities determined that they wished to prosecute the appellant in respect of these offences. However, first it was necessary under extradition law for Australia to secure the consent of the United States to such prosecutions. It was for that purpose that his solicitor swore the affidavit previously mentioned deposing to the appellant's desire not to raise any objection to his prosecution for the post-extradition offences, ie those outside the offences for which the United States had earlier agreed to his extradition to Australia.

67 On 5 November 1996, the Department of State of the United States signified that it, and the Department of Justice of the United States, had reviewed a note transmitted by the Embassy of Australia requesting the consent of the United States to the prosecution and sentencing of the appellant on 39 additional charges. The note stated that the United States had concluded that the documents supplied provided "sufficient evidence to support a waiver of the rule of special[i]ty in this case". Accordingly, reciting the relevant provision of the treaty on extradition²⁶, the Deputy Secretary of State of the United States authorised the "Government of Australia" to try and sentence the appellant in relation to such charges. No point has been taken concerning the identity of the permitted prosecutor.

68 Pursuant to the foregoing consent, additional charges were laid and included in the counts of the indictment. The appellant pleaded guilty to all counts, ie to 67 offences in all against a total of 15 acknowledged victims, male and female.

The sentence

69 Because of the appellant's pleas of guilty, the proceedings in the District Court of New South Wales, conducted before Freeman DCJ, were extremely brief. The prosecutor tabled a schedule of charges, a statement of the relevant facts and a copy of the statements of, and record of interview involving, the appellant. The only witness called for the prosecution was the chief investigating police officer.

26 Article (10)(1)(c).

He was cross-examined to make clear the fact that, with one exception, the police "were totally unaware of" the persons involved in the "post-extradition matters". The officer agreed that it was "only with the assistance of the [appellant] that those matters came into being". He said that in respect of the "post-extradition matters" one of the complainants had come forward following mention of the appellant's name in the media in connection with his extradition. Except for that case, it was accepted that the authorities would not have been aware of the offences had the appellant not disclosed them.

70 A number of documents, including the affidavit of the appellant's solicitor, were tendered before Freeman DCJ relating to what he described as the "circumstances of post-extradition offences that was required by the American authorities". Precisely what was said when such documents were tendered is not transcribed. However, the documents themselves indicate clearly enough on their face that close attention was paid by the Australian authorities to the need to secure the consent of the Government of the United States to the prosecution and sentencing of the appellant upon the 39 post-extradition charges. The questions asked of the police witness also indicated the importance attached by the appellant's case to his voluntary disclosure of the post-extradition offences.

71 In his remarks on sentencing, Freeman DCJ recounted in chronological sequence the facts relevant to the offences to which the appellant had pleaded guilty, beginning with the post-extradition offences. His Honour noted that the appellant had pleaded guilty and was entitled to "consideration" for that fact. He recorded that, since his return to Australia, the appellant had been "wholly forthcoming and [had] not only made admissions in relation to those matters in respect of which the warrants were originally issued but [had] voluntarily ... revealed his misconduct in connection with a number of other victims". He said that such "misconduct, with one possible exception, would fairly clearly not have come to light had the [appellant] not made these volunteered admissions and he is entitled, accordingly, to have his sentence on those matters discounted generously in accordance with the principles enunciated in *R v Ellis*"²⁷.

72 Freeman DCJ later reminded himself of the principle of totality and proceeded to describe how the pattern of offences, which the appellant had acknowledged through his solicitor, amounted to a breach of his "position of absolute trust". He described the "total helplessness and powerlessness" of the pupils and in particular in relation to the fact that a number of the offences were performed in the classroom in the presence of other children. He expressed the conclusion that the appellant's conduct would produce "deep-seated long-lasting, if not permanent, psychological damage", which he considered was already evidenced in some cases by rebelliousness and poor academic achievement. Having imposed "nominal" separate and concurrent sentences in respect of each

27 A reference to *R v Ellis* (1986) 6 NSWLR 603.

of the counts, Freeman DCJ concluded that it was "necessary to adjust this sentence to allow for a minimum and an additional term"²⁸. The overall effect of the sentences was to impose a head sentence of 18 years penal servitude upon the appellant and a total minimum term of 13½ years. This meant that the appellant would not be eligible for release to parole until February 2009. Freeman DCJ acknowledged the expert evidence concerning the appellant's treatment for his own sexual problems. He dismissed as "a little simplistic" the opinion of an expert witness that there was little risk of the appellant's reoffending, having regard to his treatment, marriage and removal from involvement with young people. He concluded:

"It is true that the [appellant] has not been known to re-offend since 1987. He has, of course, been in an entirely different atmosphere. He knew that he was under investigation. These are powerful spurs to modification of his behaviour. Now that he has been flushed out, identified and punished the threat of punishment will no longer hold him in thrall. Only the actual punishment will serve to deter him and of course it is necessary that the punishment visited upon this man, uniquely placed as he was to debauch little children, should carry a message to others who may be tempted to despoil the children of this community. ...

I have given the prisoner the full benefit, so far as I am able to, of his pleas, of his contrition, of his steps towards rehabilitation, of his need for protection, but I am left with evaluating, as I said at the beginning of these remarks, the totality of the criminality positively taken aback [sic]."

73 The reference to the appellant's "need for protection" was a reference to the fact, as was undisputed, that the appellant would have to spend his time in custody in conditions of protection against contact with, and retaliatory conduct by, other prisoners. No specific mention was made by Freeman DCJ, nor credit expressly given, for the fact that the appellant had "waived" his entitlement to confine the charges against him to those upon which he had been extradited from the United States. No reference was made to the consideration that, unless that country had exceptionally consented to an enlargement of the charges, the appellant could not have been prosecuted or punished for the further offences. At the close of his reasons, Freeman DCJ appeared to acknowledge that his sentence was at the top of the range for such offences:

"It might be thought that this is an overly harsh sentence, indeed there are murderers in this State who get off with less. It is difficult to compare across the scale of criminality. But so many victims, over such a long period of

28 Required by the *Sentencing Act* 1989 (NSW), s 5; cf *R v Moffitt* (1990) 20 NSWLR 114.

time, in circumstances so staggering as those in which the prisoner engaged for his own self-gratification, stand him out from the crowd."

- 74 Clearly, in this reference to the number of victims and the period of the offending, the judge was taking into account the way in which the appellant's confession of the post-extradition offences had added 39 instances (some of them representative), nine additional victims and an additional interval of eight years in which the appellant had admitted to committing sexual offences against his pupils ("so many victims, over such a long period"). To that extent, it is plain that the post-extradition offences played an important part in the judge's reasoning and in the justification which he felt existed for what he accepted might otherwise appear to be an "overly harsh" overall sentence.

Decision of the Court of Criminal Appeal

- 75 The judges of the Court of Criminal Appeal divided over the outcome of the appeal. The leading opinion was given by Sperling J (with whom Gleeson CJ agreed without additional reasons). The appellant was given leave to appeal against his sentence, but his appeal was dismissed²⁹. In the opinion of Grove J, the other member of the Court, the sentence was "manifestly excessive"³⁰. Grove J reached this conclusion by assuming that, because, as the sentencing judge had found, the appellant had presented a "powerful" case of circumstances personal to himself, the sentence actually imposed had already been discounted by "something in the order of 25 percent"³¹. Upon this basis, Grove J inferred that the sentence which Freeman DCJ had concluded was required by the objective criminality of the offences was 24 years penal servitude. This he regarded as clearly too severe, notwithstanding the seriousness of the offences and large number of them. In the opinion of Grove J the proper sentence was one of 14 years penal servitude with a minimum term of 10 years³².
- 76 Sperling J was critical of two of the findings of Freeman DCJ. The first concerned the latter's inclination to reject the expert opinion that the appellant would not reoffend³³. The second was his conclusion that "only the actual punishment will serve to deter him"³⁴. Sperling J observed that these were not

29 Appeal judgment at 42.

30 Appeal judgment at 4.

31 Appeal judgment at 4.

32 Appeal judgment at 5.

33 Appeal judgment at 21.

34 Appeal judgment at 21.

conclusions supported by the evidence. But he did not believe that the overall sentence imposed was attributable "in any material degree" to such errors³⁵.

- 77 Sperling J rightly emphasised the duty of trust required of every teacher³⁶. He also mentioned the special authority accorded to a religious teacher in a religious school to influence the opinions of pupils in their perceptions about the morality of behaviour³⁷. His Honour examined a number of sentences which had been cited as comparable, involving sexual offences against children. He considered that all of these were distinguishable³⁸ and that the sentence in the present case was not out of step with an established pattern of sentencing in similar cases³⁹. He then addressed the principal complaint, said to have been the failure of the sentencing judge to give sufficient weight to the admission of guilt and the voluntary disclosure of other offences. After reference to earlier decisions of the Court of Criminal Appeal⁴⁰, Sperling J acknowledged that, after the appellant had been brought back to Australia involuntarily, he had "confessed to all the matters with which he was charged and volunteered information in relation to a considerable number of further offences"⁴¹. But far from recognising that the appellant was entitled to any special consideration for having waived the right to confine the prosecution, as then constituted, to the offences on which he had been extradited, his Honour rejected the significance to be attached to the confession of the post-extradition offences. He said⁴²:

"[T]he weight of the case against [the appellant] was overwhelming; there was no reasonable prospect that so many children might be disbelieved. And

35 Appeal judgment at 22.

36 Appeal judgment at 26.

37 Appeal judgment at 25.

38 Including *R v Clare* [1984] 2 NSWLR 522; *R v Fisher* (1989) 40 A Crim R 442; *R v Ridsdale* (1995) 78 A Crim R 486. *Ridsdale* was the case with closest similarity. It involved offences by a parish priest against some 40 boys over a period of about 20 years. A sentence of 18 years, with 15 years non-parole period, was not disturbed by the Court of Criminal Appeal of Victoria. Sperling J pointed to the differences between the authority which a teacher had over pupils and that of a parish priest.

39 Appeal judgment at 32.

40 Including *R v Ellis* (1986) 6 NSWLR 603 at 604; *R v Winchester* (1992) 58 A Crim R 345 at 350.

41 Appeal judgment at 37.

42 Appeal judgment at 37-38.

as to the matters disclosed by the [appellant], it was by no means unlikely that they would have come to light in any event. There was evidence before his Honour that publicity had prompted one female complainant to contact the police shortly prior to the [appellant's] extradition and a male complainant to contact the police shortly after the [appellant's] extradition. More complaints were likely to be made as time passed. It must have been apparent to the [appellant] that nothing could have been more prejudicial to his situation at that stage than for further complaints to be made which he had not disclosed. There was also the risk that, if further complaints came to light after conviction, further charges would be laid and the sentence extended.

To confess to the matters with which the [appellant] was charged and to disclose others was no more consistent with contrition than with self-interest."

- 78 Sperling J dismissed the contention that the sentencing judge had failed to take adequately into account the personal considerations that stood to the appellant's credit. He concluded his remarks with a reference, similar to that of Freeman DCJ, to the extended period over which such a large number of children had been abused⁴³:

"The sentencing judge observed, in the present case, that the sentence he imposed was more than that imposed for murder in some instances. That is not demonstrative of error. Cannot the sexual abuse of children in the care and control of the offender, *in large numbers, over a considerable period of years* and causing long lasting harm be as serious as murder? *How many children, for how long* and with what consequences, are necessary to equate the sexual abuse of children with murder in comparative criminality? There can be no exact answer. But with a sufficient element of authority and trust, *in sufficient numbers, over a sufficient time* and with sufficient consequence it can, in my judgment, be so. Is this such a case? I do not doubt that it is."

- 79 It was upon this basis that the Court of Criminal Appeal found, by majority, that the sentence imposed on the appellant was within the discretion of the sentencing judge and should not be disturbed. By special leave, the appellant now appeals to this Court.

Extradition law and the rule of speciality

- 80 Extradition involves the partial surrender by one state in favour of another of an attribute of its sovereignty. It also involves a serious interference in the freedom of the person sought to be extradited. Under Australian law, such consequences cannot follow from extradition treaties, made by the Executive Government, alone.

43 Appeal judgment at 40-41. Emphasis added.

They require the authority of legislation⁴⁴. The applicable legislation is the *Extradition Act* 1988 (Cth) ("the Act"). The application and ambit of the Act has been considered in a number of cases before this Court⁴⁵ and the Federal Court of Australia⁴⁶.

81 In part, because nation states are jealous of the sovereignty which they surrender by agreeing to extradition treaties and by enacting laws to give them effect, and in part because of their concern to avoid abuse of the process of extradition, various limitations and controls have long been recognised by extradition law. These include limitations upon surrender of a fugitive criminal if the offence in respect of which the surrender is demanded is one of a political character⁴⁷; limitation to crimes specified by, or equivalent to those recognised under, the law of the surrendering country⁴⁸ and exclusion of crimes liable to be punished in a way deemed unacceptable to the surrendering country without an assurance that such punishment will not be imposed or, if imposed, will not be carried out⁴⁹.

82 However, from early times in extradition law, there has been a rule that a fugitive, surrendered to the jurisdiction of the courts of another state, will not, without being afforded certain privileges, be detained or tried for an offence

44 *Riley v The Commonwealth* (1985) 159 CLR 1 at 15 per Deane J.

45 *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528; *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128.

46 See eg *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282; *United States of America v Holt* (1994) 49 FCR 501; *Todhunter v United States of America* (1995) 57 FCR 70.

47 See eg *Extradition Act* 1870 (Imp), s 3(1); *Halsbury's Laws of England*, 4th ed, vol 18, par 213; cf the Act, ss 5 (definition of "political offence") and 7a; *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556; *R v Governor of Pentonville Prison; Ex parte Cheng* [1973] AC 931; *R v Governor of Pentonville Prison; Ex parte Budlong* [1980] 1 WLR 1110; [1980] 1 All ER 701.

48 See *Halsbury's Laws of England*, 4th ed, vol 18, par 213; *R v Aubrey-Fletcher; Ex parte Ross-Munro* [1968] 1 QB 620; *In re Nielsen* [1984] AC 606.

49 See *Halsbury's Laws of England*, 4th ed, vol 18, par 211; *R v Governor of Brixton Prison; Ex parte Guerin* (1907) 51 Sol Jo 571.

committed before surrender other than the extradition crimes proved by the facts on which the surrender is grounded⁵⁰.

83 The close attention paid to this consideration (called "speciality") is well illustrated by the decision of the Court of Appeal in *R v Davies*⁵¹. By s 19 of the *Extradition Act* 1870 (Imp) it was provided that, where a person was surrendered by a foreign state pursuant to an arrangement with that state, he would not "until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded".

84 The accused in *Davies* was surrendered to the United Kingdom by the United States pursuant to an extradition treaty of 1972. The application for his extradition named 31 charges of theft. The accused waived a procedural step in the United States and was extradited to England based on the application. At the trial, counsel for the Crown and the accused agreed to an alteration of the charges from theft to a statutory offence of fraudulent trading contrary to the *Companies Act* 1948 (UK). Following his plea of guilty to the reframed charge, the accused was convicted and given a suspended sentence of imprisonment. The accused then left the United Kingdom. However, a concern arose amongst United Kingdom officials as to whether the *Companies Act* offence was an extraditable crime under the *Extradition Act* 1870 (Imp). The Court held that the provisions of that Act were mandatory and had to be observed by English courts however convenient it might be to the Crown, the accused or both that further or different counts be added to the indictment. Accordingly, the Court held that the waiver was ineffective to give the Crown Court jurisdiction to try the new charge. On this footing, the conviction on the amended count was quashed. Lawton LJ, giving the reasons of the Court, explained⁵²:

"When this matter came to the notice of the Home Office and of the Foreign and Commonwealth Office they were disturbed, particularly because of the undertaking which had been given to the United States Government ... after discussion as to whether what was proposed in the United States District Court ... that the special[i]ty provisions, as they are called – that is to say,

50 *Halsbury's Laws of England*, 4th ed, vol 18, par 218; cf *Extradition Act* 1870 (Imp), s 3(2); *R v Uxbridge Justices*; *Ex parte Davies* [1981] 1 WLR 1080; *R v Morgan (Oliver)* [1991] RTR 365 (note).

51 (1981) 76 Cr App R 120.

52 (1981) 76 Cr App R 120 at 124; cf *R v Governor of Pentonville Prison*; *Ex parte Chinoy* [1992] 1 All ER 317; *R v Secretary of State for the Home Department*; *Ex parte Gilmore* [1998] 2 WLR 618; [1998] 1 All ER 264.

the provisions which invoked the Treaty and the Extradition Act 1870 – would be observed. ... [Counsel] has rightly drawn our attention to the desire of Her Majesty's Government to comply strictly with their obligations under the Extradition Act 1870 and with any undertaking that they have given to any foreign government."

85 A reflection of this principle of speciality is now found in s 42 of the Act. Sub-section (1) of that section provides, relevantly:

"Where an extraditable person in relation to Australia is surrendered to Australia by a country ... the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia ...

- (a) be ... tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:
 - (i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or
 - (ii) any other offence in respect of which the country consents to the person being so ... tried ..."

86 Under the Act, provision is also made for the making of regulations⁵³. By s 11 of the Act, the regulations may "state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations"⁵⁴.

87 It is pursuant to the foregoing provisions that the regulations applicable to extradition of persons to and from the United States is governed⁵⁵. The regulations include, in Sched 2, the protocol amending the treaty on extradition between

53 s 55(b).

54 s 11(1)(a).

55 Extradition (United States of America) Regulations (Amendment) 1992.

Australia and the United States of America of 14 May 1974⁵⁶. The protocol substantially simplified the treaty.

88 It was pursuant to Art XIV of the treaty⁵⁷, as altered by Art 10 of the protocol, given effect by the regulations, that Australia requested the United States to consent to the appellant's "detention, trial [and] punishment" upon the 39 additional offences beyond those for which his extradition had originally been granted. It was pursuant to the treaty that the documents seeking such consent, placed without contest before this Court, were submitted to the United States. Consistently with the speciality principle recognised by the Act, expressed in Art XIV of the treaty (as amended) and incorporated into Australian law by the regulations, it is clear that Australian prosecuting authorities could not have detained, tried or punished the appellant for the post-extradition offences without the consent of the United States. Nor could the District Court of New South Wales have lawfully convicted the appellant of such offences.

89 It is in this sense that I have referred to the significance of the appellant's "waiver". The legal rights involved do indeed belong to the United States in accordance with the amended treaty. But the clear and practical consequence of those rights afforded a privilege to the appellant to object to prosecution upon any of the post-extradition offences. That much is recognised by the United States itself. Its documents expressly refer to the "waiver of the rule of special[i]ty in this case". The appellant could have remained silent resting on that privilege. If, in the single (post-extradition) case that had come to their attention, the prosecution authorities had ventured to prosecute him for that (or any other) post-extradition offence, he would have been entitled to object and his objection would have had to have been upheld. Had he objected, no such prosecution would have been contemplated, still less attempted, on the applicable counts of the present indictment. It is therefore, with respect, a play on words to say that the appellant's actions did not, and could not, constitute a "waiver" of rights belonging to him. In every practical sense they did, and this would have been known to the police and prosecutors. If the appellant had insisted on conformity with the principle of speciality, there would have been no immediate prospects of obtaining the consent of the United States to his being detained and tried for the post-extradition offences⁵⁸. This much follows from extradition law. It is clearly settled.

56 The protocol was signed at Seoul on 4 September 1990 by representatives of Australia and the United States and it entered into force on 21 December 1992.

57 The relevant parts of Art XIV are set out in the reasons of McHugh J at [5].

58 The Act, s 42(a)(ii). Considerations of the lapse of time can also arise in extradition in the resistance of extradition applications: *R v Governor of Pentonville Prison; Ex parte Sinclair* [1991] 2 AC 64.

90 It would, of course, have been open to Australia to seek the consent of the United States to prosecution of the appellant for the post-extradition offences upon grounds other than the appellant's waiver. However, the appellant would have been entitled to exhaust his legal remedies in the United States to resist the provision of such consent against his wishes. Clearly, any such action would not only have involved the prosecuting authorities in substantial inconvenience and heavy costs of litigation in the United States. It would also have involved considerable delay and no certainty that, over opposition, the eventual outcome would have favoured the provision of consent.

91 With this understanding of the law of extradition, the significance of the appellant's decision to waive his legal rights, and to insist upon confessing to 39 offences against nine additional persons that were not amongst those for which he had been extradited, assumes a new complexion. For such waiver the appellant was entitled to expect particular and additional consideration from the sentencing judge and the Court of Criminal Appeal. As I have demonstrated, far from receiving such consideration, the appellant's action appears to have been overlooked or ignored. Indeed, the results of his action, in exposing him to additional punishment for offences against a larger number of persons and over a considerably longer period of time, gave rise to a conclusion which significantly aggravated the perception of his total criminality. That consideration was treated as justifying the apparently "overly harsh sentence" which Freeman DCJ regarded as necessary to the offences against "so many victims, over such a long period of time".

Failure to rely on the point

92 Can it be said that the failure of the appellant, or more accurately those previously representing the appellant, either in the District Court or in the Court of Criminal Appeal, expressly to raise the significance of waiver of extradition rights debars the appellant from relying on that consideration in this Court? Although the appellant did not concede that the issue had not been put in express terms in the courts below, so much seems clear both from the failure of the earlier judges to mention it and the lack of any express reference to it in the grounds of appeal in the Court of Criminal Appeal and the initial grounds filed in this Court.

93 One can have an understanding of the position of the sentencing judge and the judges of the Court of Criminal Appeal in failing to turn their attention specifically to this point. In busy courts of trial and appeal, judges must rely to a very large extent upon the representatives of the parties to present to the court the considerations of fact and law that are relevant. This Court is now involved in the hearing and determination of an "appeal" as provided by s 73 of the Constitution. It is obliged to "redress error on the part of the court below"⁵⁹. It is not involved

⁵⁹ *Mickelberg v The Queen* (1989) 167 CLR 259 at 267 per Mason CJ.

in a "rehearing" or the exercise of its original jurisdiction. It is not obliged to "trawl through"⁶⁰ the record of the courts below to identify errors of law, fact or procedure, never previously raised and about which no specific complaint was made.

94 No constitutional objection was raised concerning the belated reliance by the appellant in this Court on the failure to identify, and give weight to, what would otherwise have been legal privileges belonging to him under the rule of speciality established by extradition law. The Crown did not oppose the amendment of the grounds of appeal. But does a failure by this Court to insist that such points be raised at first instance and in the appellate court, if they are ever to be later relied upon, invite serious inefficiencies in the conduct of criminal proceedings? Does it condone a reduction of vigilance on the part of legal representatives at earlier stages of the proceedings? Would it reward those who save up technical points to be advanced for the first time when a case reaches this Court? In a Court of Criminal Appeal, procedural rules may require leave before such new points may be raised⁶¹. In this Court, a strict adherence to the appellate function might have a similar effect.

95 Whatever may be the general force of the concern about the belated submission of new arguments and a fresh ground of appeal, such considerations have no application in this case. At first instance, the Crown was represented by senior counsel and the appellant by a solicitor. Although the particular issue of waiver of extradition rights (ie non-insistence on the rule of speciality) was not raised by either legal representative, both the relevance of the extradition of the appellant and the materials from which the significance of what had occurred might have been derived, were sufficiently placed before the sentencing judge. They were also before the Court of Criminal Appeal. Questions were asked at first instance of the investigating police officer, the only relevance of which was to bring out the appellant's insistence upon cooperating in respect of the post-extradition offences, despite advice which he had received from his solicitor about the possibly adverse consequences. It cannot be suggested in this case that there was any advantage to the appellant in failing to raise explicitly the point concerning waiver and speciality, either in the District Court or in the Court of Criminal Appeal. In these circumstances, the question is whether the courts below may be taken to have been sufficiently alerted to the issue such that their failure expressly to notice it, and to give weight to it, may be seen as an error of the court rather than of the appellant and his solicitor such as would now oblige this Court to ignore the point, whatever would otherwise be its consequences.

60 *Gipp v The Queen* (1998) 194 CLR 106 at 140.

61 See eg Criminal Appeal Rules (NSW), r 4.

96 In my opinion, this is the kind of exceptional case⁶² where it can be said that the factual foundation for a point of legal significance was adequately laid before the courts of trial and appeal, so that the failure to perceive the significance of the consideration resulting from the operation of the law is not something that should be laid exclusively at the door of the appellant. True enough, the appellant was competently represented. Many experienced lawyers, before the matter reached this Court, failed to perceive the point eventually agitated before us. But in many instances, parties will be poorly represented or not legally represented at all. If the failure of an accused person, or of that person's legal representatives (or earlier judges), to perceive the significance of a legally relevant consideration were, in every case, to deprive an appellant of a right to advance that point before this Court, much injustice might be done. This Court can protect itself adequately from unmeritorious or insignificant points raised for the first time when proceedings reach it. In such cases the Court will ordinarily refuse special leave to appeal. But where special leave is granted, and the appeal is before this Court, such considerations carry much less weight. The Court is then obliged to dispose of the appeal on its merits, including its legal merits. It will be slow to assume that courts of trial and of appeal have overlooked, or failed to pay due regard to, considerations raised belatedly. But where that conclusion appears to be warranted, and where the oversight is not justified in law and prejudicial to a party, this Court is fully entitled to rule on the point. Indeed, in my opinion, it is bound to do so⁶³.

97 There is no doubt that, both before Freeman DCJ and in the Court of Criminal Appeal, the circumstances of the appellant's confession to the post-extradition offences were relied on in the appellant's submissions. It was therefore the duty of the sentencing judge (and later of the Court of Criminal Appeal) to give that consideration the weight which, in law, it deserved. Both Freeman DCJ and the Court of Criminal Appeal gave weight to the significance of the appellant's disclosures as they touched upon his contrition and remorse for his offences⁶⁴. They were also considered as they brought to attention the crimes to which he confessed⁶⁵. The courts below also gave weight to the general significance of the pleas of guilty and to the fact that this saved exposing the appellant's victims to the burdens of giving evidence at a trial. The pleas also saved public expense and

62 cf *Giannarelli v The Queen* (1983) 154 CLR 212 at 221 per Gibbs CJ, 222 per Murphy J.

63 cf *Judiciary Act* 1903 (Cth), s 35A(b) which directs attention, in the grant of special leave to appeal, to "whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates".

64 *R v Hall* (1994) 76 A Crim R 454.

65 *R v Ellis* (1986) 6 NSWLR 603.

delays in the criminal list in the hearing of cases which must proceed to trial and this appears to have been given weight⁶⁶.

98 However, there was one further and particular consideration, additional to the foregoing, that was not given any attention at all. This was that, had the appellant not waived his privilege under extradition law to insist on the rule of speciality, it would have been effectively impossible, or certainly extremely difficult, to try and punish him for the 39 offences which he disclosed after his extradition. The appellant's confessions exposed him to additional punishment for the 39 offences which he acknowledged against nine additional pupils. It also resulted in judicial castigation for the number of victims and the duration of his offences which could not have been prosecuted without evidence that the appellant did not object on the basis of speciality and without the consent of the United States. Without such evidence, it would have been extremely difficult or virtually impossible to obtain that consent.

99 Specific error has therefore been shown in the reasoning of the Court of Criminal Appeal which, in turn, followed in this respect and affirmed the reasoning of Freeman DCJ. There was a public interest in this case in the appellant's actions that went beyond the significance ordinarily attached to a plea of guilty⁶⁷ and the revelation of additional offences which it would have been difficult for the prosecution to prove without confession. That public interest had several aspects. It involved assisting the authorities to clear up crimes which would not otherwise have been brought to justice⁶⁸. But it also involved the public confession by the appellant of his wrongdoing to a large number of young pupils whose trust he had abused. It obliged the authorities to inform those victims of the appellant's acknowledgment of his sexual offences, that he had confessed to them, that such offences were accepted by the legal system as having occurred, and that the law recognised that the victims were wholly innocent. The victims were also made aware that the appellant would be punished for what he had done. Unless the sentencing judge were to mark in a specific and express way the credit to which the appellant was entitled for having surrendered his privilege to insist on the rule of speciality under extradition law, the outcome of this case would not encourage others, in a like position, to act as he did⁶⁹. On the contrary, to the extent that the

66 *R v Bond* (1990) 48 A Crim R 1 at 8; *R v Winchester* (1992) 58 A Crim R 345 at 350.

67 Because the appellant pleaded guilty the provisions of s 439 of the *Crimes Act* 1900 (NSW) applied to him as explained in *R v Winchester* (1992) 58 A Crim R 345 at 350-351.

68 *R v Ellis* (1986) 6 NSWLR 603.

69 cf *R v Winchester* (1992) 58 A Crim R 345 at 350: "The leniency is afforded in order to encourage early pleas of guilty so that the criminal list is more expeditiously
(Footnote continues on next page)

decisions of the sentencing judge and of the majority of the Court of Criminal Appeal became known to the legal profession, they would tend to reinforce the provision of advice to persons extradited to Australia, as the appellant had been, to confess to no further offences and to insist upon the strict observance of the privilege derived from the rule of speciality accorded to them by extradition law. That cannot be a result which is in the interests of the criminal justice system, of accused persons, of the victims of crime or of society. It is not, therefore, a result which a proper approach to sentencing would uphold.

- 100 Due and explicit regard ought to have been given to the significance of the appellant's waiver of extradition rights, ie his non-insistence on the rule of speciality. It was a consideration different from, and additional to, contrition, the clearing up of crime difficult to detect and the saving of public costs. Because no such consideration was given at first instance or on appeal, and on the contrary because of the way the additional confessions were used to the appellant's disadvantage, the sentencing discretion miscarried. The Court of Criminal Appeal erred in failing to correct this error. On the face of things, this conclusion requires that the matter be returned to the Court of Criminal Appeal for the resentencing of the appellant.

Remaining considerations

- 101 The Crown submitted that, if this Court came to the conclusion that a specific error had been disclosed in the sentencing of the appellant which ought to have been corrected by the Court of Criminal Appeal, it should withhold relief on the footing that the overall sentence imposed on the appellant was not shown to be erroneous, given the objective seriousness of his total criminality⁷⁰. Even if discounts were properly allowed for the circumstances personal to the appellant and for the reasons of public policy necessary to reflect the community's interest in his pleas of guilty and non-insistence on the rule of speciality under extradition law, it would still be essential that his sentence should bear a reasonable proportion to the circumstances of the crimes of which he was convicted⁷¹. Giving full allowance to the mitigating circumstances, the acknowledged offences obviously required the very substantial punishment of the appellant by loss of his liberty⁷². It was pointed out that, on the basis of the individual sentences pronounced by Freeman DCJ, the custodial sentence for the 28 offences against six persons in the

disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay."

70 cf *Mill v The Queen* (1988) 166 CLR 59 at 62-63.

71 *R v Geddes* (1936) 36 SR (NSW) 554 at 556 per Jordan CJ.

72 *R v Rushby* [1977] 1 NSWLR 594 at 597-598 per Street CJ; *R v Dodd* (1991) 57 A Crim R 349 at 354.

"pre-extradition" group of offences amounted to a minimum term of 10 years penal servitude. For the remaining 39 offences against nine persons in the post-extradition group, a total of 3½ years aggregate minimum term was added. This signified (so it was submitted) that the sentencing judge had substantially discounted the punishment for the latter when compared with the punishment imposed for the former. As well, notwithstanding the multiplicity of offences and the number of victims, only five of the 67 offences attracted a cumulative sentence. The Crown stressed that sentencing was not a "purely logical exercise". This Court has recognised that the "troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment"⁷³.

- 102 I do not accept that this is a case in which this Court should examine in any more detail than is necessary the general approach that should be taken to sentencing. Such issues were not explored in argument with the elaboration that would make this case a suitable one for general remarks about a so-called "two-tiered" approach to sentencing or the place of instinct and intuition. The

73 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476. See also *R v Williscroft* [1975] VR 292 at 300.

recent decision of this Court in *Pearce v The Queen*⁷⁴ has been interpreted⁷⁵, rightly in my view, as a "call for a greater degree of transparency on the part of the sentencing judge in exposing the manner in which, and the reasons by which, the aggregate sentence is arrived at". Judges have long since accepted the burden of adjusting their sentences for various considerations. Statute sometimes requires this. Freeman DCJ at trial and Grove J in the Court of Criminal Appeal proceeded in that way. It is always necessary to look back at the product of such adjustments for the requirement of the principle of totality and other applicable principles of sentencing. It is too late (and undesirable) to return to unexplained judicial intuition. It is not what the primary judge or the appellate court did in this case.

103 The difficulty of accepting the Crown's submission that, even if error were shown, this Court should not disturb the resulting sentence, stems from the fact that this Court is not regularly engaged either in sentencing offenders or in reviewing the merits of sentences⁷⁶. It is impossible for this Court to judge what the Court of Criminal Appeal would have done if it had been convinced that an error of principle had occurred, disadvantageous to the appellant, which required reconsideration of his sentence. It is preferable that the reconsideration of the appellant's sentence be performed by the court which has the statutory function in that regard, namely the Court of Criminal Appeal. Not only does it have the function; it also has the relevant experience and knowledge. I entirely agree that this Court should be slow to interfere with sentencing decisions of the Courts of Criminal Appeal and their equivalents, precisely for this reason. But where error is shown, this rule of restraint neither justifies nor authorises the abdication by this Court of its constitutional function. We perform our part by identifying an error of principle. It is then for the Court of Criminal Appeal to perform its part once again, but on this occasion freed from error.

104 In addition to his complaint on the extradition point, the appellant maintained his other objections to the sentence imposed by Freeman DCJ, asserting that it was in any case "manifestly excessive" and "too severe". Should this Court, in this case, go beyond the determination of specific error and consider the general complaint that the sentence imposed was manifestly excessive? It is most exceptional for this Court to entertain such an argument. Normally, unless a specific error of principle is shown, this Court will not grant special leave to appeal against sentence⁷⁷. By special leave, an appeal lies to this Court from Courts of

74 (1998) 72 ALJR 1416; 156 ALR 684.

75 Wood, "Sentencing Review", (1999) 11 *Judicial Officers' Bulletin* 33 at 35.

76 *Neal v The Queen* (1982) 149 CLR 305 at 323 per Brennan J; *Postiglione v The Queen* (1997) 189 CLR 295 at 336-337.

77 *Deakin v The Queen* (1984) 58 ALJR 367 at 367; 54 ALR 765 at 765; *Bugmy v The Queen* (1990) 169 CLR 525 at 530; cf *R v Gardiner* [1982] 2 SCR 368 at 396, 404.

Criminal Appeal, or their equivalents, throughout Australia. Such courts themselves decide appeals and applications for leave to appeal against sentence for the demonstration of such excess or inadequacy of punishment as indicates an error or departure from principle⁷⁸. A case could certainly arise where a sentence was so excessive or so inadequate that, notwithstanding its confirmation by the appellate court, this Court would intervene. In *House v The King*⁷⁹ it was recognised that one circumstance in which appellate intervention in a case involving a discretionary decision is justified is where, although material error of reasoning could be not identified with exactness, the result is one which is manifestly erroneous or unreasonable. Sentencing is quasi-discretionary in its nature. It can give rise to similar outcomes. It would be undesirable for appellate courts, in such extreme cases, to feel a need to mask the real basis of their intervention by invented "errors" when, in a proper case, the manifest excess or inadequacy of the result offers the true, and sufficient, justification for appellate intervention and for allowing the appeal.

- 105 One possible reason for considering the appellant's complaint that the sentence was manifestly excessive would be the possibility that, if the matter were returned with no more than the identification of the error of principle which has been found, the Court of Criminal Appeal might proceed to reconsider only that part of the appellant's sentence which involved the post-extradition offences. Such an approach would deny the appellant the opportunity of reconsideration of other criticisms which he voiced in this Court about the overall sentence imposed upon him. The most substantial of the appellant's objections in that regard concerned the suggested failure of the sentencing judge, and of the majority in the Court of Criminal Appeal, to pay appropriate attention to the fact that the appellant will be obliged to serve his long custodial sentence in protective custody. It is true that this consideration was mentioned in passing. However, it is well recognised in England⁸⁰ and in Australia⁸¹ that every year in protective custody is equivalent to a significantly longer loss of liberty under the ordinary conditions of prison⁸². In a sentence already accepted as being at least at the upper extremity of that available, and acknowledged by the sentencing judge as likely to be regarded by

78 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ; *R v Geddes* (1936) 36 SR (NSW) 554; *R v Dodd* (1991) 57 A Crim R 349.

79 (1936) 55 CLR 499 at 505.

80 *R v Lowe* (1977) 66 Cr App R 122 at 126; *R v Davies* (1978) 68 Cr App R 319.

81 *R v Cartwright* (1989) 17 NSWLR 243 at 255.

82 In *R v Davies* (1978) 68 Cr App R 319 at 322 it was said that one year of solitary confinement is equivalent to 18 months to two years ordinary imprisonment because of the "intense severity" of the regime. See also *R v Perez-Vargas* (1986) 8 NSWLR 559 at 563 per Street CJ.

some as "overly harsh", this consideration might not have been given as much weight as it deserved.

Conclusion: error requires reconsideration of the sentence

106 It is unnecessary to go further into the general complaint of the appellant about the alleged excess of his sentence. The established error of principle requires, in my view, that the sentence imposed upon the appellant by Freeman DCJ should be reconsidered. This will mean that the entire sentence and not merely that component which concerned the post-extradition offences will require consideration. Because the sentencing judge laid great emphasis upon the significance of the time of offending and number of offences (and was in this regard clearly influenced in his overall result by the post-extradition offences) the demonstrated error will necessitate the complete reconsideration of the sentence imposed on the appellant.

107 The Court of Criminal Appeal will therefore be obliged to exercise its own sentencing discretion in the place of that which miscarried at first instance. The appellant will be entitled, his sentence having been reopened, to make such submissions to the Court of Criminal Appeal as are appropriate and to draw to the notice of that Court any extenuating circumstances of his case, the relevant considerations of sentencing principle and the considerations of public policy raised in cases where, as here, the prisoner standing for sentence has been extradited but has confessed to further offences and waived or surrendered the privilege to insist upon the rule of speciality applicable under extradition law. It is unnecessary for this Court to deal further with the appellant's complaint about the suggested excess and severity of his sentence. That can be left to the Court of Criminal Appeal.

Orders

108 I agree with the orders proposed by Gummow and Callinan JJ.

109 HAYNE J. The circumstances that give rise to this appeal are set out in the reasons for judgment of Kirby J. The appellant submitted that the primary judge should have reduced the sentence otherwise to be imposed, on the ground that some of the offences to which he pleaded guilty were offences for which he could not have been prosecuted without his consent because they were not offences for which he had been extradited from the United States of America⁸³. For the reasons given by McHugh J, it may be doubted whether it is wholly accurate to speak of the appellant having waived *his* rights. I do not think it necessary, however, to consider the accuracy of that description and am content to adopt it as a shorthand reference to the appellant's principal contention which was that because no discount was allowed for this waiver, the sentence was "manifestly excessive" and "too severe". This submission wrongly melds two distinct contentions: that the judge made a specific error in sentencing and that, although no specific error can be identified, the sentence was manifestly excessive.

110 The primary judge made very detailed sentencing remarks in the course of which he referred to the appellant having resisted his extradition from the United States. The judge did not, however, mention expressly the appellant's later waiver of his right not to be dealt with for offences other than those for which he was extradited. He said:

"The only significance, if any, of his contest of the extradition proceedings is that it does in my mind at least tend to militate, not strongly but to a certain extent, against his now professed complete contrition. It would have been a more dramatic demonstration of his contrition and of his willingness to stand, as his solicitor says, and now 'take his punishment like a man' had he volunteered to return to this country to face his accusers.

However since his arrival on these shores, the prisoner has been wholly forthcoming and has not only made admissions in relation to those matters in respect of which the warrants were originally issued but has voluntarily - in May of this year - revealed his misconduct in connection with a number of other victims. That misconduct, with one possible exception, would fairly clearly not have come to light had the prisoner not made these volunteered admissions and he is entitled, accordingly, to have his sentence on those matters discounted generously in accordance with the principles enunciated in *R v Ellis*^[84].

83 *Extradition Act* 1988 (Cth); *Extradition (United States of America) Regulations*, as amended by *Extradition (United States of America) Regulations (Amendment) 1992*; *Treaty on Extradition between Australia and the United States of America*, Art XIV (as amended by Art 10 of the Protocol done at Seoul on 4 September 1990).

84 (1986) 6 NSWLR 603.

The prisoner is, as well, entitled of course to consideration for his pleas of guilty simpliciter for a number of reasons. They are an indication of his contrite state of mind now. They, in a pragmatic way, save the State the costs associated with what may well have been prolonged and not easy trials. Most importantly they avoid the necessity for his victims reliving their experiences at his hands. Certainly Detective Sergeant Magann who gave evidence agreed willingly that the prisoner has been completely co-operative in his dealing with the New South Wales Police since his arrival here earlier this year and those offences which are described in shorthand as the post-extradition offences would probably not have come to light but for the prisoner's actions."

This appears to reflect accurately the submissions made on behalf of the appellant in the course of the plea in mitigation. No ground of appeal to the Court of Criminal Appeal referred to the appellant's waiver of his rights or asserted that the primary judge had fallen into specific error by failing to take this waiver into account. Nor is any reference to the point to be found in the detailed and comprehensive reasons given by Sperling J in the Court of Criminal Appeal. I agree with Kirby J that it is clear, then, that the issue debated in this Court was not put in express terms in the courts below.

111 The argument (advanced for the first time in this Court) that the primary judge should have taken separate and additional account of the appellant's waiver of his rights assumes that the judge was under some duty to search for (and give effect to) an argument not advanced on the appellant's behalf in mitigation of sentence. There may, perhaps, be circumstances where a sentencing judge should take into account matters that have not been urged in mitigation. Cases in which the offender is not represented may present such difficulties. I do not accept, however, that the primary judge made any specific error and I do not accept that the Court of Criminal Appeal erred in failing to identify any such error.

112 The appellant's solicitor swore an affidavit, received on the hearing of the plea, in which he deposed that, despite his advice, the appellant had disclosed the non-extradition offences to which he was later to plead guilty and that the affidavit was sworn knowing that it was to be sent to the authorities in the United States "in relation to the additional charges in respect of which [the appellant] now wishes to plead also guilty". The point which it was sought to make in this Court was that these facts might have been given some different legal characterisation on the hearing of the plea: as a waiver of rights. So far as can be discerned from the sentencing remarks, the central theme of the plea was one of the appellant's remorse and contrition - evidenced by his plea of guilty and by his revelations of otherwise unknown wrongdoing. Characterising the appellant's actions as a waiver of rights would be significant only if waiving his rights engaged some different or special consideration of public policy not already taken into account by the primary judge in passing sentence.

113 An offender who confesses to crime is generally to be treated more leniently than the offender who does not. And an offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known. Leniency is extended to both offenders for various reasons. By confessing, an offender may exhibit remorse or contrition. An offender who pleads guilty saves the community the cost of a trial. In some kinds of case, particularly offences involving young persons, the offender's plea of guilty avoids the serious harm that may be done by requiring the victim to describe yet again, and thus relive, their part in the conduct that is to be punished. And the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition.

114 These considerations are well known and well accepted. They were noted in *R v Ellis*⁸⁵, the case to which the primary judge referred in his sentencing remarks. In *Ellis*, Street CJ said⁸⁶:

"This Court has said on a number of occasions that a plea of guilty will entitle a convicted person to an element of leniency in the sentence. The degree of leniency may vary according to the degree of inevitability of conviction as it may appear to the sentencing judge, but it is always a factor to which a greater or lesser degree of weight must be given.

When the conviction follows upon a plea of guilty, that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.

The leniency that follows a confession of guilt in the form of a plea of guilty is a well recognised part of the body of principles that cover sentencing. Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the

85 (1986) 6 NSWLR 603.

86 (1986) 6 NSWLR 603 at 604.

law enforcement authorities, as well as guilt being established against the person concerned."

It is those considerations which the appellant submitted on the plea were matters in mitigation; it is those matters to which the primary judge said he was giving effect in passing sentence upon the appellant. The primary judge made particular mention of contrition, avoidance of the cost of trial and avoidance of the victims reliving their experiences, as well as the probability that the non-extradition offences would not have come to light but for the appellant's confession. What is now suggested is that, although not asked to do so, the primary judge should have made a still further reduction to the sentences otherwise to be imposed to allow for the appellant's waiver of his rights. There are several flaws in the argument.

115 First, it assumes that sentencing an offender is some mechanical or mathematical process. It is not. Nobody can identify, let alone define, some precise relationship between the complex and infinitely various elements that bear upon what sentence is to be imposed on an offender such as this appellant. No calculus will reveal some mathematical relationship between this appellant's remorse, the harm he has inflicted on his victims and society's denunciation of what he did to them. A sentencing judge can do no more than weigh these and the many other factors (such as retribution and deterrence) that bear upon the question and express the result as several terms of imprisonment to be served, wholly or partly concurrently or consecutively. Remorse, harm, denunciation, retribution and deterrence - in the end, all these and more must be expressed by a sentencing judge in units of time. That is a discretionary judgment. It is not a task that is to be performed by calculation. Resort to metaphors such as "discount" or "allowance" must not be taken as suggesting that it can be.

116 Secondly, leniency may be given to an offender where to do so advances some policy of the criminal law. In any case in which an accused person waives his right not to be prosecuted for non-extradition offences it may be expected that his waiver would attract leniency. It may be accepted that there are powerful policy reasons for encouraging and rewarding such conduct. But they are the same policy reasons that operate in the case of confession to previously unknown crime. Waiver of rights will usually reveal remorse and contrition; the State is saved the cost of further protracted and expensive proceedings; the victims are vindicated without their having to suffer the ordeal of giving evidence at the trial. And as is the case where an offender confesses to previously unknown crime, it may be thought probable that no conviction would have been recorded had the offender not taken the step, as he did in this case, of waiving his rights.

117 If the underlying policy considerations are the same in the case where the offender confesses to previously unknown crime and the case where the offender waives rights not to be dealt with for non-extradition offences, does it mean, nevertheless, that the offender who takes both steps (as this appellant did) warrants greater leniency than the offender who takes only one?

- 118 To frame the question in this way can serve only to distract attention from the relevant inquiries, which are why leniency is extended and what sentences should be passed for the particular offences and overall. It distracts attention from those questions because it seeks to attribute significance to the legal characterisation or label attached to the offender's actions of confession and waiver rather than to identifying why those actions are important and should be encouraged. Further, putting the question in this way may appear to invite the kind of mathematical or mechanical approach to sentencing which I have said should not be adopted. It may suggest the application of some greater percentage "discount".
- 119 There is, however, a more fundamental difficulty. The suggested comparison of an offender taking one step with an offender taking both steps is artificial and irrelevant. Is the appellant to be compared with an offender who confesses to non-extradition crimes but does not waive rights? The latter offender cannot be punished for the non-extradition crimes, and no question arises of granting leniency for the fact of confession alone. Confession without waiver in that case is of no significance.
- 120 To divide the conduct of the appellant and attribute separate significance to confession and waiver is wrong. The appellant should not first be given leniency for confessing, and then further leniency for waiving his rights. His conduct must be considered as a whole. The attempt to segregate and characterise aspects of the appellant's conduct, and award separate degrees of leniency for each aspect, is misleading and apt to produce absurd results.
- 121 If an offender is sentenced for a number of offences it is necessary to examine both the particular sentences imposed for each offence and the overall effective sentence reached as a result of orders for cumulation or concurrence. It is in both the individual sentences and the overall sentence that the considerations relevant to sentencing must find their reflection.

122 Considering only the individual sentences or confining attention to the overall effective sentence will distort the inquiry. Subject to the qualification that may be required where an offender pleads guilty to what is often called a representative count, the offender is to be punished for each particular offence that has been proved or admitted and only for those offences⁸⁷. And, subject to the consideration of questions of totality, a just sentence must be imposed for each of those offences⁸⁸. Totality may lead to the moderation of the overall sentence and may require some tailoring of the individual sentence to achieve a proper result. But that is not to deny the importance of imposing a just sentence in respect of each offence.

123 The primary judge confronted a difficult sentencing task in this case. The offences to which the appellant pleaded guilty took place over more than 10 years. There were 67 counts charged involving 15 victims. Some counts were treated as representative of other similar offences committed on the particular victim on many other occasions. Of the 67 counts charged, 28 were offences for which the appellant was extradited and 39 were non-extradition offences. There were 13 counts of sexual intercourse with children, 46 counts of indecent assault and 8 counts of acts of indecency or gross indecency.

124 The overall sentence imposed on the appellant was a head sentence of 18 years with a total minimum sentence of 13½ years. This sentence was made up as follows:

On the extradition charges the appellant was sentenced to a term of 6 months on 1 count of indecent assault⁸⁹, 6½ years on 1 count of unlawful sexual intercourse with a child⁹⁰ and 7½ years (with a minimum term of 3 years) on another count of unlawful sexual intercourse with a child⁹¹. All other sentences imposed in respect of the extradition charges were made concurrent with one or other of these sentences. These concurrent sentences ranged in length from 6 months to 6½ years.

87 See, for example, *R v De Simoni* (1981) 147 CLR 383.

88 See, for example, *Mill v The Queen* (1988) 166 CLR 59.

89 Contrary to s 61E(1) of the *Crimes Act* 1900 (NSW).

90 Contrary to s 61D(1) of the *Crimes Act*.

91 Contrary to s 61D(1A) of the *Crimes Act*.

On the non-extradition charges, the appellant was sentenced to 18 months imprisonment on 1 count of indecent assault⁹² and 2 years on the count of committing an act of indecency⁹³.

The effect of the orders for cumulation was to give the effective head sentence and minimum terms of 18 and 13½ years mentioned earlier.

125 All the sentences imposed in respect of non-extradition charges, other than the terms of 18 months and 2 years that I have mentioned, were made concurrent with one or other of these two sentences. In no case did these other sentences exceed 2 years. The non-extradition offences in respect of which concurrent sentences of 2 years or less were imposed included 2 counts of sexual intercourse without consent⁹⁴ as well as offences of indecent assault and committing acts of indecency and acts of gross indecency. It is plain beyond doubt, then, that the appellant was dealt with much more leniently for the non-extradition offences than he was for the extradition offences.

126 It is in this light that it is necessary to return to the appellant's basic contention - that the sentence was manifestly excessive because no discount was given for the waiver of his right not to be punished or prosecuted for non-extradition offences. In effect, the appellant submitted that the head effective sentence of 18 years, with a minimum term of 13½ years, was too large because of a circumstance that had application to some only of the offences. Reduced to its essentials, the argument amounted to the contention that the additional 3½ years minimum term imposed upon the appellant in relation to the non-extradition offences made the overall sentence too heavy and made it too heavy because some further discount should have been allowed for the waiver of his rights. This, so the argument must proceed, was an error that should have been apparent to the Court of Criminal Appeal notwithstanding that the appellant did not rely, in that Court, upon any argument dependent upon his having waived his rights. The argument must be rejected.

127 The contention not having been made in the Court of Criminal Appeal, there is serious doubt whether it is now open to the appellant to raise it for the first time in this Court⁹⁵. I need not, however, base my decision on this ground.

128 As I have already said, the argument melds two radically different circumstances for appellate review of sentencing: specific error and manifest excess. Saying that a sentence is manifestly excessive is not the same as saying

92 Contrary to s 81 of the *Crimes Act*.

93 Contrary to s 61E(2) of the *Crimes Act*.

94 Contrary to s 61D(1) of the *Crimes Act*.

95 *Gipp v The Queen* (1998) 194 CLR 106 at 127-129 per McHugh and Hayne JJ.

that a sentencing judge made a specific error in arriving at the sentence that is under consideration. To equate manifest excess and specific error is to invite appellate error and to obscure the true nature of appellate review of sentences. Unless the legislature has prescribed a fixed penalty, a judge sentencing an offender makes a discretionary judgment. Necessarily, then, judges may differ about the proper sentence to be imposed on the offender; there will be a range of possible sentences that could be imposed without error.

129 The task of the Courts of Criminal Appeal in this country in hearing appeals against sentences is a limited task and it is governed by well-established principles that have been repeatedly stated⁹⁶. In particular:

"If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."⁹⁷

Such cases are, however, different from cases in which the complaint is that the sentence is manifestly excessive. There, as was said in *House v The King*⁹⁸:

"It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

130 The difference between cases of specific error and manifest excess is not merely a matter of convenient classification. It reflects a fundamental difference in what the appellate court does. In the former case, once an appellate court identifies an error, the sentence imposed below must be set aside and the appellate court is then required to exercise the sentencing discretion afresh. The offender must be re-sentenced unless, of course, in the separate and independent exercise of *its* discretion the appellate court concludes that no different sentence should be passed. By contrast, in the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed

96 It is enough to refer to *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

97 *House* (1936) 55 CLR 499 at 505.

98 (1936) 55 CLR 499 at 505.

is too heavy and thus lies outside the permissible range of dispositions. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed.

131 Neither specific error nor manifest excess was demonstrated to the Court of Criminal Appeal. No case of specific error was made out because the primary judge had identified and given effect to all of the considerations that warranted the extension of leniency to the appellant. By the appellant's voluntary act he had exposed himself to punishment for crimes the commission of which was not known and which, for the most part, the judge concluded would not have otherwise been discovered. His actions relieved the community of the cost of a trial and relieved the victims of what otherwise may have been a difficult and damaging ordeal. True it is that the primary judge did not specifically attribute these results to the appellant's waiver of his rights following extradition, but it is plain that this was not suggested in the plea and it was not suggested in the Court of Criminal Appeal. Rather, both the primary judge and the Court of Criminal Appeal attributed these consequences to the appellant's acts of confession (a confession, be it said, made waiving other rights of the appellant - his rights to silence and to contest his trial). In my view, the legal characterisation of the steps the appellant took as a waiver of his rights was a characterisation that was irrelevant in this case. In another case (for example, one in which the offences and the offender were already known to the authorities) the offender's waiver of extradition rights may be a very significant mitigating fact but that is not this case.

132 As for manifest excess, there is no reason to conclude that the Court of Criminal Appeal erred in its judgment that the sentence imposed on the appellant was not beyond the permissible limits.

133 The appeal should be dismissed.