APPEALS AGAINST SENTENCE

JURISDICTION OF FULL COURT UNDER CRIMES ACTS (VIC.)

(Contributed)

THE PROVISIONS of the Crimes Act (Vic.) conferring jurisdiction upon the Full Court to entertain appeals against conviction and appeals against sentence are copied from the Criminal Appeal Act 1907 (Eng.) with amendments which for present purposes are not material. Similar provisions are contained in the Criminal Appeal Act 1912 (N.S.W.), the Criminal Law Consolidation Act 1935 (S.A.) and the Criminal Codes of Queensland, Western Australia and Tasmania.

It is proposed to examine the nature and extent of this statutory jurisdiction in so far as it relates to appeals against sentence. The cases dealing with this matter are very numerous, and express a wide range of differing views. But it is a curious circumstance that, almost without exception, they deal with the question of the nature and extent of the jurisdiction as one depending upon considerations of policy, or upon the authority of previous decisions. As was said in *Commissioner for Railways (N.S.W.) v. Cavanough* (1935) 53 C.L.R., p. 225, "the scope and effect of an appeal must in the end be governed by the terms of the enactment creating it"; yet little or no attention seems to have been given to the language of the statutory provisions.

In these observations the question will be considered in the first place as one of construction. Reference will be made to the general scheme of the legislation for dealing with appeals against conviction as well as appeals against sentence; and then the provisions relating to appeals against sentence will be discussed with more particularity.

Section 593 of the Crimes Act 1928 (Vic.) provides that a person convicted on indictment "may appeal" to the Full Court against his conviction (in certain circumstances specified) and "with the leave of the Full Court, against the sentence passed on his conviction, unless the sentence is one fixed by law".[1]

If the legislation had stopped at this point and had not gone on to define the powers and duties of the Court upon these appeals, it would probably have been proper to construe it as providing for an

[1]Compare Criminal Appeal Act 1907 (Eng.) s. 3: Criminal Appeal Act 1912 (N.S.W.) s. 5: Queensland Criminal Code s. 668D: Criminal Law Consolidation Act 1935 (S.A.) s. 352: Western Australian Criminal Code s. 688: Tasmanian Criminal Code s. 401.

appeal in the strict sense of a proceeding "in which the question is whether the order of the court from which the appeal is brought was right on the materials which that court had before it": see *Ponnamma v. Arumogan* [1905] A.C. p. 390. And it would have followed that, in view of the discretionary nature of the jurisdiction which is exercised by a judge when imposing a sentence, the established rules governing an appeal in the strict sense from an exercise of discretion would have had to be applied to appeals against sentence under the Act: *Victorian Stevedoring Ltd. and Meakes v. Dignan* (1931) 46 C.L.R. pp. 107–110: *House v. R.* (1936) 55 C.L.R. pp. 504–5: *Cranssen v. R.* (1936) 55 C.L.R. pp. 519–520.

In accordance with those rules an appeal from an exercise of discretion cannot succeed unless it is shown that there has been some error vitiating the exercise of the discretion. This error may be an identifiable error consisting of (a) the application of wrong principles or error of law, or (b) the exclusion of relevant matters from consideration or (c) the taking into account of irrelevant or unproved matters, or (d) the adoption of a mistaken view of the facts. Unless such an identifiable error is established the appeal cannot succeed unless the decision appealed from is so unreasonable or so plainly unjust that one can infer that there must have been some error in the exercise of the discretion, even though one cannot say what that error was: *House v. R.* (*supra*): *Cranssen v. R.* (*supra*).

These, then, it would seem, would have been the rules governing appeals against sentence under the legislation if it had merely conferred a right of appeal in the general terms set out in s. 593. But what the legislation does is something quite different. By s. 594 (1) it provides that, subject to a discretion exercisable where there is no substantial miscarriage of justice, the Full Court must allow an appeal against conviction if it thinks that any one of four specified grounds has been established, and must in any other case dismiss the appeal. And by s. 594 (4) it provides that on an appeal against sentence the Full Court must quash the sentence "if it thinks that a different sentence should have been passed", and that in any other case it must dismiss the appeal.[2] Where the sentence is quashed the Full Court must "pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed".

[2]Compare Criminal Appeal Act 1907 (Eng.) s. 4: Criminal Appeal Act 1912 (N.S.W.) s. 6: Queensland Criminal Code s. 668E: Criminal Law Consolidation Act 1935 (S.A.) s. 353: Western Australian Criminal Code s. 689: Tasmanian Criminal Code s. 402.

For the purposes of the present enquiry these are the key provisions of the legislation, for in them the legislature has given specific directions as to how all appeals are to be dealt with. Provisions substantially identical with them are contained in the Criminal Appeal Act 1912 (N.S.W.) and the following observations made by Dixon J. in *Grierson v. The King* (1938) 60 C.L.R. pp. 435–6 in relation to that Act would seem to be directly applicable to the Victorian legislation:

> "It does not give a general appellate power in criminal cases, exercisable on grounds and by a procedure discoverable from independent sources. It defines the grounds, prescribes the procedure, and states the duty of the Court. The grounds or principles upon which the Court is to determine appeals are stated, and the duty is imposed on the Court of dismissing an appeal unless on those principles it determines that it should be allowed."[3]

The first thing to be done, therefore, in order to determine the nature and extent of the jurisdiction in appeals against sentence must be to examine with particularity the language of the key provision relating to such appeals, namely s. 594 (4).

Section 594 (4) propounds a specific question for determination by the Court. Does the Court think "that a different sentence should have been passed"? Its duty to interfere with a sentence, and its right to do so, arise only when it is able to answer that question in the affirmative. If it is not able to do so it must dismiss the appeal. Accordingly it is clear that the burden rests upon the party claiming an alteration. If the appellant is to succeed in obtaining a reduction in his sentence he must satisfy the Court that a different and more lenient sentence should have been passed. And if, at the hearing of his appeal, the Crown seeks to have the sentence increased, its claim will fail unless it satisfies the Court that a different and more severe sentence should have been passed. But what is it that must be shown in order to establish "that a different sentence should have been passed"?

It might be contended that the words quoted mean "that on the material which was before the judge who imposed the sentence a different sentence should have been passed by him". Indeed this is perhaps the construction which most readily suggests itself. But to adopt it would involve holding that the appellant, if he is to succeed, must show error on the part of the judge. The proceeding

[3]Compare *R. v. Griffiths* (1932) 23 Cr. App. R. 155 and *R. v. Wilkinson* [1931] N.Z.L.R. 602.

would be an appeal in the strict sense. There is, however, a long and unbroken line of authority inconsistent with this construction of s. 594 (4).

From the time when the legislation was first enacted in England the practice there has always been to admit freely any further relevant evidence which may be tendered in support of an appeal against sentence; and this practice now has the authority of a very large number of reported cases.[4] It was well established when the legislation was adopted in Victoria; and it would seem to have been followed in the other Australian states as well as in Victoria.[5] In the case of appeals against conviction the admission of further evidence in support of the appeal has been restricted in conformity with the rules which are applied on the civil side when a new trial is sought on the ground of the discovery of fresh evidence. But this is explained by the fact that upon an appeal against conviction there is only one of the four possible grounds of appeal to which further evidence could have any relevance, namely, the ground that there has been a miscarriage of justice. This has been held to make applicable indirectly the civil rules referred to: see *Craig v. R.* (1933) 49 C.L.R. 439; *Green v. R.* (1939) 61 C.L.R. 175. No such restrictions, however, have been applied to the admission of further evidence in support of appeals against sentence. [4], [5].

This practice, and the cases which establish its correctness, are, as already stated, inconsistent with the construction of s. 594 (4) which is suggested above. Upon that construction the appellant could never succeed in an appeal against sentence except by showing that the judge who imposed it was guilty of error or in other words that he was wrong on the material before him. And that, of necessity, is something which no further evidence could ever go to establish. The construction in question, therefore, would involve that, contrary to the practice and the cases referred to, further evidence could never be admitted upon an appeal against sentence. It would not

[4]Compare *R. v. Hawes* (1908) 1 Cr. App. R. 26, 42: *R. v. Syres, ibid.* 172: *R. v. Francis, ibid.* 259: *R. v. Ettridge* (1909) 2 Cr. App. R. 62, 66: *R. v. Kendrick* (1911) 6 Cr. App. R. 117: *R. v. Lane, ibid.* 136: *R. v. Holder* (1911) 7 Cr. App. R. 59: *R. v. Bruce* (1913) 9 Cr. App. R. 168: *R. v. Sanders, ibid.* 179: *R. v. Porter, ibid.* 213: *R. v. Murch, ibid.* 214: *R. v. Cartwright* (1914) 10 Cr. App. R. 222: *R. v. Ryle* (1915) 11 Cr. App. R. 312: *R. v. Adams* (1916) 12 Cr. App. R. 139: *R. v. Yardley* (1918) 13 Cr. App. R. 131: *R. v. Marrows, ibid.* 207: *R. v. Ferrua* (1919) 14 Cr. App. R. 39: *R. v. Usher* (1927) 20 Cr. App. R. 130: *R. v. Jackson, ibid.*: *R. v. Botolph* (1928) 21 Cr. App. R. 37: *R. v. Clue, ibid.* 68: *R. v. Lines, ibid.*: *R. v. Brombilla* (1930) 22 Cr. App. R. 74: *R. v. Pomfret* (1931) 23 Cr. App. R. 31: *R. v. Brown, ibid.* 48: *R. v. Thompson, ibid.* 76: *R. v. Jones, ibid.* 162: *R. v. Ormesher, ibid.* 172: *R. v. Carr, R. v. McGrath, ibid.* 176.

[5]As to Queensland see *R. v. Lewis* [1923] Q.S.R. 93: *R. v. McIntosh, ibid.*, p. 278: *R. v. Oberthur* [1931] Q.W.N. 4.

even be permissible, for example, for the appellant to call the constable who proved prior convictions against him in the Court below to state that they related to a person other than the appellant.

Throughout the long line of relevant cases the admissibility of further evidence seems to have been treated as obvious and never to have been the subject of debate; and this, for several reasons, is not surprising.

The original proceedings for ascertaining the appropriate sentence are customarily of an extremely informal kind: compare *R. v. Weaver* (1908) 1 Cr. App. R. 12: *R. v. Mortimer* (1908) Cr. App. R. 20, 24: *R. v. Van Pelz* [1943] K.B. 157: *R. v. Marquis* [1951] W.N. 244. Moreover, it often happens that there are matters relevant to the ascertainment of the appropriate sentence, such as offers of employment or supervision or treatment, which do not come into existence until after sentence has been imposed. These considerations make it difficult to suppose that the legislature would have deliberately chosen, as the method for reviewing sentences, so formal a proceeding as an appeal in the strict sense, in which the only permissible enquiry is whether the judge was right on the material before him.

Secondly, there is the fact that s. 600 provides that for the purposes of the act the court may, if it thinks it necessary or expedient in the interests of justice, exercise certain powers, which include the following:[6]

(i) To order the production of any documents connected with the proceedings whether they are or are not already exhibits.

(ii) To order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court whether they were or were not called at the trial.

(iii) To receive the evidence of any witnesses, including the appellant, who are competent but not compellable witnesses.

(iv) To exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals in civil matters. (In England the corresponding provision refers to the powers of the Court of Appeal.)

In relation to the power last mentioned it is to be noted that at the date when the legislation was first enacted in Victoria the Full

[6]Compare Criminal Appeal Act 1907 (Eng.) s. 9: Criminal Appeal Act 1912 (N.S.W.) s. 12: Queensland Criminal Code s. 671B: Criminal Law Consolidation Act 1935 (S.A.) s. 359: Western Australian Criminal Code s. 697: Tasmanian Criminal Code s. 409.

Court had the same wide power as it now possesses to admit further evidence in civil appeals, including the express power to admit evidence of matters occurring after the date of the decision appealed from: see Rules of Supreme Court 1906, Order 58, Rule 4: *R. v. Watt* [1912] V.L.R. pp. 239, 244–5. How wide those powers are may be seen from the observations in *Ellis v. Leeder* (1951) 58 A.L.R. p. 712.

Now if, on the true construction of s. 594 (4), appeals against sentence were appeals in the strict sense, the only case in which further evidence could be admitted in support of any appeal under the act would be that in which the appeal is against conviction and the evidence tendered satisfies the strict rules which, on the civil side, are applied to an application for a new trial on the ground of the discovery of fresh evidence. It is not easy to suppose that, if the admission of further evidence in support of appeals had been intended to be confined within these very narrow limits, s. 600 would have been expressed in such wide and unqualified terms.

Thirdly, there is the fact that s. 600 concludes with the words: "Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

The most natural explanation of the insertion of this proviso would seem to be that, in the view of the legislature, the act authorized the admission of further evidence upon appeals against sentence.

If this is not the explanation then the proviso must relate exclusively to appeals against conviction; and on this view the explanation would have to be that it is aimed at a situation which might possibly arise on such appeals in certain special circumstances. By virtue of s. 595 (1) and (3) if such an appeal succeeds in part only, or if there has been a special verdict which has been misconstrued by the trial judge, it is within the power of the Court to increase or reduce the sentence though there is no appeal against sentence. It might happen in such cases that further evidence would be given at the hearing of the appeal upon the question whether there had been a miscarriage of justice. And such further evidence might happen to provide a reason for an increase of sentence. This explanation, however, is not altogether convincing. In view of the generality of the language of the proviso and its position in the act, the more natural explanation is that it was inserted because the act was considered to authorize the admission of further evidence on appeals against sentence.

These various considerations are strong to show that further

evidence is admissible upon such appeals and that therefore the construction of s. 594 (4) which is suggested above cannot be accepted; but in any event this view appears to be placed beyond doubt by the long course of authority already referred to.

Once it is seen that that construction must, for the reasons stated, be rejected, it becomes reasonably clear what the true construction must be. Since the critical words do not mean "if the Court thinks that upon the material which was before the judge who imposed the sentence a different sentence should have been passed by him" their meaning must be "if the Court thinks that in all the circumstances of the case (whether appearing from the material which was before the judge or from further evidence) a different sentence should have been passed". In other words, what the appellant has to establish to the satisfaction of the Court is not that there was error vitiating the exercise of the discretion, but that the sentence passed was inappropriate to the true facts of the case.

For the purpose of deciding whether it is satisfied of this the Court, in the first place, must endeavour to ascertain for itself what are the true facts of the case. In doing so it will have regard to the transcript of the proceedings below, the report of the judge, and any evidence which may be given on the hearing of the appeal. And if and when the Court has ascertained what the true facts are, it must then decide the question whether the sentence passed was inappropriate to those facts.

In dealing with this last question the Court necessarily applies its own standards of punishment and exercises a general judicial discretion; and the discretion which is thus conferred on it by the Act is not expressed to be subject to any conditions or limitations. It is true that the words "should have been passed" in s. 594 (4) seem to imply that the appropriateness of the sentence should be considered as at the date when it was passed and not as at the date of the hearing of the appeal; but even this limitation has not been accepted by the courts. This is made clear by the fact that they have altered sentences by reason of events occurring after the passing thereof.[7]

If the true view of the Court's jurisdiction be, as stated, that it is invested with a general judicial discretion, then it follows, of course, that the word "appeal" in s. 593 is used in a loose sense. But this is not unusual. The word is commonly used to describe a wide variety of proceedings which are not appeals in the strict sense. Indeed, in

[7]Compare *R. v. Pickering* (1921) 15 Cr. App. R. 175: *R. v. Usher* (1927) 20 Cr. App. R. 130: *R. v. Jones* (1932) 23 Cr. App. R. 162: *R. v. Turner, ibid.* 175: *R. v. McGrath, ibid.* 176.

relation to taxation appeals it is used to describe proceedings which are in the strictest sense an exercise of original jurisdiction, since there is no judicial decision preceding the so-called appeal: see *F.C.T. v. Sagar* (1946) 71 C.L.R. p. 423.

It follows also, from this view of the nature of the jurisdiction, that as previously stated the rules already referred to which limit appeals in the strict sense from an exercise of discretion to cases in which that exercise is vitiated by error are not applicable to appeals against sentence. It is true that those rules, or possibly a less stringent version of them, have at times been treated as being applicable to appeals to the Court of Appeal in England from an exercise of discretion (though not, of course, in cases in which that Court's power to receive further evidence has been exercised): compare *Lovell v. Lovell* (1950) 81 C.L.R. per Latham C.J. 518–520. And it is also true that appeals to the Court of Appeal have been held to be by way of rehearing as at the date when the appeal is heard; see *Victorian Stevedoring Ltd. and Meakes v. Dignan* (1931) 46 C.L.R. 107. It might therefore be argued that, if it is possible to overcome what would seem to be the logical difficulty in applying the rules to appeals of such a kind, it should also be possible to apply them to appeals against sentence. But the trend of recent authority relating to appeals to the Court of Appeal from an exercise of discretion appears to be against treating the rules as defining the limits of the Court's power and to favour treating them as merely defining particular classes of case in which it is proper for the Court to interfere with the exercise of discretion.[8] The position has been stated to be that there is a very strong presumption that the way in which the discretion has been exercised is an appropriate one, but that if the Court is clearly satisfied to the contrary, either because the case falls within the said rules or for any other reason, then it may properly interfere: compare *Lovell v. Lovell* (1950) 81 C.L.R. per Kitto J. 532–534. But whatever may be the true view as to the principles governing appeals to the Court of Appeal from an exercise of discretion, the authorities upon that question cannot justify a refusal to give effect to the language of s. 594 (4). In relation to those appeals there is no such specific and exhaustive definition of the Court's duty as is contained in that subsection. And if the meaning of that definition has been correctly stated above, it seems clear that it negatives any direct application of the rules in question.

[8]See *Evans v. Bartlam* [1937] A.C. 473: *Charles Osenton & Co. v. Johnston* [1942] A.C. 130: *Blunt v. Blunt* [1943] A.C. 517: *Storie v. Storie* (1945) 80 C.L.R. 597: *Lovell v. Lovell* (1950) 81 C.L.R. 513: *Ellis v. Leeder* (1951) 58 A.L.R. 711–712.

It might be suggested that to construe s. 594 (4) as investing the Court with a general judicial discretion would have inconvenient consequences. But the fact that the Court has such a discretion does not involve that the decision of the judge who passed the sentence is to be ignored. On the contrary his decision is one of the matters which must be considered by the Court in exercising the discretion. And it may be of considerable, and even decisive, importance, according to the circumstances of the particular case. The position may be analysed as follows:

(i) The sentence may have been imposed after a trial which has given the judge some special advantage in ascertaining the facts upon which a just sentence must depend. For example, the accused may have given evidence and thereby enabled the trial judge to see what sort of a man he is. Or the crime may be of such a nature that the characters of the Crown witnesses are of importance on the question of sentence. In such cases the appellant may fail because the Court thinks it not unlikely that there were matters observed by the judge which justified the sentence, even though, upon what appears from the transcript, the sentence seems to it to be inappropriate. In other words, the appellant may be unable to satisfy the Court that on the true facts a different sentence should have been passed, because he is unable to show that all the material facts are before the Court. But even in cases of this class the appeal may, of course, be successful. The judge's decision may be vitiated by error of the kind which, in accordance with the rules already stated, would justify the setting aside by an appellate court of an exercise of discretion. The existence of error of this kind must ordinarily prevent the Court from attaching weight to the judge's decision. In this way those rules, though they do not govern the appeal, have an indirect application to it. Moreover, even when no such error exists, the Court may consider that, after full allowance has been made for such special advantages as the judge enjoyed, the circumstances call for a different sentence; or the judge's report may show that the sentence was not affected by matters observed by him and not apparent on the transcript[9]; or additional evidence may be given on the appeal which shows that a different sentence should have been passed.

(ii) The sentence may have been passed after a trial which gave

[9]Compare *R. v. Nuttall* (1908) 1 Cr. R. 180.

the judge no special advantage in ascertaining the facts upon which a just sentence must depend; or there may have been no trial and the sentence may have been passed upon a plea of guilty after hearing an address by counsel on behalf of the accused. In such cases the Court is in just as good a position to ascertain the material facts as the judge was, and the appeal will not fail by reason of any difficulty in placing all the facts before the Court. But the burden, of course, still rests upon the appellant to satisfy the Court that a different and less severe sentence should have been passed, and in a matter which depends so much upon judgment and experience the fact that the judge has decided that the sentence is the proper one may carry considerable weight with the Court.

(iii) Whether the case falls under (i) or (ii) above, if additional evidence is called on the appeal, the weight which can be attached to the judge's decision must necessarily be in inverse proportion to the importance of the additional evidence.

These considerations relating to the burden which rests upon the appellant and to the importance, in varying circumstances, of the decision of the judge who passed the sentence, make it clear that the inconveniences which might have been supposed to flow from construing s. 594 (4) in accordance with its terms as conferring on the Court a general judicial discretion, have no real existence. The Court is not required to determine the appropriate sentence without looking at the sentence which has been imposed, and then to substitute its assessment, whenever there is any difference, however trifling, between the two. The decision of the judge who passed the sentence is one of the circumstances to be taken into account and may be of decisive importance. Moreover, on the question of the appropriate length of sentence for a particular offence, since there can be no exact tariff to be applied, it is difficult to see how the Court could be satisfied that a different sentence should have been imposed unless the sentence which, considering the matter independently, it would have thought to be the appropriate one, differs substantially from that which has been imposed. If the difference is not substantial, then ordinarily the Court, considering all the circumstances, including the decision of the judge who passed the sentence, will not be satisfied that a different sentence should have been passed. But once the Court is so satisfied, the statute compels it to quash the sentence, unless, of course, it can escape the statutory command by refusing or rescinding leave to appeal.

In view of the fact that the statute confers a discretion upon the Court in general terms, it would be contrary to principles of construction established by the highest authority for the Courts to attempt to limit the statutory discretion by laying down rules as to how it must be exercised: see the decision of the House of Lords in *Evans v. Bartlam* [1937] A.C. 473. The following passage quoted by Lord Wright in that case from the judgment of Bowen L.J. in *Gardner v. Jay* (1885) 29 Ch.D. 58 is in point on this question:

> "When a tribunal is invested by Act of Parliament or by rules with a discretion without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge, why should the Court do so?"

Lord Wright went on to distinguish between the laying down of rules fettering the discretion and the giving of indications as to the way in which, ordinarily, the discretion is likely to be exercised. "It is . . . often convenient in practice", he said, "to lay down, not rules of law, but some general indications, to help the court in exercising the discretion, though in matters of discretion no one case can be an authority for another" (p. 488).

A similar view was expressed by Bowen L.J. in *In re Boycott* (1885) 29 Ch.D. 571 in a passage which was quoted with approval by Lord Esher M.R. and Lopes L.J. in *In re Norman* (1886) 16 Q.B.D. 673. After referring to the fact that judges find it convenient to let the profession and the public know the lines upon which they mean to exercise such discretion as they have, Bowen L.J. said: "I think no court has a right to limit the discretion of another court, though it may lay down principles which are useful as a guide in the exercise of its own discretion" (p. 579). Reference may also be made to *Downey v. O'Connell* [1951] V.L.R. 117 and *Ellis v. Leeder* (1951) 58 A.L.R. p. 712.

The early decisions of the Court of Criminal Appeal in England dealing with appeals against sentence contain a number of statements of the second class referred to by Lord Wright and Bowen L.J., and there has, unfortunately, been some tendency in later cases to treat these statements as laying down rules of law limiting the judicial discretion conferred by the statute: compare *R. v. Barker* (1937) 81 Sol. Jo. 719: *R. v. Gallagher* [1924] 4 D.L.R. p. 1069: *R. v. Lanzon* [1940] 3 D.L.R. 606.

Perhaps the best known of these statements is that in *R. v. Sid-*

low (1908) 1 Cr. App. R. 28 where the Court of Criminal Appeal is reported to have stated that it "would not interfere with a sentence unless it was apparent that the judge at the trial had proceeded upon wrong principles or given undue weight to some of the facts proved in evidence". This statement has sometimes been regarded as laying down a rule of law limiting the Court's power to interfere with sentences to those cases in which the original exercise of discretion in imposing the sentence can be shown to be vitiated by error. But it is reasonably clear from the language used by the Court that it was not purporting to define the extent of its statutory powers. It was merely giving a general indication as to how it proposed, in future, to exercise those powers. This was made quite plain in *R. v. Nuttall* (1908) 1 Cr. App. R. 180. The Court there explained that what was said in *R. v. Sidlow* (*supra*) has no application except where the judge who imposed the sentence was in a better position than the Court to determine the appropriate sentence; and it restated the proposition as being that in such cases the Court is reluctant to interfere unless there is error in principle. This clearly is not a rule of law, but a statement of the second class referred to by Lord Wright and Bowen L.J. in the cases cited above. It is merely a rough working rule for the exercise of the statutory discretion and even as such it should be applied only in those cases in which the personal observation of the trial judge has placed him in a position of special advantage and no additional evidence of importance has been called upon the hearing of the appeal. This view as to the effect of *R. v. Sidlow* (*supra*) is supported by the way in which the position is stated in many other cases.[10]

The following passage from *R. v. Finlay* [1924] 4 D.L.R. 829 illustrates this line of authority:

> "A perusal of what is set out in Purcell's Digest, *supra*, and of many cases where sentences have been reduced in England, shows that the Court there does frequently interfere with sentences, and reduce them on various grounds, notwithstanding the statements made in the cases referred to above, where attempts were made to set out principles for guidance; in fact, the conclusion to be reached from the English practice is, that the circumstances of each case are very carefully taken into

[10] *R. v. Woodman* (1909) 2 Cr. App. R. 67: *R. v. Haden, ibid.* 148: *R. v. Sneasby, ibid.* 178: *R. v. Wilson* (1909) 3 Cr. App. R. 8: *R. v. Ross, ibid.* 198: *R. v. Priday* (1914) 10 Cr. App. 34: *R. v. Wolff, ibid.* 107: *R. v. Wilde and Jukes* (1914) 11 Cr. App. R. 34: *R. v. Williams* (1916) 12 Cr. App. R. 11: *R. v. O'Brien* (1930) 22 Cr. App. R. 20: *Skinner v. R.* (1913) 16 C.L.R. pp. 339–340: *R. v. Adams* (1921) 65 D.L.R. p. 215: *R. v. Finlay* [1924] 4 D.L.R. 829: *R. v. Hicks* [1925] 2 D.L.R. 1000: *R. v. Venegratsky* [1928] 3 D.L.R. 201.

account in every instance, and that any mitigating circumstances or otherwise are given the fullest consideration.

"Considering the practice followed in England, and the wide latitude exercised there by the Court of Criminal Appeal, as indicated above I do not think it possible to lay down any definite rule on the subject. Parliament, by enacting that an appeal may be taken by an accused person against the sentence imposed upon him, must have intended that the accused was entitled to have the opinion of the Court of Appeal after a consideration of all the circumstances connected with the case; it must have intended that the Court of Appeal should modify such sentence, if, in their opinion, it should be modified. The Court of Appeal can only exercise its best judgment after a careful consideration of all the circumstances, and will always remember that the trial judge, having seen the accused and heard the witnesses, has an advantage in reaching a conclusion as compared with a court which has not, a circumstance which cannot be lightly regarded."

In the case of *R. v. Sidlow* (*supra*) there appears, in conjunction with the passage already quoted relating to "wrong principles", the further statement that it is "not possible to allow appeals because individual members of the Court might have inflicted a different sentence, more or less severe". Statements on this point in subsequent cases are to the effect that it is not the policy of the Court to interfere with a sentence on the ground that a different sentence seems to the Court to be appropriate unless the original exercise of discretion is vitiated by error.[11] These statements, clearly, are not rules of law fettering the exercise of the statutory discretion. They are merely statements of the second class referred to by Lord Wright and Bowen L.J. in the passages cited above. Moreover, even as statements of that class they must not be applied too literally or too generally; for to do so would contradict the statutory direction that the Court must quash a sentence whenever it is satisfied that a different sentence should have been passed. The truth is that these statements, like the statement in *R. v. Sidlow* (*supra*) relating to "wrong principles", are directed at the case in which the personal observation of the judge has placed him in a position of special advantage and no additional evidence of importance has been called upon the hearing of the appeal. In such a case the Court will not ordinarily have all the material facts before it, unless the judge's

[11]Compare *R. v. Maurice* (1908) 1 Cr. App. R. 176: *R. v. Hillier* (1909) 2 Cr. App. R. 142: *R. v. Wolff* (1914) 10 Cr. App. R. 107: *R. v. Gumbs* (1926) 19 Cr. App. R. 74: *R. v. Lambert, ibid.* 131: *R. v. Shershewsky* (1912) 28 T.L.R. 364.

report states what are the matters of personal observation on which he has relied. And where the facts are not fully before the Court it will not be proper for the Court to allow the appeal merely because it considers that, if the facts before it had been the whole of the relevant facts, a different sentence would have been appropriate. The Court must be satisfied that upon the true facts and the whole of the facts a different sentence should have been passed. It is to this point that the statements in question are directed; and the reason why they expressly except the case in which the original decision is vitiated by error is simply that in such a case the Court will ordinarily be unable to attach any weight to the fact that the judge had an advantage from personal observation.

Another statement appearing very frequently in the cases is that the Court does not reduce a sentence on the ground of undue severity unless it is "manifestly excessive": compare *R. v. Shershewsky* (1912) 28 T.L.R. 364: *Skinner v. R.* (1913) 16 C.L.R. 336. To this proposition, construed in its literal sense, no objection can be taken. The burden rests upon the appellant seeking the reduction to satisfy the Court that a different and lesser sentence should have been passed; and if he fails to make this "manifest" to the Court his appeal must be dismissed. But there would seem to have been a tendency to construe the expression "manifestly excessive" as meaning "grossly excessive" or "so excessive as to show that there must have been some error vitiating the original exercise of discretion". And if the expression is construed in this manner the proposition, it is submitted, cannot be accepted even as a rough working rule for the exercise of the Court's discretion in appeals based on severity of sentence.

It is clear that the Court of Criminal Appeal in England has never proceeded upon any such rule. Perhaps as common a form of reduction as any recorded in the Criminal Appeal Reports is one from 18 months to 12 months;[12] and it cannot reasonably be contended that in such cases the length of the original sentence was grossly excessive or so excessive as to show error vitiating the original exercise of discretion. And equivalent or even smaller proportionate reductions and increases have been quite common.[13] It has

[12]*R. v. Ross* (1909) 3 Cr. App. R. 198: *R. v. Henderson* (1910) 5 Cr. App. R. 97: *R. v. Hawkins, ibid.* 237: *R. v. Richmond* (1911) 6 Cr. App. R. 204: *R. v. Laycock, ibid.* 209: *R. v. Spellen* (1931) 23 Cr. App. R. 130.

[13]*R. v. Webb* (1910) 5 Cr. App. R. 112–(3 years to 2 years): *R. v. Warrilow,* ibid. 230–(4 years to 3 years): *R. v. Simpson,* ibid. 217–(12 years to 15 years): *R. v. Perkins* (1911) 6 Cr. App. R. 248–(3 months to 2 months): *R. v. Bradshaw, ibid.* 221–(12 months to 9 months): *R. v. Austin* (1914) 10 Cr. App. R. 70–(4 years to 3 years): *R. v. McCulloch* (1914) 11 Cr. App. R. 51–(12 months with

also been a common thing to alter the nature of the imprisonment directed in order to make it more suitable for the particular offender;[14] and to substitute a bond for Borstal training in order to give the accused another chance.[15]

Moreover, independently of authority, it seems clear upon the language of the statute that no such rule can be accepted. Section 594 (4) commands the Court to quash the sentence if it thinks that a different sentence should have been passed, and, in any other case, to dismiss the appeal. It does not seem possible, consistently with this direction, to hold that the court, though satisfied that a different and lesser sentence should have been passed, may dismiss the appeal on the ground that the sentence is not grossly excessive.

Associated with the statements last above referred to are a number of statements to the effect that it is not the function of the Court to make minor alterations in sentences.[16] These statements are not perhaps very happily expressed, for it is clear that under the statute it is the function of the Court to alter a sentence whenever it is satisfied that a different sentence should have been passed, even though the difference may be of a minor character. The truth at which the statements in question are directed is no doubt this, that, as has already been pointed out, if the sentence which the Court, considering the matter independently of the existing sentence, would have thought to be the appropriate one, does not differ substantially from the existing sentence, the Court will commonly find it impossible to be satisfied that a different sentence should have been passed.

It remains to consider whether there is any authority binding upon the Full Court of Victoria which would prevent it from accepting the views set out above as to the nature of its jurisdiction under the statute. It is submitted that there is no such authority and that on the contrary the weight of judicial authority in Australia is decisively in favour of the views stated.

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hard labour to 10 months in Second Division): *R. v. Massey* (1921) 16 Cr. App. R. 85–(12 months to 15 months): *R. v. Canham* (1929) 21 Cr. App. R. 174–(5 years to 4 years): *R. v. Adams* (1931) 23 Cr. App. R. 51–(15 months to 11 months): *R. v. Walton* (1944) 30 Cr. App. R. 96–(3 years to 4 years): *R. v. Potter* (1946) 31 Cr. App. R. 116–(3 years to 4 years): compare also *McGrath v. R.* (1916) 18 W.A.L.R. 124–(7 years to 5 years) and *R. v. Kerwitz* [1940] Q.W.N. 35–(4½ years to 3½ years).

[14]*R. v. Priday* (1914) 10 Cr. App. R. 34: *R. v. Jowsey* (1915) 11 Cr. App. R. 241: *R. v. Betts* (1931) 23 Cr. App. R. 10: *R. v. Holmes, ibid.* 46: *R. v. Curtis, ibid.* 158: *R. v. Darry* (1945) 30 Cr. App. R. 182.

[15]*R. v. Malt* (1931) 23 Cr. App. R. 45: *R. v. Cook, ibid.* 47: *R. v. Brown, ibid.* 48: *R. v. Greenwood, ibid.* 55: *R. v. Stewart, ibid.* 61: *R. v. Thompson, ibid.* 76: *R. v. Wilson, ibid,* 104: *R. v. Hounslow* (1932), *ibid.* 160: *R. v. Scholes, ibid.* 161: *R. v. Trowbridge, ibid.* 162: *R. v. Carr, ibid.* 176.

[16]Compare *R. v. Maxwell* (1909) 2 Cr. App. R. 28: *R. v. O'Connell* 73 J. P. 118: *R. v. Dunbar* (1928) 21 Cr. App. R. 19.

In Victoria there are two decisions which require consideration, namely, *R. v. Johansen* [1917] V.L.R. 677 and *R. v. Malcolm* [1919] V.L.R. 596. In the former case Hood J. expressed the view that, upon appeals against sentence under the statute, the Court should apply the rules which govern an appeal in the strict sense from an exercise of discretion. But the other members of the Court did not adopt this view. Hodges J. said nothing as to the nature of the jurisdiction. He examined the facts of the case and said that he was not prepared to say that the sentence was excessive or that the Court should reduce it. Cussen J. said that having regard to the terms of s. 594 and to certain circumstances of the particular case which were specified by him, he would have been disposed to pass a less sentence and to add a term of reformatory detention, but that he was not prepared to say that the decision of the other members of the Court was not in accordance with previous decisions of the Court. These observations strongly suggest that His Honour felt it difficult, in the face of the language of s. 594, to accept the view of Hood J. as to the nature of the Court's jurisdiction. In *R. v. Malcolm* (*supra*) Hood J. reiterated the view he had expressed in *R. v. Johansen* (*supra*) but once again the other members of the Court did not express agreement with him. Cussen J. merely stated that in the circumstances of the particular case the Court could not interfere. Schutt J. stated that he was not prepared to define the exact power of the Court on appeals against sentence.

In the High Court there are two decisions of direct importance, namely, *Skinner v. R.* (1913) 16 C.L.R. 336 and *Whittaker v. R.* (1928) 41 C.L.R. 230.

In *Skinner's* case the accused was convicted of carnal knowledge of a girl under the age of sixteen and was sentenced to seven years' imprisonment. He gave evidence on oath at the trial, and so presumably did the girl. One of the defences was that she was a common prostitute. The case therefore was one in which the trial judge was in a position of great advantage in determining the proper sentence. The accused appealed to the Court of Criminal Appeal in New South Wales upon the ground that the sentence was excessive. It does not appear that any evidence was called upon the hearing of the appeal. The appeal was dismissed and the accused applied to the High Court for special leave to appeal from this dismissal. This application was refused. In the High Court Barton A.C.J., pp. 339–340, emphasized at the outset the great advantage which the trial judge ordinarily enjoys in deciding the appropriate sentence. He then said that it follows that the Court of Criminal Appeal is not prone to interfere and will not do so unless the sentence is mani-

festly excessive or inadequate. He said further that if the sentence is not merely arguably insufficient or excessive but obviously so because, for instance, the judge's decision was vitiated by error, the Court of Criminal Appeal would review the sentence; but short of such reason His Honour did not think it would do so. The form of these propositions indicates clearly that they were not intended as rules of law limiting the jurisdiction of the Court. And as they are expressly based upon the advantage which the trial judge ordinarily enjoys, His Honour's view would seem to have been that they had no application where that advantage was absent. Isaacs J., p. 342, referred with approval to what was said by the Court of Criminal Appeal in England in *R. v. Sidlow* (*supra*) *and R. v. Shershewsky* (*supra*). Gavan Duffy, Powers and Rich JJ. merely expressed general concurrence. It will be seen therefore that there is nothing in this decision which conflicts in any way with the view expressed above that the statute confers a general judicial discretion, or with the views expressed above as to the nature and meaning of the statements made in *R. v. Sidlow* (*supra*) and other English cases.

In *Whittaker v. R.* (*supra*) the question arose under s. 5 D of the Criminal Appeal Act 1912 (N.S.W.) which was introduced by amendment in 1924 and which provides that "the Attorney-General may appeal to the Court of Criminal Appeal against any sentence . . . and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper". The accused had been convicted of manslaughter and sentenced to imprisonment with hard labour for twelve months. The Attorney-General appealed under s. 5 D and the Court of Criminal Appeal allowed the appeal and substituted a sentence of five years penal servitude. The accused applied to the High Court for special leave to appeal from this decision. This application was refused. From the reasons given it is clear that four of the six members of the Court construed s. 5 D as conferring on the Court of Criminal Appeal a general judicial discretion. Knox C.J. and Powers J. said, p. 235, that if the true view is that *Skinner's* case (*supra*) applies to s. 5 D and that it requires the Court of Criminal Appeal to refrain from interfering unless the trial judge proceeded upon a wrong principle, still the applicant must fail, since the trial judge did proceed upon a wrong principle. "If on the other hand", they said, "the true view of s. 5 D be, as we think it is, that unlimited judicial discretion is thereby conferred on the Court of Criminal Appeal, that Court has exercised its discretion" (p. 235). Gavan Duffy and Starke JJ. said, p. 253, that on an appeal under s. 5D the Court of

Criminal Appeal may in its discretion vary the sentence and impose such sentence as the Court may seem proper. "There is nothing", they said, "in the words of the section to limit the exercise of discretion, and the Court of Criminal Appeal exercised its discretion in this case . . . . " (p. 253). They added that the Court "did not proceed in opposition to any principle of law but in accordance with its own considered view of the facts".

This decision raised the question whether the legislature in New South Wales when it enacted s. 5 D intended to confer upon the Court of Criminal Appeal a greater freedom to interfere with sentences on the application of the Attorney-General than had been conferred upon the Court in the case of appeals by accused persons under s. 6 (3)—corresponding to s. 594 (4) of the Victorian Act. Before the decision in *Whittaker v. R.* (*supra*) the Court of Criminal Appeal in New South Wales had laid it down that the same principles applied to appeals under s. 5 D and appeals under s. 6 (3) and that the statements made in *R. v. Sidlow* (*supra*) and *Skinner v. R.* (*supra*) were applicable under both sections: see *R. v. King* (1925) 25 S.R., N.S.W. 218: *R. v. Withers* (1925) 25 S.R., N.S.W., p. 394. After the decision in *Whittaker v. R.* (*supra*) the question again arose for decision in *R. v. Gosper* (1928) 28 S.R., N.S.W. 568 and the Court of Criminal Appeal adhered to the view that the same principles must be applied to both sections; but the Court held that in view of the decision in *Whittaker v. R.* (*supra*) it must now be accepted that under both sections there is an unfettered judicial discretion. In relation to s. 5 D the majority view in *Whittaker v. R.* (*supra*) was again followed by the Court in *R. v. Geddes* (1936) 36 S.R., N.S.W. 554. The Court there sought to work out to some extent the general lines upon which the discretion will ordinarily be exercised but it did not give specific attention to those cases in which the trial judge possesses no advantage over the Court on appeal nor to those cases in which additional evidence is given on the appeal.

These decisions in New South Wales are, it is submitted, of decisive importance in determining the view which should be taken in Victoria as to the nature and extent of the jurisdiction under s. 594 (4) of the Victorian Act.

In Queensland the course which the decisions have followed is a curious one. In *R. v. Buckmaster* [1917] Q.S.R. 30 we have an orthodox decision quoting and applying what was said by Barton A.C.J. in *Skinner's* case (1913) 16 C.L.R. 339–340. Then in *R. v. McIntosh* [1923] Q.S.R. 278 we find a bench of five Justices examining the position, emphasizing the importance of standardizing

sentences and stating that though the Court will be unable to say that a little longer than its own estimate is excessive or that a little shorter is inadequate, nevertheless it will intervene whenever it considers that there is substantial excess or inadequacy. Then in *R. v. Roberts* [1938] Q.W.N. 37 upon an appeal by an accused person against his sentence the Court of Criminal Appeal consisting of three Justices was asked to follow *Gosper's* case (*supra*), and did so. But in *R. v. Paterson* [1940] Q.W.N. 48 that Court, again consisting of three Justices, declined to follow *R. v. Roberts* (*supra*) and held that *Skinner's* case (*supra*) laid down a rule of law binding on the Court and preventing it from intervening in the case of an appeal by an accused person unless the sentence is manifestly excessive or substantially excessive. It will be recalled that the view has been expressed above that *Skinner's* case (*supra*) does not lay down any rule of law fettering the Court's discretion. Finally, we find that in *R. v. Beevers* [1942] Q.S.R. 230 it was held on the authority of *Whittaker v. R.* (*supra*), that in the case of an appeal against sentence brought by the Attorney-General under s. 669A of the Queensland Criminal Code—corresponding to s. 5D of the New South Wales Act—the Court has an unfettered judicial discretion. The result, therefore, is that a different rule is applied according as the appeal is brought by the Attorney-General or by the accused person.[17]

The decisions in the remaining states do not appear to throw any fresh light upon the questions under discussion. They cite and apply what is said in such English cases as *R. v. Sidlow* (*supra*), *R. v. Shershewsky* (*supra*) and *R. v. Wolff* (*supra*) but with some exceptions they appear to be consistent with or to support the view set out above that the statements in these English cases do not lay down rules of law fettering the Court's discretion, but merely provide rough guides to the way in which the discretion will commonly be exercised; and that those statements are directed to the cases in which the personal observation of the judge who imposed the sentence has placed him in a position of special advantage and there has been no important additional evidence called on the hearing of the appeal.[18]

[17] See for example *R. v. Byrne* [1941] Q.W.N. 10: *R. v. Strano* [1942] Q.W.N. 10: *R. v. Little* [1942] Q.W.N. 36: *R. v. Watson* [1945] Q.S.R. 6: *R. v. Stanberg* [1947] Q.W.N. 27: *Hays v. R.* [1947] Q.S.R. 118, 126.

[18] Compare *R. v. Kennewell* [1927] S.A.S.R. 287, 304: *R. v. Lawson* [1928] S.A.S.R. 99, 103, 104: *Wade v. Trotter* [1934] S.A.S.R. 62, 64: *Dowd v. Dayman* [1939] S.A.S.R. 70: *Gorman v. Virgo* [1939] S.A.S.R. 375: *McGrath v. R.* (1916) 18 W.A.L.R. 124: *Gibbs & Jones v. R.* (1916) 19 W.A.L.R. 12: *Grayson v. R.* (1920) 22 W.A.L.R. 37: *Isherwood v. O'Brien* (1920) 23 W.A.L.R. 10

It will now be convenient to set out the conclusions arising from what has been stated above:

(a) The statutory jurisdiction of the Court upon "appeals" against sentence is not appellate in the strict sense. The Court is invested with a general judicial discretion to revise sentences and the ordinary rules governing appeals in the strict sense from an exercise of discretion have no direct application. This is shown by the language of the statute, by the long established practice regarding the admission of further evidence, and by the weight of Australian authority, particularly in New South Wales.

(b) The statute propounds a specific question for the Court's determination. That question is not whether the judge who imposed the sentence was guilty of error. It is whether in all the circumstances of the case (appearing either from the material which was before the judge or from further evidence) a different sentence should have been passed. In other words, it is whether the sentence was inappropriate to the true facts of the case.

(c) The appellant, if he is to succeed, must assume the burden of satisfying the Court that this question should be answered in the affirmative.

(d) Though the Court is invested with a general judicial discretion which is not appellate in the strict sense, the decision of the judge who passed the sentence is one of the matters which the Court must take into consideration in exercising its discretion. It may be of considerable and even decisive importance, but the weight to be attached to it must depend upon all the circumstances.

(i) Where the personal observation of the judge has placed him in a position of special advantage the weight attaching to his decision will commonly prevent the appellant from satisfying the Court that a different sentence should have been passed. But the appellant may be able to show that the decision is vitiated by error and should therefore carry no weight. In this way the question of error may indirectly become of vital importance. And even where the decision is not vitiated by error, the weight attaching to it may not be decisive, e.g., where the advantage from personal observation is slight or where the judge's report shows that the sentence was not based upon matters of personal observation or where important additional evidence is called upon the hearing of the appeal.

(ii) Where the judge was in no better position than the Court to fix the appropriate sentence, as will ordinarily be the case on pleas of guilty,* the weight which the Court will attach to the decision will necessarily vary with the circumstances. But the burden rests on those who seek to have the sentence quashed. If the sentence which the Court, upon an independent consideration, would have held to be the appropriate one, does not differ substantially from that which has been imposed, the weight attached to the judge's decision will commonly be sufficient to prevent the Court from being satisfied that a different sentence should have been passed.

(iii) Where important additional evidence is called on the hearing of the appeal, the Court is ordinarily in a better position than the judge to fix the appropriate sentence. The weight attaching to his decision necessarily diminishes as the importance of the additional evidence increases.

(e) After the Court has given to the decision of the judge such weight as is appropriate in all the circumstances the Court still has to form its own decision upon the question propounded by the statute, namely, whether it is satisfied that the sentence was inappropriate to the true facts of the case.

(f) In view of the fact that the statute confers a judicial discretion upon the Court in general terms, it would be contrary to established principles of construction for the Court to lay down rules of law fettering the exercise of this discretion. The cases which are sometimes treated as laying down such rules in relation to the Court's jurisdiction in fact merely contain general indications as to the way in which ordinarily the discretion is likely to be exercised or rough working rules for the exercise of the discretion. Moreover, these intimations and rough working rules should not be treated as applying outside the particular class of case to which they are directed; and that is in general the class of case in which the judge had a special advantage by reason of personal observation, and no important additional evidence has been called upon the hearing of the appeal.