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SENTENCING IN SOUTH AUSTRALIA: EMERGING PRINCIPLES

1. Introduction

Throughout the western world, the last eleven years have witnessed profound changes in the treatment of offenders and indeed, in the delineation of the criminal law itself. In some respects, social awareness of injustice has generated change. In other cases, legislative measures have anticipated public opinion rather than followed it.

The South Australian legislature has introduced bold changes which, directly or indirectly, have affected the use of certain sanctions by the courts. Some changes have contracted the scope of the criminal law by reducing its operation in such fields as abortion,¹ certain forms of sexual conduct,² and public drunkenness.³ Other changes have abolished sanctions altogether: corporal punishment⁴ and more recently, capital punishment⁵ have disappeared from the statute books, at least for practical purposes. Legislative measures have introduced other far-reaching changes: the suspended prison sentence has become available,⁶ the parole system has been substantially altered.⁷ Inevitably, all these changes have affected the nature of many issues confronting the criminal courts and a number of factors have contributed to a process whereby those issues have been rapidly and sharply defined. One such factor is the increased availability of legal aid. Contest in the criminal courts has become relatively common. Another factor is the substantial growth in the number of cases reported officially in the State Reports and unofficially, by the Law Society under its Judgment Scheme. This development has facilitated scrutiny and criticism of decisions both inside the criminal courts and elsewhere. A third and most significant factor is the nature of the decisions themselves. Many judgments of appellate courts have been detailed and carefully considered. There has been a healthy degree of dissension among individual judges of the Full Court and the Court of Criminal Appeal: minority and separate judgments have abounded.

If there has been one lodestar for sentencing courts throughout the period of change and growth, it has been the dictum of Napier C.J. in *Webb v. O'Sullivan*:

"The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court

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1. See Criminal Law Consolidation Act Amendment Act, 1969 (S.A.).
2. See Criminal Law Consolidation Act Amendment Act, 1976 (S.A.).
3. See Police Offences Act Amendment Act (No. 3), 1976 (S.A.).
4. Corporal Punishment Abolition Act, 1971 (S.A.).
5. Statutes Amendment (Capital Punishment Abolition) Act, 1976 (S.A.). The writer is indebted to Zelling J. for his observation that the abolition of capital punishment is theoretically incomplete in South Australia owing to the continued operation of the Imperial Colonial Laws Validity Act, 1865.
6. Offenders Probation Act Amendment Act (No. 2), 1969 (S.A.), as amended.
7. Prisons Act Amendment Act (No. 2), 1969 (S.A.).

should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest."⁸

Although this dictum has prompted questions as to the weight to be given, in varying circumstances, to the concluding nine words,⁹ in general, South Australian appellate courts have leaned towards mercy¹⁰ and probably they are less inclined than higher courts in England or in other Australian jurisdictions to resort to sentences of immediate imprisonment. When they do resort to imprisonment, the trend appears to be to impose shorter head sentences than those imposed for similar crimes in other parts of Australia.¹¹ If these observations are accurate, the trends are in keeping with the evident misgivings of the Mitchell Committee when it admitted that it may prove to be "an inescapable conclusion that, however much conditions are improved, imprisonment remains a basically harmful experience."¹² Needless to say, South Australian Supreme Court judges have not escaped criticism for their "leniency" especially in relation to offences involving Indian hemp.¹³ However, it has yet to be shown that the State's citizens are less adequately protected against crime than those in other parts of Australia.

The purpose of this article is to examine some of the factors which South Australian appellate courts have found relevant in the determination of penalty. To heighten perspective, references are made to certain comparative decisions from other Australian jurisdictions and from England. As in all comparative studies, legislative variations should be taken into account before firm conclusions are drawn regarding differing policies of appellate courts. In relation to sentencing it is particularly important to bear in mind the range of penalties available, the rights of appeal which exist in the various jurisdictions and, of course, the powers of the respective appellate courts to interfere with orders made by those of first instance. The English decisions should also be viewed in the light of Thomas's thesis that the English legislative structure has created two distinct systems of sentencing reflecting different penal objectives.¹⁴ Either the sentencer may impose a sentence intended to reflect the offender's culpability (usually in the name of general deterrence) or he may seek to influence his future behaviour by an appropriate measure of supervision, treatment or preventive confinement. Sometimes these aims may be pursued simultaneously and find expression in the same sentence, but more often this is not so. The primary decision for

8. [1952] S.A.S.R. 65, 66.

9. See *Dunbar v. Steel* (1972) 58 *Law Society Judgment Scheme, South Australia* 626 (hereinafter cited as L.S.J.S.) and *Newell v. Samuels* (1975) 66 L.S.J.S. 363; (1975) 10 S.A.S.R. 524.

10. The extent is unknown to which the apparent inclination towards mercy can be attributed to the fact that South Australia is now the only State which does not allow the Attorney-General a right of appeal following conviction on indictment.

11. These comments are based on the subjective impression of the writer rather than statistical information.

12. Criminal Law and Penal Methods Reform Committee of South Australia, *First Report, Sentencing and Corrections* (1973), 65.

13. See commentary on *Lindsay v. Giersch* [1978] 2 *Crim.L.J.* 100, 101; [1978] 2 *Crim.L.J.* 248, [1978] 2 *Crim.L.J.* 326. See also Editor's Note to extract from *R. v. Kear* [1978] 2 *Crim.L.J.* 40. Although the Editor rightly observed that the defendant, a bank robber, was sentenced to 3 years 6 months' imprisonment, he omitted to refer to the rest of the sentence or the facts that no violence had been used, the only weapon was a replica firearm, there were no co-offenders and that over four-fifths of the money stolen had been recovered.

14. *Principles of Sentencing* (2nd ed., 1979).

the sentencer, therefore, relates to the penal objective and the choice, in Thomas's terms, is between a "tariff" sentence and an individualised measure. A secondary decision relates to the actual sentence to be imposed and the principles vary for tariff sentences and individualised measures. While the tariff principles require consideration of the gravity of the offence and then allowance for mitigating factors, the individualised measure is not restricted by a principle which requires proportion between the facts of the case and the sentence imposed. If a sentencer has decided that in individualised measure should be used, it may involve far less interference with the offender's liberty than if the primary decision had been in favour of the tariff system. On the other hand, an individualised measure may subject the offender to a far greater degree of control than the alternative tariff sentence. It follows, therefore, that whereas mitigating factors are of crucial relevance in fixing a tariff sentence, they do not affect the choice of an individualised measure unless they have some bearing on the offender's future behaviour.

There is no indication that South Australian courts are making primary and secondary decisions of the nature mentioned by Thomas although cases frequently contain comments as to the penal objectives.¹⁵ Rather, it seems that courts are anxious, in all but the most exceptional cases, to avoid disproportion between the facts of the case and the sentence imposed. Measures are certainly employed which are designed to influence the offender's future behaviour but these are generally within the ceiling fixed by the gravity of the offence. The factors considered in this paper are those which have tended to draw the sentencing court closer, or drive it further, from the statutory maximum penalty and it has been widely accepted that the statutory maximum should be reserved only for the worst type of case within the definition of the crime.¹⁶ It is true of most crimes that the statutory maximum penalty is far removed from the level which is normally applied by the courts and legislative reform is urgently required to reduce the maxima to more realistic points. Even so, the general proposition still holds that some factors will tend to draw a sentencing court relatively close, for the particular offence, to the statutory maximum while others will drive the court in the opposite direction.

Almost inevitably the task of the sentencer in each case will be to weigh all the aggravating factors against the sum of the mitigating factors. In a sense, then, it is both artificial and dangerous to isolate factors and label them as aggravating or mitigating; all cases must be viewed in the light of their full circumstances. However, the present task is essentially one of identifying the relevant factors: the discussion does not imply that any of them occur in isolation. The factors have been grouped under three main headings; those relating to the general social situation at the time and in the place the offence was committed, factors surrounding the offence and factors surrounding the offender. Categorisation of some of these factors is

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15. Unfortunately few courts define precisely the terms they use and the context does not always make the meaning clear. For instance, a distinction is rarely made between general and special deterrence, the term "rehabilitation" appears sometimes as a synonym for special deterrence and "retribution" may or may not be intended to reflect the moral condemnation of the offence by the community.
 16. See, for example, *Coombe v. Whitbread and other cases* [1959] S.A.S.R. 104; *Nash v. Whitford* (1972) 2 S.A.S.R. 333.

difficult and the discussion should therefore be regarded as a single entity rather than one which falls into separate and distinct parts.¹⁷

2. The General Social Situation

South Australian courts have been prepared to take into account two factors which relate more to the general social situation of a particular community than to circumstances surrounding the offence or to the circumstances of the offender. One of these factors, the prevalence of the crime, may militate against the offender and the other, general economic depression, may militate in his favour.

(a) Prevalence of the crime.

There are limits to the extent to which sentencing courts will consider the prevalence of the crime as aggravating. In *Giles v. Barnes* the special magistrate in the court of first instance had imposed a sentence of 21 days' imprisonment on the respondent, a first offender, for stealing two blocks of chocolate, worth 60 cents, from a supermarket.¹⁸ The magistrate took the view that the penalty was required because of the extreme prevalence at the time of shoplifting and noted that numerous warnings of severity had been given by the courts. The case eventually came before the Full Court and Bray C.J., with whom Travers and Hogarth JJ. concurred, made these observations:

"There is no doubt that the prevalence of a particular offence in a particular locality may justify Courts in raising the normal standard of penalty for such an offence in that locality . . . This, however, is only one of the factors to be considered in imposing punishment on a particular offender for a particular offence, and can seldom, if ever, be the dominant one . . . Shop-lifting after all is only one form of larceny. There is a limit to the distinction which can be legitimately made between stealing 60c worth of goods from a Supermarket and stealing 60c worth of goods in other places or other circumstances. There is a point beyond which the raising of the normal level of punishment for shop-lifting cannot be legitimately allowed to go, whether or not the prevalence of the offence has been diminished. Anything further must be left to Parliament."¹⁹

One limitation, then, to the aggravating effect of prevalence is constituted by the nature of the offence itself. Another limitation was noted by Walters J. in *Martin v. Scotland*.²⁰ In that case, too, the appellant had been sentenced by a special magistrate to concurrent short terms of imprisonment on each of three counts of shop stealing. The total value of the goods stolen was \$2.41 and the appellant was a first offender. Walters J. allowed the appeal and varied the sentences to fines. In the course of his comments his Honour observed that prevalence of a particular offence can only be a proper

17. It is not possible, within the limits of this article, to consider factors which may bring a case within the wording of particular statutory provisions such as those contained in Offenders Probation Act, 1913-1971 (S.A.), s.4; Justices Act, 1921-1979 (S.A.), s.75(5); Motor Vehicles Act, 1959-1978 (S.A.), s.102. For a discussion of these provisions and the cases which have turned on them, see Daunton-Fear, *Sentencing in South Australia, op. cit. (supra at*)*.

18. [1967] S.A.S.R. 174.

19. *Id.*, 181. But note that in England it has been held in at least some cases that the mere fact a trivial sum is involved does not of itself mean that immediate imprisonment is inappropriate. See, for example, *R. v. Bowler* [1973] *Crim.L.R.* 66 and commentary thereon.

20. (1972) 2 S.A.S.R. 271.

consideration as long as it does not result in the offender being made a scapegoat for other people who have committed similar crimes but have not been caught and convicted. If an exemplary punishment does become necessary, it should be imposed on one whose offending is over rather than under the average.

The principle that prevalence, within limitations, is to be treated as an aggravating factor is easier to enunciate than to apply. In the absence of statistics even an approximation is surely difficult and yet it appears to be established that those sitting in lower courts may take into account, without calling for sworn evidence, factors of which they have personal "knowledge" in their own locality.²¹ It seems reasonable to suppose that in most cases such "knowledge" is based upon mere subjective impression created by the media and the cases which actually come before the courts. Even if statistics of offences known to the police are placed before the courts, their interpretation requires care for a number of reasons, not least that they may reflect such factors as special police diligence and increased reporting of crimes by members of the public. These factors are not necessarily related to an upsurge of crime in general or the prevalence of any particular crime.

(b) *General economic depression.*

In *Gardner v. Janic* Mitchell J. allowed an appeal by an appellant who had been sentenced by a special magistrate to one month's imprisonment and six weeks' disqualification from driving for larceny of car accessories valued at \$70.²² During the course of her judgment, Mitchell J. said:

"In the present climate of unemployment, I think that courts in this State will have to consider seriously whether short terms of imprisonment should be imposed upon any person who is in employment and is likely to lose his employment as a result of serving such a term of imprisonment."²³

Although Hogarth J. has given some support to this view,²⁴ Mitchell J. herself has distinguished her remarks in *Gardner v. Janic* from a situation which arose in *Adams v. Burton*,²⁵ where the appellant was not in employment at the time he was sentenced although he was at the time of the appeal. Mitchell J. held that in these circumstances it was not open to the appellant to argue that imprisonment should be quashed because he would lose his job. And in *Porriello v. Samuels*²⁶ Bray C.J. indicated that Mitchell J.'s dictum in *Gardner v. Janic* does not apply to an offender who has been convicted of driving under the influence of intoxicating liquor where:

"the deterrent effect of the penalty on road users in the interests of general safety is surely the most important consideration."²⁷

21. See *D'Agostino v. French* (1977) 75 L.S.J.S. 495; [1978] 2 *Crim.L.J.* 98 and see also *Mowbray v. Fingleton* (1972) 6 S.A.S.R. 159 in which Mitchell J. expressed the view that lower courts, at least as far as summary offences are concerned, are in a better position than higher courts to gauge prevalence.

22. (1975) 12 S.A.S.R. 495.

23. *Id.*, 497.

24. *Paynter v. Huffa* (1977) 76 L.S.J.S. 70.

25. (1976) 70 L.S.J.S. 419; (1976) 14 S.A.S.R. 48.

26. (1976) 69 L.S.J.S. 335; (1976) 14 S.A.S.R. 83.

27. (1976) 69 L.S.J.S. 335, 338 and see also *Sullivan v. Samuels* (1976) 14 S.A.S.R. 168; (1976) 70 L.S.J.S. 285.

Probably courts will exercise caution before they allow economic factors in the community as a whole to weigh too heavily in favour of offenders who are in employment and indeed, such caution seems desirable. In a society having a complex economic structure, generalised statements about the availability of employment are fraught with problems. Further, while it is conceded that employment is generally less likely than unemployment to influence an offender towards recidivism, discrimination against the unemployed is surely justified only in exceptional circumstances.

3. Factors Surrounding the Offence

Certain features of a crime are most likely to lead to a sentence which is relatively close to the statutory maximum and strong mitigating circumstances will be required to offset their weight. For instance, if an offence is, by definition, violent, the more extreme the violence, the closer the sentence will generally be to the maximum. If the offence is not necessarily violent, both the presence of violence and the degree of violence will be factors to be taken into account. Premeditated violence is generally viewed more seriously than that which occurs spontaneously²⁸ although there is a point at which spontaneity is outweighed by factors such as the degree of violence or the intoxication of the offender.²⁹ Deterrence is the most commonly expressed aim of punishment in South Australia for crimes of violence and yet some judges have admitted understandable misgivings about the possibility of deterring offenders from committing crimes of passion.³⁰ In other Australian States it is more common for judges explicitly to impose sentences as an expression of public indignation.³¹ Possibly South Australian courts also have this objective in mind when they speak of retribution and yet this seems unlikely as even crimes which attract such epithets as "cruel, humiliating and dangerous" are not necessarily punished by long terms of imprisonment.³²

The identity of the victim may constitute another aggravating factor: offences against those with a special responsibility of protecting others or property,³³ and attacks on those who are defenceless or vulnerable are generally viewed severely.³⁴ Although there is some indication that a more lenient attitude may be adopted in South Australia,³⁵ in other jurisdictions the exploitation of a vulnerable victim is not usually mitigated by the forgiveness of the victim and the restoration of the offender to his position

28. *Gamlen v. McAvaney* (1975) 68 L.S.J.S. 351 *cf.* commentary on *Benhasser* [1977] 1 *Crim.L.J.* 37.

29. *Birch v. Fitzgerald* (1975) 11 S.A.S.R. 114. See also *R. v. Ravenhill* [1974] *Crim.L.R.* 127.

30. See comments of Walters J. in *Gamlen v. McAvaney* (1975) 68 L.S.J.S. 351; see also *R. v. Sargeant* [1975] *Crim.L.R.* 173.

31. See, *e.g.*, Adams and Crockett JJ. in *R. v. Williscroft and other cases* [1975] V.R. 292; *Austin v. R.* [1971] Tas. S.R. 227; *R. v. Nancarrow* [1972] Q.W.N.1.

32. *R. v. Thomas and Millar* (1973) 61 L.S.J.S. 400; *R. v. Rainbird* (1974) 63 L.S.J.S. 173.

33. In *R. v. Kear* [1978] 2 *Crim.L.J.* 40 Wells J. referred to warders, rangers and narcotic agents as well as police officers. See also *Barry v. Samuels* (1975) 66 L.S.J.S. 310; (1975) 10 S.A.S.R. 376; *R. v. Kane* [1974] V.R. 759; *R. v. Howard* [1968] N.S.W.R. 429.

34. See, *e.g.*, *Harris v. R.* [1967] S.A.S.R. 316; *Edwards v. R.* [1931] S.A.S.R. 121.

35. In *R. v. Moffa* (1977) 74 L.S.J.S. 399 the Court of Criminal Appeal seems to have regarded it as mitigating that the offender's children were "prepared to forgive" him for the manslaughter of his wife.

of trust.³⁶ Closely allied to offences which exploit the vulnerable are those which involve a breach of trust: indeed, the two categories often overlap. Both groups, unless there are strongly mitigating circumstances are likely to attract relatively severe censure by the courts.³⁷

Offences which involve a threat to public safety, especially serious driving offences, are likely to attract comments by the South Australian courts concerning the need to deter potential offenders.³⁸ But if the behaviour of the victim has been a contributing factor, the court may well take a more lenient view. Certainly in *R. v. Mayne*, where the applicant had been convicted of causing death by dangerous driving, and the victim had been as much to blame as the applicant for the accident, Bray C.J., as a member of the Court of Criminal Appeal, said:

“Other things being equal, it does not seem right that an accused who is only partly to blame for the death of another should receive as heavy a penalty as one who is solely to blame for it.”³⁹

If the contributing behaviour takes the form of provocation by the victim, various consequences may ensue. If the defendant is charged with murder, and the provocation falls within the limits of the partial defence, he is entitled to a verdict of manslaughter. This, indirectly, is likely to have some effect on penalty. If the defendant is charged with assault it is probably true to say that the more closely the provocation approaches the defined limits of the partial defence for murder, the stronger the mitigating effect. It seems unlikely, though, that the provocation must be such, for the purposes of penalty, that an ordinary man would be driven to the particular crime that the defendant committed or indeed, any crime. However it may be that the offender must commit the crime before his passion has actually cooled and the need for proportionality between the provocative act and the offence is another subject which has yet to be examined. Certainly, the fact that the victim in *R. v. Thomas & Millar* had allegedly stolen \$10 from one of the applicants did not constitute provocation “in any relevant sense” for the offence of assault occasioning actual bodily harm.⁴⁰ There are no South Australian decisions which indicate whether provocation will be mitigating if it is given by someone other than the victim, and a further unresolved problem is the extent to which provocation will be viewed as mitigating in respect of offences against property. It would seem hard to justify discriminating against an offender who did not commit assault but who gave vent to his feelings by the destruction of property or by appropriating money or goods to his own use.

It may be that it is not the contributing behaviour of the victim which has led to the actual crime of which the defendant has been convicted, but rather a pre-existing condition in the victim. Again, the effect of this circumstance on penalty is a subject which has not so far been considered

36. *R. v. Lord* [1975] *Crim.L.R.* 51; *R. v. Netz, ex parte Attorney-General* [1973] Qd.R. 145.

37. *R. v. Kear* [1978] 2 *Crim.L.J.* 40; *R. v. Wirth* (1976) 71 L.S.J.S. 483; (1976) 14 S.A.S.R. 291 and see also *R. v. Skeates* [1978] Qd.R. 85.

38. See, e.g., *R. v. Thompson* (1975) 67 L.S.J.S. 269; (1975) 11 S.A.S.R. 217.

39. (1975) 11 S.A.S.R. 583.

40. *R. v. Thomas and Millar* (1973) 61 L.S.J.S. 400. Note also the English case of *R. v. Fell* [1975] *Crim.L.R.* 349 which suggests that a higher degree of patience may be required of some members of society than others, as, for instance, where the victim is a mental patient and the defendant a nurse.

by the South Australian appellate courts but if the offender had no means of knowing of the victim's weakness it seems probable the factor will be taken into account.⁴¹

It is also unclear how far a sentencing court will take into account the fact that an offender has been unsuccessful in achieving his intended objective. Where the offender's lack of success is attributable to a purely fortuitous circumstance including the prudence of the victim, it seems hard to justify a distinction between a punishment for the consummated offence and one for attempt. And yet many offences carry within their definition an element which relates to the degree of harm done, and the definition in turn affects the statutory range within which the sentencing court must impose penalty.⁴² At an implicit level, then, it seems that the legislature has accepted that harm done must to some degree affect the *quantum* of punishment and it remains to be seen whether the issue will also be debated in the courts.

Difficulty of detection is a factor which has been held to aggravate penalty and although the authorities on this point are relatively old, there seems no reason to suppose that sentencing courts now take a different view.⁴³ Possibly a similar attitude will be taken towards any offender who causes the diversion of substantial police manpower from its normal duties.

4. Factors Surrounding the Offender

Some factors relate to the offender's background and others to his behaviour at the time of the crime and subsequently. These will be considered separately although the categories are not altogether unrelated.

(a) *The offender's background.*

(i) *Age.*⁴⁴

It is particularly difficult to isolate the age of the offender from other factors which may be aggravating or mitigating to penalty. Clearly age is likely to be associated with the stage an offender has reached in his criminal career. The younger the offender, the less likely he is to have a criminal record. However, there also seems to be a positive correlation between youth and violence and probably youth and the prevalence of crime. On the other hand, old age is inevitably associated with ill-health and debilitating conditions.

Bearing these factors in mind, it is still possible to discern in South Australia, as in other jurisdictions, a general reluctance to impose custodial

41. But cf. *R. v. Cuthbert* [1967] 2 N.S.W.R. 329, where the respondent had been charged with murder but the Crown accepted a plea of guilty of manslaughter. The respondent, who was wearing sandshoes, had jumped on the head of the victim, whom he and other youths had attacked. The victim died and a contributing factor appears to have been his exceptionally thin skull. The Court of Criminal Appeal was unsympathetic with the argument that the pre-existing condition of the victim should mitigate the penalty.

42. It is beyond the scope of this article to embark upon the substantial jurisprudential problem raised by the relationship between the quantum of punishment and the amount of harm inflicted by the offender. However see Schulhofer, "Harm and Punishment; A Critique of Emphasis on the Results of Conduct in the Criminal Law," (1974) *U.Pa. L. Rev.* 1497.

43. *Edwards v. R.* [1931] S.A.S.R. 121; *Manuels v. Crofter* [1940] S.A.S.R. 7.

44. Age is one of the factors which may lead to an order under ss. 4(1) or (2a) of the Offenders Probation Act, 1913-1971 (S.A.).

sentences on young offenders.⁴⁵ Further, it appears that the courts adopt a realistic view concerning the transition from youth to maturity and accept that it is a gradual rather than a sudden process which occurs at an arbitrary point fixed by chronological age. In *Arnold v. Samuels*, Bray C.J., with whom Bright J. concurred, said:

"It cannot be that all the considerations which have induced the law to make special efforts to reclaim youthful offenders disappear magically as the clock strikes twelve at midnight on the day before the offender's eighteenth birthday."⁴⁶

However, it is not always possible for a sentencing court to avoid imposing a sentence of imprisonment on a young offender. In *Webber v. Creek*, the appellant was a woman aged 23 and it seems from the report of the case that she had no previous convictions.⁴⁷ She pleaded guilty to three counts of obtaining goods by false pretences and asked for 65 similar offences to be taken into account. In all, the value of the goods was around \$3,000 although restitution of goods valued at \$1,300 had been made. Bray C.J. dismissed the appeal against three sentences of six months' imprisonment, which were to be served concurrently. While his Honour accepted the general proposition that reclamation is desirable of youthful offenders he admitted:

... "there must come a time, after all, when the number and nature of crimes so weigh down the scales, even against a first offender, that deterrence and prevention, to say nothing of retribution to the extent to which it is still admissible, overpower rehabilitation and reformation."⁴⁸

At the other end of the age scale, maturity and old age may militate in the offender's favour, particularly if associated with a good record over a long period.⁴⁹ But old age may be outweighed by such factors as the gravity of the offence and the length of the offender's prior record.⁵⁰

(ii) *Absence of a prior record.*

The most widely cited statement on the credit to be given to a first offender was made by Walters J. in *Coles v. Samuels*:

"In the absence of circumstances of substantial gravity surrounding a simple offence or a minor indictable offence committed by a first offender who stands to be punished for a single offence and who has no other offences to be taken into consideration, and in the absence also of a sufficient reason for sentencing him to a term of imprison-

45. *Kessling v. Commane and other cases* (1975) 10 S.A.S.R. 284; (1975) 66 L.S.J.S. 206; *R. v. Weaver* (1973) 6 S.A.S.R. 265. See also *Lahey v. Sanderson* [1959] Tas. S.R. 17; *R. v. Price* [1978] Qd. R. 68; *Casey v. Smyth* [1977] 1 *Crim.L.J.* 331. In England, the fact that the offender is young will, in all but the most unusual circumstances, lead to the use of an individualised measure. However, where a tariff measure is required, youth is normally a substantially mitigating factor. See Thomas, *op. cit.* (*supra* n.14), 17 *et seq.*

46. (1972) 3 S.A.S.R. 585, 596.

47. (1975) 66 L.S.J.S. 355; (1975) 10 S.A.S.R. 378.

48. (1975) 66 L.S.J.S. 355, 357. It is interesting to note that it seems implied in his Honour's remarks that if rehabilitation had been the overriding aim of punishment he would have quashed the sentences of imprisonment. *Cf.* views of Sangster J. in *R. v. Szabo* (1977) 75 L.S.J.S. 219, 232.

49. See, e.g., *R. v. Beresford* (1972) S.A.S.R. 446.

50. *R. v. Balchin* (Unreported) No. 21 of 1974; *Elliott v. Harris* (No. 2) (1976) 70 L.S.J.S. 227; (1976) 13 S.A.S.R. 516.

ment, I am disposed to think that a reformatory or a primarily deterrent sentence is scarcely indicated, and that the imposition of a fine, a release on probation, or a discharge on a suspended sentence should *prima facie* be adequate."⁵¹

However, it has been held that the principle in *Coles v. Samuels* does not necessarily apply to offences such as common assault⁵² and in *Elston v. O'Driscoll*, Mitchell J. said forcefully that it would be wrong for every first offender to expect, at the very least, that if a sentence of imprisonment is imposed on him, it will be suspended.⁵³ Her Honour dismissed an appeal by a receiver of stolen goods, a first offender, who had been sentenced to an effective term of four months' imprisonment on two counts. On the other hand, in *Tothill v. Marklew*, Bray C.J. was inclined towards the view that imprisonment is not appropriate for the average first offence of driving under the influence of intoxicating liquor but that it should be reserved for cases of exceptional gravity.⁵⁴

(iii) *The existence of a prior record.*

Two apparently competing principles have given rise to a degree of tension which is reflected in the decisions relating to the relevance of a prior record. The one is that courts are reluctant to punish, or to appear to punish, an offender more than once for a particular offence. Cases such as *R. v. Clark* reveal this reluctance.⁵⁵ In that case the Full Court said that it is trite law that a man is not to be sentenced on his prior record. On the other hand, courts frequently feel that they cannot disregard prior offences, even of a different type, because they indicate the defendant's general indifference to his legal obligations.⁵⁶ In the old case of *R. v. Gibbings* the Court of Criminal Appeal said that where prior offences indicate a recent course of similar conduct then:

. . . "inasmuch as one of the principle objects of punishment is to discourage the commission of crime, the Court would be wanting in its duty if it did not impose a heavier penalty in consequence of the number of offences previously committed."⁵⁷

However, it is possible that *R. v. Clark* and *R. v. Gibbings* can be reconciled if the imposition of longer sentences reflects, as it does with tariff sentences in England,⁵⁸ the progressive loss of credit for a good record rather than the progressive aggravation for a bad one. Indeed, in *R. v. Clarke*, the Full Court suggested that the principal bearing an offender's record has on the exercise of judicial discretion is the extent to which it

51. (1972) 2 S.A.S.R. 488, 489. Note that Walters J. implied that had reformation been the overriding aim of punishment, imprisonment might be appropriate!

52. *Barry v. Samuels* (1975) 66 L.S.J.S. 310; (1975) 10 S.A.S.R. 376 and see also *Statham v. Huffa* (1975) 68 L.S.J.S. 432; (1975) 13 S.A.S.R. 205.

53. (1974) 62 L.S.J.S. 468.

54. [1969] S.A.S.R. 460 and see also *Olesen v. Giersch* (1976) 70 L.S.J.S. 59; cf. Walters J. in *Newell v. Samuels* (1975) 66 L.S.J.S. 363. Although these cases were decided before the Road Traffic Amendment Act (No. 3), 1976 (S.A.) came into operation, that Act did not introduce material changes in relation to the imprisonment of offenders convicted of driving under the influence of alcohol or drugs.

55. (1972) 4 S.A.S.R. 30.

56. See, e.g., *Pitson v. White* (1973) 60 L.S.J.S. 250; *Ward v. Samuels* (1975) 64 L.S.J.S. 67; *Allan v. Linnane* (1975) 66 L.S.J.S. 210; (1975) 10 S.A.S.R. 459; *Goode v. Kowald* (1972) 4 S.A.S.R. 579.

57. [1936] S.A.S.R. 36, 36-37. A disturbing feature of this case is that the Court seems not only to have taken into account the offender's prior offences but also a prior acquittal!

58. Thomas, *op. cit.* (*supra* n.14), 197.

does or does not justify leniency. If this view be generally adopted, one would expect to find a point at which a recidivist's sentences level off and become stable, assuming there is no real change in the nature of his offences.

Understandably, appellate courts are distinguishing between a first offender and one who has committed "several first offences"⁵⁹ but in *Napper v. Samuels* Bray C.J. said that where there are several offences and no previous convictions, the closer the connection between the offences in time or circumstance, the nearer they approximate to one offence only.⁶⁰ And there is ample South Australian authority for the proposition that courts are entitled to take into account the fact that a series of crimes may merely constitute one single course of conduct or "one sortie into crime."⁶¹

There is no doubt that both the number and the nature of prior offences are considered relevant. Different weight is apparently attached to different orders of previous courts and in *R. v. Avgoustinou* Bray C.J. offered the view that dispositions such as a mere finding of guilt, a dismissal without proceeding to penalty and a conviction without penalty are all of some relevance.⁶² However, his Honour considered that greater weight should be attached to the last of these dispositions than to the other two. The fact that an offender has made at least some attempt to keep out of trouble may be to his credit⁶³ but so far, there have been no South Australian cases which have dealt with the question of whether a later sentence must bear any relationship or proportion to a previous sentence for a similar offence.⁶⁴

(iv) *Race or nationality of the offender.*

South Australian appellate courts have shown some inclination to make concessions to offenders who, because of their race or nationality, are unfamiliar with Anglo-Australian criminal law or are likely to suffer special hardship as a result of a particular sanction. For instance, in *R. v. Kiltie*, Bray C.J. recognized that the applicant, a full blood Aborigine, might be expected to feel severely the effect of imprisonment by reason of his race and temperament.⁶⁵ And although appellate courts do not appear to have been confronted by the issue, courts of first instance seem in some cases to have reduced penalties because of a conflict between Aboriginal tribal law and Anglo-Australian criminal law.⁶⁶ It is surely beyond question that where tribal law requires or even inclines an Aborigine to act in a manner which is contrary to the criminal law the fact should be taken into account by a sentencing court. A more difficult problem has arisen, however, in other jurisdictions, where a tribal Aborigine has committed an offence which is contrary not only to the criminal law but also to the laws of his own tribe.

59. *Cleland v. Ralph* noted in (1972) 4 S.A.S.R. 75, 77.

60. (1972) 4 S.A.S.R. 63.

61. *E.g., Whitbread v. Mayne* [1963] S.A.S.R. 46; *R. v. Carbone* (1976) 14 S.A.S.R. 280.

62. (1975) 13 S.A.S.R. 48; (1975) 69 L.S.J.S. 107.

63. *Mowbray v. Fingleton* (1973) 6 S.A.S.R. 159. See also *R. v. Dawson* [1978] *Crim.L.R.* 437.

64. *Cf. R. v. Sloane* [1973] 1 N.S.W.L.R. 202 with *R. v. Beasley* [1974] 1 N.S.W.L.R. 736 and see also Thomas, *op. cit.* (*supra* n.14), 204 *et seq.*

65. (1974) 9 S.A.S.R. 452.

66. *R. v. Skinny Jack and others* (13.7.64); *R. v. Curley Punjungan and others*, District Criminal Court, Nos. 9, 13, 5 and 14 of 1973. See also discussion by Dauntion-Fear and Freiberg, "Gum Tree Justice: Aborigines and the Courts," in *The Australian Criminal Justice System*, ed. Chappell and Wilson (1977), 45 *et seq.*

Should a sentencing court take into account the fact that the offender has been already dealt with by his own people, or that he will inevitably be made to suffer tribal sanction? It must be borne in mind that many of the punishments imposed by tribal Aborigines are corporal while others are capital. Further, some penalties are preceded by rituals which intensify or prolong suffering. Willingness on the part of sentencing courts to take tribal sanctions into account could be interpreted as encouraging punishments which many people would denounce as cruel, and yet failure to do so can result in double punishment. It is beyond the scope of this article to canvass further this particular dilemma and, indeed, radical reform may be required which would cover a much wider field than that of the criminal law.⁶⁷

Perhaps a more common problem for the criminal courts is raised by Aborigines who have, to some extent, been urbanised. Inevitably, the process of urbanisation creates contact with the norms of the white Australian society, varied though those norms may be. And it seems, from a statement made by Wells J. in *Wanganeen v. Smith*, that such contact may lead to the forfeiture of any special consideration available to those who have not been urbanised:

"A tribal aboriginal native may have to be dealt with in a very special way if he is brought before one of the ordinary courts of the land for an offence allegedly committed by him against the criminal law; but where an aboriginal native has established himself in the more general community and intends to remain there and to work side by side with other members of the community, he must accept the ordinary standards of behaviour expected of his fellow citizens. If he drinks intoxicating liquor, he must expect that all laws that control the orderliness of those who consume liquor, whether in a hotel or outside it, shall be applied to him without any distinction by reason of his race. If he inhabits and uses the cities and towns of our country, then he must expect to abide by the ordinary rules by which law and order are maintained. He cannot expect that special exceptions will be made for him. No doubt his personal characteristics and background and history will be taken into account by a Court in the ordinary way; but he cannot expect special treatment just because he is an aboriginal native, any more than he would expect that he should, on that account, receive any worse treatment if he comes before a Court. In such a case he comes as a citizen of Australia and must be treated just like any other citizen who lives in a town or in a city, and who makes use of the various facilities provided there."⁶⁸

On the face of it, this statement may appear to militate harshly against the typical Aboriginal fringe-dweller, especially one who has seen enough of the white man's society to adopt his goals and aspirations and yet lacks the means to achieve them. However, it may be that when a sentencing court considers the offender's "personal characteristics and background and history" it will, in effect, make special concessions to him on account of his race.

If concessions are to be made to Aborigines, one might expect that leniency should also be shown to migrants, at least until they have had the opportunity to acquaint themselves thoroughly with the Anglo-Australian

67. The Report of the Australian Law Reform Commission is awaited.

68. (1977) 73 L.S.J.S. 139, 139-40.

criminal law. There is little authority on this point, although Bray C.J. in *Capone v. Jones and other cases* recently took into account, in distinguishing between co-offenders, who were husband and wife, the traditional deference of the Italian wife to the Italian husband, as head of the family.⁶⁹ And there are other decisions which suggest that a deterrent penalty is less likely to be imposed on migrants who have not been entirely assimilated and whose outlook may still be coloured by the way of life in other countries.⁷⁰

Scenes of inter-racial violence are not so common in Australia as they are in many other parts of the world but there seems no reason to doubt that Australian courts will adopt the same approach the English Court of Appeal has recently taken and will impose deterrent sentences regardless of the ethnic origin of the offender⁷¹ or the colour of the victim.⁷²

(v) *The physical illness or disability of the offender.*

There seems to have been an increasing tendency on the part of South Australian appellate courts, as indeed there has by the English Court of Appeal,⁷³ to make concessions towards those who suffer some serious physical illness or disability. In 1933, Napier J., as he then was, did not consider it relevant to penalty that the appellant was ill and the imposition of a substantial fine upon him was tantamount to sentencing him to imprisonment because of his inability to pay.⁷⁴ Rather, Napier J. thought an appeal to the clemency of the Crown would be appropriate. By contrast, in the much more recent case of *Thomas v. Samuels*, Hogarth J. was prepared to give the appellant the benefit of the doubt that his criminal offences were indirectly attributable to an eye-defect.⁷⁵ And Walters J., who has been prepared occasionally to depart from the generally accepted principles relating to the circumstances in which an appeal court will interfere with penalty,⁷⁶ has twice extended "acts of mercy" to appellants suffering from serious ill health.⁷⁷ On the other hand, there has been a recent decision of the Court of Criminal Appeal in which the state of the offender's physical condition was not altogether free from doubt and his offence was serious.⁷⁸ In these circumstances, Bray C.J. suggested that an appeal to the clemency of the Crown would be appropriate in the event of grave deterioration occurring before the expiration of a term of imprisonment.

(vi) *The mental or emotional disturbance of the offender.*

Assuming that the offender has not been found insane within the meaning of the M'Naghten Rules, the crucial issue for a sentencing court, when dealing with a mentally or emotionally disturbed offender, is whether the penalty is limited by his culpability or whether the court may also take into account the likelihood of his recidivism. In Thomas's terms, the question is whether the sentence is limited by tariff principles or whether an individualised measure may be used. Although South Australian cases are

69. 13.2.78.

70. *Darcy v. Nikoloff and Darcy v. Mancheff* [1954] S.A.S.R. 62. See also *Jakovljevic v. Miller* (1971) 1 S.A.S.R. 500.

71. *R. v. McKay* [1975] Crim.L.R. 591.

72. *R. v. Cushen and Spratley* [1978] Crim. L.R. 571.

73. Cf. Thomas, *Principles of Sentencing* (1st ed., 1970), 194 with his *Principles of Sentencing* (2nd ed.), *op. cit.* (*supra* n.14), 216.

74. *Thatcher v. Lenthall* [1933] S.A.S.R. 322.

75. (1971) 56 L.S.J.S. 235.

76. See Daunton-Fear, *Sentencing in South Australia*, *op. cit.* (*supra* n.17).

77. *Weir v. Symons* (1975) 68 L.S.J.S. 233; *Brennan v. Murray* (1972) 58 L.S.J.S. 621.

78. *Elliott v. Harris* (No. 2) (1976) 70 L.S.J.S. 227; (1976) 13 S.A.S.R. 516.

divided, the mainstream of authority seems to favour the view that, at least as far as imprisonment is concerned, culpability is the limiting principle. However, in *R. v. Kiltie*, Bray C.J., who adopted this approach, was in the minority.⁷⁹ The applicant, who was 19, but whose mental age was 10, had been convicted of attempted rape and had been sentenced to five years' imprisonment by the trial judge. Bray C.J., in a strong dissenting judgment, said that he would have allowed the appeal and would have reduced the sentence to three years' imprisonment. In his Honour's view, it would be a "bad day" for the criminal law if the degree of moral guilt of the particular offender in the dock were irrelevant. Just as we recognize that insanity within the M'Naghten Rules is completely exculpatory so should low intelligence and diminished responsibility,⁸⁰ falling short of insanity, be regarded as mitigatory. Bray C.J. went on to say that even if society had made no other provision to protect the public from people such as the applicant, he still would not agree to the imposition of a heavier penalty than that demanded by his culpability for the offence. He continued:

"If the community has failed to make proper provision for the care and oversight of people like the applicant, it is not for the criminal law to attempt to fill the gap. To do so confuses the functions of a gaol and an asylum, and of a judge and a psychiatrist."⁸¹

The majority of the Court of Criminal Appeal, however, Hogarth and Zelling JJ., dismissed the application on the ground that the Court had no power at the time to order an institution, established under the Mental Health Act, to accept the applicant as a patient.

But in *R. v. Masolatti*, where the applicant had been convicted of burglary, the Court of Criminal Appeal expressly supported Bray C.J.'s views in *R. v. Kiltie* and reduced a sentence of three years' imprisonment to a term of 18 months.⁸² Similarly, in *Winter v. Samuels* Jacobs J. rejected the argument that the high risk of the appellant's recidivism justified the imposition of a sentence which was disproportionate to his culpability. The appellant had been convicted of the illegal use of a motor vehicle and was sentenced by the lower court to 14 months' imprisonment. Jacobs J. allowed the appeal and reduced the head sentence to seven months' imprisonment, taking into account the fact that the appellant had already served five months in prison before the appeal.

Although the mainstream of South Australian authority favours adjusting a term of imprisonment to correspond with the court's assessment of the offender's culpability, the same principle does not necessarily hold for all other sanctions. Indeed, Wells J. has said, in relation to a severely depressed

79. (1974) 9 S.A.S.R. 452.

80. This term does not have a technical meaning in South Australia as it does in some other jurisdictions where it refers to a defence. See Thomas, *op. cit.* (*supra* n. 14), 75 *et seq.* for cases on the operation of the defence in England.

81. (1974) 9 S.A.S.R. 452, 453-454. His Honour also took note of the fact that the applicant, an Aborigine, might feel imprisonment especially severely by reason of his race and temperament. It seems that an offender may now receive a more sympathetic ear from a sentencing court than he would have done some years ago if a mental or emotional disturbance will cause him to suffer excessive ill-effects from imprisonment *Cf. R. v. Smith* (1975) 67 L.S.J.S. 93; (1975) 12 S.A.S.R. 8 and *Hawkes v. Samuels* (1973) 61 L.S.J.S. 460 with *Hutt v. O'Sullivan* [1953] S.A.S.R. 158.

82. (1976) 71 L.S.J.S. 35; (1976) 14 S.A.S.R. 124. See also *Amanatidis v. Samuels* (1972) 57 L.S.J.S. 53; *R. v. Nell* [1969] 2 N.S.W.R. 563; *R. v. Edgehill* [1969] 2 N.S.W.R. 570; *R. v. Gascoigne* [1964] Qd.R. 539; *R. v. Poulton* [1974] V.R. 716.

offender who was convicted of driving under the influence of intoxicating liquor, that leniency may be reflected in the amount of a fine but not in the length of a disqualification period.⁸³ This approach was followed by Mitchell J. in *Bratz v. Samuels*.⁸⁴ Her Honour drew attention to the fact that in the case before her, as in the one heard by Wells J., the appellant could be a continuing source of danger because the circumstances giving rise to his depression had not been alleviated. Her Honour distinguished an earlier decision of Hogarth J., *Brady v. Wright*, on the ground that in that case there was no indication that the appellant was likely to be a continuing source of danger on the roads.⁸⁵

The general approach in South Australia towards mentally and emotionally disordered offenders contrasts sharply with that adopted in England and, to a growing extent, with that taken by appellate courts in the Eastern States of Australia.⁸⁶ According to Thomas, the English Court of Appeal generally favours individualised treatment rather than a tariff measure and where the offender's condition is such that he is likely to commit grave offences in the future, and no specific treatment can be given, life imprisonment is frequently used. This is subject, of course, to the sanction being available for the particular offence he has committed but as in Australia, life imprisonment may be imposed for a wide range of crimes.⁸⁷ If the offence is really of a minor nature, a tariff measure will apparently govern the limits of the sanction.⁸⁸

In the English case of *R. v. Hodgson*, the Court of Appeal stated that there are three conditions which must be satisfied before life imprisonment can be imposed. These are:

- “1. Where the offence or offences are in themselves grave enough to require a very long sentence.
2. Where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future, and
3. Where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.”⁸⁹

More recent English cases have suggested that a sentencing court may properly engage in a type of balancing exercise and consider the dangerousness of the offender in relation to the gravity of the immediate offence.⁹⁰ Life imprisonment may be justified, although the facts of the immediate offence are not the gravest, where there is a strong likelihood of

83. *Wilson v. Green* (1973) 61 L.S.J.S. 380.

84. (1976) 69 L.S.J.S. 26.

85. (1974) 62 L.S.J.S. 44; See also *Cook v. Huffa* (1975) 68 L.S.J.S. 341; (1975) 12 S.A.S.R. 277 which might be reconciled similarly on the ground that Cook's distress had reached its peak at the time of the offence whereas there was no such indication in *Bratz v. Samuels* (1976) 69 L.S.J.S. 26.

86. E.g., *Felshaw* [1978] 2 *Crim.L.J.* 48; *Mooney* [1978] 2 *Crim. L.J.* 351.

87. For the Australian position, see Freiberg and Biles, *The Meaning of "Life". A Study of Life Sentences in Australia* (1976), Australian Institute of Criminology.

88. *R. v. Clarke* [1975] *Crim.L.R.* 595; *R. v. Tolley* (1979) *Crim.L.R.* 118; cf. *R. v. Arrowsmith* [1976] *Crim.L.R.* 636.

89. (1967) 52 Cr. App. R. 113, 114, and note that the same criteria were used by the New South Wales' Court of Criminal Appeal in *R. v. Page* [1977] 2 N.S.W.L.R. 173.

90. See cases cited by Thomas, *op cit.* (*supra* n.14), 306 and *R. v. Ryan* [1978] *Crim.L.R.* 700.

repetition. If, on the other hand, the risk of repetition is remote, life imprisonment would only be justified where the gravity of the immediate offence is the greatest. To engage in this sort of balancing exercise is, of course, to extend the possible range of circumstances in which life imprisonment may be justified.

It will be interesting to see whether South Australian courts continue to treat the offender's culpability as fixing the upper limit for sentences of imprisonment for those who are mentally or emotionally disturbed. The stand taken by Bray C.J. in *R. v. Kiltie*⁹¹ was bold and since his Honour's approach has been followed it casts heavy responsibility on the State to provide adequately for alternative means of protecting the community. It is apparent from the situation in England, where courts have wide powers to make hospital and guardianship orders, that legislative provision is of limited use unless the community's social resources match the legal. If the social resources are strained to capacity, or those in charge of them are unwilling or unable to provide for those in need of care, the pressure mounts upon the courts to resort to imprisonment, with little regard for the preservation of proportionality between the offender's culpability and the length of his sentence.

(vii) *Hardship for the offender's relatives and dependants.*

Although the authorities are divided, the predominant view amongst Supreme Court judges seems to have been that likely hardship for the offender's relatives and dependants is of little or no relevance to sentence. Indeed, this is an area where at least some judges have been less inclined to make concessions than the English Court of Appeal. One of the most frequently cited cases is *Moore v. Fingleton*.⁹² The appellant, a woman, had been convicted of larceny and was sentenced by a special magistrate, *inter alia*, to six months' imprisonment with hard labour. She had 57 prior convictions. Her two children were dependent upon her, the younger of whom was a ten month old baby who suffered from spina bifida. The appellant was pregnant at the date of the trial and was contemplating marriage to the putative father. The main ground for the appeal was that the sentence was manifestly excessive in view of the fact that the younger child required the constant care of his mother. On the appeal, Bray C.J. noted that the state of the baby was not a motive for the crime and continued:

"I cannot say that the hardship which may be caused to her dependant child by the appellant's imprisonment was a factor which should have induced the learned Special Magistrate to stay his hand, when the dependency of the child was in no way connected with the commission of the crime and where no peculiar personal hardship on the appellant herself has been shown as likely to result from the sentence."

Rather, in his Honour's view, appeal should be made to the clemency of the Crown and he also drew the appellant's attention to the existence of the Parole Board.⁹³

91. (1974) 9 S.A.S.R. 452.

92. (1972) 3 S.A.S.R. 164. See also decision of Tasmanian Court of Criminal Appeal, *Sullivan v. R.* (14.3.1972) noted in [1975] *Australian Legal Monthly Digest* 3243.

93. Similar decisions were reached in *Gramadopoulos v. O'Sullivan* (1955) 22 L.S.J.S. 129; *Jarrett v. Samuels* noted in (1972) 4 S.A.S.R. 78 and *Capone v. Jones and other cases* (13.2.78).

While the English Court of Appeal will not normally take into account hardship to relatives and dependants, Thomas claims that three exceptions exist to this general policy, although none is automatically applied.⁹⁴ However, the exceptions are of a wide-ranging nature and it would appear that the plight of the baby in *Moore v. Fingleton*⁹⁵ could well come under each of them. The first exception is where the degree of hardship is exceptional, the second is where the offender is the mother of young children and the third is where the imprisonment of one parent effectively deprives the children of parental care.

However, it is possible that the policy of South Australian appellate courts is changing. In *R. v. Moffa*, the Court of Criminal Appeal was prepared to take into account the hardship caused to the children of an offender who had been convicted of the manslaughter of his wife, their mother.⁹⁶ The crime had been reduced from murder to manslaughter because of the victim's provocation and it appeared that at least some of the children had sympathy for their father. In any event, they were inclined to forgive him and were in need of his support and company. Some inclination to make a concession for hardship was also apparent in *R. v. Wirth* although on the particular facts, the hardship was of the wrong type.⁹⁷ The applicant, a bank teller, had been convicted on two counts of larceny as a servant. In all, he had stolen \$13,000 which he had taken to meet his gambling debts. He had since made restitution, the finance being provided by a company against the security, given by relatives, of mortgages on their homes. The applicant had voluntarily undertaken to repay the loan which he could only achieve by taking two jobs and working long hours. The trial judge had sentenced him to an effective term of two years' imprisonment in consequence of which he could not meet the repayments of the loan and his family suffered financial embarrassment. Bray C.J. considered some of the English cases and thought they might reflect a general change of policy. However, the cases should be seen in the light of the English criminal appeal legislation which, in his Honour's view, conferred on appellate courts a wider power of interference.⁹⁸ Wells J., another member of the Court of Criminal Appeal, noted that on the facts of the case, the relatives' hardship arose from their own action in mortgaging their homes. This could not be regarded in the same light as hardship which they had in no sense brought upon themselves. His Honour admitted, however, that concessions might be made for hardship:

" . . . where the circumstances are highly exceptional, where it would be, in effect, inhuman to refuse to do so . . . For example, if it were demonstrated to the satisfaction of the Court that to send a man to prison, would, without much doubt, drive his wife to suicide, it would be a steely-hearted judge who did not, however illogically, at least try to meet the situation by suitably framed orders as to penalty. But further than that, in my judgment, courts should not go."

94. *Op. cit.* (*supra* n.14), 211 *et seq.*

95. (1972) 3 S.A.S.R. 164.

96. (1977) 74 L.S.J.S. 399. See also *Brady v. Wright* (1974) 62 L.S.J.S. 44 where Hogarth J. reduced a period of disqualification from driving to the statutory minimum on the basis of hardship likely to be suffered by the appellant's family.

97. (1976) 71 L.S.J.S. 483; (1976) 14 S.A.S.R. 291.

98. *Cf.* Thomas, *op. cit.* (*supra* n. 14), 395 *et seq.* with Daunton-Fear, *op. cit.* (*supra* n. 17).

The hypothetical example given by Wells J. is interesting and there is a strong case to be made for a sentencing court taking into account the probability of the suicide of the offender's wife. But there are problems in adopting such a policy. A genuine threat of suicide is hard to distinguish from a feigned one. Courts which make known their willingness to take account of such factors could leave themselves open to blackmail. Would it be against the public interest to adopt a policy which might be construed by offenders and their relatives as encouragement to suicide or perhaps self-injury? These are weighty problems and call for careful consideration. On the other hand, there seems little justification for an inflexible policy which would deny leniency to an offender whose close relative or dependant is suffering from a terminal or serious disease, such as spina bifida. Even if the view of Bray C.J. in *Moore v. Fingleton*⁹⁹ is accepted, that only personal hardship to the offender is relevant to sentence, it is difficult to see, on the facts of that case, that the child's suffering could do other than create considerable hardship for the appellant herself. Only a most callous woman could escape severe mental stress.

However, it is respectfully submitted that a court should not be precluded from leniency merely because the hardship is suffered by a relative or dependant rather than by the offender. At first sight, it might appear that such an extension of the grounds for leniency would lead to an upsurge of pleas for mercy. But it is not suggested that relief should be afforded to all those with ailing relations. Rather, the courts should restrict their clemency to cases where the degree of hardship is extreme and there is a strong likelihood that the offender, and only the offender, could relieve that hardship. These factors will always have to be considered in relation to the gravity of the particular offence of which the offender has been convicted and inevitably, there will be some cases where the nature of the offence outweighs the suffering of the dependant.

(viii) Failure to use social resources fully.

There is no doubt that some offences arise from financial needs which could have been met legitimately if application had been made for the appropriate relief. One such case was *Steenon v. Holmes* where the appellant had been convicted of false pretences in that she obtained money from the State by claiming that her husband had deserted her.¹⁰⁰ In fact, her husband did desert her from time to time but as she had pleaded guilty, she was precluded from claiming she was deserted when she received the moneys in question. It was undisputed that all the appellant had done was to obtain from the State moneys which would have been available, in the form of unemployment benefits, for herself and her family if the truth had been told and the proper formalities adopted. It was unclear why the appropriate relief had not been claimed but it seemed the appellant did not know how to cope with her situation and was apprehensive of authority. Whatever the cause, Bray C.J. said on the appeal that the special magistrate should have taken into account the fact that the community as a whole was not out of pocket, or at least not to the extent of the moneys obtained by false pretences.

(ix) The relevance of the offender's employment.

The two penalties which are most likely to threaten an offender's employment are imprisonment and disqualification from driving. Apart from

99. (1972) 3 S.A.S.R. 164.

100. (1977) 75 L.S.J.S. 371. See also *Capone v. Jones and other cases* (13.2.78).

the cases where the general economic situation has been considered,¹⁰¹ it is uncertain to what extent a sentencing court will take into account the fact that imprisonment would cause the offender's unemployment. Probably the undesirability of losing a secure job is a factor, albeit a minor one, which will disincline a court from ordering a custodial sentence. But clearly, the graver the crime, the less it is likely that employment will tip the scales against imprisonment.

Disqualification from driving, especially for a lengthy period, will, of course, jeopardise the employment of an offender for whom driving is an essential part of his work. In the past, there was little inclination on the part of the courts to make any concession to an offender whose livelihood depended upon driving a motor vehicle.

Indeed, in *Picken v. O'Sullivan*, Napier C.J. observed that the threat to the public of a dangerous driver is all the greater if he is constantly on the roads.¹⁰² However, in *McSporran v. Nuske* Wells J. made clear his view that courts will not always consider it irrelevant that an offender depends heavily upon his right to drive, though his Honour only knew of one "type of exception" where sentencing courts would adopt a more lenient approach namely, where there are "extreme compassionate grounds."¹⁰³ Wells J. gave an example of the type of circumstances he had in mind:

... "where an offender is a hopeless cripple, and disqualification will mean he is virtually under house arrest for the time of his disqualification. A similar situation, perhaps, could have arisen in the present case if, for instance, the appellant's wife had been a chronic invalid, and it would have been impossible for him to attend to her wants if the disqualification were to continue; but short of a situation like that, it appears to me that the authorities point all in one direction, and that mere hardship, in particular hardship with respect to a man's trade, calling or business is no ground for lessening the disqualification, even more, is no ground for an appeal court to interfere."¹⁰⁴

In the more recent case of *Porriello v. Samuels*¹⁰⁵ Bray C.J. agreed that the considerations Wells J. mentioned in *McSporran v. Nuske*¹⁰⁶ might well induce a court to impose a short period of disqualification or even, where the law allows it, no disqualification at all. But Bray C.J. could not accept that the type of case his Honour mentioned is the only one where the offender's livelihood is relevant to disqualification. He envisaged, for instance, that there might be circumstances in which the effect of disqualification on an offender's livelihood might induce a court to impose a greater fine and a lesser period of disqualification than it would have done otherwise.¹⁰⁷

101. See *supra*, text to n. 22 *et seq.*

102. [1952] S.A.S.R. 184; *Thallas v. Polkinghorne* (1971) 2 S.A.S.R. 266; *Skinner v. Vigar* (1972) 2 S.A.S.R. 268; *Wood v. Koehne* [1963] S.A.S.R. 52. And in *Tothill v. Marklew* [1969] S.A.S.R. 460 Bray C.J. said it would have been an aggravating circumstance if the appellant, a taxi-driver, had not been off-duty when he committed the offence of driving under the influence of intoxicating liquor. Note the extension of the compulsory disqualification provisions under the Road Traffic Act Amendment Act (No. 3), 1976 (S.A.).

103. (1972) 4 S.A.S.R. 282, 284.

104. *Id.*, 284-5.

105. (1976) 69 L.S.J.S. 335; (1976) 14 S.A.S.R. 83.

106. (1972) 4 S.A.S.R. 282.

107. This possibility had already been suggested by Hogarth J. in *Brooks v. Baldock* (1974) 9 S.A.S.R. 591.

Of course, in some cases, loss of employment or loss of a career will ensue from conviction alone and the issue then before the sentencing court will be whether to take that loss into account in determining the appropriate sanction. According to Thomas, the English cases indicate that the Court of Appeal will attach greater weight to loss of employment or loss of a career where the offence is unconnected with the offender's work than when it is committed during the course of it.¹⁰⁸ There is inadequate South Australian authority to discern any trend towards the acceptance of such a distinction.

The fact that an offender has performed meritorious services in the past may well militate in his favour. Credit is sometimes given for a good record with the armed services¹⁰⁹ and there is no reason to suppose that civilian services to the community are regarded less favourably. However, a position of prominence or fame within the community may carry with it an unusually heavy responsibility to maintain law-abiding standards and failure to do so may attract a harsher sanction than would be imposed on a less conspicuous offender.¹¹⁰

(b) The offender's behaviour at the crime.

Violence has already been considered in relation to factors surrounding the offence and it has been observed that a distinction is usually made between violence which is premeditated and violence which occurs spontaneously.¹¹¹ Similarly, it appears that sentencing courts will generally take the factor into account if a crime of dishonesty has been committed in sudden anger due to a sense of grievance against the victim or as the result of a sudden temptation.¹¹² If an offender, having embarked upon the commission of an offence, voluntarily desists from completing it, that factor, too, is likely to be viewed as mitigating¹¹³ although courts have yet to determine whether a distinction should be made between voluntary desistance which flows from sudden contrition and that which occurs through fear of detection or mere discovery that the spoils of the offence are not worth pursuing.

Where more than one offender is involved in the commission of an offence or a series of offences, arguments frequently arise concerning disparity in sentencing. The general principle which is followed in South Australia was enunciated by the Full Court in *R. v. Tiddy*:

"Where other things are equal persons concerned in the same crime should receive the same punishment; and where other things are not equal a due discrimination should be made."¹¹⁴

The Full Court went on to consider the sorts of factors which justify discrimination including the existence of differing degrees of responsibility

108. *Op. cit.* (*supra* n. 14), 214.

109. See, e.g., *Hillier v. Boorman* (1975) 66 L.S.J.S. 213; (1975) 11 S.A.S.R. 394; *R. v. Donaldson* [1968] 1 N.S.W.R. 642.

110. *R. v. Jagger* (1967) 51 Cr.App.R. 473.

111. See *supra*, text to n. 28 *et seq.*

112. *R. v. Edkins* [1936] S.A.S.R. 34.

113. *R. v. Borinelli* (1962) 43 L.S.J.S. 425.

114. [1969] S.A.S.R. 575, 577. See also *Sellen v. Chambers* (1974) S.A.S.R. 103. But note views of Bray C.J. in *R. v. Biddell* (1975) 68 L.S.J.S. 25; (1975) 11 S.A.S.R. 460 for the position where the offenders have committed different crimes. deduction.

between the co-offenders.¹¹⁵ Clearly, a sentencing court will, unless there are strong reasons for acting otherwise, reflect in the penalty a finding that one offender was a leader and another a follower.¹¹⁶ Further, it will be a matter of aggravation that an offender intended his behaviour to be an incentive to others to break the law, or that he must have realised that his action would be so interpreted.¹¹⁷ In *R. v. Carey and Adey* the applicants had embarked upon a campaign to legalise the smoking of marijuana and each was convicted of various offences associated with their campaign.¹¹⁸ There was evidence that they knew their conduct would lead to prosecution, and Bray C.J. thought it was possible that "they deliberately sought the crown of martyrdom." However, it was also clear from his judgment that the Court of Criminal Appeal was alert to the danger of fanning martyrs' flames:

"Out of mingled motives of quixotry and bravado [the applicants] have engaged in what strikes me as an amalgam of an illegal crusade, a publicity campaign and an undergraduate jibe at old father antic, the law. But the law is not so weak that it can only vindicate itself with an over-heavy hand."¹¹⁹

As South Australian appellate courts are prepared to distinguish differing degrees of responsibility between co-offenders, it seems most likely that they will also be willing to regard threats as mitigating which do not amount in law to duress but are sufficient to constrain another person to commit an offence.¹²⁰

(c) *The offender's behaviour after the offence.*

Certain aspects of an offender's behaviour after the commission of an offence may cause a sentencing court to reduce the penalty it would otherwise have imposed. If the court is satisfied that the offender has genuine feelings of remorse¹²¹ this factor may be taken into account and it will always be relevant to an offence of dishonesty that an offender has made complete or partial restitution.¹²² Restitution may, of course, be evidence of remorse but it is not necessarily so. Remorse or repentance may also be shown by the fact the offender has pleaded guilty but in *Harris v. R.* the Court of Criminal Appeal made clear its view that other motives for such a plea, especially an acceptance of the inevitable, do not entitle the offender to "any particular consideration."¹²³ This view contrasts strongly with that recently taken by McInerney and Crockett JJ. as members of the Full Court of Victoria in *R. v. Gray*¹²⁴ and with that of the English Court of Appeal.¹²⁵ In the Victorian case, McInerney and Crockett JJ. expressly dissociated

115. The Full Court cited with approval Thomas, "Sentencing Co-Defendants—When is Uniform Treatment Necessary?", [1964] *Crim.L.R.* 22. For a more detailed discussion of the South Australian cases on the sentencing of co-offenders see Daunton-Fear, *op. cit.* (*supra* n.17).

116. *R. v. Beaumont* [1955] S.A.S.R. 110.

117. *Clarke v. Clarke* (1964) 47 L.S.J.S. 763.

118. (1975) 67 L.S.J.S. 87; (1975) 11 S.A.S.R. 575.

119. (1975) 67 L.S.J.S. 87, 89.

120. Thomas believes the English Court of Appeal may take this view: *R. v. Taonis* [1974] *Crim.L.R.* 322.

121. *Harris v. R.* [1967] S.A.S.R. 316; *Dalton v. Samuels* and *Darwin v. Samuels* (1971) 1 S.A.S.R. 411, 423 *per* Walters J.

122. *R. v. Wirth* (1976) 71 L.S.J.S. 483; (1976) 14 S.A.S.R. 291.

123. [1967] S.A.S.R. 316, 329. See also *R. v. Cox* [1972] Q.W.N.54.

124. [1977] V.R. 225.

125. Thomas, *op. cit.* (*supra* n.14), 50 *et seq.*

themselves from the view that a plea of guilty can only operate in mitigation so far as it evidences genuine remorse and argued that where the plea was intended to serve, and has in fact served, the public interest, the sentencing court may take the matter into account. Their Honours gave the examples of a plea which would save the prosecutrix in a sexual case from the ordeal of giving evidence and a plea which would save the State a lengthy and expensive trial. McInerney and Crockett JJ. recognized that motives for pleading guilty may not be entirely altruistic and conceded that:

"If such action be tainted overmuch by self-interest it probably will not avail the accused."¹²⁶

Their Honours then proceeded to consider pleas of guilty where self-interest is the predominant feature. This could stem from recognition by the accused that the case against him is overwhelming or it could occur as a result of plea bargaining. Remorse and plea bargaining are not, according to their Honours, necessarily contradictory, and a remorseful accused should not be penalised merely because he made an advantageous arrangement with the Crown. On the other hand, McInerney and Crockett JJ. condemned as entirely improper the holding out to an accused, who has a genuine defence, any inducement to plead guilty in the hope of attracting leniency. The English Court of Appeal seems to have gone still further than McInerney and Crockett JJ., and Thomas says that the cases suggest that a bare plea of guilty, without any further mitigation, may justify a reduction in a sentence of between one-quarter and one-third of that established by the facts of the offence.¹²⁷ It seems, however, that the English cases only suggest a reduction in the quantum of the sentence. Thomas doubts that a bare plea of guilty would lead a court to substitute a different type of sentence for that required by the facts of the offence.

While it is appreciated that the administration of justice, with its limited resources of time, money and manpower, depends to some extent on pleas of guilty by those who are in fact guilty of criminal offences, it is submitted that the policy adopted in England and, to a lesser degree, that espoused by McInerney and Crockett JJ., are fraught with danger. It is hard to see that the English policy can do other than act as an inducement to accused persons in general to plead guilty. And although McInerney and Crockett JJ. condemned any such inducement, they conceded that reduction may be made where a plea of guilty is tendered in the public interest. Surely it is not cynical to wonder how many offenders who are lacking in remorse for their offences yet find their consciences stirred by the public interest. It is submitted that the South Australian Court of Criminal Appeal was right in *Harris v. R.* when it stated that the only circumstances in which a plea of guilty should justify the reduction of a sentence are when the plea is a manifestation of contrition, repentance or remorse.¹²⁸ As a plea of guilty is necessarily equivocal, it is probable that sentencing courts will need further information before they are satisfied that genuine repentance exists.

There seems little doubt that it is generally accepted in South Australia, as it is elsewhere, that an offender cannot be penalised just because he has

126. [1977] V.R. 225, 232.

127. Thomas, *op. cit.* (*supra* n. 14), 52. See also commentary on *R. v. Wigley* [1978] *Crim.L.R.* 635 and *R. v. Wills* [1978] *Crim.L.R.* 636.

128. [1967] S.A.S.R. 316.

pleaded not guilty and has put the Crown's case to proof.¹²⁹ He is, after all, merely exercising his right in a jurisdiction in which he is innocent until he is proved guilty. The position is a little less clear where he has conducted a vigorous defence which has involved the ordeal for witnesses of cross-examination and the fabrication of a story to substantiate his plea. However, it seems from *Harris v. R.* that South Australian courts will not treat such conduct as aggravating, at least as far as the limits which were reached in that case. The appellant had been convicted on two counts of carnal knowledge of a girl under the age of 13 and on one count of gross indecency with a girl under the age of 16. Both victims were his wife's sisters. On the appeal, the Court of Criminal Appeal made these comments:

. . . "Nor indeed in our view could [the appellant] properly be penalised at all for the conduct of his defence in so far as he denied the offences, caused girls to endure cross-examination, or ascribed in his statement an obvious motive to them for concocting a false story.¹³⁰ Obviously, if a man wishes to defend himself against what he claims is a false charge it is, if not essential, at least exceedingly helpful, that he should be able to allege some motive for making a false charge. Finally, when one examines [the appellant's] statement it is fairly obvious that it is in his own language, at least with regard to the remarks about the girls, and once again we do not think vehemence in the expression of a defence, at least up to the limits reached in this case, should be held against an accused person, even if he is subsequently convicted. It is important that accused persons, many of whom still defend themselves, should not be tongue-tied in the expression of their defence, or be more severely dealt with if they fail to hedge their arguments of their denials with deprecatory disclaimers. And in our opinion the idea should be energetically repudiated that any prisoner has anything to gain by saving the Court trouble or Crown witnesses embarrassment."¹³¹

The view of the English Court of Appeal seems to be that a vigorous defence cannot aggravate a penalty beyond the level warranted by the facts of the offence,¹³² although there have been some instances where excessive aggravation appears to have passed unnoticed on appeal.¹³³ Where lies have been told on oath there have sometimes been references to possible proceedings for perjury.¹³⁴

The patience of a sentencing court may be strained not only by an accused person who fabricates information but also by one who refuses to plead or is generally disruptive. In this situation it seems clear that the remedy lies in contempt proceedings and that it is quite improper for a sentencing court to reflect its disapproval of the offender's conduct by increasing his sentence.¹³⁵

There are some interesting shades of opinion among South Australian judges as to the extent to which co-operation with the police, or lack of it,

129. See e.g., *R. v. Harper* [1968] 2 Q.B.108; *R. v. Gray* [1977] V.R. 225.

130. See also *Hryczyszyn* [1977] 1 *Crim.L.J.* 105.

131. [1967] S.A.S.R. 316, 378.

132. *Thomas, op. cit. (supra n.14)*, 50-51.

133. *R. v. Bowler* [1973] *Crim.L.R.* 66.

134. See, e.g., *Martin* (1.8.73) cited by *Thomas, op. cit. (supra n.14)*, 50.

135. See *Allan v. Linnane* (1975) 66 L.S.J.S. 210; (1975) 10 S.A.S.R. 459; *R. v. Aquarius* [1974] *Crim.L.R.* 373 and *R. v. Logan* [1974] *Crim.L.R.* 609.

is to be reflected in sentencing, particularly where information is required which could lead to the conviction of others. Until recently, it seemed fairly clear on the authority of *R. v. Paul* that informers might expect special leniency in South Australia.¹³⁶ In that case, Angas Parsons J. approved the English decision of *R. v. James and Sharman*¹³⁷ in which an offender had been rewarded for informing against his accomplices on the ground that "it is expedient that they should not be persuaded to trust one another, that there should not be honour among thieves." While more recent English authorities are generally in accord with this view,¹³⁸ the South Australian case of *R. v. Barber* suggests that a sentencing court may now look behind the mere fact that one offender has informed against another before deciding to treat the matter as mitigating.¹³⁹ The appellant, who had been convicted of possessing Indian hemp, refused, or at least failed, to name his accomplices. Bray C.J., as one member of the Court of Criminal Appeal, referred to the fact that the courts had previously acted on the view that it is not expedient that there should be honour among thieves and had sometimes rewarded informers by mitigation of their sentences. His Honour continued:

"In some cases genuine remorse by those who have been used as tools of organised crime may be manifested by disclosure of the identity of their principals and when that happens I think it deserves generous recognition, particularly when it is only done at the cost of personal danger. But in many ordinary cases of crimes committed by a confederacy of young men of approximately equal guilt the betrayal of his colleagues by the one who happens to be caught would be so contrary to the unwritten code of behaviour current in this community that, in my view, it would be unrealistic to demand it and I for one would be reluctant to penalise its absence."

Sangster J., however, another member of the Court, was clearly concerned by the possible implications of Bray C.J.'s views and expressly dissociated himself from any notion that non-disclosure is creditable or that disclosure is discreditable. While it is conceded that this implication might be drawn from the judgment of Bray C.J., it is submitted that the most significant feature of his statement was the emphasis he placed upon remorse. If his Honour's view prevails in the future, possibly South Australian appellate courts will treat the offender's conduct after the offence as irrelevant to sentence unless there is evidence of remorse or there is at least partial restitution in respect of a crime of dishonesty.

5. Conclusion

Unprecedented demands have been made of the criminal courts during the last eleven years to keep pace with statutory innovations and with swiftly changing community standards. Appellate courts have been called upon to devote an increasing proportion of their time to complex problems of sentencing. Great progress has been made under the Chief Justiceship of Dr. J. J. Bray in delineating issues and in developing and refining principles. Many of the decisions bear the distinctive hallmarks by which Dr. Bray has

136. [1928] S.A.S.R. 16 and see Note in (1928) 2 *A.L.J.* 3.

137. (1913) 9 Cr. App. R. 142.

138. See Thomas, *op. cit.* (*supra* n.14), 218 but note that in *R. v. Davies* [1975] *Crim.L.R.* 596 assistance given after the offender's trial did not confer upon him the right to come back to the trial judge or Court of Appeal and ask for a

139. (1976) 71 L.S.J.S. 424; (1976) 14 S.A.S.R. 388.

become widely known throughout Australia, those of scholarship and a concern to protect the freedom of the individual. Of necessity, the development and refinement of sentencing principles is a continuing process: new problems require new solutions. The development can never be so complete that it trammels the proper exercise of judicial discretion by which the sentencer retains the ability to adapt his order to the facts of the particular case confronting him. Nevertheless, these factors do not negate the value of established principles: many problems are recurrent and it is essential that lower courts are acquainted with the way in which appellate courts have resolved them in the past. In particular, the identification by appellate courts in the last eleven years of recurrent aggravating and mitigating circumstances must be of lasting benefit. Even if future appellate courts place different emphases upon the various factors, the process of analysis and synthesis is well under way.