Appeals against sentence in Australia: a reform agenda

By Richard Edney

The practice of law has a tendency to become ossified and hardened by tradition. While tradition is not necessarily problematic in itself, it can sometimes promote entrenched ways of thinking and understanding.[1] Some legal practices continue simply because they are viewed as 'normal' and are therefore rarely challenged.

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Appeals against sentence in serious criminal cases under Australian law have a long tradition, but the reasons for the way in which they are decided have been forgotten. In particular, the historical origins for appeals against sentence have become obscured and are seldom questioned.

This article examines the current legal position in respect of appeals against sentence in serious criminal cases,[2] starting with an 'archaeological' dig into the historical forces that underpin appeals against sentence and a short primer on the history of appeals in serious criminal cases in the UK. Our appeal process is a product of that legal tradition, especially the *Criminal Appeal Act* 1907 (UK),[3] which is now outdated and arguably the cause of injustice. In this context, reform is well overdue.

SENTENCE APPEALS: THE SEARCH FOR FORENSIC ERROR

In serious criminal cases – in most instances, those commenced by indictment – successful appeals rely on identifying forensic error. Sentencing error broadly falls into two categories. First, there may be some error in the process of sentencing, either legal or factual. For instance, errors can include mis-statement of the maximum penalty, misapprehension of the factual circumstances of the appellant, or failure to accord procedural fairness. Identifying error in sentencing will thus require a close examination of the plea hearing and sentencing remarks.

Second, error may be disclosed in cases where the sentence is inappropriate given the circumstances of both the offence and offender, even though the sentencing judge >>

has apparently taken all relevant matters into account and excluded all irrelevant matters. Alternatively, the sentence may fall outside the range of properly imposed sentences in all the circumstances of the case.[4] This ground of appeal – known as 'manifest excess'[5] – does not require extensive argument;[6] rather, it is determined by the appeal court, which compares the offence, offender and sentence to determine whether there has been a proper exercise of the sentencing discretion.

Error, whether of a specific type or of a general nature that is encompassed by the phrase 'manifest excess', is critical to appeals under Australian criminal law because without it, appellate courts will not intervene. This approach to sentence appeals was established early, in the seminal High Court of case of *House v King*[7] in 1936, and applies even where the appellate court judges themselves feel that a sentence is not one they would have imposed.[8] This approach is also supported by the 'instinctive synthesis' approach to sentencing, which allows judicial officers a wide discretion in determining the appropriate sentence and where appellate courts – even if they would have passed a different sentence – will not have done so in the absence of error.[9]

THE IMPORTANCE OF HISTORY: THE UNACKNOWLEDGED INFLUENCE OF THE *CRIMINAL APPEAL ACT* 1907 (UK)

The origins of this contemporary approach to appeals against sentence under Australian criminal law is English, and a product of the particular circumstances that led to the establishment of the Court of Criminal Appeal.[10] When considering the powers of Australian courts regarding appeals against sentence, it is also important to recognise that the statutes regulating criminal appeals are not particularly decisive in determining whether or not an appeal against sentence should be allowed. The need to identify error is thus not contained within each statute, but has been read into it by judicial interpretation – as the statutes dealing with appeals against sentence do not deal with the precise circumstances in which error is said to arise in sentencing. For instance, in NSW – the first Australian jurisdiction to adopt the United Kingdom legislation in 1912 with the passing of the *Criminal Appeal Act* 1912 (NSW) – those convicted upon indictment may, with leave, appeal against the sentence imposed following their conviction.[11] The fact that there is no mention of error is significant (see below). The power of the NSW Court of Criminal Appeal in appeals against sentence under the *Criminal Appeal Act* 1912 (NSW) is expressed in s6(3) as follows:

> '(3) On an appeal under s5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.'

Similar provisions are seen in all Australian states[12] and in the Northern Territory.[13] They are adopted from the UK's *Criminal Appeal Act* 1907 (UK). Although this legislation has been superseded and amended in the UK,[14] its influence has remained in the way that courts approach sentence appeals. This is because, in its terms, the statute does not require error: a 'plain' reading of the legislation appears to give a sentencing court an unfettered discretion, both to increase or reduce a sentence. Such a decision does not require the finding of error. The requirement of error stems not in fact from the words of the legislation, but from the approach of the English Court of Criminal Appeal and its interpretation of the *Criminal Appeal Act* 1907 (UK).[15]

Such an approach reflects the contemporary approach to sentencing appeals under Australian criminal law. As far as the Australian appellate lawyer is concerned, finding error – either legal or factual – in the sentencing process is the key to a successful appeal.

WAS ERROR THE ONLY WAY? A POSITIVE APPROACH TO SENTENCING

The fact that an appellant must demonstrate error to appeal successfully against sentence stems from a particular interpretation of the *Criminal Appeal Act* 1907 (UK). Clearly, the English Court of Criminal Appeal could have interpreted the provisions of that Act and its own role differently. If it had, the sentencing landscape of Australia would be substantially different.

An alternative reading of the provisions could have led to a more 'positive' approach to appeals from sentences, concerned with a qualitative assessment of the sentence imposed by the trial judge. Instead of being driven by the search for forensic error, a positive approach would lead to the appeal court assessing the criminality of the appellant, considering the relevant individual circumstances and whether the approach of the sentencing judge was proportionate, just and fair. On the broad and general terms of the legislation that governs sentence appeals, such an interpretation is open. However, given the entrenchment of the approach that requires error on appeal, it seems unlikely that the courts will adopt an alternative interpretation without parliament passing appropriate legislation.

IS THERE ANOTHER WAY? THE PROSPECT OF REFORM

Any attempt at legislative reform is likely to be met by opposition. This is understandable. Like most courts, Australian courts of criminal appeal already have large court lists, and such a reform would likely add to it. Further, the current legal structures that cast the appeal against sentence as a search for forensic error are unlikely to change. The dominance of instinctive synthesis as the preferred judicial method of sentencing, with its reliance on the 'judicial wisdom' of the sentencing judge in the absence of demonstrable error, also means that reform is unlikely. Inherent in this approach is the notion that each case is different, and the sentencing function can only be properly discharged when the sentencing judge considers factors relevant to the offence and offender. As those factors are unique to each individual, appellate courts are unlikely to

retreat from a position that gives considerable discretion to the sentencing judge.

Nevertheless, alternative models exist that could provide guidance for possible reform. The *de novo* appeal system that exists in some Australian jurisdictions from the Local or Magistrates Court to the District or County Court permits an appellant to have the sentencing discretion re-exercised without establishing sentencing error. Canada provides a further model, which requires the appellate court to consider whether there has been a 'fitness of the sentence' to the offence, and the appellant's personal circumstances.[16]

CONCLUSION

Any proposal to reform a particular aspect of a legal system requires an understanding of the history of the particular legislation being amended which, in this case, is a longstanding one. But simply because an approach has become entrenched does not mean that it is the only – or best – option. An approach that does not require error, but instead focuses on qualitative aspects and ensuring a proportionate outcome between offence and sentence[17] would save substantial court costs[18] and, importantly, would not diminish the instinctive synthesis aspects of the current system of sentence appeals. Rather, it would ensure that appellants have the opportunity to have their cases subject to the instinctive synthesis twice. ■

Notes: **1** I have been critical of the routine use of the 'dock' in serious criminal cases precisely for that reason. See R Edney, 'The Use of the Dock under Australian Criminal Law: Desirable Practice or Impediment to a Fair Trial' (2001) 25 *Criminal Law Journal* 194. **2** In this regard I am concerned with criminal matters that are heard and determined in the Supreme Court and the County or District Court. **3** The right of an offender to appeal against sentence is now contained in the *Criminal Appeal Act* 1968 (UK), s9 (1). Interestingly, the power provided to the appeal court is similar to the original power imposed under the *Criminal Appeal Act* 1907 (UK) but subject to the condition that 'as a whole' the appellant is not dealt with more severely. See *Criminal Appeal Act* 1968 (UK), s11(3). **4** The converse of manifest excess – in the context of Crown appeals – is manifest adequacy. See generally *R v Griffiths* (1977) 137 CLR 293; *R v Everett* (1994) 181 CLR 295. **5** See generally R Fox & A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed) (1999). **6** *R v Dinsdale* (2000) 202 CLR 321 at 325-6 per Gleeson CJ and Hayne J. Also see *DPP v Rzek* [2003] VSCA 97 at [31] per Eames JA. **7** (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ. **8** A classic statement of this deference to the original sentencing judge is contained in *R v Taylor & O'Meally* [1958] VR 285 at 289 per Lowe and Gavan Duffy JJ. **9** The phrase 'instinctive synthesis' derives from the decision of *R v Williscroft* [1975] VR 292 at 300 per Adam and Crockett JJ. Effectively, the 'instinctive synthesis' refers to the process by which the sentencing court considers all the circumstances of the offence and offender and then comes to a conclusion of what the appropriate sentence is. Hence, the word 'synthesis'. The 'instinctive' aspect incorporates the notion that a sentencer can also almost – as the phrase suggests – instinctively come to a settled view on what is the appropriate sentence. For an overview of the instinctive synthesis approach to sentencing, see R Edney & M Bagaric, *Australian Sentencing: Principles and Practice* (2007) 15-42. The preference for the instinctive synthesis approach to sentencing by the High Court – despite the passionate dissent of Justice Kirby – was confirmed in *Markarian* (2005) 215 ALR 213. **10** For an illuminating overview of this history, see Radzinowicz and R Hood, *A History of English Criminal Law and its Administration from 1750: Volume 5* (1986) at 758-78. **11** *Criminal Appeal Act* 1912 (NSW), s5(1)(c). **12** *Crimes Act* 1958 (Vic), s567(d), s568(4); *Criminal Law Consolidation Act* 1935 (SA), s352(1)(a)(iii) and s353(4)(a)-(b); *Criminal Code* 1899 (Qld), s668D(1)(c), s688E(3); *Criminal Code* (WA), s688(1a)(a)-(b) – s689(3); *Criminal Code Act* 1924 (Tas), s401(1)(c), s402(4). **13** *Criminal Code* (NT), s410(c), s411(4). The position in the ACT is similar, but the phraseology is somewhat different. See *Supreme Court Act* 1933 (ACT), s37O(5)(a)-(b). **14** See note 3. For a useful commentary on the contemporary English position, see *Blackstone's Criminal Practice 2008* (Oxford) at 1965-1971. **15** A good early example is *R v Sidlow* (1908) 1 Cr App R 28. **16** See C Ruby, *Sentencing* (4th ed) (1994) at 429-31. **17** Of course, I am not contending that Australian courts ignore proportionality when sentencing offenders. Proportionality is a key aspect of sentencing. For an overview, see R Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489. **18** As there would not be the time taken to establish the existence of error.

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