Supreme Court of New South Wales

R v Jurisic Matter No 60131/98 [1998] NSWSC 423 (12 October 1998)

C O U R T O F C R I M I N A L A P P E A L

RECORD SHEET

NATURE OF JURISDICTION: Crown appeal against

inadequacy of sentence in

the District Court

(Tupman DCJ)

FILE NO/S: 60131/98

DELIVERED: Monday 12 October 1998

HEARING DATE/S: Wednesday 12 August 1998

PARTIES: REGINA v Christopher Tom

JURISIC

JUDGMENT OF: Spigelman CJ Wood CJ at CL Sully J

B M James J Adams J

C O U N S E L:

APPELLANT - P G Berman

RESPONDENT - G J Bellew

S O L I C I T O R S:

APPELLANT - S E O'Connor

RESPONDENT - John J McDermott

RESULT: Appeal allowed

CATCHWORDS:

Sentencing- guideline judgments - consistency of sentencing - dangerous driving occasioning death or grievous bodily harm, s52A *Crimes Act* 1900 - appropriate penalty - s11 *Home Detention Act* 1996 - home detention as a means of serving term of imprisonment - re-sentencing on Crown appeal - double jeopardy

NO OF PAGES: 83

IN THE COURT OF

CRIMINAL APPEAL

60131/98

SPIGELMAN CJ

WOOD CJ at CL

SULLY J

JAMES J

ADAMS J

Monday 12 October 1998

R v Christopher Tom JURISIC

Having pleaded guilty to three charges of dangerous driving occasioning grievous bodily harm, the respondent was sentenced to imprisonment for eighteen months to be served by way of home detention; was disqualified from holding a driver's licence for one year; and sentence deferred in respect of two other offences charged on condition that he enter a recognisance, in the sum of $1,000, to be of good behaviour for two years. The Director of Public Prosecutions appeals on the ground that the sentences thus imposed were inadequate.

Held:

1. ***Home Detention Act***

A term of imprisonment by way of home detention is a substantially less onerous sentence than imprisonment within the confines of a prison.

This Court has jurisdiction to hear an appeal from both the term of imprisonment imposed by the trial judge and the home detention order made under s11 of the Act, and to vary the term of imprisonment and/or the order.

Smith (1997) 95 ACrimR 373 not followed.

Trial judges should implement the Act by first determining the appropriate sentence. If that is less than the statutory maximum in the Act, the judge must exercise the discretion to refer. Factors relevant to the exercise of the discretion discussed. On a favourable report the final discretion to make the order must be exercised. It is an error to treat a home detention order as an alternative to a periodic detention order.

2. Sentencing Guidelines

There is a need to ensure consistency in sentencing decisions. Inconsistency offends the principle of equality before the law and is a manifestation of injustice. Public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified.

The English Court of Appeal has established a technique of guideline judgments, in which the Court formulates general principles and, sometimes, gives an indication of appropriate range to guide trial courts.

This Court has frequently stated principles of general application with respect to appropriate sentences for particular offences. This Court has frequently indicated where custodial sentences, or custodial sentences of severity, were appropriate for specific offences. Guidelines so promulgated may be overlooked by the profession and trial judges. . Per Wood CJ at CL the principles are sometimes overlooked in the volume of appellate decisions, and the pressures imposed on trial courts to dispose of increasingly busy criminal lists.

The formal step of issuing guideline judgments is a logical development of what the Court has long done. Such judgments may reinforce public confidence in the integrity of the process of sentencing

Guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.

Such guidelines are intended to be indicative only. They are not intended to be applied in every case as if they were rules binding on sentencing judges. Guideline judgments are a mechanism for structuring discretion not restricting discretion.

3. Driving Causing Death: Guidelines

The development of Australian legislation and sentencing practice in respect of dangerous driving occasioning death or grievous bodily harm, has been similar to that in England. The seriousness with which society regards offences is an important consideration in sentencing decisions. Significant disparity between public opinion and judicial sentencing conduct will eventually undermine the perceived legitimacy of the legal system. Trial judges in New South Wales, like England, do not appear to have reflected in their sentences the seriousness with which society regards the offences of occasioning death or serious injury by dangerous driving. The existence of such a disparity constitutes an appropriate occasion for the promulgation of a guideline judgment by a court of criminal appeal. The development of English guideline cases on such an offence referred to: *Guilfoyle* (1973) 57 CrAppR 549; *Boswell* (1984) 79 CrAppR 277; *Attorney-General's References Nos. 14 and 24 of 1993* (1994) 15 CrAppR(S) 630.

4. Section 52A of the *Crimes Act*

The new s52A introduced in 1994 redefined the offences and increased the maximum penalty for driving occasioning death from five to ten years, or fourteen years in circumstances of aggravation; and in the case of grievous bodily harm from three years to seven years, or eleven years in circumstances of aggravation. The increase in penalties was designed to more accurately reflect the seriousness of the offences with a view to convictions acting as a "strong deterrent". The sentences imposed should reflect the level of community concern about the conduct proscribed by s52A and dangerous driving: *Musumeci* NSWCCA, 30 October 1997; *Speer* NSWCCA, 11 December 1990; *Manwarring* NSWCCA, 13 April 1994; *Slattery* (1996) 40 ACrimR 519, 523.

Statistics show that the pattern of sentencing under the former s52A did not reflect the seriousness with which the community regarded the offences. A sharp upward movement in penalty is appropriate for the new s52A: see authorities summarised in *Musumeci* and *Slattery*. The statistics on sentencing under the new s52A, albeit limited, do not suggest that the response of trial judges has fully reflected these considerations. There has been a flow of almost invariably successful Crown appeals against the

inadequacy of sentences under the new s52A. It appears that the pattern of inadequacy that existed under the former s52A has not changed to any appreciable degree. Some further guidance is needed. This is an appropriate occasion to promulgate a guideline judgment of the character developed by the English Court of Appeal.

The nature of the offence is not such that the Court can devise a simple table in which indicative penalties are linked to a quantitative measure of the offence. However, in the case of an offence covering a wide range of conduct which varies qualitatively rather than quantitatively, the Court can indicate in a general way the kind of case which would usually require a particular kind or level of sentence, whilst acknowledging that there will always be exceptional cases.

The presence or absence of the following factors will determine the appropriate penalty: (i) extent and nature of the injuries inflicted; (ii) number of people at risk; (iii) degree of speed; (iv) degree of intoxication or of substance abuse; (v) erratic driving; (vi) competitive driving or showing off; (vii) length of the journey during which others were exposed to risk; (viii) ignoring of warnings; (ix) escaping police pursuit.

Items (iii) to (ix) are aggravating factors relating to the conduct of the offender. They are present to a material degree where any one of them indicates that the offender has abandoned responsibility for his or her conduct.

The Court should promulgate the following guidelines:

(1) A non-custodial sentence for an offence against s52A should be exceptional and almost invariably confined to cases involving momentary inattention or misjudgment.

(2) With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.

The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence.

5. **The Appropriate Order in this Case**

The sentence imposed by the sentencing judge, in terms of length of term, was inadequate.

Her Honour's reasoning indicated an error of principle by coming to a settled view of appropriateness of home detention before imposing a sentence per Sully J; Spigelman CJ and Adams J contra; Wood CJ at CL and James J not deciding.

The relevant application of the double jeopardy principle to successful Crown appeals against sentence is that the Court imposes a sentence that is the least sentence that could properly have been imposed upon the respondent at first instance: *Rose (Mark Anthony)* NSWCCA 23 May 1996, 3. The least sentence in the present case was two years per Spigelman CJ with whom Wood CJ at CL and James and Adams JJ agreed.

In all the circumstances the respondent should serve a period of full time custody (per Sully J with whom all members of the Court agreed).

ORDERS

1 The Crown appeal against sentence is upheld.

2 The sentence imposed on the first count in the Court below is quashed. In lieu, the respondent is sentenced to imprisonment for two years to comprise a minimum term of one year commencing on 28 January 1998 and expiring on 27 January 1999, on which date the respondent is to be released on parole; and an additional term of one year

commencing on 28 January 1999 and expiring on 27 January 2000.

3 The order of disqualification made in the Court below is quashed. In lieu, the respondent is disqualified for a period of two years from 28 January 1998 from holding a driver's licence.

IN THE COURT OF

CRIMINAL APPEAL

60131/98

Monday 12 October 1998

SPIGELMAN CJ

WOOD CJ at CL

SULLY J

JAMES J

ADAMS J

R v Christopher Tom JURISIC

JUDGMENT

SPIGELMAN CJ: I have had the advantage of reading in draft form the judgment of Sully J. His Honour sets out the Crown's summary of the facts, the validity of which is accepted by the Respondent.

Home Detention Act

The relevant statutory provisions are set out in the judgment of Sully J.

In *R v Smith* (1997) 95 ACrimR 373 this Court, by majority, made a decision as to the approach to be taken in applying the provisions of the *Home Detention Act* 1996 (NSW). In *Lambrinos* (NSWCCA 17 July 1998) and *Byrne* (NSWCCA 5 August 1998) two differently constituted Courts chose not to follow that decision. As a result sentencing judges were left with divergent guidance from this Court. A bench of five was constituted to resolve the issue.

This Court has never regarded itself as strictly bound by its previous decisions. (See *Nguyen v Nguyen* [1990] HCA 9; (1990) 169 CLR 245, 268-269; *John* (1978) 2 NSWLR 259, 262, 264; *Moran* (1991) 52 ACrimR 440, 442; *Mai* (1992) 26 NSWLR 371, 380-381; 60 ACrimR 49, 58).

Whilst the convening of a bench of five is a desirable option to follow, there is no rule of practice in this regard. (*Mai* supra 380-381; 58). The former practice of the Victorian Full Court to this effect (see Kidd "Stare Decisis in Intermediate Appellate Courts" (1978) 52 *ALJ* 274 @ 277-278) appears to be more flexibly applied today. (*Tait* [1996] VicRp 48; (1996) 1 VR 662, 666; [1996] VicRp 48; (1995) 80 ACrimR 374, 378).

The appropriate test, as adopted in this Court by a bench of five in *John* supra, is:

"[T]he Court of Criminal Appeal is not bound to follow an earlier decision if it is satisfied that the decision is wrong".

This test is the same as that propounded by the High Court in *Nguyen* supra.

The difficulty that has occasioned the difference of opinion in this Court is the fact that the legislation may be characterised as based on the premise that there is equivalence between home detention and imprisonment. This is manifest in five critical features of the legislative scheme:

(i) The overriding object of the Act is stated to be:

"To provide for home detention as a means of serving a sentence of full time imprisonment" (See s4(1)).

(ii) There is a clear distinction between a "sentence" and a "home detention order": an order may be made "in respect of a sentence of imprisonment" (s5(1) and s6(3)).

(iii) The Court which is empowered to refer an offender for "assessment as to the suitability of the offender for home detention", is expressed to be the Court by whom the person "is sentenced" or a Court "reviewing such a sentence" (s9(1)).

(iv) Home detention is again described to be "a means of serving the minimum term of the sentence" (s9(1)).

(v) The process culminates in the power for which s11 provides:

"A Court that has sentenced an offender may by order direct that the minimum term of the sentence (or in the case of a fixed term sentence, the whole of the sentence) be served by way of home detention."

The sequence of events for which the Act provides requires the Court to specify the sentence before it knows whether or not the offender will serve the sentence by means of home detention. Accordingly, the sentencing judge is placed in a position where he or she does not know the severity of the sentence when required to specify the period of imprisonment.

As Grove J said in *Smith:*

"There is an immediate contrast able to be perceived between periodic detention which is an option exercised by the sentencer at the time of imposition of sentence and home detention which is explicitly a potential means of serving an already selected option of full-time imprisonment". (376-377)

His Honour correctly identified this difference between home detention and periodic detention. A trial judge must pass the sentence of imprisonment without knowing whether or not a fixed term, or a minimum term, will be served by way of home imprisonment or not. This is not entirely satisfactory from the point of view of exercising a sentencing discretion. However, it is not the first time that legislation has created anomalies for the inexact art of sentencing. There are many other aspects of full time imprisonment which affect the onerous nature of the sentence and about which a judge will have no knowledge at the time of sentencing. The prison system of New South Wales contains a number of different environments in which sentences are served, from maximum security to a variety of medium or minimum security institutions. Within institutions prisoners may be subject to regimes of varying onerousness.

The fact that the *Home Detention Act* states that home detention is a means of serving "a term of imprisonment", does not involve a necessary inference that, for all purposes, home detention is to be regarded as equivalent to imprisonment. I agree with his Honour Justice Sully that to serve a term of imprisonment by way of home detention, rather than within the confines of a prison, even a low security prison, is a substantially less onerous sentence.

I agree generally with the steps required to be taken by a trial judge, as set out in the judgment of Sully J in answer to his Honour's Question 2. The Act requires a trial judge to determine the appropriate sentence of imprisonment without regard to the possibility that a home detention order may be made. The trial judge will subsequently have to exercise the judicial discretion to refer, under s9 of the Act, and the ultimate discretion to make the order for detention, under s11.

An order under s11(1) should only be made if the sentencing judge is satisfied that the term of imprisonment, so served, is the appropriate sentence, in the sense that it reflects the criminality of the conduct in the circumstances of the case. It may be unlikely that, having exercised the reference power under s9, a trial judge would refuse to exercise the power under s11. Nevertheless, in principle, a trial judge could do so, by reason of the inadequacy of the sentence as so served.

Cases such as this come before the Court under s5D of the *Criminal Appeal Act* 1912 which permits the Crown to appeal "against any sentence pronounced by the court of trial". By s2 of that Act, "sentence" is defined to include "any order made by the court of trial on conviction with reference to the person convicted". An "order" that a term of imprisonment "be served by way of home detention" is an "order ... with reference to the person convicted".

Accordingly, this Court has jurisdiction to hear an appeal from both the term of imprisonment imposed by a trial judge and the order made under s11 of the *Home Detention Act* 1996. The present appeal expressly covers both aspects of the sentence.

I do not agree with Justice Grove's conclusion in *Smith* supra 377:

"My conclusion therefore is that an order for home detention is a collateral order to a sentence of imprisonment and accordingly is not a matter to be taken into account by this Court in assessing the adequacy of a term of imprisonment imposed in the court from which appeal is brought".

As I have shown above a home detention order is a "sentence" within s5D. This Court can review the adequacy of a term as so served. No reference has been made in the earlier cases to the extended definition of "sentence". Once it is seen that an appeal lies from both the term of imprisonment and the order, then the combined effect, in terms of the onerousness of both aspects of such a sentence is before this Court.

Under s5D this Court has a discretion to "*vary the sentence and impose such sentence as ..... may seem proper*" to the Court. The Court can "vary" the term of imprisonment or the home detention order or both. If it varies the term of imprisonment to exceed eighteen months, then no home detention order can be made and any existing order must be quashed (s5(1)).

Sentencing Guidelines

That there are a multiplicity of factors that need to be considered in sentencing has long been recognised. There is, however, a tension between maintaining maximum flexibility in the exercise of the discretion, on the one hand, and ensuring consistency in sentencing decisions, on the other. Inconsistency in sentencing offends the principle of equality before the law. It is itself a manifestation of injustice. It can lead to a sense of grievance amongst individuals on whom uncharacteristically severe sentences are imposed and amongst the broader community, or victims and their families, in the case of uncharacteristically light sentences. (See *Griffiths* (1977) 137 CLR 293 @ 326-327 per Jacobs J).

A technique that has been established in England to ensure consistency of sentencing, is for the Court of Appeal to formulate what are described as "guideline judgments" in which, in the context of dealing with a particular case or group of cases, the Court formulates general principles and, sometimes, an indication of appropriate range, to guide trial courts. This structural approach goes beyond the mere recognition of sentencing patterns from the accumulation of first instance decisions.

The utility of guideline judgments has been considered in the context of law reform discussion (see *Sentencing: Report of the Victorian Sentencing Committee* 3 volumes April 1988, see esp vol 1 pars 4.10-4.14 and vol 3 appendix P; New South Wales Law Reform Commission *Sentencing Discussion Paper 33*, April 1996 pars 6.36-6.41; New

South Wales Law Reform Commission *Sentencing Report 79,* December 1996 pars 1.7 and 1.14) and in academic literature. (See Wilkins "Sentencing Guidelines to Reduce Disparity" (1980) *CrimLR* 201; Ashworth "Techniques of Guidance on Sentencing" (1984) *CrimLR* 519; Allen "Sentencing Guidelines: Lessons to be Learned?" (1988) 39 *Nth Ireland* LQ 315; Hall "Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments" (1991) 14 *NZ Universities Law Rev* 211; Freiberg "Sentencing and Judicial Administration " (1993) 2 J of Judicial Admin 171; Dingwall "The Court of Appeal and Guideline Judgments" (1997) 48 *Nth Ireland* LQ 143; Harvey and Pease "Guideline Judgments and Proportionality in Sentencing" (1997) *CrimLR 96*); Ashworth and von Hirsch "Recognising Elephants: The Problem of the Custody Threshold" (1997) *CrimLR* 187; Lovegrove, *Judicial Decision Making, Sentencing Policy, and Numerical Evidence* 1989 chp 2 esp 31-33; ; Ashworth, "Four Techniques for Reducing Sentencing Disparity" in von Hirsch and Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy,* 2nd ed, 1998; Lovegrove, "Sentencing Guidance and Judicial Training in Australia" in Munro & Wasik (eds) *Sentencing, Judicial Discretion & Training* 1992, chp 11.

Legislative provision has been made in one State for guideline judgments. Section 143 of the *Sentencing Act* 1995 (WA) provides:

"143(1) The Full Court of the Supreme Court or the Court of Criminal Appeal may give a guideline judgment containing guidelines to be taken into account by court sentencing offenders.

(2) A guideline judgment may be given in any proceedings considered appropriate by the court giving it, and whether or not it is necessary for the purpose of determining the proceeding.

(3) A guideline judgment may be reviewed, varied or revoked in a subsequent guideline judgment."

A proposal to introduce such a provision in Victoria was not implemented because, it is reported, of resistance by judges of the Supreme Court. There is no statutory basis for the practice in England. So far as I am aware, the Supreme Court of Western Australia has not yet exercised the jurisdiction under s143 of the *Sentencing Act*.

In the context of a new category of sexual offence, which covered a wide range of conduct, the WA Court of Criminal Appeal refused to issue a guideline judgment under s143, as sought by the Crown, to the effect that "the offence should attract a custodial sentence in all but exceptional circumstances." Malcolm CJ said that the courts had not "had sufficient experience" with the offence. (*GP* (1997) 93 ACrimR 351, 376. See also 390-391 per Murray J with whom Steytler J agreed, 399).

Kerr (SCt of WA, CCA 9 July 1997) was a Crown appeal against sentence where the accused had been convicted of attempted murder of his defacto. The Crown request for a guideline judgment for cases of "domestic violence" was rejected. As Kennedy J put it:

"The general field of domestic violence is, however, far too broad to enable this Court to deliver a guideline judgment which would be of general use to sentencing judges. Each sentence must be appropriate to the particular circumstances of the case."

Furthermore, as Franklyn J said:

In my view there is no justification for putting offences described as 'of domestic violence' in a special category."

I do not doubt that considerations of the character identified in *GP* and *Kerr* are appropriate to be considered in refusing to issue a guideline judgment. However, this Court, like other courts of criminal appeal, has frequently stated principles of general application with respect to appropriate sentences for particular offences. Such statements have, in part, the characteristics of a guideline judgment. The formal step of recognising that the Court does issue such guidelines is a logical development of what the Court has long done.

Most frequently, the Court has indicated where a custodial sentence would usually be appropriate. For example:

(i) Social security fraud - "except in very special circumstances"

Purdon (Jennifer Rose) NSWCCA 27 March 1997

Herrera (Navia Mercedes Daza) NSWCCA 6 June 1997

Medina NSWCCA 28 May 1990

Winchester (1992) 58 ACrimR 345, 347

(ii) Drug importation

El Karhani (1990) 21 NSWLR 370, 381 ("Almost all cases of importing a commercial quantity of cocaine")

Fabian (1992) 64 ACrimR 365, 376 ("usually the appropriate sentence")

(iii) Traffickers in narcotics

Thompson NSWCCA 4 April 1998 ("except in exceptional circumstances")

Pilley (1991) 56 ACrimR 202, 208

Fabian (1992) supra, 379

(iv) Home invasion

Hayes (1984) 1 NSWLR 740, 742

Weaver (James) NSWCCA 24 February 1997

Li (Kenny) NSWCCA 9 July 1997

(v) Indecent assault on a child

Turner NSWCCA 26 July 1995

Allpass (1993) 72 ACrimR 561 (bonds in exceptional cases)

O'Sullivan NSWCCA 20 October 1989 ("ordinarily a custodial sentence" but not "necessarily required" @ 4-5; cf *Baxter* NSWCCA 26 May 1994 and *Turner* supra)

(vi) Homosexual assault on a minor

McKenna (Peter John) NSWCCA 16 October 1992

(vii) False evidence and destroying evidence before ICAC

Chad (Nelson Rowatt) NSWCCA 13 May 1997 ("in the absence of extraordinarily compelling subjective circumstances")

(viii) Cultivation of cannabis

Puke (Richard) NSWCCA 12 September 1997 ("except in the most exceptional circumstances")

Tedesco (1982) 7 ACrimR 430, 432

With respect to certain kinds of offences, this Court has stressed that the length of a sentence of imprisonment should be substantial. For example:

(i) Assaults upon police and prison officers

Crump NSWCCA 7 February 1975

Myers NSWCCA 13 February 1990

Davis NSWCCA 4 February 1994

Nasif (Chaouki) NSWCCA 10 March 1995

(ii) Threatening injury to hinder police investigation

Perez (Janelle) NSWCCA 11 December 1991 ("heavy deterrent penalty of proper severity").

Hamilton (1993) 66 ACrimR 575, 581

(iii) Assaults by club bouncers

Laalaa NSWCCA 19 May 1995 ("stern punishment" @ 35)

(iv) Child sexual assault

L NSWCCA 3 July 1986 ("sentences must be of a severe nature")

Dent (Stephen John) NSWCCA 14 March 1991 ("call for heavy sentences")

(v) Abuse by a carer

Cappetti (Robyn Francis) NSWCCA 22 September 1989 ("deprived of their liberty for a substantial period")

Pitcher (Darren James) NSWCCA 19 February 1996 ("deterrence through the severity of sentences")

(vi) Crimes against young children

Ditfort (Donald Patrick) NSWCCA 17 March 1992 ("require heavy sentences")

(vii) Drug importation

Muanchukingkan (Boonchu) (1990) 52 ACrimR 354, 356 ("heavily deterrent sentences")

(viii) Bagsnatching

Heath NSWCCA 24 August 1990 ("serious punishment")

(ix) Armed robbery

Wells NSWCCA 19 April 1989 ("lengthy custodial sentences")

Petrinovic (Frank) NSWCCA 18 September 1990 ("the community expects heavy sentences")

(x) Home invasion

Li (Kenny) NSWCCA 9 July 1997 ("severe and condign punishment")

(xi) Bribing a police officer

P*angallo* (1991) 56 ACRimR 441, 443 ("must be severely punished")

(xii) Threats to police

Mitchell (Richard Ernest) NSWCCA 1 June 1994 ("calling for severe punishment")

(xiii) Contempt by refusal to testify

Registrar Court of Appeal v Gilby NSWCA 20 August 1991 ("a significant sentence of imprisonment")

(xiv) Any prevalent offence

Henderson (Jana Brian) (1991) 5 ACrimR 369, 373 (drug trafficking)

Cuthbert (1967) 86 WN (Pt 1) NSW 272, 278

Coleman (Anthony Keith) NSWCCA 5 November 1997 (street brawling)

Kukunoski NSWCCA 17 August 1989 (dishonesty of State Rail Authority staff)

Brenton (Timothy Craig) NSWCCA 14 November 1994 (car theft)

The Court has, on at least one occasion, identified a pattern of sentencing by trial judges, which it has indicated should be corrected. In the case of home invasion this Court said:

"... a trend has developed to underrate the degree of criminality involved in this offence". *Jones* NSWCCA 30 June 1994 @ 5, 9.

The Court has also regarded it as appropriate, on at least one occasion, to indicate a usual level of sentence. In the case of escape from custody:

"*The ordinary level of sentence for what might be called an unremarkable escape could be expected to approximate two years*". *Thomson* NSWCCA 21 May 1986; see also *Prasad (Virena)* NSWCCA 1 September 1993.

The laying down of guidelines in the manner that has hitherto occurred runs the risk that the guidelines will be overlooked and, therefore, not afforded the degree of recognition that they were intended to have. A formal system of labelling particular judgments as "guideline judgments" will ensure that the profession and trial judges are aware of what has been suggested.

At times, and with respect to particular offences, it will be appropriate for this Court to lay down guidelines so as to reinforce public confidence in the integrity of the process of sentencing. Guideline judgments, formally so labelled, may assist in diverting unjustifiable criticism of the sentences imposed in particular cases, or by particular judges.

In my opinion, guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.

Such guidelines are intended to be indicative only. They are not intended to be applied to every case as if they were rules binding on sentencing judges. Decisions of appellate courts on sentencing are not to be treated as binding precedents.

The position is as stated in the judgment of Dunn LJ in *De Havilland* (1993) 5 CrAppR (S) 109, 114:

"Apart from the statutory maxima and certain other statutory restrictions, for example, those on the sentencing of young offenders, the appropriate sentence is a matter for the discretion of the sentencing judge. It follows that decisions on sentencing are not binding authorities in the sense that decisions of the Court of Appeal on points of substantive law are binding both on this Court and on lower courts. Indeed they could not be, since the circumstances of the offence and of the offender present an almost infinite variety from case to case. As in any branch of the law which depends on judicial discretion, decisions on sentencing are no more than examples of how the court has dealt with a particular offender in relation to a particular offence. As such they may be useful as an aid to uniformity of sentence for a particular category of crime; but they are not authoritative in the strict sense. Occasionally this Court suggests guidelines for sentences dealing with a particular category of offence or a particular type of offender. Bibi (1987) 71 Cr.App.R. 360 and Clarke (1982) 4 Cr.App.R.(S.) 197 are recent examples of such guidelines. But the sentencer retains his discretion within the guidelines, or even to depart from them if the particular circumstances of the case justify a departure. The vast majority of decisions of this Court are concerned with the facts and circumstances of the particular case before it and are directed to the appropriate sentence in that case. Each case depends on its own facts."

In accordance with this approach, guideline judgments perform a limited role. Nevertheless, in my opinion, such judgments will provide a useful statement of principle to assist trial judges to ensure consistency of sentencing with respect to particular kinds of offences. I reiterate that such guidelines are not binding in a formal sense. They represent a relevant indicator, much as trial judges have always regarded statutory maximum penalties as an indicator.

The critical difference between judicial guidelines and statutory guidelines - whether minimum penalties or a grid system - is the flexibility of the former. There is provision for the special or exceptional case. There is recognition that sentencing must serve the objective of rehabilitation, as well as the objectives of denunciation and deterrence. A trial judge can respond appropriately to all the circumstances of a particular case.

It has long been accepted that denunciation of criminal conduct is a relevant factor in the sentencing process. In the course of such denunciation, courts do and should have regard to the moral sense of the community and to community expectations of appropriate punishment. Courts are, however, aware that the requirements of justice and the requirements of mercy are often in conflict, but that we live in a society which values both justice and mercy.

The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders. However, public confidence in the administration of criminal justice requires consistency in sentencing decisions. As I have

said, inconsistency is a form of injustice. Indeed, a point can be reached where sentences issued by a few judges may be so widely regarded as inadequate that - despite the possibility of correction on appeal - the legitimacy of the legal system itself may be called into question by a significant section of the community.

The existence of multiple objectives in sentencing - rehabilitation, denunciation and deterrence - permits individual judges to reflect quite different penal philosophies. This is not a bad thing in a field in which "the only golden rule is that there is no golden rule". (*Geddes* (1936) 365 SR (NSW) 554, 555 per Jordan CJ). Indeed, Judges reflect the wide range of differing views on such matters that exists in the community. However, there are limits to the permissible range of variation. The Courts must show that they are responsive to public criticism of the outcome of sentencing processes. Guideline judgments are a mechanism for structuring discretion, rather than restricting discretion.

Public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified. Courts of criminal appeal operate under constraints which do not ensure that such criticism is necessarily allayed by the usual case by case appellate process. Appeals must be initiated by the Crown. If initiated they are regarded as exceptional and require identification of an error in the exercise of discretion. If upheld, the appellate court is constrained in the sentence it can impose by the principle of double jeopardy. Public confidence in the administration of justice will be best served by ensuring that the system minimises the appellable errors made by trial judges.

The case for guideline judgments was put very effectively, if I may say so with respect, by Lord Bingham of Cornhill, the Lord Chief Justice of England, in a speech his Lordship delivered to the Police Foundation on 10 July 1997. His Lordship said:

"It is, nonetheless, important to acknowledge ...that inconsistency may itself be a form of injustice. It is generally desirable that cases which are broadly similar should be treated similarly and cases which are broadly different should be treated differently. As Aristotle observed, 'True equality exists in the treatment of unequal things unequally'. To this end the Court of Appeal has, in a series of guideline cases, indicated the brackets within which sentence for given offence should ordinarily be expected to lie. Decisions of this kind apply to a number of offences, including causing death by dangerous driving, public order offences, kidnapping, rape, incest, unlawful sexual intercourse, buggery, living on immoral earnings, theft in breach of trust, robbery, explosive offences, obscene publications and drugs. Even where there are no guideline cases, a wealth of appellate decisions give pointers towards the appropriate level of sentence in a given case. Where there is no guideline case it is normally because the circumstances of a given offence vary so widely that any guidance would be so general as to be meaningless. But the Court of Appeal has been criticised for failing, in recent years, to give guidance in such commonly recurring offences as manslaughter, many kinds of theft and deception and the government proposes in forthcoming legislation to impose a duty on the Court of Appeal to provide guidance on levels of sentence. This is, without doubt, an important function of the Court, developed with great skill and insight under the leadership of Lord Lane. We must seek to rise to the challenge, for while the preservation of discretion in this field is important there is no room for arbitrariness or whimsy. It is, however, pertinent to observe that in most of the leading cases in which guidance on levels of sentence has been given the effect has been to increase the general level of sentencing. At a time when the prison population is rising sharply this is an effect to be noted. It has also, in practice, proved easier to raise the general level of sentences than to lower it."

A guideline judgment is more likely to arise in the context of a Crown appeal than in the context of an appeal against severity by an offender. In the usual case it will be the Director of Public Prosecutions who draws the attention of the Court of Criminal Appeal to the background circumstances, in terms of inconsistency of judgments and other matters, which may make it desirable to promulgate a guideline judgment with respect to a particular offence.

In England the Court has often heard a number of cases concerning the same offence together - both Crown appeals and severity appeals. This has the advantage of presenting a range of factual circumstances to the Court. This Court would be assisted if the Director of Public Prosecutions drew the attention of the Registrar to similarities among cases (including both Crown and severity appeals) so that consideration could be given to their being heard together.

Driving Causing Death: Guidelines

The proceedings before the Court involve s52A of the *Crimes Act* 1900 which is concerned with dangerous driving occasioning death or grievous bodily harm. The development of Australian legislation and sentencing practice in this respect is, as I will show below, very similar to the development in England which was described by Lord Bingham in his address to the Police Foundation in the following way:

"[W]hen differences of opinion arise on issues of sentencing between the judges and an identifiable body of public opinion, the judges are bound to reflect whether it may be that the public are right and they are wrong. In two instances which occur to me, rape and killing by dangerous driving, I think it is true that public opinion (reinforced in the latter case by legislation) brought home to the judges that they had on occasion failed in their sentences to reflect the seriousness with which society regarded these offences."

I agree with Lord Bingham. The seriousness with which society regards offences - reflected in the maximum permissible penalties, as amended from time to time - is an important consideration in sentencing decisions. Significant disparity between public opinion and judicial sentencing conduct will eventually lead to a reduction in the perceived legitimacy of the legal system.

As in England, it appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving. The existence of such disparity constitutes an appropriate occasion for the promulgation of a guideline judgment by a court of criminal appeal. That is what occurred in England with respect to offences cognate with that in the instant case.

The first occasion on which the Court of Appeal (Criminal Division) of the High Court of Justice laid down a guideline for sentencing for such an offence was in *Guilfoyle* (1973) 57 CrAppR 549. The Court was concerned with the offence of causing death by dangerous driving. The Court said at 552:

"Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and, secondly, those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs."

The Court went on to note that in the first kind of case a fine may be appropriate but in the second kind of case a custodial sentence was called for.

The Court returned to the issue of the guidelines for such offences in *Boswell* (1984) 79 CrAppR 277. The Court noted that since *Guilfoyle* the offence had been narrowed by requiring recklessness and the maximum penalty had been increased from two years to five years. This made it clear that under the new offence anyone convicted would fall into the more serious of the two categories identified in *Guilfoyle* (259). Delivering the judgment of Court, Lord Lane CJ said with respect to the new offence:

"To be guilty the defendant must have created an obvious and serious risk of injury to persons or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it, although he had seen it.

It is not possible (it needs hardly to be said) to say in advance what the proper sentence should be in any particular case. However the duty of the Court is to reflect the concern of Parliament and also, which is sometimes forgotten, to reflect the concern of the public about these matters." (259)

His Lordship went on to refer to the criminal statistics for reckless driving which indicated:

(i) It was an offence almost exclusively committed by males;

(ii) The majority of offenders did not receive a custodial sentence;

(iii) Of those who did receive a custodial sentence, the large majority received sentences of six months or under and almost all of them received sentences of twelve months or under.

His Lordship went on to say:

"Those figures seem to us to show that the offence is regarded by the courts as less serious than in fact it is: less serious than Parliament intended it to be and less serious than the public in general regard it. It is a trite observation, and I make no apologies for making it, that the motor car is a potentially lethal instrument. Any driver who fails to realise that what he is doing at the wheel is creating a risk when to any ordinary person such risk would be obvious, or, even worse, sees the risk and nevertheless takes a chance on avoiding disaster and so kills, is prima facie deserving a severe punishment. In our view such punishment should in many cases involve immediate loss of liberty."

His Lordship went on to identify a list of aggravating and mitigating factors for the offence. The mitigating factors were:

(i) If the offence was caused by "a momentarily reckless error of judgment";

(ii) Good driving record and good character;

(ii) Plea of guilty;

(iv) Genuine remorse or shock, sometimes occasioned by the fact that the victim is a close relative or friend.

Amongst aggravating features, his Lordship identified:

(i) Consumption of alcohol or drugs and the extent thereof;

(ii) Excessive speed particularly in competitive driving against another vehicle and showing off;

(iii) Disregard of warnings from passengers;

(iv) "Prolonged, persistent and deliberate course of very bad driving ...a person who over a lengthy stretch of road ignores traffic signals , jumps red lights, passing other vehicles on the wrong side, driving with excessive speed, driving on the pavement and so on";

(v) Other offences committed at the same time, eg driving whilst disqualified;

(vi) Previous convictions for motoring offences;

(vii) Number of people injured or killed;

(viii) Other behaviour at the time of the offence, eg failure to stop or attempts to escape;

(ix) Reckless driving in the course of attempting to avoid detection or apprehension.

His Lordship indicated that whenever such an aggravating feature was present then "a custodial sentence is generally necessary" (260). His Lordship went on to state that the maximum terms of twelve to eighteen months, as then usually imposed by the courts, were too low given the presence of any of the aggravating features identified.

Implicitly, his Lordship was saying that some combination of such aggravating features must have been present in other cases and had not been reflected in the sentences imposed.

In England the offence was further amended by the *Road Traffic Act* 1991. This established a broader offence of "causing death by dangerous driving", replacing the offence of "causing death by reckless driving" and a new offence of "causing death by careless driving when under the influence of drink or drugs". The maximum sentence in respect of each was originally five years imprisonment. However, within a few years the maximum sentence for both offences was increased from five years to ten years.

These legislative changes required a reconsideration of the guideline case of *Boswell*. The opportunity to do so came before the Court of Appeal (Criminal Division) in *Attorney-General's References Nos. 14 and 24 of 1993* (1994) 15 CrAppR (S) 630. Lord Taylor CJ set out the recent legislative history and said:

"These reforms show an intention by Parliament to strengthen the criminal law, to reduce death on the roads by increasing the punishment available to the courts, and by specifically targeting those who cause death while driving with excess alcohol. The five year maximum sentence for causing death by dangerous driving has been doubled. In tandem with that, causing death by the less serious form of culpable driving, characterised as careless, carries the same maximum sentence if coupled with driving whilst unfit through drink or over the limit. The latter offences do not require proof of a cause or connection between the drink and the death." (643)

His Lordship went on to outline the aggravating features set out by Lord Lane CJ in *Boswell* and, referring to the new offence of careless driving rather than dangerous driving, his Lordship said:

"Thus, where a driver is over the limit and kills someone as a result of his careless driving, a prison sentence will ordinarily be appropriate. The length of sentence will of course depend upon the aggravating and mitigating circumstances in a particular case. But especially on the extent of the carelessness and the amount the defendant is over the limit. In an exceptional case, if the alcohol level at the time of the offence is just over the borderline, the carelessness is momentary, and there is strong mitigation, a non-custodial sentence may be possible. But in other cases a prison sentence is required to punish the offender, to deter others from drinking and driving, and to reflect the public's abhorrence of deaths being caused by drivers with excess alcohol." (643)

His Lordship went on to indicate the amendments to the guideline judgment in *Boswell* which were appropriate in the light of developments since that time:

"Since Parliament has thought it right and necessary not merely to increase but to double the maximum sentence for offences under sections 1 and 3A of the 1988 Act (as amended) the guidelines in Boswell need to be reconsidered. Clearly the statements of principle in that case and the examples of aggravating and mitigating circumstances still stand, but at page 260 of the Report, there appears the following statement:

'Drivers who for example in racing on the highways and/or driving with reckless disregard for the safety of others after taking alcohol should understand that in bad cases they will lose their liberty for two years or more.'

In our judgment the phrase 'two years or more' should now read 'upwards of five years' and in the very worst cases, if contested, sentences will be in the higher range of those now permitted by Parliament." (644)

Section 52A of the *Crimes Act*

Legislative development in Australia has been in the same direction as that of England. The considerations which have been taken into account in the development of the English guidelines in this regard, including the list of aggravating and mitigating factors, have also been applied in decisions of this Court.

Prior to 1994, s52A of the *Crimes Act* contained an offence of culpable driving applying to situations where death or grievous bodily harm was occasioned by the impact of a motor vehicle, in circumstances in which the driver was either under the influence of liquor or drugs or travelling at speed or in a dangerous manner. The maximum penalty for the offence occasioning death was five years and for the offence occasioning grievous bodily harm was three years.

A new s52A came into force on 23 December 1994. That provision now relevantly reads:

"52A(1) Dangerous driving occasioning death. A person is guilty of the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:

(a) under the influence of intoxicating liquor or of a drug; or

(b) at a speed dangerous to another person or persons; or

(c) in a manner dangerous to another person or persons.

A person convicted of an offence under this subsection is liable to imprisonment for 10 years.

(2) Aggravated dangerous driving occasioning death. A person is guilty of the offence of aggravated dangerous driving occasioning death if the person commits the offence of dangerous driving occasioning death in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.

(3) Dangerous driving occasioning grievous bodily harm. A person is guilty of the offence of dangerous driving occasioning grievous bodily harm if the vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle:

(a) under the influence of intoxicating liquor or of a drug; or

(b) at a speed dangerous to another person or persons; or

(c) in a manner dangerous to another person or persons.

A person convicted of an offence under this subsection is liable to imprisonment for 7 years.

(4) Aggravated dangerous driving occasioning grievous bodily harm. A person is guilty of the offence of aggravated dangerous driving occasioning grievous bodily harm if the person commits the offence of dangerous driving occasioning grievous bodily harm in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 11 years.

...

(7) Circumstances of aggravation. In this section, 'circumstances of aggravation' means any circumstances at the time of the impact occasioning death or grievous bodily harm in which:

(a) the prescribed concentration of alcohol was present in the accused's blood; or

(b) The accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road; or

(c) the accused was driving the vehicle to escape pursuit by a police officer; or

(d) the accused's ability to drive was very substantially impaired by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).

(8) Defences. It is a defence to any charge under this section if the death or grievous bodily harm occasioned by the impact was not in any way attributable (as relevant):

(a) to the fact that the person charged was under the influence of intoxicating liquor or of a drug or a combination of drugs; or

(b) to the speed at which the vehicle was driven; or

(c) to the manner in which the vehicle was driven."

The new s52A redefined the offences and increased the maximum penalty for driving occasioning death to ten years, or fourteen in circumstances of aggravation, and in the case of grievous bodily harm increased the penalty to seven years, or eleven years in the case of circumstances of aggravation. Four categories of offence are thus created.

The new s52A arose from a report of the Parliamentary Staysafe Committee which was requested by the Attorney General to review the offences. The report was tabled in Parliament in March 1994 (*Staysafe No 25*, March 1994). This Court had also indicated the need for increased maximum penalties. (*Heinrich* (1992) 61 ACrimR 212, 220; *Garlick* (1994) 73 ACrimR 433, 439-440).

When introducing the amending legislation the Attorney General said:

"...it is clear that one of the major problems with the legislation as it presently stands is that it fails to act as a strong deterrent. Almost every day there are reports in the media of yet another death on the road arising out of the actions of a driver who is either under the influence of alcohol and/or driving in a manner or at a speed which is dangerous to other persons.

In many cases the drivers and those killed or injured are young people or children. This is a senseless waste of young lives. The Government is of the view that there is a need to send a strong message to the community that dangerous driving, wherever it occurs, will not be tolerated."

The Attorney General went on to note that the increase in penalties was designed to more accurately reflect the seriousness of the offence with a view to convictions acting as a "strong deterrent". The Attorney concluded:

"The Government is sending a message to the community and to the courts that dangerous driving which kills or maims will be severely punished wherever and whenever it occurs." (Hansard NSW Legislative Council 27 October 1994 pp4793-4794)

The level of community concern about the conduct proscribed by s52A, as reflected in this substantial increase in the maximum penalties, must be reflected in the sentences which trial courts impose. The concerns manifested by Parliament in this way, must be given effect to by the Courts.

The approach to sentencing for offences under s52A, which has been developed in a line of decisions in this Court, was summarised by Hunt CJ at CL in *Musumeci* (NSWCCA 30 October 1997) which, in many respects is a guideline judgment, although not called such. Omitting his Honour's detailed references, he said:

"This Court has held that a number of considerations which had to be taken into account when sentencing for culpable driving must also be taken into account when sentencing for this new offence of dangerous driving:

1. The Legislature has always placed a premium upon human life, and the taking of a human life by driving a motor vehicle dangerously is to be regarded as a crime of some seriousness.

2. The real substance of the offence is not just the dangerous driving; it is the dangerous driving in association with the taking of a human life.

3. Such is the need for public deterrence in this type of case, the youth of any offender is given less weight as a subjective matter than in other types of cases.

4. The courts must tread warily in showing leniency for good character in such cases.

5. So far as youthful offenders of good character who are guilty of dangerous driving, therefore, the sentence must be seen to have a reasonable proportionality to the objective circumstances of the crime, and persuasive subjective circumstances must not lead to inadequate weight being given to those objective circumstances.

6. Periodic detention has a strong element of leniency built into it and, as presently administered, it is usually no more punitive than a community service order.

7. The statement made by this Court in relation to the previous offence of culpable driving - that it cannot be said that a full time custodial sentence is required in every case - continues to apply in relation to the new offence of dangerous driving. As that offence is committed even though the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence (although that does not mean that a non-custodial sentence is ordinarily appropriate in such a case), but the case in which a sentence other than one involving full time custody is appropriate must be rarer for this new offence."

Although said in the context of dangerous driving causing death, his Honour's comments can be readily adapted to the cognate offence of dangerous driving causing grievous bodily harm.

His Honour's reference to the need for public deterrence under point 3, reflects his Honour's own earlier expressed view, with regard to the former s52A:

"[I]t is important that such sentences should act as a public deterrent in relation to such culpable driving." *(Speer* NSWCCA 11 December 1990; *Manwarring* NSWCCA 13 April 1994; *Slattery* (1996) 40 ACrimR 519, 523).

His Honour had also said in the context of the former s52A:

"The variety of circumstances which give rise to a conviction for culpable driving is so great that there is no normal range of penalties; so that guidance cannot be given specifically as to just when a full time custodial sentence is required." (*Hallocoglu* (1991) 29 NSWLR 67, 77; 63 ACrimR 287, 296).

I agree with his Honour that it is very difficult to assess the degree of culpability in dangerous driving cases because of the wide range of behaviour which may constitute the offence. Furthermore, absent a defence under s52(8) that the injury was not "in any way attributable" to the dangerous elements of speed, alcohol, etc, a guilty plea or verdict does not establish a clear causal link between that element and the death or injury. Rather, such is presumed.

However, in another case his Honour also said, about the new s52A:

"The action of the legislature in almost tripling the maximum sentence for a particular type of offence must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the legislature that the existing sentencing patterns are to move in a sharply upward manner." (Slattery supra 524).

Despite clear indications from this Court concerning the seriousness of this offence, there has been a continued flow of, almost invariably successful, Crown appeals from sentences for offences under s52A. (*Savka* (1996) 88 ACrimR 393; *Slattery* supra; *Sellers* (1997) 92 ACrimR 381; *Smith* (1997) 95 ACrimR 373; *Tapfield* NSWCCA 30 July 1997;

Musumeci supra; *Milsom* NSWCCA 10 December 1997; *Kalanj* NSWCCA 18 December 1997; *Lambrinos* NSWCCA 17 July 1998; Black NSWCCA 23 July 1998; Byrne NSWCCA 5 August 1988; *Thackray* NSWCCA 17 August 1998.

Statistics are kept by the Judicial Commission of New South Wales with respect to offences. In the case of the former s52A, where the maximum penalty was five years if death resulted and three years for grievous bodily harm, the statistics record 361 cases of death and 220 cases of grievous bodily harm over the period 1990 to May 1998. Only 81 of the 361 cases involving death resulted in a full time imprisonment and a further 78 cases involved periodic detention. Of the 81 cases of imprisonment, 59 involved a sentence of two years or less and all but three were less than two and a half years, being half the maximum. Of the 220 cases involving grievous bodily harm, only 24 involved a sentence of full time imprisonment and 22 involved periodic detention. Of the 24 cases in which imprisonment was ordered, 16 were for a period of eighteen months or less, being half the then maximum.

It appears that patterns of sentencing under the former s52A did not reflect the seriousness with which the community regarded the offences. Further, whilst the degree to which heavy sentences result in general deterrence is not easy to establish, it does not appear that the objective of such deterrence was adequately reflected in the sentences issued.

This Court has made clear in the authorities summarised in *Musumeci* supra and in *Slattery* supra, that a sharp upward movement in penalty is appropriate for the new s52A. The Judicial Commission statistics are not as comprehensive as is desirable to fully assess the response to the new level of penalty. Such indications as exist, however, do not suggest that the response of trial judges has fully reflected these considerations, as the number of successful Crown appeals against sentence itself attests.

The only category in which there are a reasonable number of cases in the data base involves a contravention of s52A(1)(c): dangerous driving occasioning death by driving in a dangerous manner. Of the 45 cases under this new provision, only 15 have resulted in a sentence of full time imprisonment and another 11 involve periodic detention. Of the 15 cases of imprisonment, all but one involved a full term of five years or less, being half the maximum. Indeed, 10 of the 15 were for three years or less and 9 of the 15 had minimum or fixed terms of only twelve months.

Separate statistics do not exist for 52A(1)(b) - dangerous driving causing death involving speed. In the case of 52A(1)(a) - dangerous driving causing death involving drugs or alcohol - the statistics have only recorded 7 cases, all of which resulted in imprisonment. This is a very small sample. Although little weight can be attributed to the figure, all cases were for five years or less, being half the maximum term.

In the case of s52A(3)(a) - dangerous driving occasioning grievous bodily harm under the influence - only 6 cases are recorded, of which 3 led to full time imprisonment, all for three and a half years or less being half the maximum. For s52A(3)(c) - grievous bodily harm occasioned by dangerous driving - there are 16 cases, 7 resulted in imprisonment, all but one of which was for three years or less. Again there are no statistics for s52A(3)(b) i.e. the offence involving speed.

There have been 14 cases of the aggravated offence of causing death under s52A(2), for which the maximum penalty is fourteen years. All resulted in imprisonment, with full terms in 8 of the 14 cases being four years or less, 4 at five years and 2 at six years. None reached seven years, half the maximum.

In the case of the aggravated offence of occasioning grievous bodily harm under s52A(4), there were 18 cases of which 14 resulted in full time imprisonment. Of those 14 cases, 9 involved sentences of three years or less and all were five years or less, against a maximum of eleven years.

The statistics for the new s52A must be treated with some caution. In the case of the offences involving death, it is likely that the Crown will have pursued a case of manslaughter in the worst cases. In all but one category, the total number of cases recorded is small.

Nevertheless such impression as one does glean is that the pattern of inadequacy that appears to have existed under the former s52A, has not changed to any appreciable degree.

Notwithstanding the reasoning of Hunt CJ at CL in *Hallocoglu* that there is no "normal range of penalties" for this offence, some further guidance from this Court is needed. This is an appropriate situation in which to promulgate a guideline judgment of the character developed by the English Court of Appeal.

The nature of the offence is not such that the Court can devise a simple table in which indicative penalties are linked to a quantitative measure of the offence. English guideline judgments have been of that character in appropriate circumstances: theft, by value of property (*Clark* [1997] EWCA Crim 3081; (1998) CrimLR 227); possession of various quantities of a particular drug (*Wijs* (1998) CrimLR 587); fraudulent evasion of tax, by amount evaded (*Dosanjh* (1998) CrimLR 593); importation of particular drugs, by quantity (*Aramah* (1982) 4 CrAppR(S) 407). What can be done, however, in case of an offence covering a wide range of conduct which varies qualitatively rather than quantitatively, is to indicate in a general way the kind of case which would usually require a particular kind or level of sentence, whilst acknowledging that there will always be exceptional cases.

The list of mitigating and aggravating factors, conveniently collected by Lord Lane CJ in *Boswell* and quoted above, are reflected in the judgments of this Court to which I have made reference. The presence or absence of these factors - and their degree - will determine the appropriate penalty. A survey of the authorities indicates that the following factors arise:-

(i) Extent and nature of the injuries inflicted.

(ii) Number of people put at risk.

(iii) Degree of speed.

(iv) Degree of intoxication or of substance abuse.

(v) Erratic driving.

(vi) Competitive driving or showing off.

(vii) Length of the journey during which others were exposed to

risk.

(viii) Ignoring of warnings.

(ix) Escaping police pursuit.

A number of these factors are reflected in the definition of "circumstances of aggravation" in s52A(7), for purposes of the two higher offences.

Paras (i) and (ii) focus on the occurrence, whereas paras (iii) to (ix) refer to the conduct of the offender. The presence of these latter factors may indicate that the offender has abandoned responsibility for his or her own conduct. When the presence of such a factor can be so described, then it can be said to be present to a material degree for purposes of determining an appropriate sentence.

In my opinion this Court should promulgate the following guidelines:

1 A non-custodial sentence for an offence against s52A should be exceptional and almost invariably confined to cases involving momentary inattention or misjudgment.

2 With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed term) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.

I realise that the formulation I propose - does the relevant aggravating factor manifest, in the circumstances of the case, that the offender has abandoned responsibility for his or her own conduct - introduces an element of judgment on which reasonable minds may differ. Nevertheless the formulation of the issue in such a way will serve the objective of consistency of sentencing with respect to conduct that the community has indicated plainly that it wishes to deter and condemn.

The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence. This is also the approach in the English guideline judgment on rape (*Billam* (1986) 6 CrAppR(S) 48; (1986) 82 CrAppR 347; [1986] 1 WLR 369).

The Appropriate Order in this Case

Sully J finds that her Honour's reasoning discloses an error of principle. I do not agree that this is so. I do not understand that her Honour formed a view about home detention before imposing a sentence of imprisonment. Further, I should indicate that her Honour was obliged to follow the majority reasoning in *Smith* to which she referred.

I do, however, agree with the alternative basis on which Sully J has reached his conclusion. The sentence imposed by her Honour, in terms of length of term, was so inadequate as to manifest appellable error. Although I do not agree that a sentence of four to four and a half years would have been appropriate - and I note his Honour only says that this would not have been appellably severe - I agree with Sully J's analysis of what is appropriate to be done now. In the particular circumstances of this case, I agree with the orders his Honour proposes.

Sully J has referred to the principle of "double jeopardy" in the case of successful Crown appeals. There is a long line of authority which requires courts of criminal appeal to be conscious of the additional distress caused to an offender when a sentence passed some time before is increased. The terminology comes from analogy with the double jeopardy involved in a second prosecution after acquittal:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v United States (1957) 455 US 184, 187-188, quoted with approval in *Pearce* (1998) HCA 57 para 10 per McHugh, Hayne and Callinan JJ.

The application of this principle to Crown appeals against sentence is well established, although its incidents have not been authoritatively articulated. This is not the case in which to explore the limits of its application.

The relevant limit for present purposes is as stated by Gleeson CJ:

"... when re-sentencing a respondent on a successful Crown appeal this Court gives weight to the circumstances of double jeopardy involved in a Crown appeal by imposing a sentence that is the least sentence that could properly have been imposed upon the respondent at first instance." Rose (Mark Anthony) NSWCCA 23 May 1996, 3.

The evidence before the Court established that the respondent had abandoned responsibility for his own conduct. The effect on his driving ability of his ingestion of cocaine was plainly material. Although, he did suffer some head injuries, his conduct immediately after the accident was almost euphoric. His appearance also plainly indicated that the effect of the drug on him was substantial. The relevant aggravating factor was present to a material degree.

In my opinion, the "least sentence" in the present case was two years. That is the total sentence which Sully J proposes.

Her Honour found "special circumstances" to exist which justified a longer additional term. On appeal the element of double jeopardy, particularly as judgment is to be delivered almost at the expiry of the original minimum term, is also a "special circumstance". I agree with his Honour's proposed minimum and additional terms. I agree with the orders proposed by Sully J.

The particular circumstances of this case and the principle of double jeopardy result in this particular offender receiving a penalty of lower severity than should have been imposed at trial. This has, to a certain extent, become a test case. The important thing is to ensure that trial courts consistently impose sentences which will serve as a significant general deterrent to such conduct. That is the objective of the promulgation of the above guidelines.

_____

IN THE COURT OF

CRIMINAL APPEAL

60131/98

SPIGELMAN CJ

WOOD CJ at CL

SULLY J

JAMES J

ADAMS J

MONDAY 12th OCTOBER 1998

REGINA v Christopher John JURISIC

JUDGMENT

WOOD CJ at CL: I have read in draft the judgments of Spigelman CJ and Sully J. I agree with the reasons appearing in the judgment of Spigelman CJ, for allowing this appeal, and generally with those appearing in the judgment of Sully J. I do not consider it necessary to determine whether the learned sentencing Judge fell into the error of principle identified by Sully J, in relation to the way she went about determining the sentence to be imposed. I am satisfied, having regard to the facts, that the case was one calling for a sentence in excess of that for which an order for home detention was available, and that appellable error was shown in the imposition of a sentence that was manifestly lenient.

I also express my entire agreement with Spigelman CJ, concerning the utility of, and justification for, the identification by this Court of judgments which it considers might stand as guideline judgments. The Court has, in the many instances identified and in several other areas, over the years endeavoured to lay down sentencing principles for

particular classes of case where sentences reflecting a significant element of general deterrence are required, or where non custodial options are inappropriate. It appears that sometimes these principles are lost or that their significance is overlooked, in the volume of appellate decisions handed down and in the pressures imposed on trial Courts to dispose of increasingly busy criminal lists.

By tagging selected decisions as guideline judgments, the Court is not to be taken as usurping the function of the legislature, or as inappropriately intruding into the exercise of the sentencing discretion reserved to trial Judges. Rather, what is intended is for the Court of Criminal Appeal to highlight the sentencing principles which fall for it to determine, in a way that might assist trial judges, the DPP and trial Counsel, and reduce the occasion for that degree of inconsistency or departure from principle that is an indicator of injustice.

I agree with the orders proposed by Sully J, and with the reasons why the discretion relevant for a Crown appeal against sentence ought not to be exercised in the respondent's favour, in this case.

IN THE COURT OF

CRIMINAL APPEAL

60131/98

SPIGELMAN CJ

WOOD CJ at CL

SULLY J

JAMES J

ADAMS J

Monday 12 October 1998

REGINA v Christopher Tom JURISIC

JUDGMENT

Introduction

SULLY J: On 16 September 1997 Mr. Christopher Tom Jurisic, ["the respondent"], pleaded guilty in the Local Court at North Sydney to three charges of dangerous driving occasioning grievous bodily harm. Upon those pleas, the respondent was committed, pursuant to s.51A of the **Justices Act 1902 (NSW)**, for sentence to the District Court. The respondent appeared on 5 December 1997 in the District Court and before her Honour Judge Tupman. The respondent adhered to his pleas of guilty, and her Honour sentenced him accordingly.

Each of the three offences charged against the respondent contravened s.52A(3)(a) of the **Crimes Act 1900 (NSW)**. Any such contravention is punishable by a statutory maximum penalty of imprisonment for 7 years. The offence entails, as well, and by reason of s.10A(2)(c) of the M**otor Traffic Act 1909 (NSW)** an automatic disqualification, for a period of 3 years, from holding a driver's licence. A Court of competent jurisdiction may by order reduce that automatic period of disqualification.

The victims of the offences were three members of one family. One victim was the father of the family, Mr. James Gough Murphy. The other two victims were children of Mr. Murphy and his wife: they were named Anna Jane Murphy and Clare Louise Murphy.

On 5 December 1997 her Honour received evidence, and heard submissions, on sentence. Her Honour, as to the offence concerning Mr. James Murphy as victim, formally convicted the respondent, sentenced him to imprisonment for 18 months; apportioned that term of imprisonment between a minimum term of 9 months and an additional term of 9 months; and made an order, pursuant to s.9 of the **Home Detention Act 1996 (NSW)** for the assessment of the respondent as to his suitability to serve his sentence of imprisonment in home detention.

In due course, the respondent was assessed by the relevant authorities as suitable for home detention. Accordingly, and on 28 December 1997, her Honour formally sentenced the respondent, in connection with the offence of which Mr. Murphy was the victim, to imprisonment for 18 months, to comprise a minimum term of 9 months commencing on 28 January 1998 and expiring on 27 October 1998 and to be served by way of home detention; and an additional term of 9 months to commence on 28 October 1998 and to expire on 27 July 1999, and to be served by way of home detention. Her Honour disqualified the respondent from holding a driver's licence for a period of 1 year from 28 January 1998.

In connection with the other two offences charged against the respondent, her Honour deferred sentence in each case on condition that the respondent enter a recognisance, himself in the sum of $1,000, to be of good behaviour for a period of 2 years and to accept the supervision of the Probation and Parole Service. These orders were made pursuant to s.558 of the **Crimes Act 1900 (NSW)**.

On 23 March 1998 the Director of Public Prosecutions gave notice of appeal on the grounds that the sentences thus imposed by her Honour in respect of the three matters with which her Honour was dealing, were inadequate.

The appeal came on originally for hearing on 15 July 1998. The Court, as then constituted, was of the opinion that the appeal raised matters of significant public importance with regard to the proper construction and application of the **Home Detention Act 1996 (NSW)**; and the appeal was adjourned, accordingly, so that a Bench of five Judges could be constituted for the purpose of hearing it. In due course, the Court as now constituted was convened; and the appeal was heard before that reconstituted Bench on 12 August 1998.

At the hearing of that appeal, two preliminary points arose: *first*, whether the Notice of Appeal, grounded as it was in s.5D of the **Criminal Appeal Act 1912 (NSW)**, was competent to put in issue before the Court the order made by Judge Tupman for the service by way of home detention of the sentence of imprisonment imposed by her Honour upon the respondent; and *secondly*, whether there had been an unconscionable delay in the bringing by the Director of Public Prosecutions of the appeal.

As to the first point, s.5D of the **Criminal Appeal Act 1912 (NSW)** enables a Crown appeal to this Court "against any sentence pronounced by the Court of trial in any proceedings to which the Crown was a party". This reference to the Crown is sufficient to embrace the Director of Public Prosecutions: see s.5D(2). A "sentence" is defined by s.2(1) of the **Criminal Appeal Act** as including "any order made by the court of trial on conviction with reference to the person convicted". This is, in my opinion, sufficient o encompass an order for the service by home detention of a sentence of imprisonment.

As to the second point, the relevant principles are stated succinctly, and sufficiently for present purposes, in the judgment of Hunt CJ at CL in **Reg. v. Hallocoglu** (1991) 29 NSWLR 67 at 79G-80E. The relevant facts are that the sentence proceedings before Judge Tupman concluded on 28 January 1998; the Director of Public Prosecutions by letter dated 10 February 1998 informed the respondent of the possibility of an appeal upon the basis that the sentences were inadequate; on 23 March 1998 a Notice of Appeal was filed; and the notice was served not specifically advised to this Court but described at the hearing, and by counsel for the respondent, as having been "shortly after the appeal had in fact been lodged".

In my opinion, the application of the foregoing principles to the foregoing facts does not suggest that the present appeal should be dismissed by reason of unconscionable delay in its institution.

Facts

The relevant objective facts can be extracted as follows from the written submissions put in by the Crown in connection with the present appeal. It is conceded by the respondent that the Crown summary is accurate.

"At about 2.00 pm on Saturday 18 January 1997, the respondent was driving a dark blue Mercedes sedan registered number AEI-01A in a northerly direction along the Warringah Freeway at Naremburn. The freeway is a major artery linking the northern suburbs to the city of Sydney and south via the Sydney Harbour Bridge. At Naremburn it carried 6 lanes north bound and 6 lanes south bound. The southern boundary of the northbound lanes is curbed and guttered. Beyond the kerb is a grass verge about 5 metres wide bounded by a high rock wall. At about 2.00 pm, the traffic flow was heavy in both the north bound and south bound lanes but was moving steadily. An 80 kilometre per hour speed restriction applied.

The respondent's vehicle left the northbound roadway and mounted the kerb on the western side of the roadway. It then travelled about 30 metres across and along the nature strip before the passenger side of the vehicle side swiped the rock wall. The vehicle then continued for a further 30 metres along the nature strip before returning to the roadway. It travelled in an arc and crossed the six north bound lanes of the freeway. It then crossed the concrete median strip before continuing across two south bound lanes. Upon entering lane four south bound the passenger side of the respondent's vehicle collided with the front and driver's side of a Ford sedan registered number THV-599 travelling south.

The Ford sedan was being driven by James Murphy. His wife, Jane, was seated in the front passenger seat and his children, Robert, Claire and Anna aged 8, 8 and 6 respectively, were seated in the rear of the vehicle. After the impact both vehicles continued south for a short distance before coming to rest in lanes 2 and 3 south bound of the freeway. At the time of the accident, Mr. Murphy was wearing a seat belt. The impact caused him to strike his head on the interior of the vehicle and to briefly lose consciousness. He was also winded by the airbag which inflated upon impact. All passengers in Mr. Murphy's vehicle were able to alight from the vehicle. However Mr. Murphy remained trapped in his vehicle for about 10 minutes after the accident. During this time petrol leaked from the Mercedes and Mr. Murphy saw smoke and small flames in the Mercedes, and heard passers by warn others to clear the area, as they believed that the Mercedes vehicle was about to ignite. Mrs. Murphy and the children were then sitting at the side of the road.

Three passers by removed Mr. Murphy from his vehicle and laid him down on the median strip. Shortly afterwards, flames engulfed the Mercedes. The Fire Brigade quickly brought the fire under control.

At the time of the collision the weather was fine and visibility was good. The road was dry.

At the accident scene, the respondent was spoken to by at least three motorists who stopped to assist: Ms Alley, Ms Older and Mr. Tillett.

Ms Alley saw the respondent helped out of his vehicle. She then saw him wander towards the traffic. She moved him off the road and sat him down in the gutter. When she asked "Do you remember what happened?" the respondent said "I was just changing lanes.". The respondent had a cut on his head which was bleeding and a broken left arm. He kept moving his jaw around and was very agitated. He did not appear to comprehend what she was saying to him.

Ms Older saw the respondent get out of his vehicle. He spoke to her. She said: "He looked really strange. His mannerisms were really slow as was his speech. His head was lolling around and his eyes didn't look right, they looked very dopey."

Mr. Tillett also saw the respondent helped out of his vehicle. He approached him and asked if he was okay. The respondent was giggling and said, "Fuck look what's happened". Mr. Tillett observed that the respondent's pupils were very big, he was very agitated and when he was walking around "he was very bouncy".

The respondent was conveyed to the Royal North Shore Hospital by ambulance where he was treated for the laceration to his head and a fractured left arm. He informed medical staff at the hospital that he had used some cocaine prior to the collision. At 3.00 pm a blood sample was taken from the respondent. The sample was analysed and found to contain less than 0.05 mg of cocaine per litre of blood.

The respondent was interviewed by police at the hospital. He stated that he recalled travelling through the city and going over the Harbour Bridge. He stated that he could not recall the events leading up to the collision. He declined to be interviewed further upon legal advice.

Judith Perl, a pharmacologist employed in the Clinical Forensic Unit of the NSW Police Service for 13 years, expressed the opinion that at the time of driving the respondent would have most likely been under the influence of cocaine to the extent that his driving ability would have been impaired. Her opinion is based on the blood sample, the statement to medical staff at the hospital and details of the collision provided to her by police. Ms Perl indicated that cocaine is a central nervous system stimulant which impairs driving ability by altering perceptions and judgement and increasing aggressive or risk-taking behaviour during the acute phase of intoxication. Cocaine may also produce hallucinations. Following the stimulation phase, as the blood concentration of the stimulant decreases, there is a reactive drug induced fatigue stage when driving ability is also impaired. During this stage the driver will experience drowsiness, sleepiness and fatigue, a slowing of reactions and impairment of perceptions and judgement.

All five members of the Murphy family were conveyed to Royal North Shore Hospital by ambulance after the accident. Mr. Murphy (aged 37) was treated for the following injuries:

- fracture of the left tibia and fibula

- cervical spine whip lash injury

- laceration to the left knee

- fractured thoracic vertebrae T8 & T10

- fractured ribs

- soft tissue injury on left and right upper arm

Mr. Murphy underwent an operation for his fractured fibula and tibia and spent 14 days in hospital. This was followed by a further operation on 17 April 1997 to remove screws from the upper tibia and an operation on 5 January 1998 to remove the internal pin from his leg.

He was in a plaster half slab for 1-1/2 months and used crutches for a lengthy period. He suffered on-going pain and tenderness to his front/left chest, on-going mid back pain and episodic abdominal pain due to seat-belt bruising. He also suffered loss of movement, in his ankle and toes, loss of sensation in his leg and foot and weakness in the right thumb. He underwent extensive physiotherapy (for at least 10 months after the accident) and was absent from work for more than 60 days. He also required psychological counselling.

Mrs. Jane Murphy initially had difficulty breathing and suffered severe bruising, chest and neck pain. She was treated for a fractured sternum and cervical injuries, and soft tissue injury to her neck and back.

Claire Murphy (aged 8) suffered a lacerated spleen, abdominal pain and tenderness and bruising. She spent 4 days in hospital.

Anna Murphy (aged 6) suffered bruising to her chest and abdomen and two fractures to her right leg. Her leg was put in a plaster cast, then an elasticised bandage (total period of 4 weeks). Anna spent 4 days in hospital. Robert Murphy received soft tissue seat-belt injuries."

The relevant subjective features of the respondent, as thus summarised by the Crown, and as conceded by the respondent to be accurately stated, are:

"The respondent was aged 27 years at the time of the accident. As a result of the fracture to his left arm sustained in the accident, the respondent required surgery in 1998 to remove the metal plate from his arm.

Since leaving school the respondent has been employed in the family curtain making business. At the time of the accident he held the position of production manager. The respondent married on 22 November 1997, and his first child is expected in 1998.

The respondent suffered some form of mild head injury as a result of a skateboard accident when aged about 14 years. The accident caused later amnesic episodes and loss of childhood memories. It probably caused some form of brain damage and resulted in later behavioural and personality changes. The respondent required further medical assessment as he had not at the date of sentence been either tested or assessed.

Prior to the offences, the respondent had four driving-related convictions, two in 1988 and two in 1989. For the first offence, driving in a manner dangerous, the respondent was fined $400 and disqualified from driving for 3 years (until March 1991). For the second offence, driving whilst licence was cancelled, the respondent was fined $300.

In 1989, the respondent was convicted of exceed speed limit, (fined $150) and for driving whilst disqualified; for the latter, he was sentenced to 100 hours community service, fined $500 and disqualified for a further 6 months, (until 15 September 1991).

Between 1985 and 1996 the respondent's record contains 12 entries for excessive speed, one for negligent driving and one for unlicensed driver. On three occasions the respondent's licence was cancelled for demerit points, and on two occasions he was issued with a probationary licence."

The Remarks on Sentence

It is not necessary, for present purposes, to canvass the entirety of the extensive remarks made by her Honour on sentence. There are, however, two particular aspects of those remarks calling for present consideration.

The first of them concerns her Honour's findings of fact as to the causation of the collision in question. The second of them concerns the way in which her Honour approached the operation of the **Home Detention Act**. It will be necessary to return later herein to this latter aspect.

Her Honour discussed at length an assertion made by the respondent that he had, in real terms, no useful recall of relevant events leading up to the collision. Her Honour came to the conclusion, for reasons which she explains clearly in the remarks on sentence, that the respondent should be accepted in what he thus asserted. It was, in my opinion, clearly open to her Honour to take that view of the respondent and of his asserted lack of relevant memory.

Her Honour's own views on the question of causation have to be gleaned from a number of passages in the remarks on sentence. Her Honour's first relevant observations are:

"There is no evidence before me to assist me in determining how this accident occurred, except that, on a subsequent blood sample, it was discovered that there was present in the prisoner's blood 0.05 mg per litre of the drug cocaine.

There is also before me a pharmacologist's report that indicates that such a quantity of this drug would have adversely impacted on the prisoner's ability to drive, either as a result of increasing aggressive or risk-taking behaviour or alternatively, at a later stage of intoxication by the drug, inducing drowsiness, sleepiness, fatigue and impairment of perceptions, judgment and slowing of reaction time.

.....

I accept, by the stage that the prisoner crossed the median strip and drove on to the south bound lanes, that he had lost the ability to control the motor vehicle for some reason or other, which the evidence does not enable me to understand, except to the extent that it was contributed to by the cocaine in his blood."

Her Honour then discussed at length the respondent's assertion that he had no, or almost no, relevant recall; explained why she was disposed to accept the respondent in that regard; and continued:

"However, I also take into account the fact that there is evidence before me that at the scene of the accident, or shortly afterwards, to hospital or ambulance staff, the prisoner admitted to having used some cocaine prior to the accident and whilst there is little more detail before me than that, I accept that this admission, at least at the time, amounted to an admission that he had used cocaine at a relevant time, that is sufficiently close to the accident so that it would show up in his blood stream on a blood sample taken in the afternoon of 18 January 1997."

Her Honour went on to make some further brief remarks about the prisoner's lack of any useful recall; indicated that she drew no adverse conclusion as to remorse or contrition on the part of the respondent; and continued:

"I do accept, however, that he had used cocaine, either that day or sufficiently close to the time of the accident so that such a finding was able to be made on a blood sample and that in fact it adversely affected his ability to drive on that day."

I have thought it fair to the learned sentencing Judge to refer in some detail to the process of her Honour's reasoning on the question of causation. In my own opinion, however, it is unnecessary to travel in that regard beyond the combined effect of the provisions, of s.52A(3) of the **Crimes Act 1900 (NSW)**; of the precise terms of the charges as preferred against the respondent; and of the respondent's plea of guilty to each such charge. The pleas, it is trite to observe, admitted every material ingredient of the offences charged. One such material ingredient was that of driving the relevant motor vehicle under the influence of a drug. Had the grievous bodily harm occasioned by the impact not been "in any way attributable" to the respondent's having driven the relevant motor vehicle while under the influence of a drug, then the respondent would have had a defence pursuant to s.52A(8). No attempt was made to raise any such defence; and that consideration reinforces the proposition that the grievous bodily harm charged in each of the three offences here relevant, was in fact attributable to the respondent's having driven his motor vehicle while under the influence of a drug.

Once that point is reached, then it follows, in my opinion, that the objective facts here relevant point to the commission of three connected offences, none of which could possibly be described as minor, and each one of which exposed the respondent to imprisonment for a maximum of 7 years. The correct construction, and the dutiful application, of s.52A(3), as variously constituted Benches of this Court have constantly and consistently re-affirmed, called, in my opinion, for the imposition of a full-time custodial sentence of some real substance.

It was, of course, the case that there were significant subjective matters that called for consideration. It will be necessary to say something more in that regard in the concluding section of the present judgment. It is necessary, however, first to deal with the questions of policy, of principle and of practice that arise in cases of the present kind and by reason of the **Home Detention Act 1996 (NSW)**.

The Legislative Background of the Home Detention Act

In my opinion, ss 33, 34(1), 34(2)(f), and 34(3) of the **Interpretation Act 1987 (NSW)** make it permissible to have regard, for present purposes, to the sponsoring Ministerial speeches upon the second reading of the Bill for the **Home Detention Act** when the same received its second reading in the Legislative Assembly and in the Legislative Council.

The Bill received its second reading in the Legislative Assembly on 20 June 1996. The sponsoring Minister was the Minister for Corrective Services. The Minister outlined at the commencement of his speech, and as follows, the underlying policy of the legislation:

"A key commitment in Labor's Corrections policy for the 1995 election was the diversion, wherever possible, of minor offenders from gaol. Labor recognised that imprisonment is an expensive and highly punitive sentencing option. There is clear consensus in the community that full-time imprisonment should be reserved for those who represent a threat to public safety or who have committed crimes meriting the harshest of sanctions. The majority of offenders are not in this category and are far better dealt with through various community-based options. The **Home Detention Bill** is designed to establish home detention as one such sentencing option which is an alternative to full-time imprisonment."

The Minister continued:

"Home detention has been proven overseas and in Australian trials to be a humane and relatively low-cost custodial option. Particular categories of vulnerable offender can be given a last chance to avoid the rigours of full-time imprisonment without compromising community safety or the deterrent aims of the sentence. Home detention is not a soft option. It places severe constraints on the liberty of offenders by subjecting them to intensive supervision and electronic surveillance. It means offenders who pose little threat of violence can be held in the community at a cost well below that of imprisonment."

The Minister then proceeded to summarise the principal provisions of the Bill. Speaking of the regime of monitoring which is fundamental to the operation of the scheme envisaged by the legislation, the Minister said this:

"The offender will be able to leave the home for purposes approved by the supervisor.

Circumstances which would be approved for absence from home would include continuation of employment, seeking employment, attendance at a rehabilitation course, visits to a doctor and undertaking community work. The times for such absences from the home would be specified by the supervisor. As with inmate classification, home detention provides opportunities to achieve staged reduction in the stringency of security measures and commensurate increases in privileges as an incentive for a positive response to the program."

The Bill had its second reading in the Legislative Council on 15 October 1996, the sponsoring Minister being the Attorney-General. As I read the relevant Hansard, the Attorney-General tabled a written speech to be incorporated, by leave of the House, in Hansard. The incorporated speech of the Attorney-General is not quite identical with the speech of the Minister for Corrective Services; but it is almost identical. There are two particular differences which might be of present significance: *first*, the Attorney-General's speech does not refer in terms to a policy, to be expressed in the form of legislative provision for home detention, of diverting "minor offenders" from gaol; and, *secondly*, the Attorney-General's speech includes this proposition:

"As a home detention order will be imposed by a court, there will be no erosion of the principle of 'truth-in-sentencing'."

The concept of "truth-in-sentencing" is, of course, now well established in the law of this State. It has its origin, at least in terms of specific legislative expression, in s.3 of the **Sentencing Act 1989 (NSW)**. It is there provided as follows:

"3. The objects of this Act are: (a) to promote truth in sentencing by requiring convicted offenders to serve in prison (without any reduction) the minimum or fixed term of imprisonment set by the court; and (b) to provide that prisoners who have served their minimum terms of imprisonment may be considered for release on parole for the residue of their sentences."

It is, perhaps, timely to observe that the concept of "truth-in-sentencing", correctly understood in the light of the foregoing statutory provisions, does not focus, as a matter of mere formality, upon the imposition of a sentence of imprisonment by a Court, - (which is to say, by a real and constitutionally independent Judge sitting in a real Court), - rather than by some other administrative body or official. The concept focuses, rather, upon the importantly different proposition that a sentence of imprisonment, lawfully imposed by such a Judge sitting in such a Court, is to take effect according to its tenor and without supervening administrative interference taking place without the knowledge, let alone the knowledge and approval, of the sentencing Judge.

What has just been said does not involve some trifling semantic quibble, or some exaggerated judicial or curial *amour propre*. What is involved can be seen by developments in the extra-curial administration of the scheme of periodic detention that was established by the **Periodic Detention of Prisoners Act 1981 (NSW)**. That statutory scheme, as progressively corrupted administratively, was examined in close detail by this Court in the decision earlier herein cited, of **Hallocoglu**. Hunt CJ at CL, (Grove and Sharpe JJ agreeing), had this to say:

"The Crown's submission that the punitive effect of periodic detention has now been substantially reduced is clearly correct - to a startling degree. In what would appear to be the usual case, a prisoner ordered by a court to serve his sentence by way of periodic detention in fact serves only one-third of his sentence in periodic detention; the remainder of his sentence is no more punitive than a community service order.

To say that this change to the periodic detention scheme is surprising is to express my reaction in mild terms There appears to be no legislative warrant for the change but legality of the departmental policy is not in issue in this appeal. I am unaware of any warning communicated to the courts that the nature of periodic detention was to be, or has been, changed administratively to such an extraordinary extent. It is important that the changed consequences of an order that a sentence be served by way of periodic detention should now be brought to the attention of all criminal courts in this State." (29 NSWLR, 74G-75A)

I think it expedient to make all of the foregoing points because it seems to me to be clear that the new scheme of home detention is intended to entail, among other things, "opportunities to achieve staged reduction in the stringency of security measures and commensurate increases in privileges as an incentive for a positive response to the program", such opportunities requiring neither the prior knowledge nor the prior approval of the sentencing Court. In my opinion, this Court should do in respect of home detention orders, what Hunt CJ at CL felt constrained to in the cognate field of periodic detention orders, and place on record a clear warning to the sentencing Courts of this State, that any home detention order should be made in the clear understanding that it is entirely possible that supervening administrative action, taken without the knowledge or approval of the sentencing Court, might well entail, in a particular case, that the burden of the order, as contemplated by the sentencing Court, is significantly reduced.

The Structure of the Act

The objects of the Act are stated specifically, and in s.4, as follows:

"(1) The objects of this Act are to provide for home detention as a means of serving a sentence of full-time imprisonment, and to that end:

(a) to define the class of sentences of imprisonment that may be served by way of home detention, and the class of offenders who are eligible to serve a sentence in that way, and

(b) to provide for due assessment of eligible offenders so as to determine their suitability, and the suitability of their circumstances, to serve a term of imprisonment by way of home detention, and

(c) to provide for the making and revocation of home detention orders and for the imposition of conditions applicable to home detention:

(i) specifying periods of confinement and the circumstances in which the offender may be absent from home, and

(ii) regulating the conduct of the offender while subject to home detention and providing for the monitoring of that conduct, and

(iii) generally defining the constraints and privileges pertaining to home detention.

(2) It is not the object of this Act to divert to home detention offenders who might be appropriately dealt with by way of periodic detention or by a non-custodial form of sentence."

Section 5 of the Act defines the sentence that may be the subject of a home detention order. The basic provision in that regard is made by ss (1) of s(5), which sub-section is in the following terms:

"(1) A home detention order may be made in respect of a sentence of imprisonment comprising:

(a) a fixed term of imprisonment not exceeding 18 months, or

(b) a minimum and an additional term that do not in the aggregate exceed 18 months."

Sub-sections (2) and (3) make certain ancillary provisions, the fine detail of which is not now relevant.

Sections 6, 7 and 8 provide for certain criteria, the existence of any one or more of which precludes the availability of a home detention order. The only portions of those sections that need to be reproduced for present purposes are ss (4) and (5) of s 8, which sub-sections provide as follows:

"(4) A home detention order must not be made unless the offender has been assessed under section 10 and the relevant assessment report recommends that the sentence might be appropriately served by way of home detention.

(5) A court may, for reasons appearing to it to be sufficient, decline to make a home detention order despite the contents of the assessment report."

Sections 9 and 10 of the Act deal with the assessment of applicants for home detention orders. For present purposes, it is necessary to refer only to ss (2) and (3) of s 9, which sub-sections provide as follows:

"(2) When a court refers an offender for assessment under this section, the referral stays the execution of the sentence until it is decided whether a home detention order is to be made, and the court may defer compliance with section 8 of the **Sentencing Act 1989** until such a decision is made.

(3) When execution of a sentence is stayed under this section:

(a) the sentence does not commence to run until the stay expires as provided by section 11, and

(b) for the term of the stay the offender may be remanded in custody or granted bail in accordance with the provisions of the **Bail Act 1978**."

Section 11 of the Act completes the group of provisions dealing with the formalities necessary to the making of a lawful home detention order. Section 11 is of present significance, and it is desirable to quote it in full:

"(1) A court that has sentenced an offender may by order direct that the minimum term of the sentence concerned (or, in the case of a fixed term sentence, the whole of the fixed term) be served by way of home detention.

(2) A reference in subsection (1) to a court that has sentenced an offender:

(a) includes a reference to that court even if constituted by another person or other persons, and

(b) in the case of a sentence passed by a Local Court, includes a reference to any Local Court.

(3) A home detention order must not be made:

(a) if the making of the order in the case concerned is prohibited by a provision of this Part, or

(b) if the court is not satisfied, having regard to the contents of the relevant assessment report, that the order is appropriate in the circumstances of the case.

(4) At such time as the court makes or declines to make a home detention order, a stay of execution of sentence under section 9 expires, and in cases where the order is not made, the sentence of imprisonment is to be carried out.

(5) Section 8 of the **Sentencing Act 1989** applies to the carrying out of a sentence as referred to in subsection (4), and the court may, in fixing a commencement date for the relevant term of imprisonment, take into account time spent by the offender on remand pending assessment under section 10."

Part 3 of the Act, comprising sections 12 to 20 both inclusive, deals with the operation of home detention orders. It is relevant for present purposes to note the following provisions of s 13, which deals with the setting of conditions applying to any particular home detention order:

"(1) The following conditions apply to home detention:

(a) conditions prescribed by the regulations as standard conditions of any such order,

(b) additional conditions:

(i) specified by the court on the making of the relevant home detention order, or

(ii) notified by the Board under subsection (3).

(2) Conditions applying to home detention may include conditions relating to the offender's employment while the home detention order is in force and may require the offender to perform community service work while not otherwise employed.

(3) Additional conditions may be revoked or varied, and new conditions may be added by the Board by notice in writing served on the offender concerned.

(4) Subsection (3) does not permit revocation of any standard conditions or conditions imposed by the court, or allow the conditions to be varied so as to be inconsistent with standard conditions or conditions imposed by the court."

The Board to which reference is made in the foregoing quotation is the Parole Board established under the **Sentencing Act 1989 (NSW)**. Specific provision is made in Part 3 for the revocation of any home detention order for breach of any of the conditions attaching to the order. It is to be noted that an application for any such revocation of a home detention order is to be made by the offender's supervising officer and is to be made to the Parole Board. Such a supervising officer will be, always and by reason of the specific terms of section 3 of the Act, "a person employed in the Probation and Parole Service who is designated a supervising officer for the purposes of this Act".

It is not, I think, necessary to canvass the detail of the remaining sections of the Act, namely sections 21 to 28, both inclusive; except to note that section 28 requires a Ministerial review of the Act, and of its operation, "as soon as possible after the period of 18 months from the commencement of section 11". The relevant Minister is required, in addition, to report at least once in each calendar year after the tabling in Parliament of the report deriving from the initial review, "(a) report to both Houses of Parliament on the impact of this Act on families".

Regulations have been made pursuant to the power conferred in that behalf by the Act. Reg. 9 states, as follows, the standard conditions of a home detention order:

"9. For the purposes of section 13(1)(a) of the Act, the following are standard conditions of home detention:

(a) the offender must be of good behaviour and must not commit any new offence,

(b) the offender must advise a supervising officer as soon as possible if arrested or detained by a police officer,

(c) the offender must reside only at premises approved by a supervising officer,

(d) the offender must remain at the approved residence at all times other than when engaged in specified activities approved of or arranged by a supervising officer or when faced with immediate danger (such as in a fire or medical emergency),

(e) the offender must adhere to the specified activity plan during approved absences from the approved residence,

(f) the offender must advise a supervising officer as soon as practicable after departure from the approved residence due to immediate danger,

(g) the offender must accept any visit to the approved residence by a supervising officer at any time,

(h) the offender must submit to searches of places or things under the immediate control of the offender, as required by a supervising officer,

(i) the offender must submit to electronic monitoring (including voice recording) of compliance with the home detention order and comply with all instructions given by a supervising officer in relation to the operation of monitoring systems,

(j) the offender must not tamper with, damage or disable monitoring equipment,

(k) the offender must comply with any direction of the supervising officer in relation to association with specified persons,

(l) the offender must not consume alcohol,

(m) the offender must not use prohibited drugs, obtain drugs unlawfully or abuse drugs lawfully obtained,

(n) the offender must submit, as required by a supervising officer, to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use,

(o) the offender must authorise any medical practitioner, therapist or counsellor to provide information to a supervising officer,

(p) the offender must accept any direction of a supervising officer in relation to the maintenance of or obtaining of employment,

(q) the offender must inform any employer of the home detention order and, if so directed by a supervising officer, of the nature of the offence that occasioned it,

(r) the offender must authorise contact between any employer of the offender and a supervising officer,

(s) the offender must engage in personal development activities or in counselling or treatment programs, as directed by a supervising officer,

(t) the offender must undertake community service work when not otherwise employed (not exceeding 20 hours per week), as directed by a supervising officer,

(u) the offender must not possess or have in his or her control any firearm or other offensive weapon,

(v) the offender must comply with all reasonable directions of a supervising officer."

The Implementation of the Act

Two practical questions arise, namely:

1. Is a sentence of imprisonment with a superadded home detention order properly to be regarded in any assessment of the adequacy of the sentence as being as onerous as, or as being less onerous than, the same sentence of imprisonment that is actually served in prison?

2. How should primary sentencing Judges approach the implementation of the Act?

As to question 1. This question as been considered by three differently constituted Benches of this Court: **Reg v Brendan Kelly Smith** (1997) 95 A Crim R 373; **Reg v Dominic Michael Lambrinos** (unreported: Court of Criminal Appeal: 17 July 1998; and **Reg v Kerry Anne Byrne** (unreported: Court of Criminal Appeal: 5 August 1998. Distinctly different opinions are expressed in various of the judgments in those three cases. It was the existence of such differences of opinion that caused the convening of the present Bench of five Judges.

In **Smith**, the Court was asked to entertain a Crown submission which is summarised as follows in the judgment of Grove J:

"The essence of the Crown submission was that the order for home detention introduced a significant degree of leniency into any sentence imposed and that accordingly that leniency should be taken into account in assessing the adequacy of such sentence. By way of analogy observations by this court that periodic detention has such an element built into it was the subject of reference: **Hallocoglu** (1992) 29 NSWLR 67; 63 A Crim R 287 and the cases referred to therein.

The Crown contended that, although the Home Detention Act was recent legislation and there was no authority directly in point, it was a matter of common sense and logic that in parallel with the reasoning exemplified in **Hallocoglu**, home detention should be assessed as more lenient than full-time incarceration." (95 A Crim R, 376)

Grove J surveyed section 4 of the **Home Detention Act** and the Home Detention Regulations made pursuant to it. His Honour made in that context the following observations which are of present relevance:

"It is noted that the **Periodic Detention of Prisoners Act 1981 (NSW)** contains no declaration of objectives in terms similar to the **Home Detention Act**, being limited to its preamble that it is to make provision for and with respect to periodic detention of certain persons sentenced to imprisonment. Home detention hence is a method by which an already imposed sentence of imprisonment may be served. ..... The structure of the Act makes it a matter for decision after the sentence is imposed whether it will be permitted to be served by way of home detention. .....

It can be observed that pursuant to the home detention regulation, Reg. 9, there are prescribed standard conditions applying to home detention which are restricting upon freedom of movement of the prisoner under sentence upon terms which are comparatively as rigorous as those as would be applied to a prisoner in a minimum security institution who was permitted work or study release privileges." (95 A Crim R, 377)

His Honour expressed his conclusion as follows:

"My conclusion therefore is that an order for home detention is a collateral order to a sentence of imprisonment and accordingly is not a matter to be taken into account by this court in assessing the adequacy of a term of imprisonment imposed in the court from which appeal is brought. That conclusion is, I consider, compatible with the ordinary separation of responsibility (subject to Administrative Law jurisdiction) that it is for the executive to determine how, where and under what conditions a sentence of imprisonment imposed by a court is to be served. The **Home Detention Act** transfers one of the decisions on the aspect of where sentence is to be served to the judicial arm." (95 A Crim R, 377)

Studdert J expressly concurred in the foregoing analysis of the **Home Detention Act**.

Smart J expressed a contrary view. His Honour said:

"The fact that a sentence may be served in different ways or by different means does not result in the sentence being necessarily of the same severity. The means of service are important. I would take them into account in assessing the severity or adequacy of a sentence.
.....

If the judge thinks that home detention could, or would, be appropriate he may refer the offender for an assessment. If he thinks that home detention is inappropriate he would not refer the offender for an assessment. It does not mitigate against my view that the length of the sentence is determined first and then a decision is made as to whether there should be a reference for an assessment as to home detention." (95 A Crim R, 378, 379)

In **Lambrinos**, I made the following observations concerning the **Home Detention Act**:

"....[The Sentencing Judge] ..... built into his final remarks on sentence some comments about the **Home Detention Act**. It is not necessary, I think, to say a great deal in regard to that; but it might be useful to make the following observations in relation to that topic.

There is, as matters stand, a division of opinion in the Court, - I do not mean in this Bench, but in the Court more generally understood, - respecting the extent to which the assessment of the adequacy or otherwise of a sentence may be carried out, taking account of the fact that an order for service of the sentence, or part thereof, in home detention has been made. The first thing that might usefully be said is that on Monday of this week, in the matter of **Jurisic**, a Bench of the Court presided over by his Honour the Chief Justice reserved that point for consideration by a Court of five Judges convened for that purpose; and which, it is proposed, will look at that question in mid-August.

Any reference, therefore, in the cases between now and the decision of such specially constituted Court, of matters arising out of the **Home Detention Act**, should be made in the understanding that it is proposed that such a specially constituted Court will take up the differences of opinion which have emerged with regard to the operation of the Act; and will seek to clarify the correct state of the law in that regard.

The second thing that might usefully be said about the **Home Detention Act** is that, if one looks at the Second Reading Speech of the Minister for Corrective Services when introducing the enabling Bill into the Legislative Assembly, certain things are immediately apparent. One, relevant for present purposes, is that a primary legislative

purpose is to take out of the Corrective Services mainstream what the Minister described to Parliament as "minor offenders". I wish to say that, for my own part, I would not have thought it reasonably possible to fit the present case, on any view of its facts, into a category properly described as a category of "minor offenders".

Since I have thought it proper to say anything about the **Home Detention Act**, I would wish to take the opportunity to say that, for myself, I would agree entirely with the view expressed by his Honour the presiding Judge in the matter of **Smith**. His Honour Mr. Justice Dunford has also expressed views to that effect, in somewhat different terms, but in terms with which , also, I agree."

The other members of the Court, Smart and Ireland JJ, did not comment about the matters of which I thus spoke.

In **Byrne**, the principal judgment of the Court was given by Dunford J. Speaking of the decision in **Smith**, Dunford J said:

"With all respect to the majority, I find myself unable to accept their assessment of home detention. I do not consider that the distinction between periodic detention, where an assessment is done before imposing sentence, and home detention, where the assessment is done afterwards, is significant and I do not regard the analogy drawn between the prescribed standard conditions for home detention in Reg. 9 and the conditions of a prisoner in a minimum security institution permitted work or study release privileges to be apposite. Not only are such prisoners deprived of home comforts and spousal and family company, but they only reach the stage of minimum security with work or study release privileges after a period of less congenial conditions.

In **R. v. Pine:** (unreported - CCA - 4 March 1998) I said,

"For myself, I cannot see how home detention with, inter alia, comfortable accommodation, furniture and fittings, home cooking, the company of spouse and/or family members and a generally unregulated timetable, could be regarded as not more lenient than full-time incarceration in an institution under the administration of the Department of Corrective Services."

In my respectful opinion, the view of Grove and Studdert JJ should not be followed and, even taking into account the respondent's description of home detention quoted above, I would regard a sentence to be served by way of home detention as less onerous than one of full-time custody and, like Smart J in **R v Brendan Smith**, I would take the means of serving the sentence into account in assessing the adequacy of the sentence."

The other two members of the Court, once again Smart and Ireland JJ, delivered simple concurring judgments, making no extended comments about the **Home Detention Act**.

With all proper deference to those of my brethren who have expressed a contrary view, I can but say for myself that I agree entirely with what is said by Dunford J in **Byrne**. I accept that the standard conditions of a home detention order are burdensome; but it seems to me that they are burdensome in the sense of being, by and large, inconvenient in their disruption of what would be the normal pattern and rhythm of the offender's life in his normal domestic and vocational environment. Any suggestion that such inconvenient limitations upon unfettered liberty equate in any way at all to being locked up full-time in the sort of prison cell and within the sort of gaol that are normal in New South Wales could not be accepted, in my respectful view, by anybody who has had the opportunity of going behind the walls of any one of those prison establishments; and of seeing, even from the limited point of view of a casual visitor, what is really entailed by a full-time custodial sentence.

I can imagine that from time to time a Court might have to deal with an offender whose destitution is so complete as to make even such full-time incarceration an improvement in material well-being. Such an exceptional case can always be accommodated by what I believe to be the correct general principles.

In my respectful view, the majority opinion in **Smith** is wrong and should not hereafter be followed.

As to Question 2, any attempt to answer a question such as this one must proceed, in my opinion, from an acknowledgment that, as this Court has pointed out on many occasions, sentencing is an art and not a science; and it is neither practical nor desirable to impose procedural straight-jackets upon primary sentencing Judges.

That said, it is, in my opinion, important to establish clearly the proposition that a primary sentencing Judge should ignore absolutely the existence of the **Home Detention Act**, and should not entertain any application respecting the Act, until after that Judge has determined, according to proper principles correctly applied to the given facts of the particular case, what sentence of imprisonment should be imposed upon the particular offender.

If that process yields a term exceeding the statutory maximum prescribed by section 5 of the **Home Detention Act**, then, and obviously, no further question as to the application of the **Home Detention Act** will arise.

If, on the other hand, that initial process results in the imposition of a sentence which is within the statutory maximum as thus defined in the **Home Detention Act**, then the Judge must exercise, in a properly judicial way, the discretion conferred by section 9(1) of that Act. This is a matter for experienced and professional judgment on the part of the Judge; and, as I said earlier, it is neither practical nor desirable to attempt a statement of rigid and all-encompassing rules by reference to which that type of judgment should be exercised in any particular case. That said, it is, however, my view that the following principles are both practical and desirable guidelines in the exercise of this particular judicial discretion:

1. The Judge in question should bear in mind that there is nothing dutiful, and there is certainly nothing humane, in holding out to any offender what amounts to a false promise. This Court is called upon on far too many occasions to uphold a Crown appeal against sentence; and thereupon to commit to prison an offender who has been given some form of bond, or the benefit of some form of community service order, or the benefit of periodic detention, in a context where no dutiful performance of the primary sentencing function could reasonably have justified such leniency.

2. It follows, therefore, that before exercising the relevant statutory discretion in favour of making the reference for assessment, the Judge should take carefully into account the considerations:

(a) that, in the real world, it will be assumed, whatever the Judge might say to the contrary, that a favourable assessment will entail the making, in fact, of a home detention order;

(b) that the making of such an order will entail, conformably with the principles earlier herein discussed, a significant watering down of the sentence of imprisonment; and, therefore, a significant diminution in the effectiveness of the sentence in terms of proper retribution; of proper personal deterrence; and of proper general deterrence.

(c) that the consequence of making a home detention order might result in the converting of a sentence that is effectively unappellable because it is within the range of a proper sentencing discretion, into a sentence which is properly appellable because it has been turned, effectively, into a sentence that is no longer within such a range.

If the sentencing Judge decides to exercise the section 9(1) discretion in favour of seeking an assessment of suitability for home detention, then the Judge will receive in due course an assessment that either recommends the particular offender as suitable for home detention, or recommends that the offender is not so suitable. If the assessment recommends unsuitability for home detention, then a home detention order cannot be made: see section 8(4) of the **Home Detention Act**. If, on the other hand, the assessment recommends suitability for home detention, then the Judge must exercise a further and discrete discretion as to whether a home detention order will, in fact, be made in the particular case: see section 8(5) and section 11(3) of that Act. What has been said previously regarding the exercise of the section 9(1) discretion applies *mutatis mutandis* to the exercise of this further discretion.

There is, in my opinion, one further general proposition that should guide primary sentencing Judges in the context of the application of the **Home Detention Act**.

It is, in my opinion, a misconception producing appellable error or law for a primary sentencing Judge to treat a home detention order as any sort of an alternative to a periodic detention order. No doubt, primary sentencing Judges will approach in different particular ways the practice in any particular case of the art of sentencing. That sentencing process must entail, however, at whatever particular point in the process, and by whatever particular path the point is reached, at least the following steps:

1. A decision whether the particular case, judged according to proper sentencing principles, permits at all of the grant of any kind of bond, recognisance, community service order, or other order not entailing the imposition of a sentence of imprisonment.

2. If the answer to that first question be in the negative, whether the sentence of imprisonment which is required according to proper sentencing principles, might properly be ordered, by reference to those same principles, to be served in full-time custody, or by way of periodic detention. As earlier explained, the taking of this particular decision will entail a proper bringing to account of the considerations discussed by Hunt CJ at CL in **Hallocoglu**.

3. If, and only if, the foregoing steps result in a conclusion that a sentence of full-time imprisonment is appropriate; and if, and only if, such a sentence is quantified according to proper principles correctly applied, and is actually imposed, will any question of the applicability of the **Home Detention Act** arise.

It is, in my opinion, not permissible for a primary sentencing Judge to consider at all the suitability of an offender for home detention, unless and until the foregoing steps have all been taken. If the possible application of the **Home Detention Act** is then raised with the sentencing Judge, then, and only then, will there arise a need to consider the exercise of the various statutory discretions that I have earlier discussed. Human nature being what it is, an approach along the lines which I have been discussing in this section of the present judgment, cannot be expected to eradicate completely the temptation for a primary sentencing Judge, who is philosophically disposed to favour a generous use of home detention orders, but who feels constrained by statute or by curial authority to impose a sentence of full time imprisonment, to tailor the sentence so as to bring it within section 5 of the **Home Detention Act.** All that can be said is that the suggested principles and approach will at least identify that temptation; and give warning, both fairly and distinctly, that a yielding to such a temptation will simply result in appellate intervention by this Court.

The Resolution of the Present Appeal

In the present case, the learned sentencing Judge made very favourable findings as to the subjective features of the respondent's particular case. I do not see that any of the conclusions thus reached by her Honour were not fairly open on the evidence.

As to the relevant objective facts, it is clear from what her Honour said that she correctly appreciated the gravity, in general terms, of an offence contravening section 52A of the **Crimes Act**; and that she correctly appreciated the gravity, in a sense more particular to the respondent, of the respondent's offending behaviour.

The process of reasoning by which her Honour then brought together her findings as to the objective and subjective matters relevant to the respondent's case, commences with an acknowledgment by her Honour: "..... that the starting point for offences of this type is that the court would look at the imposition of a term of full time imprisonment". Her Honour refers very briefly to some reported decisions of this Court to which her attention had been drawn, and says that she accepts that those authorities stand for "..... the proposition that this court should take such offences as this seriously indeed and should impose a custodial penalty in almost all cases".

In my respectful opinion, these perceptions of her Honour were correct, and were in accord both with manifest statutory policy, and with a body of decisions of this Court by which her Honour was bound.

The next step in her Honour's process of reasoning commences with the following observations:

"It has been put on behalf of the prisoner that I might consider the imposition of periodic detention as an appropriate sentence in this case or, as an alternative, having made the decision that the matters are worthy of full-time imprisonment, I would request an assessment for home detention so that any period of imprisonment would be

served pursuant to the provisions of that Act. I have come to the conclusion that periodic detention in this case would not adequately reflect the objective seriousness and criminality of the offences. It seems to me that with a combination of the three counts, albeit arising from the one episode, and the prior poor traffic record of the prisoner, that it could not be said that this is an appropriate case for periodic detention.

However, I have come to the conclusion that the period of imprisonment which I intend to impose can, if the prisoner is assessed as appropriate, properly be served by way of home detention in this case."

Her Honour then makes brief reference to the decision, earlier herein discussed, in **Smith**. Her Honour then continues:

"It seems to me in this case, in circumstances where the prisoner has substantially altered his life, improved his attitude generally, needs to undertake assessment and treatment for possible brain damage suffered many years ago, is able to engage in full time employment and has a stable family, both family of origin to support him and new family in terms of his wife, that this is the very sort of case where the community could be satisfied that a period of imprisonment could well be served pursuant to the provisions of the Home Detention Act, without in any way derogating from the seriousness of the offences and the general deterrence aspect that the Court is required to take into account in assessing and setting an appropriate penalty."

In my respectful opinion, this stage of her Honour's process of reasoning discloses an error of principle. Her Honour seems to me to have come to a settled view about the appropriateness of dealing with the respondent by means of a home detention order, before having clearly articulated and imposed a sentence of imprisonment. For reasons earlier herein explained, I am of the opinion that such an approach erroneously inverts the process of reasoning required by the correct construction, and the proper application, of the **Home Detention Act**.

This conclusion would suffice, without more, to justify the intervention of this Court. It is, however, my opinion that there is a further justification for such intervention, namely the inadequacy, on any correct view, of a sentence of imprisonment of 18 months with a minimum term actually to be served of 9 months.

It is, in my opinion, necessary to be clear that the offending conduct of the respondent, as expressly admitted by him in the form of his pleas, did not constitute minor breaches of the applicable law. To drive a motor vehicle of any kind, and on any public street, at a time when judgment, alertness and general awareness are impaired by any previously ingested narcotic drug, is not, in any circumstances, a minor offence. It is a substantial contravention of section 52A of the **Crimes Act**. It is a contravention, the gravity of which is properly to be measured by reference to the statutory maximum penalty as prescribed by Parliament, namely, so far as is here relevant, imprisonment for 7 years. When such unlawful driving of a motor vehicle entails, as it plainly did entail in the present case, the real and substantial risk of death or serious injury to other lawful users of a major public highway, then the gravity of the offence, in terms of the relevant objective factors, stands well up the scale of applicable statutory penalty.

As I have earlier acknowledged, there was a substantial subjective case to be made in favour of the respondent. Her Honour accepted that case; and her Honour was, in my respectful view, entitled on the evidence before her to accept that case. That entailed, in my opinion, that the respondent's just liability to punishment was properly to be fixed at a point lower than would otherwise have been proper on the applicable scale of statutory penalties.

To say that does not entail, however, that the respondent was dealt with justly according to law by the imposition of a penalty entailing a sentence of imprisonment for 18 months, divided equally between minimum and additional terms, and ordered to be served in its entirety by home detention. In my opinion, a proper sentence in the present case would have been a sentence in the order of imprisonment for 3 years, with a minimum term in the order of 18 months. Absent the very special subjective features of the respondent's particular case, I would myself have thought that an aggregate sentence in the order of imprisonment for 4 - 4-1/2 years, and a minimum term in the order of 2-1/2 years, would not have been appellably severe on the given objective facts.

How the situation that now obtains is justly to be rectified, is not easily resolved. The respondent's minimum term of 9 months commenced on 28 January last and will expire on the 27th of next month. The available evidence suggests that his home detention thus far has not been without its inconveniences and minor irritations to him. Given the strong subjective case of which I have earlier spoken, it seems to me that there is no denying the great severity of an approach that would now pluck the respondent out of his home, and send him into full-time prison detention. There are as well, of course, the constraints required by well entrenched authority in any case of a re-sentencing by this Court in the wake of a successful Crown appeal against a primary sentence.

These constraints are based upon a perception that the success of the Crown appeal has exposed the particular offender to a second and completely fresh sentencing; or, as the point is conventionally expressed, to "*double jeopardy*". It is settled law that such "*double jeopardy*" should be recognised in a practical and real way by re-sentencing to a term somewhat less than would have been, otherwise, appropriate in accordance with proper principle.

I think, however, that the facts of the present matter require, even after allowance has been made for all of the foregoing considerations, that the respondent should serve a period of full-time custody. I have considered periodic detention as a sentencing option; but I am persuaded that so to deal with this respondent would not accord with proper principle.

A sentence of imprisonment for 2 years, apportioned equally between minimum and additional terms, would seem to me to be a just outcome, especially if the sentence is back-dated to commence on 28 January 1998, the date of commencement of the sentence imposed by her Honour.

This approach:

1. reflects the gravity of the respondent's offence;

2. gives him full credit for the time served to date by way of home detention;

3. gives just effect, in the particular case, to the policy of the Parliament as expressed in s.52A of the **Crimes Act**;

4. recognises the existence of "special circumstances" as contemplated by s.5(2) of the **Sentencing Act 1989 (NSW)**. Those circumstances are, essentially, the respondent's prospects of rehabilitation; and the fact that he will be required to serve for the first time a period of full-time custody.

A disqualification for a period of 12 months from the holding of a driver's licence is, in my opinion, inadequate to the just requirements of the respondent's case. I think that the respondent does not deserve any relief from the automatic statutory disqualification for 3 years. I accept, however, that such opinion needs some qualification in the context of a successful Crown appeal. I would, therefore, impose a disqualification for 2 years.

Sentencing Guidelines

I have read in draft the reasons prepared by the Chief Justice. I agree with the entirety of what his Honour has said on the matter of sentencing guidelines.

Orders

I propose the following orders:

1. The Crown appeal against sentence is upheld.

2. The sentence imposed on the first count in the Court below is quashed. In lieu, the respondent is sentenced to imprisonment for 2 years to comprise a minimum term of 1 year commencing on 28 January 1998 and expiring on 27 January 1999, on which date the respondent is to be released on parole; and an additional term of 1 year

commencing on 28 January 1999 and expiring on 27 January 2000.

3. The order of disqualification made in the Court below is quashed. In lieu, the respondent is disqualified for a period of 2 years from 28 January 1998 from holding a driver's licence.

IN THE COURT OF

CRIMINAL APPEAL

60131/98

SPIGELMAN CJ

WOOD CJ at CL

SULLY J

BM JAMES J

ADAMS J

Monday 12 October 1998

R v Christopher T JURISIC

JUDGMENT

BM JAMES J: I have had the advantage of reading in draft the judgments of Spigelman CJ, Wood CJ at CL and Sully J. Like Wood CJ at CL, I agree with the reasons given by Spigelman CJ for allowing the appeal and I agree generally, but subject to the qualification noted by Wood CJ at CL, with the reasons appearing in the judgment of Sully J.

I agree with what has been written by both Spigelman CJ and Wood CJ at CL on the subject of guideline judgments.

I agree with the orders proposed by Sully J.

- - - - - -

IN THE COURT OF

CRIMINAL APPEAL

60131/98

SPIGELMAN CJ

WOOD CJ at CL

SULLY J

BM JAMES J

ADAMS J

12 October 1988

R v Christopher T JURISIC

JUDGMENT

ADAMS J: I have had the advantage of reading in draft the judgments of Spigelman CJ, Wood CJ at CL and Sully J. I agree with the reasons of Spigelman CJ for allowing the appeal. I also agree with the reasons of both Spigelman CJ and Wood CJ at CL for this Court delivering guideline judgments and what has been said about the guidelines applicable to offences arising under s52A of the *Crimes Act* 1900. I agree with the orders proposed by Sully J.

I wish, however, to develop a little further the remarks made by Spigelman CJ on the subject of statutory imposition of minimum sentences or grid sentences. It is fundamental to any reasonable notion of the rule of law that the liberty of the subject is to be taken away only where there has been an open trial in a constitutionally appropriate tribunal governed by the rules of procedural fairness, and then only to the extent which the law requires. The application of the rule of law to the case, does not cease when a verdict of guilty has been arrived at. To the contrary, it must be applied to the crucial task of determining what is the appropriate penalty to be meted out. It is obvious that any such penalty must be related to the seriousness of the crime and the culpability of the subject. Minds may often, and frequently will, differ on the appropriateness of one penalty over another. But it cannot be consistent with our notions of justice that the particular facts of the case that characterise its seriousness and the particular circumstances of the subject that measure his or her culpability should be ignored where they are by ordinary human reason and understanding significant. A fundamental problem with grid sentencing and minimum sentencing schemes is that this is precisely what they do. Nor is this problem overcome by setting out a commencing point and giving a judicial discretion to depart from it where it is thought necessary, since that commencing point will be triggered by the conviction itself and, perhaps, a prior conviction. Though obviously highly relevant, these criteria clearly do not, and cannot reflect anything like the full range of substantial matters that significantly affect culpability. Thus the base from which departure is permitted, usually only by way of exceptional circumstances, is skewed to produce anomalous, capricious and therefore significantly unjust results.

A number of other questions arising from grid sentencing and minimum sentencing schemes need careful consideration, but this judgment is not the place for it. I mention the starting point problem for the purpose only of expanding the reference in Spigelman CJ's judgment to the difference in flexibility between the guideline judgment approach and the statutory alternative. It is perhaps worth mentioning, however, the fundamental difference that the former is developed by the Courts, which have, under the rule of law, the fundamental responsibility for measuring, by reference to well settled principles of justice, the extent to which the liberties of the subject should be removed following the commission of crime. This is, of course, by no means to deny the place of the Parliament in the setting of the proper boundaries, still less its ultimate powers over the liberty even of the single citizen, however it chooses to exercise it (see *Kable v DPP* (1996) 36 NSWLR 374 but, as to the significance of the separation of powers in the Constitution see, in the High Court[1996] HCA 24; , (1996) 189 CLR 51); rather it is to bring to notice a basic conception that underlies the recognition of the fundamental importance of the rule of law in a liberal democracy and our attempts to maintain it.

This brings me to the difficult question of public perceptions. There can be no doubt that public confidence in the system of justice, as it is administered by the Courts, is of vital importance. That confidence is, of course, capable of being undermined. Aside from the processes of fairness that may be seen by virtue of the public manner in which the Courts function, the principal mode of communication by the Courts is through its judgments. In the nature of things, these will not be cast in the mode of articles ready for publication in the press. The media therefore plays a vital role in communicating both what happens in and the judgments of the Courts. It is clear that the exigencies of

journalism result in very limited reporting of both. Moreover, the methods of journalism, as demonstrated by the ultimate product both in the press and the electronic media, give overwhelming predominance to the sensational aspects of the case reported. It is clearly difficult, in this environment, to provide measured and balanced accounts of what has occurred. This is not to deny that there is a great deal of informed and useful communication of and discussion about the courts' work. However, this is unfortunately rather the exception than the rule. It is self evident that a couple of brief columns or a two-minute statement dominated by the "newsworthy" elements of a case will almost never convey sufficient information to enable an informed judgment to be made about it. This is especially evident in the sensational reporting of controversial sentences. The sorry fact is that there is a deal of misreporting of cases to some degree or other, some of which is deliberate, usually by the omission of vitally relevant information.

Accordingly, whilst the Courts must do everything in their power so to act that public confidence is maintained, and whilst the importance of public perceptions must be accepted (and without resentment or patronising) we must treat with care assertions about what might be the public perception about this or that issue. Nor can publicity about a particular case or cases deflect a Court ever from doing justice according to law. To do so would be, amongst other things, to betray the trust that the overwhelming majority of citizens place in the Courts to stand as a bulwark against prejudice and unreason.