41/74

SUPREME COURT OF VICTORIA — FULL COURT

R v WILLISCROFT and ORS

Adam, Starke and Crockett JJ

12, 29 August 1974 — [1975] VicRp 27; [1975] VR 292

SENTENCING – PURPOSES OF PUNISHMENT.

HELD: Appeal allowed; sentences of imprisonment imposed varied.
1. The purposes of punishment are manifold and each element will assume a different significance not only in different crimes but in the individual commission of each crime. General deterrence and retribution are elements that must assume greater importance when the crime in question is a serious one, has been committed in a particularly grave form, and its contemporary prevalence is the cause of considerable community disquiet. Certainly it remains true, despite the impact of the very positive enlightenment manifest over the past generation and proposals for a criminal law that is essentially preventive rather than punitive. The concept of punishment remains fundamental to the techniques of correctional treatment.

2. Ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, it is profitless to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination. It is sufficient to say that the sentencing Judge did not in the cases before him give to the aspects other than reformation the weight that ought to have been allotted to them. Or, in other words, he undervalued the nature and circumstances and gravity of the offences of armed robbery and attempted armed robbery with the result that his discretion miscarried.

ADAM and CROCKETT JJ: This is an appeal by the Attorney-General on behalf of the Crown under s567A of the *Crimes Act* 1958 against sentences passed in the Supreme Court on 10 June 1974 upon four men convicted on indictment, on the ground that different sentences should have been passed. It has been contended for the Crown that those sentences, or their effective result, having regard to concurrency orders, were inadequate in the circumstances.

Each of the four respondents was convicted of armed robbery. Those convictions arose from the one episode in which all four men played a part. The convictions were with respect to offences created by s120 of the *Crimes Act* for which a maximum penalty of 15 years is fixed by the section.

The commission of that offence (which occurred on 9 January 1974) followed two attempted armed robberies. The first was on 26 December 1973. The respondents Williscroft, Weston and Woodley participated in the first of those attempts and in respect of such attempt were convicted of the common law offence of attempted armed robbery. The participants in the second attempt (which took place on 3 January 1974) were Weston, Woodley and Robinson, and they were duly convicted of that particular offence.

In relation to both the second attempted offence and the completed offence of armed robbery, cars were stolen for use in connexion with the commission of those offences. As a result Weston, Woodley and Robinson were each convicted of two counts of larceny of a motor car with intent to use it in connexion with a felony, and Williscroft was convicted of one such count.

Such an offence is created by s82(1) of the *Crimes Act* for which a maximum term of imprisonment of seven years and a minimum term of six months are fixed. All convictions followed upon pleas of guilty and those pleas disposed of each count upon the presentment.

Before setting out the sentences which have been impugned, it is convenient to refer briefly to the background of the respondents and to the circumstances of the offences. This may be done

by adopting in conjunction with some connecting narrative the following passages that appear in the very full and comprehensive reasons for sentence expressed by the learned Judge:

> "All four of the accused are young men. Weston is twenty-one. He is a New Zealander who has been working in this country since about January, 1973. He married within the last month while on bail and his young wife is pregnant. He has no prior convictions. Woodley is nineteen. He is also a New Zealander. He came here in January 1973, on what was called a working holiday. He is unmarried. On 20 September 1973, he was convicted by the Magistrates' Court at Mordialloc of the larceny of a T.V. set from a motel suite and of the larceny of a motor car. He was fined $100 in default twenty days' imprisonment on the first charge and he was placed on probation for two years on the second charge. Williscroft is twenty-four. He is a Tasmanian. He is married with one child. He came to Victoria in May 1973, and again in about November 1973, as a result of problems concerning his wife. He is now separated from his wife. He has no prior convictions. Robinson is twenty-eight. He is a part-Maori New Zealander who came to Australia in 1971. He has worked in this country in Victoria, in Western Australia and then again in Victoria. He is unmarried. He has a long list of prior convictions in New Zealand between 2 December 1960, and 17 January 1969. The convictions were for eighteen offences and the convictions were recorded on twelve different occasions... "His offences began when he was fifteen and were for shopbreaking, fighting and offences relating to motor cars and similar matters. In June 1966, he was convicted of attempting to take a motor car and sentenced to be detained for training in Borstal. He was released in July 1967, and his only offence since then was that of January 1969, when he was convicted of disorderly behaviour and fined $30... "All four men were in urgent need of money. All four men were young, active and resourceful. Woodley had already turned to crime once in 1973. Even more significant is the fact that on or about 19 December 1973, Weston and Woodley purchased a single-barrelled shotgun for $50."

The barrel of the shotgun was then sawn off. The first attempt at armed robbery was upon a service station in Richmond. It occurred at 1.30 a.m.

> "Woodley drove Williscroft and Weston to the service station in Punt Road. While Woodley remained in the car Williscroft and Weston masked their faces with the stockings and, armed with the sawn-off shotgun and the pinchbar, held up the attendant at the service station. The attendant fled and Williscroft and Weston then attempted to rob the till. They could not find any money so they had to leave empty-handed."

For the next attempt the shotgun was further shortened. The object of the respondents' attention on this occasion was an estate agency in St. Kilda conducted by a Mr Wills and his wife.

> "On 3 January Woodley drove Weston to Albert Park with Robinson's knowledge. Weston and Woodley selected a suitable car to steal and Weston forced an entry to it and took it. The stolen car was to be used as the getaway car to take the three men to the spot where they would leave the car they already had. All this had been worked out beforehand. At about 11:45 a.m. Robinson and Weston entered the office of the real estate agency. Woodley was in the getaway car. Robinson was armed with the sawn-off shotgun. Both Robinson and Weston were disguised with women's wigs, sunglasses, gloves and, in Robinson's case, a black shirt, and in Weston's case, blue overalls. Inside the office there were only Mr and Mrs Wills. Robinson said, 'Where's the money?' and he pointed a gun at Mr Wills. Mr Wills said, 'There's no money', and boldly added, I'm not frightened of you'. But, as Weston said, 'He was shaking all over'. Mrs Wills was telling him to stay back. Weston pushed him back and told him to stay back. The two entered the office, but once again they were foiled. They could not find any money and therefore had to leave empty-handed."

The final offence was the robbery of a TAB agency at Mont Albert. The method employed was the same as that adopted at St. Kilda. A car was stolen and used as the getaway car. Disguises were used. The co-agent of the TAB agency was the only person present at the time of the robbery. She was held at gunpoint with the sawn-off shotgun by Williscroft while Robinson took $696 from a drawer. Only $373 of the money has been recovered, although the respondents were arrested within 24 hours. Their arrest was followed by interrogations by police officers during which each respondent fully confessed the part he had played in each of the crimes to which we have made reference.

Each respondent was represented by counsel when presented on the counts for which he had been indicted. The burden of the plea for leniency made on behalf of each was that the three invasions of property were part of the one course of conduct by impecunious young men anxious to follow a course of crime only until their financial embarrassment should be relieved. It was said that having regard to their youth and the manner in which at least two of them were

domestically circumstanced, there was every prospect that a very lenient sentence would serve to reclaim them from a life of crime that otherwise might be expected to ensue upon a lengthy sentence. This prospect of redemption was said to be reinforced by the repentance demonstrated by the respondents after their apprehension and the fact that, even in the case of respondents who did not previously possess an unblemished character, they could be safely counted free of the risk of recidivism.

The learned Judge by his reasons for sentences made it plain that he considered the offences of armed robbery and attempted armed robbery to be serious offences which could be met by nothing less than a period of imprisonment. Moreover, he was alive to the requirement that his sentences operate as a deterrent to others who may be minded to engage in similar acts of lawlessness.

Having adverted to these considerations the judge proceeded to sentence each respondent for the terms and for the reasons that appear in the following extract from his recorded comments:

> "The records of the accused are not the same, and not all of them were involved in all the crimes contained in the presentment. This means that the question arises whether the punishment should differ as between the four men. While the sentences imposed will necessarily differ, because Robinson and Williscroft are not charged on some of the counts, my conclusion is that the effect of all the sentences should be the same. This conclusion is arrived at on the basis that all four men can be regarded as having been implicated in the development of the project to undertake armed robberies, and all participated substantially in the project--in particular, in the hold-up of 9 January. I do not feel that Robinson's sentence should be greater by reason of his earlier criminal record. Woodley's conviction in September of 1973 has given me more concern; but, on the whole, I have decided not to increase his sentence by reason of it. I note that no application has been made by the Crown that the Court should deal with Woodley as a probationer under s517(3) of the *Crimes Act*, and therefore he will have to be dealt with elsewhere for his breach of probation. I do not draw any distinction between the first, third and fifth counts on the ground that counts 1 and 3 are for attempts only. It was merely fortuitous that no money was obtained as a result of these hold-ups.
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> "Nor do I draw any distinction between the degree of participation by the four accused in the case of the crimes with which they are charged. My conclusion is that in this case it is just that all four men should receive the same punishment. Taking into account all the circumstances including the youth of the offenders and the fact that no physical harm was caused by them, I have come to the following conclusions.
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> "1. That on the fifth count the appropriate sentence for all the accused is the term of four years' imprisonment.
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> "2. That on the first count the appropriate sentence for Weston, Woodley and Williscroft is the term of four years' imprisonment.
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> "3. That on the third count the appropriate sentence for Weston, Woodley and Robinson is the term of four years' imprisonment. "The second and fourth counts relate to what was an incidental step in the perpetration of the offences stated in the third and fifth counts. "The conclusions I have come to with respect to those counts is:
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> "1. That on the second count the appropriate sentence for Weston, Woodley and Robinson is one year's imprisonment.
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> "2. That on the fourth count the appropriate sentence for all four men is one year's imprisonment. "I have decided that as the offences in the five counts can be regarded as all being part of the one criminal enterprise I should, in the circumstances of this case, make all the sentences concurrent. "There still remains the difficult question of deciding what should be the minimum term during which the accused should not be eligible to be released on parole. I have already adverted to the need to make it quite clear to these four men how drastic and unpleasant it is to be in gaol so that they will have good reason to keep clear of crime once they have been released. The minimum term must therefore not be too short for that lesson to be taught and, it is hoped, learnt. On the other hand, all these men have much to live for. They all have a trade and all have shown themselves capable of being steady workers. Williscroft's troubles seem to be those which are most easily understood. They stem from his unsuccessful marriage. There seems to me to be a reasonable expectation that on release he would, if permitted, return to Queenstown in Tasmania and settle down there to regular work and resume the care of his young daughter now being looked after by his parents. "Weston has brought wholly unnecessary unhappiness into the life of his wife. She will, she says, be waiting for

> him with his child who will be born while its father is in gaol. Again, there seems to be a reasonable expectation that, if given an opportunity, Weston will settle down to married life and honest work. "Woodley is more of a problem. His record of 1973 shows that he has a disposition to crime although more than one person spoke of his kindliness, honesty and consideration for others. I think he should be given the encouragement to fulfil the expectation of others. "Robinson must be a lonely man. He managed to lead an honest life for some time and he derives some advantage from being sentenced with his co-accused. I do not feel it would be fair to him to treat him differently from the others and I feel that he, too, should be given an opportunity. "The opportunity that I am speaking about is that of becoming eligible for parole at a time which might well be considered a good deal earlier than would usually be the case. The result will be that if the Parole Board decides to release any of the accused at the expiration of the minimum period I intend to fix, the period of parole will be longer than is often the case where the sentence is four years and there will be a longer period during which there will be a strong incentive for the man to avoid trouble with the law. The minimum term will be fixed in the opinion that it will be long enough for the necessary lesson to be taught but sufficiently short to encourage each man to work in gaol for his early admission to parole, for men are not necessarily released on parole as soon as their minimum terms have expired. "The term I fix as the minimum term is, in the case of all four men, one year."

It is quite evident from the duration of these sentences and the remarks made immediately prefatory to them that the Judge has been impressed by the prospect of the respondents' reformation and for that reason had imposed sentences that can only be described as extremely merciful. The Attorney-General has contended that the degree of leniency inherent in the sentences renders them inadequate and inappropriate having regard to all the circumstances. Accordingly, this Court has been asked to set aside the sentences imposed and to resentence each respondent.

In the case of an appeal by a prisoner on the ground that the penalty imposed on him was excessive, this Court in *R v Taylor and O'Meally* [1958] VicRp 46; [1958] VR 285 at p289 pointed out that appellate intervention was permitted only when—

> "it appears that he [the judge] has made a mistake as to the facts, or has acted on an erroneous principle of law, or has taken into account some matters which should not be taken into account, or has failed to take into account matters which should have been taken into account, or has clearly given insufficient weight, or excessive weight, to some matter taken into account, or unless the sentence is obviously—not merely arguably—too severe or too lenient".

These same principles are equally applicable when the appellant is the Attorney-General: *R v Butler* [1971] VicRp 109; [1971] VR 892.

The Attorney-General's notices of appeal contain a number of grounds. These are common to all four respondents save that in the case of the two respondents with prior convictions the notice complains that the sentences failed to reflect those respondents' past bad character.

However, upon the hearing of these appeals (which by consent were heard together) the Solicitor-General, who appeared for the appellant, made it clear that he did not seek to draw a distinction between the respondents but was concerned to contend that either all sentences were inadequate or none was. Moreover, despite the multiplicity of grounds to be found in the notices of appeal, refinement of the Solicitor-General's argument ultimately disclosed really only one ground of attack. It was this: whilst perhaps it was possible for various reasons to take exception to the conclusion that rehabilitation of each offender was probable, the appellant was content to accept that that conclusion was open to be made by the trial Judge. However, notwithstanding such assumption it was contended that, having regard to the nature and extent of the respondents' wrongdoing and the circumstances in which it was committed, it is plain that the sentences imposed represent such an imbalance between the hope of achieving the respondents' rehabilitation and the need for a salutary punishment that would act as a deterrent to others as to render such sentence manifestly inadequate.

In determining the question that this submission posed for resolution it must be acknowledged that a number of cases decided in this Court indicate inarguably that it is the adequacy of the term of imprisonment, independent of the minimum term fixed before which the offender is eligible for parole, that must be examined: see, for example, *R v Campbell* [1970] VicRp 16; [1970] VR 120 at p130. This then is the first question to be resolved. If these terms cannot be said to be excessive, then, and only then, is it permissible to look at the minimum term imposed

with a view to determining if that minimum term is so improper as to warrant interference: cf. R v *Governor of Her Majesty's Gaol at Pentridge; Ex parte Cusmano* [1966] VicRp 78; [1966] VR 583, at p587, and *R v Bruce* [1971] VicRp 80; [1971] VR 656. This Court has often observed that it is desirable that as a general rule there should not be too great a disparity between the maximum and minimum terms imposed. This, however, is not and cannot be an inflexible requirement. We should be disposed to think that if, in the present cases, the term of four years to which each respondent was sentenced was not inadequate, then the Judge's conclusion as to the prospect of rehabilitation to which it was open to him to come would not have rendered the minimum terms that he selected inappropriate having regard to the discretion he possessed in the matter: *Crimes Act* 1958, s534. However, having regard to the opinion which we have formed on the primary question it is unnecessary for us to express a concluded view on this matter.

This Court very recently (16 May 1974) had occasion in a similar appeal (*R v Kane* [1974] VicRp 90; [1974] VR 759), to refer to a number of authorities touching on the exercise of the sentencing power. Among other citations the judgment in that case sets out a passage from the judgment of the Court of Criminal Appeal in New South Wales in *R v Cooke* (1955) 72 WN (NSW) 132, in which reference is made to the oft-cited observations of the Court of Appeal in New Zealand in *R v Radich* [1954] NZLR 86. For the purpose of the present case it is sufficient in order to provide a starting point for consideration of what seem to us to be the relevant factors to do no more than cite again the particular passage from the New Zealand case that received the express approval of the Court of Criminal Appeal in New South Wales. The passage (at p87) is as follows:

> "We should say at once that this last argument omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment."

For our part, we are bound to say that we gain only limited assistance from this passage. To say that a sentence imposed must be commensurate with the seriousness of the crime leaves it unclear whether what is meant is a reference to the category of crime of which the offender has been convicted or the particular act of wrongdoing committed by the offender. If the former, then the statement simply cannot, at least as a generalization, be correct.

For instance, manslaughter *per se* is a serious crime but it is notorious that the circumstances of its commission can attract sentences so widely disparate as 12 years' imprisonment to release upon a good behaviour bond. If the latter, then, with all respect, the proposition is only stating the obvious. Moreover, if the effect of the sentence on the probable future life of the offender is, as we apprehend it is, a reference to the prospect of reformation, then we find it difficult to accept that such a consideration must necessarily be subsidiary "to the main considerations"; a difficulty rendered no less since the judgment, with the exception of deterrence both general and particular and, possibly, retributive punishment, does not reveal what are considered to be "the main considerations". We should have thought that in any case where an offender is released upon probation or granted a good behaviour bond for an indictable offence, *ex hypothesi*, it is implicit that in the circumstances the offence is sufficiently lacking in heinousness as to permit all other considerations to be treated as subsidiary to the prospect of the offender's rehabilitation.

The purposes of punishment are manifold and each element will assume a different significance not only in different crimes but in the individual commission of each crime. General deterrence and retribution are elements that must assume greater importance when the crime in question is a serious one, has been committed in a particularly grave form, and its contemporary prevalence is the cause of considerable community disquiet. Certainly it remains true, despite the impact of the very positive enlightenment manifest over the past generation and proposals for

a criminal law that is essentially preventive rather than punitive (see e.g. Lady Wootton, *Crime and the Criminal Law*, 1963, Hamlyn lectures, 15th series), that coercive measures to repress criminal behaviour are inevitable for the management of society. That is to say that the concept of punishment remains fundamental to the techniques of correctional treatment. In order that we might adopt their tenor, we quote some extra-judicial observations of Sir John Barry, a notable authority on the science and philosophy of punishment and sentencing, from his published lectures on *The Courts and Criminal Punishment* (1969). The passage, to be found at pp14-15, is as follows:

> "The aims of punishment are often classified as retributive, preventive, deterrent, and reformative, but this classification is plainly an oversimplification. It ignores or leaves inarticulate, for example, other purposes which the criminal law serves by its solemn procedures as a teacher of minimal standards of morality and behaviour; as an agency for the expression of public indignation and condemnation; and as a force operating to produce cohesion within society.
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> "Dr Leon Radzinowicz has rightly observed that the criminal law is fundamentally 'but a social instrument wielded under the authority of the State to secure collective and individual protection against crime'. It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime."

References to retribution as an element of punishment are to be found in many of the modern authorities. But whilst punishments for crimes that shock the public conscience are undoubtedly retaliatory (and Mr Justice Oliver Wendell Holmes thought that the axiomatic "fitness of punishment following wrongdoing" was no more than vengeance in disguise—*The Common Law* (1881), at pp42, 45) retribution in the modern sense cannot be equated with the concept on which the *lex talionis* rested: see Helen Silving, *'Rule of Law' in Criminal Justice Essays in Criminal Science*, ed. GOW Mueller (1961), at pp84-5.

Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless (as it was thought to be in *Kane's Case*) to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination. It is sufficient to say that in our opinion the learned Judge did not in the cases before him give to the aspects other than reformation the weight that ought to have been allotted to them. Or, in other words, he has undervalued the nature and circumstances and gravity of the offences of armed robbery and attempted armed robbery with the result that we are persuaded that his discretion has miscarried.

We are aware that such a conclusion rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate. Indeed, in *R v Geddes* (1936) 36 SR (NSW) 554; 53 WN (NSW) 157, Sir Frederick Jordan CJ was sufficiently oppressed by the problems of seeking a rational principle for determining whether a sentence was inadequate, that he was able to find a solution only in the employment of an epigrammatic device. After pointing out that it was easier to see when a wrong principle has been applied than to lay down rules for solving particular cases, the learned Chief Justice observed that "...the only golden rule is that there is no golden rule" (at p555). But it is not sufficient for a sentence to avoid subsequent review that it can be said of it that it is the product of what is admittedly a wide discretion conferred upon a judge who can be shown to have given some consideration to all relevant elements. There must be some recognition of and accord with "the moral sense of the community" in the selection of the appropriate penalty. No matter how ephemeral that phrase may be or how elusive the task of evaluation of such a concept may prove in a given case, the task must nevertheless be essayed. The problem really is little different from and no less difficult than

that of ascertaining "community standards" for the purposes of assessing damages in a civil case. In this connexion it is helpful to observe that in *Tzouvelis v Victorian Railways Commissioners* [1968] VicRp 13; [1968] VR 112 at pp154-5 Gowans J speaking as a member of the Full Court, said:

> "Whatever may be the difficulties of ascertaining the 'general standards prevailing in the community', and whatever may be the practical problem involved in an appeal court determining whether a jury has observed those standards, it is not permissible, as I understand the law, for an appeal court charged with the function of exercising a supervisory jurisdiction in respect of the verdicts of juries to say in any particular case that the jury had set their own standard and it was all a matter for them. The appeal court must measure the verdict against some standard and the various phrases used to describe the standard (see *Australian Iron and Steel Ltd v Greenwood* [1962] HCA 42; (1962) 107 CLR 308, at p327; [1963] ALR 710, at pp722-3) do not really disguise the fact that the judges sitting on appeal must depend upon their own knowledge of awards in other cases, whether derived from personal experience or otherwise, and pronounce upon the question as to whether the award is 'substantially beyond the highest figure, which in their view could reasonably have been awarded'."

So, too, a judgment as to what is appropriate by way of sentence must depend upon knowledge of sentences for the same or similar offences which is derived from personal experience or any other source. To this end the Court asked for and was supplied with some statistical data relating to sentences imposed in this State during the past 18 months for armed robbery of banks, TAB agencies and service stations. As to the propriety and utility of such a course being followed see the note in (1973) 47 ALJ at p548. In this connexion it is also interesting to note that as long ago as 1901 a memorandum prepared by the English judges contained this comment:

> "The judges of the King's Bench Division are agreed that it would be convenient and of public advantage in regard to certain classes of crime to come to an agreement, or, at least to an approximate agreement, as to what may be called a 'normal' standard of punishment: a standard of punishment, that is to say, which should be proved to be properly applicable, unless the particular case under consideration presented some special features of aggravation or extenuation."

The information supplied to the Court, whilst not unnaturally disclosing a reasonably wide range of penalties as an acknowledgement that differing circumstances attend individual cases, confirms our own view that the type of offences in question are currently treated by the courts as meriting stern punishment. It seems clear that by and large the courts consider that aggressive and rapacious conduct so violates the community's fundamental values and imperils the average citizen's sense of security and confidence in law and order as to require those engaging in such conduct to suffer in requital for the harm they do to others.

Although much of what we have said in the course of this judgment may well be inconsistent with it, we think we should say that the Court was not asked on the appeal to adopt an interpretation of the sentencing and parole provisions of the Crimes Act 1958 similar to the construction recently placed by the Court of Criminal Appeal upon the corresponding provisions in New South Wales in the cases of *R v Portolesi* [1973] 1 NSWLR 105, and *R v Sloane* [1973] 1 NSWLR 202. The effect of those cases has been to remove from the judge the major responsibility for sentencing on the ground that, in the absence of good reasons for not doing so, he should always fix a relatively short non-parole period, his main function being to fix the maximum sentence as a general deterrent, leaving it to the Parole Board to determine the appropriate date for release after the expiry of the fixed non-parole period, the purpose for which it is said to exist being the determinant of the prisoner's rehabilitative prospects. A construction adopting such a policy was rejected by Blackburn J in *R v Lyons* (1974) 3 ACTR 9, but this Court, as it was not asked to do so, has not addressed itself to these questions on this appeal. It was brought to our attention subsequent to the hearing of this appeal and the preparation of this judgment that in an appeal to the High Court in *Lyons v R* that Court in a judgment given shortly before the hearing of the present appeal disapproved of *R v Portolesi* and *R v Sloane*: see *Power v R* [1974] HCA 26; (1974) 131 CLR 623; 3 ALR 553; 48 ALJR 297.

It thus now becomes necessary to exercise a discretion in place of that which miscarried.

Having regard to the gravity and prevalence of the offence of robbery with the use of firearms of institutions such as the TAB, it is clear, in our view, that the offence of armed robbery in this case calls for the imposition of a condign sentence. "Prevalence of crime of a certain class is a valid

criterion when punishment is to be assessed": per Herron CJ giving the judgment of the Court of Criminal Appeal in *R v Cuthbert* [1967] 2 NSWR 329 at p333; 67 SR (NSW) 95. Barry J (*op. cit.* pp27-8), in speaking of armed robberies of totalisator board agencies, *inter alia*, considered that the perpetrators of such crimes, having "elected to prey upon society", act so that "the only response that society can make in self-defence is to ensure that when they are caught and convicted the punishment shall be of a kind that will incapacitate them from similar enterprises for a long period of time, and, hopefully, that it may deter others, too, from embarking on like undertakings." Of course, consideration must be given to those matters that command the extending of mercy. Upon making such allowance we consider the proper sentence on the count of armed robbery for each respondent is seven years' imprisonment. For the reasons given by the trial Judge we would not discriminate between the respondents on this or the other counts on the ground either that two of them had prior convictions or because of the different parts played by them in the commission of each crime.

With respect to the counts of attempted armed robbery, whilst it is true that those offences remained inchoate for no other reason than that no money was found on each of the premises concerned, those offences nevertheless were attempts only and the lesser nature of the offences should be recognized by the imposition of a somewhat smaller sentence. We consider a term of five years' imprisonment should be imposed on each count of attempted armed robbery. We agree with the trial Judge that one year's imprisonment is appropriate on the second count of larceny of a motor car with intent to use it in connection with a felony. That count refers only to Robinson, Weston and Woodley. For the same offences contained in the fourth count in respect of all four respondents a like term of one year's imprisonment should be imposed together with a disqualification as ordered by the judge from obtaining a license under the *Motor Car Act* 1958 for three years from 3 June 1974.

We consider that the three different invasions of property should be regarded as separate crimes notwithstanding the closeness in time of their perpetration and the common or near-common membership of the team involved in each of such crimes and the similarity in each case of their modi operandi. Whilst, therefore, we would make the sentences on counts 2 and 4 concurrent with those imposed on count 5, we would not be prepared to order complete concurrency in the case of the sentences upon the first and third counts. Yet, we think that equality of punishment among the four respondents is proper in all the circumstances. To give effect to these considerations we think it proper to order that in the case of Williscroft four years of the sentence on count 1 be served concurrently with the sentence imposed on count 5; in the case each of Weston and Woodley, four years six months of each of the sentences on counts 1 and 3 are to be served concurrently with the sentence imposed on count 5; in the case of Robinson, four years of the sentence on count 3 is to be served concurrently with the sentence imposed on count 5.

The result is that the effective sentence for each respondent is eight years. We would fix four years as the minimum to be served before which each respondent is eligible for parole.

STARKE J: This appeal has given me a great deal of difficulty. I think perhaps I should commence by saying that I do not subscribe to the theory of punishment set out in the passage from the judgment of the New Zealand Court of Appeal in *R v Radich* [1954] NZLR 86 at p87 which has been read by my brother Crockett during the judgment of himself and Adam J. It cannot be, I think, that in all cases and as to all crimes the element of deterrence is the main consideration and the element of reformation or rehabilitation subsidiary to it. Depending on the circumstances and the nature of the crime, sometimes more weight will be given to the reformatory element than to deterrence, and sometimes the opposite will be the case.

Deterrence, of course, has two aspects; one is deterrence of the actual offenders, and the other is deterrence of other people who might be minded to commit similar crimes. For practical purposes the only other element of punishment remaining today is, I think, a consideration of the protection of the public at large, or prevention. Retribution as an element of punishment has by now, in my opinion, disappeared, or practically disappeared, from our criminal law. It is often taken for granted that if leniency for the purpose of rehabilitation is extended to a prisoner when the judge is passing sentence, that this leniency bestows a benefit on the individual alone. Nothing, in my opinion, is further from the truth. Reformation should be the primary objective of the criminal law. The greater the success that can be achieved in this direction, the greater the

benefit to the community.

In this case, after going into the matter in depth and with great care, the learned Judge concluded that the offences committed by the four accused were not likely to be repeated, and that if given a chance the prospects of each of them settling down to a decent and honest life were good. It was not contended, and indeed it could not have been contended, that the learned Judge acted on any wrong principle of law, or that he had taken matters into consideration which he should not have, or that he had failed to take into consideration matters which he should have. Rather it was said that looking at the final result as a whole it was manifest that the learned Judge's discretion had miscarried in some way. In effect the argument was that he had put an undue emphasis on the element of reformation, or that he had not given proper effect to the deterrent element.

The main offences to which the accused pleaded guilty were one count of armed robbery and two counts of attempted armed robbery. The other offences to which they pleaded guilty were incidental to and part of the armed robberies. If only one armed robbery or one attempted armed robbery had been committed, I would have thought that this Court should not interfere. But there was in fact one count of armed robbery and two counts of attempted armed robbery. The fact that the attempts were unsuccessful is, in my judgment of no moment. Whilst in a way the three offences were all part of one splurge of criminal conduct, nevertheless I think the fact that there were three serious crimes committed cannot be overlooked and must be taken into account.

It is for this reason, but not without some hesitation, that I have come to the conclusion that the learned Judge's discretion has miscarried and that the appeal should be allowed.

When one turns, however, to the appropriate sentences which should have been imposed, I think due weight should be given to the learned Judge's view that the probability of reformation in the case of all the accused was reasonably high. He was, in my opinion, in a better position to form this view than are the members of this Court. The sentences proposed, in my judgment, do not give proper weight to this element. As I have the misfortune to be in disagreement with my brethren as to this matter, no good purpose would be served in indicating what I would consider to be the appropriate sentences. All that I need say is that in my judgment they should be less than those imposed. Appeals allowed; sentences varied.

Solicitor for the Crown: John Downey, Crown Solicitor.
Solicitors for Williscroft and Weston: Galbally and O'Bryan.
Solicitor for Woodley and Robinson: George Madden, Public Solicitor.
