Sentencing Discretion

House v The King (1936) 55 CLR 499

A person can go before two different judges for sentencing and receive two very different sentences. This is despite both judges hearing the same set of facts and subjective features and then applying the same law. Neither judge is wrong. This is the magic of the sentencing discretion.

The Sentence Range

In mathematics, two plus two equals four. But in the sentencing exercise two plus two equals a range from three to five. A lenient judge will hand down a sentence at the bottom of the range, a tough judge will hand down one at the top – even for the same offender. Neither is wrong because both are within range.

The justices on the Court of Criminal Appeal will not intervene just because they personally would have handed down a sentence elsewhere within the range. So, when will an appellate court interfere with the sentencing discretion?

Sentencing Error

In 1936, the High Court held that it must appear that some error has been made in exercising the discretion. The majority (Dixon, Evatt & McTiernan JJ) identified five errors that would lead the appellate court to exercise its own discretion in substitution for that of the sentencing judge:[1]

1. The judge acted on a wrong principle,
2. The judge allowed extraneous or irrelevant matters to guide or affect him,
3. The judge mistakes the facts,
4. The judge does not take into account some material consideration, or
5. The sentence is unreasonable or plainly unjust.

Unreasonable or Plainly Unjust

Appeals generally rely on all five of these grounds but it is the last one that is most important. The majority in *House* acknowledged that it may not appear how the judge reached the result and so the nature of the error is not discoverable. Nevertheless, if the result is ‘unreasonable or plainly unjust’, then an appellate court may infer that there has been a failure properly to exercise the discretion.

In modern parlance we would say that the sentence falls outside the expected range and is manifestly excessive / inadequate.[2] The sentence should be reviewed on the ground that a substantial wrong has occurred.

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[1] House v The King (1936) 55 CLR 499 at 505

[2] Markarian v The Queen (2005) 228 CLR 357 at [25]

Court of Criminal Appeal

Sentence appeals from the District and Supreme Courts go the CCA and one of the five errors in *House* must be demonstrated before the CCA will intervene. So, it is necessary to parse every sentence of the judgment and consider whether they disclose an error. Even if one can't be identified, the appellant can still rely on the 'plainly unjust' catch-all. There is a 28 day time limit to file a Notice of Intention to Appeal[3] so it is best to get the judgment to counsel as soon as possible.

The Proviso

One final word of warning is that simply identifying an error in the sentencing exercise is not enough to get the CCA to intervene. The CCA must be persuaded that the error so identified also led to a miscarriage of justice. This is colloquially known as 'the proviso'. One of the most frustrating experiences for a barrister is to have the CCA find that there has been an error but that it did not lead to a miscarriage of justice and so they choose not to intervene.

Conclusion

If an error is demonstrated and the CCA find there has been a miscarriage of justice, then they will intervene. Section 6(3) Criminal Appeals Act 1912 provides:

> *On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.*

If the court does resentence the offender, then the court may order the production of documents and order witnesses to attend.[4] It is usual for the offender to give evidence himself as to his remorse and rehabilitation.

I am available every day should you require further assistance.

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[3] s10(1)(a) Criminal Appeal Act 1912
[4] s12 Criminal Appeal Act 1912