

SENTENCING IN THE COURT OF CRIMINAL APPEAL

Veronica Roby Research Assistant

This study consists of a statistical analysis of the outcomes of the decisions of the New South Wales Court of Criminal Appeal over a three year period. It reveals the types of offences most commonly reviewed by the Court of Criminal Appeal and looks at the different forms of appeals and their outcomes, such as conviction quashed, new trial ordered or sentence altered. Variations in the sentences imposed following successful appeals are also examined.

The Data

Data for the study were derived from judgments handed down by the Court of Criminal Appeal over a period dating from the introduction of the *Sentencing Act* 1989, on the 25 September 1989, to September 1992. Supplementary information from the Attorney General's Case Tracking System was also used.

The total number of cases (individual appellants) examined was 988. On the basis of figures cited in the Annual Reports of the Supreme Court for the years 1990 and 1991,¹ it is estimated that this figure represents about 85% of all appeals disposed of during that time. The remaining appeals were unavailable to the Commission.

It was also estimated that one out of every twenty appeals was either a s 5A submission on questions of law, a s 5F appeal from an interlocutory judgment, or an appeal from the Offenders Review Board. These were excluded from the analysis due to their small number.

Thus, the following analysis comprises 964 cases representing about 85% of all conviction, conviction and sentence,

sentence severity and Crown (leniency) appeals decided during the period 25 September 1989 to September 1992. In cases where there was more than one appellant, both appellants have been counted as separate entities. The data collected for each case relate only to the principal offence. Where multiple offences were present, the principal offence was identified as being the offence that attracted the most severe penalty.²

The Nature of Appeals

Types of Appeal

A breakdown of appeal types revealed that close to one in five (n=179) were appeals against conviction only, just over one in ten (n=115) were appeals against both conviction and sentence, almost six in ten (n=561) were appeals against sentence severity and the remaining one in ten (n=109) were appeals by the Crown. Figure 1 shows this breakdown of appeals.

Note¹

The Supreme Court of New South Wales Annual Review, 1990, pp 23-28 and the Supreme Court of New South Wales Annual Review, 1991, pp 25-30.

Note²

Or the offence with the highest ANCO number if more than one offence attracted the same penalty (see note 3).



Offence Categories

The offences were grouped into four categories based on ANCO codes.³ These categories are set out in Table 1.

Almost half of all of the appeals (n=451) were for offences against the person. A further quarter (n=239) were for offences against property. About one in five (n=175) appeals were for drug offences and one in ten (n=99) appeals were related to other offences. Figure 2 shows the percentage of appeals falling into each offence category.

OFFENCE CATEGORY	OFFENCES
Offences against the person	Murder, manslaughter, assault, sexual assault and robbery
Offences against property	break, enter and steal, fraud, and environmental offences
Drug offences	possession, supply, manufacture and importing of drugs, including cannabis, heroin and narcotics
Other Offences	offences against good order, driving offences, escaping from custody and importing prohibited imports ⁴

Figure 1
Type of Appeal

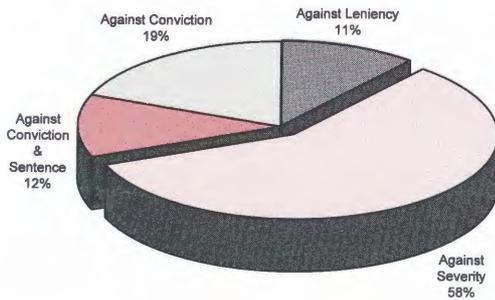
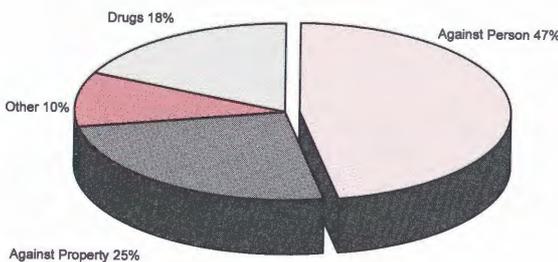


Figure 2
Appeals by Offence Categories



Note³

Australian National Classification of Offences, Australian Bureau of Statistics, ABS Catalogue No 1234.0, 1985.

Note⁴

Prohibited imports are often drugs, however, this information was not specified in many cases so they have not been included under drug offences.

The results of a further breakdown of appeal types by offence categories are summarised in Figure 3. It can readily be seen that offences against property have the highest proportion of appeals against severity (69.5% or n=166). This may be compared with the proportion of appeals against severity for offences against the person which was the lowest for any group of offences (51.7% or n=233). These patterns did not change when combined conviction and sentence appeals were examined.

The proportion of Crown appeals was highest in cases where the principal offence was a drug offence (17.7% or n=31). The next highest proportion of Crown appeals was for offences against the person (12.0% or n=54).

Offences against the person had the highest proportion of conviction appeals (22.2% or n=100) while the lowest proportion of conviction appeals was for drug offences (10.9% or n=18).

Figure 3
Appeal Types by Offence Categories

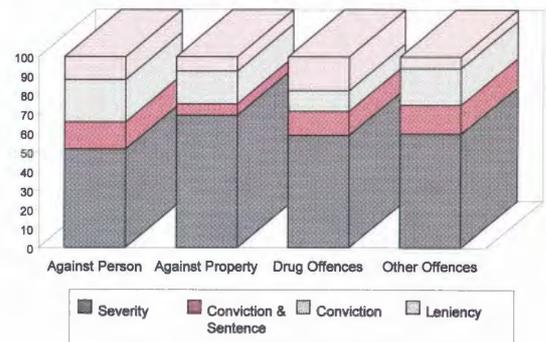
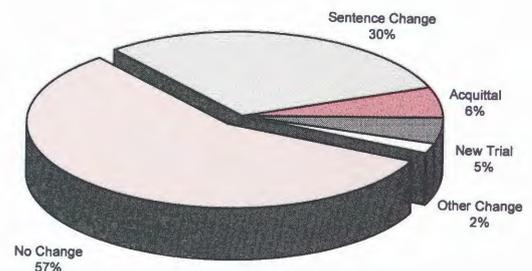


Figure 4
Outcome of Appeals



Successful Appeals

On the basis of an analysis of principal offences, it was found that 42.5% (n=410) of appeals were successful. Of these successful appeals, seven out of ten (n=293) resulted in changes to the sentence, just over one in ten (n=55) resulted in an acquittal, another one in ten (n=44) resulted in an order for a new trial and just under one in twenty (n=18) involved a technical or “administrative” change such as a minor adjustment to the sentence date. Figure 4 shows the outcomes for both successful and unsuccessful appeals.

Almost half (n=200) of the successful appeals for principal offences were for appeals involving offences against the person, one in five (n=86) involved offences against property, 16.3% (n=67) were for drug offences and 14.1% (n=58) were for other offences.

Results showed that, proportionally, changes in sentence duration are most likely to occur where the principal offence was a drug offence. Eighty-five percent (n=56) of appeals in connection with drug offences resulted in some change to the sentence. Proportionally, changes in sentence are least likely to occur for offences against property. Sixty-six percent (n=57) of successful appeals for property offences were sentence appeals.

Sentence Variations

The Supreme Court of New South Wales Annual Review, 1990⁵ states that for 1990 “there was a relatively high success rate of sentencing appeals” and suggests that this can be partly attributed to “significant changes in both State and Federal sentencing laws” that affected this period. One notable change occurred with the introduction of the *Sentencing Act* 1989 which commenced on September 25, 1989. Under this Act non-parole periods and remissions were abolished and the notion of minimum and additional terms introduced. Thus, the present analysis embraces a most volatile period of change

in sentencing practice. As a result it is difficult to compare this study in a meaningful way with studies that preceded the *Sentencing Act*. As it was pointed out in *Maclay* ((1990) 19 NSWLR 112), sentencers were required to adopt a “fresh approach” to the setting of fixed, minimum and additional terms and so, in the main, were not called upon to translate their old sentencing patterns into new ones. Further, while this study consists of appeal decisions dating from the commencement of the *Sentencing Act*, this does not mean that all of the original sentences were handed down after the Act commenced. Particularly in the case of the earlier appeals in our data, it is quite likely that the offender was originally sentenced under the old law. Thus in order to untangle the mix of cases and, so far as possible, work with a more homogeneous set of data, only those offenders who were sentenced under the *Sentencing Act* were considered. A further refinement was made by limiting our data not only to the principal offence, but also to the principal offender.⁶

Thus, the following analysis proceeds on the basis of data derived from a sample where all sentences, both before and after appealing, were from the post-*Sentencing Act* period, involving only the principal offence and the principal offender. Secondly, only data for the successful cases, that is where the actual term of the sentence, rather than the date of sentencing, was changed, were considered. Thirdly, our analysis is based only on offenders who received a full-time imprisonment term both prior to and following the appeal. Finally, both successful sentence appeals and combined conviction and sentence appeals, where the result was a change to the sentence, were included. These data were then separated into appeals against severity (n=51) and appeals by the Crown (n=18).

⁵ Note
p 23.

⁶ Note

These cases were omitted to reduce statistical dependence among the observations.

Severity Appeals

Table 2 shows the average terms of imprisonment, including minimum or fixed terms and additional terms, prior to and following successful severity appeals, along with the ranges of the terms and the average difference in the length of the terms. Often the Court of Criminal Appeal will decrease the minimum term but increase the additional term, resulting in an overall sentence⁷ of the same length. This explains why additional terms after appealing are, on average, longer than they were before the appeal. Generally, however, there is a decrease in both the minimum and the additional term, resulting in a shorter sentence.

Figure 5 shows the current relationship between the old and new sentences. The statistical method known as regression analysis was employed to calculate a "line of best fit" for the data. A "line of best fit" simply portrays the neatest possible line that can be drawn through the data and which best represents the set of data points. The equation of such a line represents a formula for calculating the expected sentences following a successful appeal against severity. The formula was determined as:

$$\text{New Sentence} = 0.88 * \text{Old Sentence} - 3.87 \text{ months}$$

The correlation, or relationship, between the original sentence length and the new sentence was 0.93. When this figure is squared it represents the proportion of the variance (ie the dispersion of the scores around the mean score) in the new sentence explained mathematically by the old sentence. This means that 86% of the

variance in the new sentence is "explained" by the old sentence. Further, our information indicates that when a new sentence is substituted it is about 88% of the old sentence.⁹

Our formula differs from the formula developed in a previous study by the NSW Bureau of Crime Statistics and Research which found that when the Court of Criminal Appeal allowed an appeal against severity and decided to reduce the sentence, the reduction was about 25% of the original sentence.¹⁰ The data for this study consisted of 513 judgments from 1981 to 1985 and the formula developed was:

$$\text{New Sentence} = 0.76 * \text{Old Sentence} - 7.5 \text{ months}$$

Using this formula the amended sentence is equivalent to about 76% of the original sentence. In the light of this, it would appear that sentence reductions under the *Sentencing Act* are smaller than they were previously.

Regression analysis was also used to calculate a formula for minimum terms. The equation for the "line of best fit", which tells us the expected minimum term, was computed as:

$$\text{New Min. Term} = 0.75 * \text{Old Min. Term} - 2.77 \text{ mths}$$

The correlation coefficient was again 0.93, indicating that 86% of the variance in the new minimum term can be "explained" by the old minimum term. The formula is

Note⁷

Henceforth the expression "sentence" is used to mean "the term of the sentence", that is, either the fixed term or the sum of the minimum and additional terms.

Note⁸

Additional terms were present in 90.2% of cases. The remaining ten percent of cases involved a fixed term.

Note⁹

This is an estimate but we are 95% confident that the new sentence will be between 78% and 98% of the original sentence.

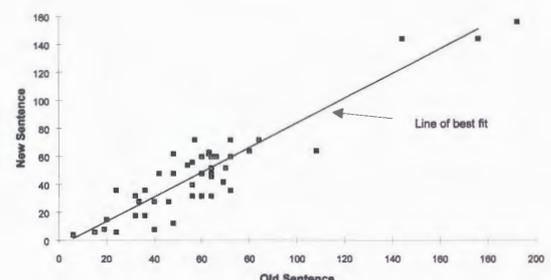
Note¹⁰

Weatherburn, D, *Appeals Against Sentence Severity: Sentencing Judgments of the NSW Court of Criminal Appeal*, NSW Bureau of Crime Statistics and Research, 1988.

TABLE 2 Average Terms of Imprisonment for Successful Severity Appeals

TERM	BEFORE APPEALING	AFTER APPEALING	DIFFERENCE
Minimum or Fixed Term			
(Average)	45.7 mths	31.5 mths	-14.2 mths
(Range)	6 mths-12 yrs	4 mths-9 yrs	
Additional Term⁸			
(Average)	17.1 mths	19.6 mths	+2.5 mths
(Range)	3 mths-4 yrs	2 mths-5 yrs	
Term of Sentence			
(Average)	61.1 mths	49.6 mths	-11.5 mths
(Range)	6 mths-16 yrs	4 mths-13 yrs	

Figure 5
New Sentence as a Function of Old Sentence
(Successful Severity Appeals)



remarkably similar to that derived by the New South Wales Bureau of Crime Statistics and Research¹¹ for calculating the new non-parole period, despite the fact that minimum terms and non-parole periods are not identical.

Crown Appeals

Table 3 shows the average sentences before and after successful Crown appeals, along with the ranges of the terms and the average difference in the length of the terms. It can be seen that Crown appeals are treated somewhat differently to appeals against severity, in that more often than not both the minimum term and the additional term are increased, resulting in a longer sentence.

There were only 18 appeals by the Crown in the sample, but a regression analysis was undertaken despite the small sample. The "line of best fit" was calculated and is shown in Figure 6. The formula for the line, which allows us to estimate the new sentence, was:

$$\text{New Sentence} = 1.40 * \text{Old Sentence} + 11 \text{ months}$$

Minimum terms are treated in much the same way. The equation for calculating the amended minimum term is:

$$\text{New Min. Term} = 1.38 * \text{Old Min. Term} + 8.2 \text{ mths}$$

Although our results do suggest that when the Court of Criminal Appeal varies a sentence for a Crown appeal it increases the original sentence by 40%, such a small sample size means that, to make a

confident prediction, we are restricted to saying that the increase is unlikely to exceed 75% of the original sentence.

Dispositions for Successful Appeals Against Severity

Although thus far our analysis has focused on prison terms, not all appeals against severity involve terms of imprisonment. There were 208 successful appeals against severity in our sample.¹³ These were broken down into three groups, those involving terms of imprisonment, those involving terms of periodic detention and those concerning other dispositions which consisted mainly of recognizances, but included one fine and one community service order.

The majority of cases (87% or n=181) did involve terms of imprisonment both prior to and following the appeal. However, there were four cases where the offender appealed against a term of imprisonment and received a term of periodic detention following the appeal. There were also eleven cases of offenders appealing against terms of imprisonment and receiving a recognizance or a community service order following the appeal. Seven of the ten appeals involving periodic detention received a lighter term of the same disposition, while the other three received either a fine or a recognizance. The results are summarised in Table 4.

Note¹¹

ibid, the formula was:
New Non-Parole Period
= 0.75 * Old Non-Parole
Period - 1.9 months.

Note¹²

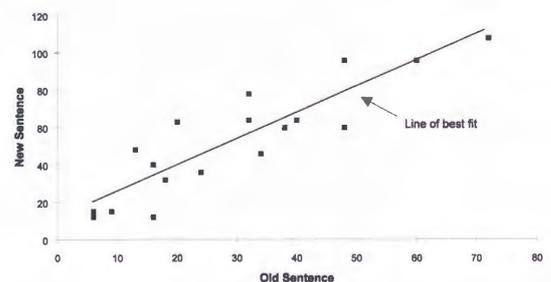
Fifteen cases had
additional terms.

Note¹³

The analysis now includes
offenders originally
sentenced in both the pre-
and post-Sentencing Act
periods. Missing
Values = 8.

TERM	BEFORE APPEALING	AFTER APPEALING	DIFFERENCE
Minimum or Fixed Term			
(Average)	20.1 mths	35.9 mths	+15.8 mths
(Range)	6 mths-4 yrs	1 yr-6 yrs	
Additional Term¹²			
(Average)	11.4 mths	21.4 mths	+10.0 mths
(Range)	3 mths-2.5 yrs	8 mths-4 yrs	
Term of Sentence			
(Average)	29.6 mths	52.5 mths	+22.9 mths
(Range)	6 mths-6 yrs	1 yr-9 yrs	

Figure 6
New Sentence as a Function of Old Sentence
(Successful Crown Appeals)



Dispositions for Successful Crown Appeals

Crown appeals are more interesting. For the 75 successful appeals in our sample,¹⁴ 41 (54.7%) received harsher prison terms. Very few (n=2) offenders sentenced to periodic detention came out with a harsher term of periodic detention, but instead most (n=17) had their sentence increased, but not necessarily lengthened, to a term of imprisonment. The majority (n=10) of offenders who originally received a recognizance were re-sentenced to imprisonment while only four offenders received a harsher recognizance. Table 5 shows these results.

Conclusion

The majority of appeals in the Court of Criminal Appeal are against sentence severity followed by conviction appeals, combined conviction and sentence appeals and lastly, Crown appeals. Most appeals were for offences against the person or property offences and 43.0% of all appeals were successful. This 43.0% comprises 30.0% change in sentence, 6.0% acquittals, 5.0% new trials ordered and 2.0% other changes.

TABLE 4 Old Penalty Type by New Penalty Type (Successful Appeals Against Severity)

OLD PENALTY	NEW PENALTY		
	PRISON	PERIODIC DETENTION	OTHER
PRISON	87.0% (n=181)	1.9% (n=4)	5.3% (n=11)
PERIODIC DETENTION	0.0% (n=0)	3.4% (n=7)	1.4% (n=3)
OTHER	0.0% (n=0)	0.0% (n=0)	1.0% (n=2)

TABLE 5 Old Penalty Type by New Penalty Type (Successful Crown Appeals)

OLD PENALTY	NEW PENALTY		
	PRISON	PERIODIC DETENTION	OTHER
PRISON	54.7% (n=41)	0.0% (n=0)	1.3% (n=1)
PERIODIC DETENTION	22.7% (n=17)	2.7% (n=2)	0.0% (n=0)
OTHER	13.3% (n=10)	0.0% (n=0)	5.3% (n=4)

Note¹⁴

Missing Values = 2.

Note¹⁵

Weatherburn, *op cit*.

An examination of post-Sentencing Act cases revealed that, in the case of successful appeals against severity, the Court of Criminal Appeal tends to reduce prison sentences by an estimated 12%. While this decrease does vary, on the whole it is much smaller than the 25% decrease suggested by the NSW Bureau of Crime Statistics and Research in their study of pre-Sentencing Act cases.¹⁵

Further, it was found that often the minimum term is decreased while the additional term is increased to match the full term of the previous sentence. Thus, while the overall sentence length appears to remain the same, it is the proportion between the minimum and additional terms which changes.

In the case of successful Crown appeals, the increase in the overall sentence is comprised of increases in both the minimum and additional terms. While our small sample suggested that this increase is about 40% of the original sentence, until a larger sample is available we can only say that the increase is unlikely to exceed 75% of the original sentence.

Most appeals against severity are against terms of imprisonment and, if successful, usually result in less severe terms of imprisonment. There are, however, appeals against terms of imprisonment which result in less severe, non-custodial, or semi-custodial dispositions. On the other hand, Crown appeals, while usually against terms of imprisonment, are often against terms of periodic detention or non-custodial dispositions and, where successful, result in the offender being sentenced to full-time imprisonment.

Disclaimer

This paper was prepared by officers of the Judicial Commission for the information of the Commission and for the information of judicial officers. The views expressed in the report do not necessarily reflect the views of the Judicial Commission itself but only the views of those officers of the Commission who have prepared this report for the Commission.