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"SPECIAL CIRCUMSTANCES" UNDER THE *SENTENCING ACT* 1989 (NSW)

by

Ian MacKinnell
Senior Research Officer

Donna Spears
Research Director

Ryan Takach
Research Assistant

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TABLE OF CONTENTS

Summary

This paper examines the imposition of custodial sentences under the *Sentencing Act* 1989 (NSW) with particular focus on the use of minimum and additional terms. First, an analysis is conducted of the incidence of the various types of custodial sentences imposed at first instance in Local and Higher Courts during the 1992 calendar year. This analysis focuses on those sentences where the additional term exceeds one third of the minimum term. Such sentences require a finding of "special circumstances" as there has been a departure from the statutory formula: s 5(2) of the *Sentencing Act* 1989. Secondly, an analysis of "special circumstances" appeals to the Court of Criminal Appeal heard during the 1992 calendar year is conducted in similiar terms.

Having demonstrated that "special circumstances" are frequently found by judges both at first instance and on appeal, this paper then looks at the way in which the Court of Criminal Appeal has given guidance on the meaning and use of "special circumstances". This paper ultimately suggests that traditional sentencing principles, as well as the need to maintain judicial discretion, inform cases where the additional term is extended beyond one-third of the minimum term.

The legislative scheme

The *Sentencing Act* 1989 made a number of significant changes to the setting of custodial sentences in New South Wales. It abolished the remission system, and removed the majority of custodial sentences – those of six months or less – from the scope of the parole system. It also abolished the calculation of a single non-parole period based on the head or aggregate head sentence, and introduced the concept of a total sentence to be set for each offence – which has significant repercussions for the setting of cumulative sentences. For custodial sentences greater than six months, the Act requires a sentencer to set a minimum term, which is to be served in custody, and an additional term, which may be served on parole: s 5(1)(b). The relationship between the minimum term and the additional term is governed by s 5(2) which states:

> The additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances.

Alternatively, a sentencer may decide to set a fixed term if, *inter alia* due to the nature of the offence or the character of the accused, it is deemed appropriate to do so: s 6.

These sections, in effect, establish three options for custodial sentences greater than six months, which vary in the proportion of the sentence that may be served on parole [Note: for total sentence of less than three years, an order for release on parole is to be made by the Court: s 24(1)]:

(a) a fixed term (ie no parole period);

(b) a minimum term followed by an additional term not exceeding one-third of the minimum term (ie a "normal" parole period);

(c) a minimum term followed by an additional term greater than one-third of the minimum term (ie a "longer-than-normal" parole period).

The Act distinguishes the second of these options in so far as it requires explicit justification for the use of options (a) and (c). In particular, it requires a finding of

"special circumstances" where the Court seeks to set the minimum term at less than three-quarters of the total sentence.

By way of comparison, under the previous system governed by the *Probation and Parole Act* 1963, "non-parole periods were often as short as 50 per cent of the head sentence, or even less": *R v Moffitt* (1991) 20 NSWLR 114 at p 133. In light of public criticism of this disparity, particularly in the context of serious crimes of violence, a new section 20A of the *Probation and Parole Act* 1963 was introduced by Parliament to require sentencers to impose a non-parole period of at least three-quarters of the head sentence for certain serious crimes, unless it was determined that the circumstances justified a lower proportion (s 21(3)).

It should be noted that, in relation to federal offences, the *Crimes Act* 1914 provides that an individual head sentence is to be imposed in relation to each offence. Section 19AB provides that, where an offender is subject to one or more sentences exceeding three years in the aggregate, the Court must either fix a single non-parole period or make a recognizance release order. As was the case for the majority of offences committed against State laws prior to the introduction of the *Sentencing Act*, the non-parole periods for federal offenders are typically less than three-quarters of the aggregate sentence.

The Act in operation

From its inception, the *Sentencing Act* 1989 was the subject of much controversy. It was criticised by some social reformers, particularly in terms of its effect on the size of the prison population, although other commentators praised the clear wording of the statute. In the early months of the Act's operation, there was a degree of uncertainty as to how it was to be reconciled with existing sentencing practice and precedents, but the daily practicalities of court work mitigated against any detailed analysis at first instance, and it was not until the first appeals against post-*Sentencing Act* sentences were heard by the Court of Criminal Appeal that any useful aids to the application of that legislation emerged.

In the landmark case of *R v Maclay* (1990) 19 NSWLR 112, it was held that the sentencing judge under the new Act is to use a "fresh approach" and not replicate sentencing paradigms found in pre-*Sentencing Act* cases. The sentencer should give weight to general sentencing principles, including the gravity of objective features and all relevant subjective factors when determining the minimum term. The Court, in *obiter*, indicated that "The process now begins, as a rule, with the fixing of a minimum term to which there is added an additional term and the relationship between the two is governed by statute" (at p 126).

This approach was based on a literal reading of s 5(1). If special circumstances were found to exist, the sentencer could then increase the additional term. Samuels JA noted that "The purpose of parole being rehabilitative, any extension of that part of a sentence to be served on parole (the additional term) by increasing the time during which the support and supervision of the parole system is available, must be designed to benefit the prisoner" (at p 116). Ironically, although the purpose of departing from the one-third rule is clearly related to rehabilitation, an increase in the additional term without a corresponding adjustment to the minimum term could clearly result in unintended punitiveness.

This issue was addressed in *R v Moffitt* (1990) 20 NSWLR 114, where Badgery-Parker J held that s 5 does not require the adoption of a sequential approach and *R v Maclay* should not be understood as construing it thus. A sentencer is permitted to determine a minimum term —

> ... upon a broad view of the case, which embraces not only those matters which arise for consideration in every case, but also any "special circumstances" which may justify a departure from the prima facie requirement ... In effect, he may take into consideration all relevant circumstances, including those which amount to "special circumstances" within s 5(2) and determine, in no particular order, how long the offender should spend in actual custody, and what period thereafter should be the period during which he is eligible for release on parole, and what should be the total sentence bearing an appropriate relationship to the maximum prescribed by the *Crimes Act* (at p 135 per Badgery-Parker J).

Effectively this means that any increase in the additional term would ordinarily be accompanied by a decrease in the minimum term. Such an approach would appear *prima facie* to rest uneasily with the "bottom-up" approach envisaged by the Government in introducing the legislation.[1] However as Wood J has observed, "... s 5(1) prescribes the manner in which the sentencing court must pronounce sentence, and not the reasoning which leads to the order made ..." (at p 121). Badgery-Parker J noted that the section "... controls a judicial act, not a process of reasoning leading to such an act; it prescribes a form of sentence to be pronounced, it does not purport to prescribe a mental process" (at p 134). The Court as a whole clearly acknowledged the inherent flexibility of judicial discretion in the sentencing process.

In *R v Moffitt*, the Court also considered the meaning of the phrase "special circumstances". The wording of s 5(2) would *prima facie* suggest that a finding of "special circumstances" would be infrequent, that is, special as opposed to ordinary. However, the Court held that s 5(2) should not be read as restrictively as s 20A of the *Probation and Parole Act* 1963 with its obvious punitive intent, but should be applied in line with the rehabilitative purpose of parole. Even so, at an empirical level, the question remains: how frequent are sentences which depart from the one-third rule? In order to answer this question, it is now appropriate to turn to the 1992 sentencing statistics and examine the incidence of departure from the one-third rule in sentence construction.

How frequent are "special circumstances"?

Court statistics for 1992 show that "special circumstances" are found quite frequently in the higher courts, where about 47% of sentences with an additional term depart from the "one-third" rule of s 5(2); but they are found much less frequently in Local Courts, where the corresponding proportion is only 17%.

This disparity between jurisdictions is even more obvious when the number of cases is taken into account. The following table compares custodial sentences in Local and Higher courts, broken down by type of sentence: fixed terms (along with the one life sentence during 1992); "normal" sentences (where the additional term conforms to

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1 Yabsley, M, Second Reading Speech Assembly Hansard 10.5.1989 p 7906.

the "one-third" rule); and "special" sentences (where "special circumstances" were found, warranting a departure from the "one-third" rule). As noted above, these categories constitute a scale of: (a) no parole period, (b) normal parole period, and (c) longer than normal parole period – ie a scale of increasing utilisation of the parole mechanism.

	Local Courts		Higher Courts	
Fixed term/Life	4,437	89.1%	1,342	38.9%
"Normal"	450	9.0%	1,114	32.3%
"Special"	91	1.8%	996	28.9%
TOTAL	4,978	100.0%	3,452	100.0%

As can be seen from the table, Local Courts impose a greater number of custodial sentences than the higher courts, but less than 2% of these sentences (only 91 instances) make use of the "special circumstances" provision of s 5(2). This is mainly because the vast majority of custodial sentences in the Local Courts are for terms of six months or less and must, therefore, have fixed terms. Even so, only 17% of Local Courts sentences with an additional term depart from the "one-third" rule – as was noted above – which indicates that "special" does appear to be synonymous with "infrequent" or "exceptional" in this jurisdiction. For this reason, the remainder of this discussion of sentencing statistics will focus upon cases in the higher courts.

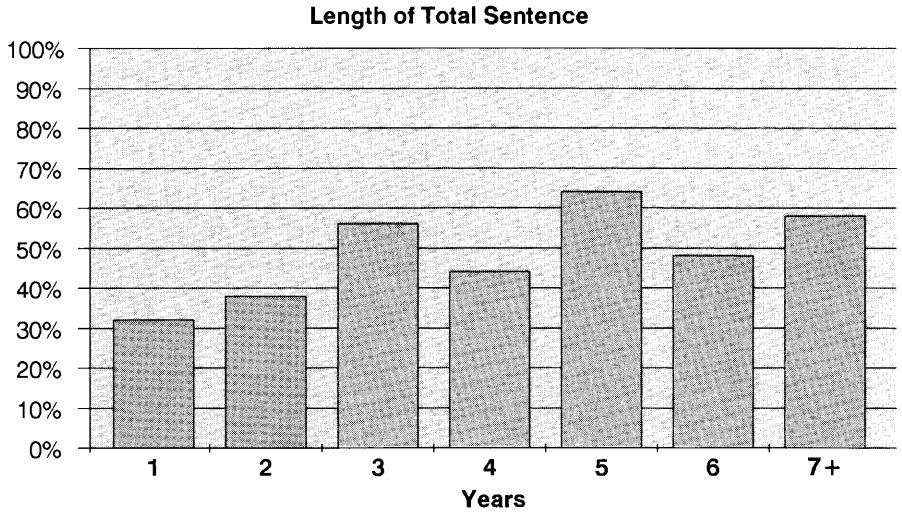
The custodial sentences imposed by the higher courts clearly exhibit a very different composition of fixed, "normal" and "special" sentences compared to those imposed by the Local Courts. Custodial sentences in the higher courts are much more likely to include an additional term (about 60% of higher court custodial sentences, compared to only about 11% of Local Court custodial sentences); and the additional term is much more likely to exceed one-third of the minimum term. Thus, the frequency with which "special circumstances" is found in higher courts is part of an overall pattern of wide judicial discretion in the use of the parole mechanism.

Given that higher courts find "special circumstances" in a significant number of cases, a second question arises: from a statistical point of view can any factors be identified which significantly affect the frequency with which "special circumstances" are found?

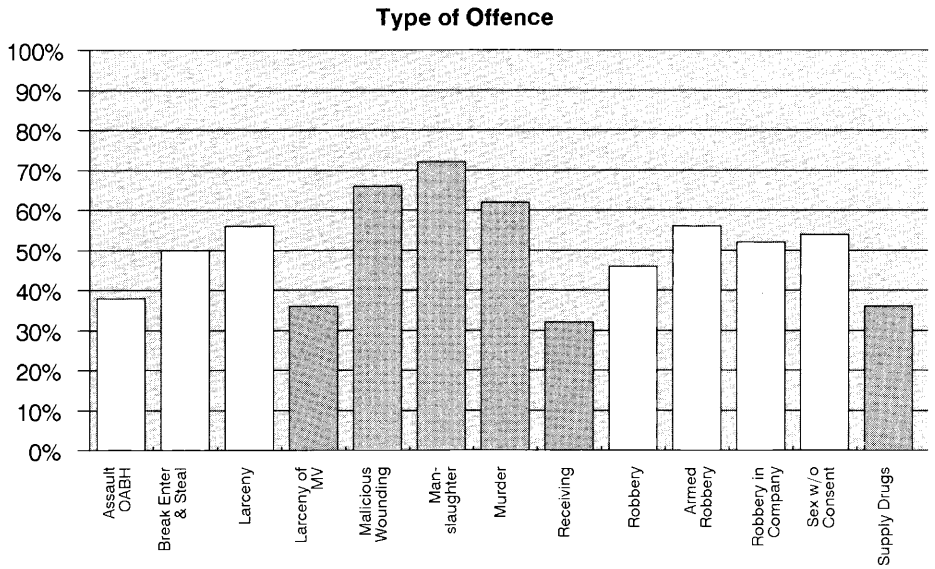
Which circumstances are "special"?

The following are a number of general observations that arise from a careful consideration of the court statistics. This is not a complete list of factors that empirically appear to influence the finding of "special circumstances". The Act does not restrict the range of circumstances that may be regarded as "special", and court statistics do not record many of the factors that sentencers properly take into account when making their assessment of a particular case.

- "special circumstances" are found in more than 40% of cases where the total sentence exceeds two years. This is consistent with the view that more serious offences are inherently more likely to be regarded as "special cases".



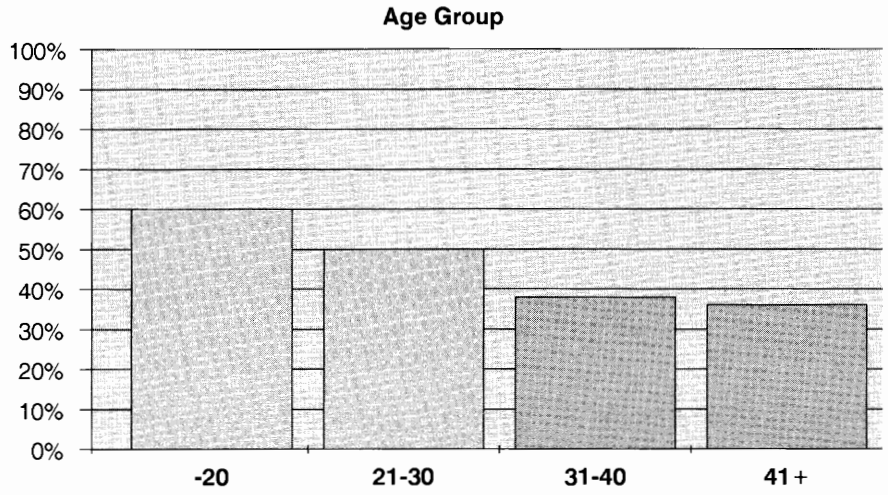
- "special circumstances" are more often found in certain offences against the person (eg in more than 60% of sentences for malicious wounding, manslaughter, and murder) and less likely in a number of property and drug offences (eg in less than 40% of sentences for larceny of motor vehicles, receiving, and supply prohibited drugs).



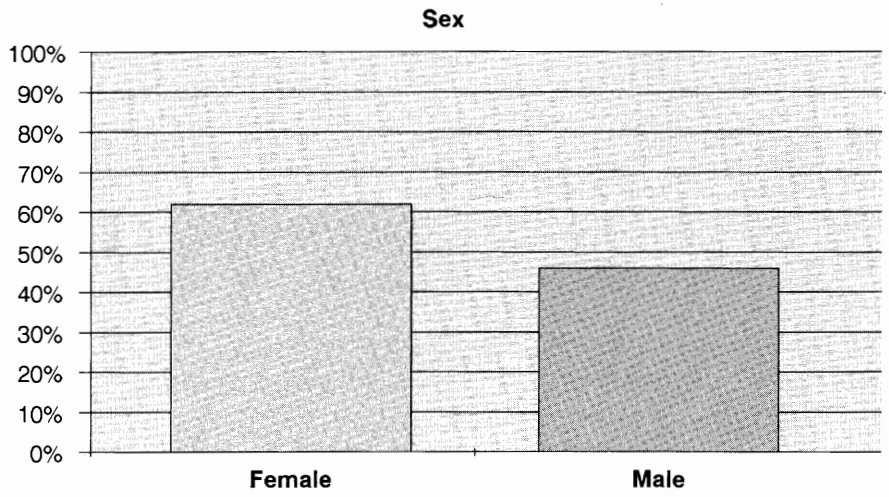
Note: These 13 offence types — the most frequent offences for which higher courts imposed an additional term — cover 1,063 sentences, or about half of the 2,110 sentences with an additional term imposed by the higher courts during 1992. Owing to the small number of cases involved in most of these offences, the variation between

them is only statistically significant (ie only constitutes a reliable guide to sentencing trends in other years) where the proportion of cases with "special circumstances" is greater than 60% or less than 40%.

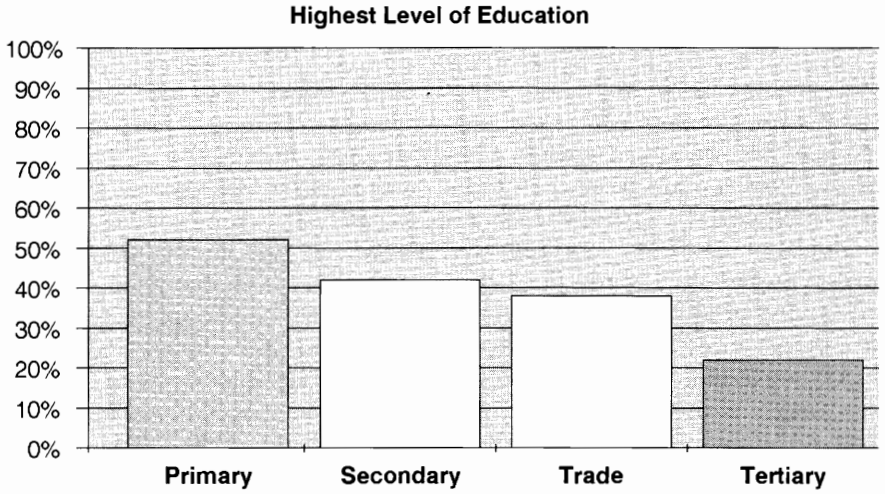
- "special circumstances" are more often found in cases involving younger offenders, than in cases where the offender falls into older age groups.



- "special circumstances" are found more often in cases where the offender is female than where the offender is male.

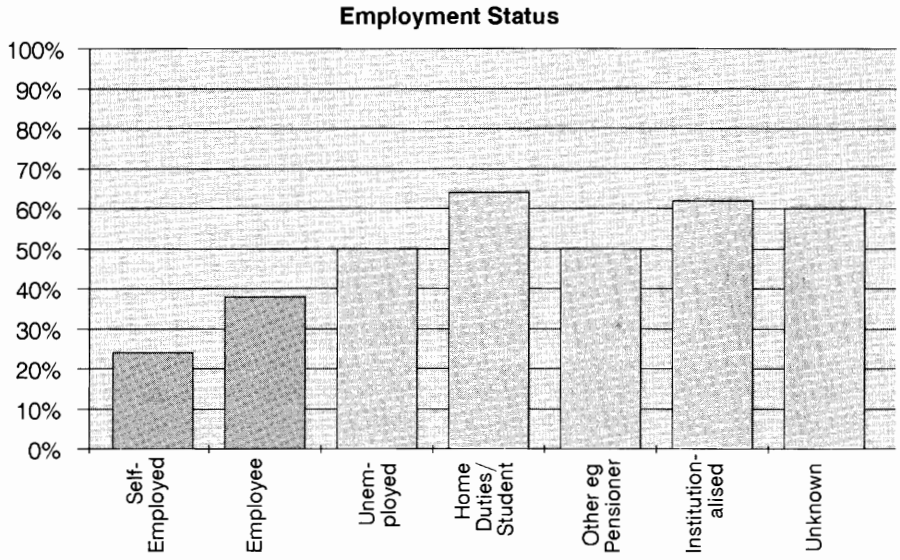


- "special circumstances" are more often found where the offender has lower educational qualifications (eg primary or secondary school only) than where the offender has trade or tertiary qualifications.



Note: the highest level of education was recorded as "Unknown" in about half of the 2,110 cases where an additional term was imposed. Nevertheless, the difference between these four groups was statistically significant (ie not just the result of chance variation from year to year).

- "special circumstances" are less often found where the offender was in employment, particularly in self-employment, than where the offender was unemployed or not in the labour force (home duties, students, pensioners, etc).



- there is no significant difference between trial and sentencing cases regarding the frequency with which "special circumstances" are found.

Overall, no one factor stands out. These statistics support the claim that a finding of "special circumstances" takes into account and arises from the consideration of a broad range of subjective and objective factors in a case, and each of these factors may contribute only a small weighting to the final decision.

Appeal cases

The Commission has access to the majority of the judgments of the Court of Criminal Appeal delivered during 1992. From those judgments, 272 cases have been identified which, *inter alia*, contained appeals against sentence. About 30% of those applicants raised the issue of "special circumstances", with about a 50% chance of success.[2] Of these 272 appeals, 42 applicants succeeded in having the ratio between the minimum and additional terms of their sentence altered on this basis. At least 38 more applicants argued this ground but failed; see Appendix I. However this figure of 42 should not automatically be added to the number of 996 cases that were successful in the first instance [see table on p 4] since some of these cases already had longer-than-one-third additional terms, which were further extended because the "special circumstances" were not adequately taken into account by the trial judge: see *R v Bannerman* NSW CCA, unreported 29 October 1992, *R v Franks* NSW CCA, unreported 24 November 1992, *R v DeGiorgio* NSW CCA, unreported 5 November 1992, *R v BCG* and *MBH* NSW CCA, unreported 15 December 1992, and *R v Taouk* NSW CCA, unreported 20 March 1992.

Crown appeals against the inadequacy of sentence raise an interesting issue — double jeopardy is in itself a "special circumstance" to be considered once the Court has decided to resentence the respondent: see *R v Hunter* NSW CCA, unreported 12 August 1992, and *R v Wotherspoon* NSW CCA, unreported 4 December 1992. Another unusual type of case is where the applicant argues that there was no evidence in their matter which in fact warranted the original finding of "special circumstances", and therefore the total sentence should be decreased: see *R v Rudd* NSW CCA, unreported 23 April 1992.

Defining "special circumstances"

The Court of Criminal Appeal in *R v Gower* (1991) 56 A Crim R 115 (citing *R v Moffitt*, per Badgery-Parker J) affirmed the view that "special circumstances" exist not merely where a case was rendered exceptional or distinguishable from all others but rather where ". . . for reasons which can be identified in the facts of the individual case a longer period of parole supervision is warranted than would be provided by adherence to the one-third rule . . ." (at p 120). It is the need for a longer term of supervision in the community that necessitates an additional term beyond one-third of the minimum term, rather than the need to shorten the minimum period per se. The question then becomes: from a legal analysis of the judgments of the Court of Criminal Appeal, what factors in a case or attributes of an offender may warrant the need for an extended period of supervision in the community?

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2 We found a total of 75 cases employing the term "special circumstances" from among the 272 appeals during 1992, 38 of which failed and 37 of which succeeded. This number does not include any cases using language such as "peculiar circumstances" or "reasons to depart from the statutory norm". By looking at cases in which the additional term was longer than one-third, another group of 13 cases were found. However in only 5 of these was "special circumstances" the reason for the change (albeit argued in different language such as above). The remaining 8 cases include those comprising Commonwealth offences which have a non-parole period rather than an additional term, those sentences which were reduced on the grounds of parity with co-offenders, or simply adjustments of sentences due to errors at trial. Thus, a mathematical examination of the "minimum term : additional term" ratio may not necessarily reflect the number of cases relying on the s 5(2) provisions; nor will it show the number of cases where the argument was pursued but failed.

A broad variety of cases and situations have been interpreted as giving rise to a finding of "special circumstances". The fact that an offender will spend most or all of the period in custody in strict protection may constitute special circumstances, regardless of whether the need for that protection arises from the circumstances of the case or not: *R v Astill (No 2)* (1992) 64 A Crim R 289 at 294ff per Kirby P.

Special circumstances may also exist where a court is imposing a series of cumulative sentences. Section 9(1) provides that where a further sentence of imprisonment is to be made cumulative on a previous sentence, that further sentence must commence at the end of the minimum term of the previous sentence. Such a finding of "special circumstances" is made "so that it [the Court] can ensure a proper proportion between the total minimum term and the effective additional term – even if it is only to produce an effective additional term equal to, or roughly equivalent to, one-third of the total minimum term which the prisoner is to serve": *R v Simpson* (1992) 61 A Crim R 58, at p 61 per Hunt CJ at CL. This view has been affirmed on numerous occasions: *R v Dib* NSW CCA, unreported 13 May 1993, at p 4 per Wood J; *R v Pollock* NSW CCA, unreported 20 May 1993, at p 6 per Hunt CJ at CL; *R v Priestley* NSW CCA, unreported 23 March 1993, at p 9 per Gleeson CJ.

The existence of a discrete period of pre-sentence custody may constitute special circumstances per se, so as to justify an adjustment of the otherwise appropriate minimum and additional terms to ensure that a proper proportion is achieved between the total period actually spent in custody and the additional term imposed: *R v Close* (1993) 65 A Crim R 55 per Hunt CJ at CL.

By the same token, the Court of Criminal Appeal has warned against allowing such factors to assume the status of special circumstances simply by virtue of their subjective features of a particular case. In *R v Astill (No 2)*, "prudent and sensible restraint" (p 302) was called for in applying s 5(2): Sully J emphasised that the legislative intention and purpose of the *Sentencing Act* must not be subverted by allowing factors to become special circumstances simply because they are idiosyncratic features of a case.

The *locus classicus* of the definition of "special circumstances" is *R v Phelan* NSW CCA, unreported 4 March 1993, where Hunt CJ at CL observed that "special circumstances" are –

> . . . something more than merely a subjective feature of the case. What does constitute a matter as a special circumstance within the meaning of s 5(2) is its production of the need or the desirability for the offender to be subjected to an extended period of conditional release subject to supervision on parole. That need or desirability may arise from the prospect of particular difficulties in adjustment after long periods in custody, or from the greater prospect of rehabilitation if supervised whilst on parole than from a longer period of incarceration. Such will often be the case with young offenders who are facing their first custodial sentence (p 5).

Failure to mention "special circumstances"

In *R v Bo Too* (NSW CCA, unreported 16 July 1992, at p 3 per Hunt CJ at CL, and affirmed in *R v McLear* NSW CCA, unreported 1 September 1992), the Court of Criminal Appeal indicated that a sentencer should give reasons for failing to depart

from the one-third rule, if there was material in the evidence capable of supporting a finding of "special circumstances". In this context, a failure to give such reasons may indicate that the Court did not consider this issue at all and thereby fell into appellable error.

In the absence of an evidentiary basis, there is no positive requirement in the *Sentencing Act* to expressly consider the possible application of section 5(2). In addition, the Court of Criminal Appeal is reluctant to intervene on a basis of imputed, rather than patent, error on the part of a sentencing judge. However, a pattern has emerged where 'appellate counsel will be intransigent in burdening this Court [of Criminal Appeal] with appeals which are essentially unmeritorious but which can be given at least a bare flicker of forensic life by pointing to an absence of particular discussion of the element of "special circumstances" ' *R v Page* NSW CCA, unreported 17 May 1993, at p 24 per Sully J.

The mere absence of such discussion does not imply that the issue of "special circumstances" has been overlooked by a sentencer: *R v Gray* NSW CCA, unreported 17 March 1993, at p 5 per Hunt CJ at CL. However as the most common submissions in sentencing appeals relate to a failure to mention "special circumstances", it has been suggested by the Court of Criminal Appeal that "sentencing judges should in every case make some reference to s 5(2)": *R v Brindley* NSW CCA, unreported 16 February 1993. This recommendation has been made on several occasions as a prudent rule of practice: see for example judicial discussion in *R v Sherman* NSW CCA, unreported 27 April 1993; *R v Calci* NSW CCA, unreported 27 April 1993, at p 9 per McInerney J.

Rehabilitation and deterrence

An analysis of recent decisions of the Court of Criminal Appeal suggests that the traditional purposes of punishment — deterrence, rehabilitation and retribution — pervade arguments in that Court as to the finding of "special circumstances". The one outstanding factor in the cases where "special circumstances" have been found, is the real and genuine prospect of rehabilitation, particularly when this was evidenced by considerable progress at the time of sentencing. However in some cases, the need for general deterrence will overwhelm factors which may otherwise warrant a departure from the one-third rule, and in such circumstances, it has been held that a sentencer may, in the proper exercise of discretion, decline to impose a longer additional term.

By way of example, in the case of *R v Nash* NSW CCA, unreported 14 April 1993, a Community Corrections Officer gave evidence that the applicant (who had been convicted of conspiracy to commit armed robbery) had "made very positive and constructive efforts in rehabilitation". Finlay J observed that "in light of this long period of sustained and confirmed rehabilitation of a man still only in his mid twenties, I have come to the view that the very experienced sentencing judge has erred by weighing too lightly this important evidence". Although the sentencer had made a finding of "special circumstances" and lengthened the additional term, the Court of Criminal Appeal held that an even longer additional period was warranted. However, in contrast to such a result, in the case of *R v Wylie* NSW CCA, unreported 18 May 1993, the Court of Criminal Appeal declined to apply s 5(2) on the basis of a favourable report by a Community Corrections Officer regarding an applicant's rehabilitation prospects.

It is important to emphasise the significance of evidence of demonstrated rehabilitation. Such cases should be contrasted to cases where the only evidence is an assertion of an intention to reform by the offender. Attempts at rehabilitation may be sufficient to constitute "special circumstances" if a longer additional term is required "because of the need for supervision to ensure that these attempts are productive of effective rehabilitation": *R v Gale* NSW CCA, unreported 20 April 1993, at p 5 per Hunt CJ at CL. The prospects of rehabilitation need to be real in order to invoke section 5(2): in the case of a drug offender whose behaviour was arguably out of character, for instance, "the applicant's prospects of rehabilitation were obviously good, but not such that he will require a longer than usual additional term because of any need for continued supervision": *R v Watson & Chatto* NSW CCA, unreported 28 April 1993, at p 8 per Hunt CJ at CL. In a significant number of cases, the Court of Criminal Appeal, has found "special circumstances" where there was evidence of rehabilitation or the need for supervision to ensure rehabilitation. In addition to those already cited, see *R v Burton* NSW CCA, unreported 17 December 1992; *R v Davies* NSW CCA, unreported 25 February 1993; *R v Breedon* NSW CCA, unreported 3 December 1992.

The need for a long period of supervision after custody will be accentuated by an offender's youth or by the fact that there has been a lengthy preceding custodial term as ". . . there is a significant community interest in facilitating the re-establishment into society of a long term offender. That is a matter which is difficult to achieve in the case of young offenders where there is not the opportunity of a significant period of supervision post-release": *R v Bell* NSW CCA, unreported 11 May 1993, at p 9 per Wood J.

At appellate level, the need for general deterrence in relation to particularly prevalent or grave offences may mitigate against the alteration of the one-third rule based on a finding of "special circumstances" due to rehabilitation. In cases of escape from lawful custody, it has been said that "the imposition of a sentence is required which continually sends a clear message to others who may contemplate committing it that they will receive severe punishment for doing so". To vary the one-third formula in this case would have been to "distort" what was otherwise a correct overall sentence: *R v Marfutenko* NSW CCA, unreported 8 September 1992. However, in *R v Halligan* NSW CCA, unreported 15 December 1992 on the basis of the "accumulation phenomenon" discussed in *R v Simpson*, the sentencer varied the statutory norm for an escapee who "became worried about his girlfriend and one of their children, and being unable to contact her left prison for approximately five hours and then went back voluntarily".

A similiar balancing exercise is undertaken with other serious and prevalent offences. In the case of an applicant convicted of breaking, entering and stealing, the Court of Criminal Appeal has held that "the offences were of a serious nature, and very prevalent, and . . . the community is entitled to have the Courts of this State reflect that seriousness with which these offences are viewed by the community" *R v Gray* NSW CCA, unreported 17 March 1993, at p 3 per Sheller JA, and the argument as to the existence of special circumstances was rejected. In *R v Bell* NSW CCA, unreported 11 May 1993, a case of an offender who committed multiple armed robberies, Wood J has observed (citing with approval a passage from *R v Broxam* NSW CCA, unreported 3 April 1986) that —

> The prevalence of the offence in respect of which the applicant was sentenced is a matter of grave social concern ... It is now well recognised that the victims of such armed robberies or attempted armed robberies may suffer devastating psychological damage consequent upon the trauma necessarily involved with the commission of such offences. In these circumstances sentencing judges will be recreant to the trust which the community places in them, were they not to impose sentences consistent with the seriousness and prevalence of such offences (at p 7).

Enduring problems

After four years of judicial experience with custodial sentences under the *Sentencing Act*, a number of problems or anomalies of an enduring nature can be identified. Cumulative sentences, or cases in which there is the possibility of a cumulative sentence, may involve unnecessarily complex calculations, with an increased likelihood of error and consequent appeal. In any case, to ensure that the overall proportion between time served in custody and time served on parole in a cumulative sentence adheres to the one-third rule, a sentencer must find "special circumstances".

This necessity arises from the fact that minimum terms accumulate on other minimum terms, so that the effective additional term (if it is one-third of the final minimum term) will be much shorter than one-third of the total time that the offender is required to serve in custody. Consequently, a whole class of "special circumstance" findings exists merely to deal with the complications arising from cumulative sentences. This is a direct consequence of the Act's focus upon individual sentences: if a single non-parole period were set for the aggregate sentence (as is still the case for Commonwealth offences), there would be no need to find "special circumstances" in order to make the effective parole period equal one-third of the effective time in custody.

Apart from the complexities involved in setting cumulative sentences, there is continuing disagreement over the nature of s 5: is it to be taken in a presumptive sense, or merely in an advisory sense? While the Act clearly requires the statement of reasons for any decision to increase the additional term beyond one-third of the minimum term, and specifically requires the existence of "special circumstances" for so doing, it does not specify what those special circumstances must be.

According to the "advisory" view, this section does not constrain sentencers [at all] from setting a shorter additional term, nor from setting a longer additional term other than requiring the sentencer to state the particular circumstances in the case that led the sentencer to make that decision. The setting of any additional term, in this view, remains a matter for the normal exercise of judicial discretion, and a sentence may vary from having no additional term (ie a fixed term) to one in which the additional term comprises almost the entire sentence, according to the normal assessment of the individual needs of the case. In other words, the setting of an additional term is simply a part of the normal art of sentencing, and should not therefore be subject to appeals based merely on the mathematical proportion between the components of a sentence.

According to the "presumptive" view, the section establishes a clear presumption in favour of the one-third proportion. On this view, sentencers must invoke stronger reasons than the normal considerations in sentencing for departing from the one-third rule. Also, according to this view, the spate of appeals urging a finding of "special

circumstances", with the coincident lengthening of the additional term, have their origin particularly in the lack of specific guidelines in the wording of section 5. The appropriate remedy in this view would lie in the amendment of the legislation.

The uncertainty surrounding the meaning and limits of s 5 appears to have contributed to the volume of appeals against sentence. It is not surprising that prisoners should latch onto any device that appeared to offer the prospect of reduced terms in custody. However, as a ground of appeal, the absence of any discussion of "special circumstances" in a judgment at first instance has an added advantage for the would-be appellant. Not only does such a ground for appeal (if upheld) result in a need to resentence the offender, but it also indicates the direction in which such a resentence should proceed – namely, to a reduction of the minimum term. The lack of a statutory definition of "special circumstances", and the evident discretion that judges at first instance have exercised in setting additional terms, may have added to the attractiveness of this avenue for appeals against sentence.

The Court of Criminal Appeal has taken one step to reduce this avenue of appeal by advising the courts of the desirability of including an explicit discussion of "special circumstances" in every custodial sentence. Such advice, however, cannot remedy the fact that s 5 is not only widely used by sentencers to justify the exercise of their traditional discretion in setting additional terms, but also by appellate counsel in determining whether there are any grounds, however remote, for instigating an appeal against sentence. It is likely that there will be continuing pressure to increase the list of recognised "special circumstances".

Conclusion

The *Sentencing Act* 1989 made a number of significant changes to the setting of custodial sentences in New South Wales:

- it removed the majority of custodial sentences (namely those of six months or less) from the scope of the parole system (and hence most of the custodial sentences ordered in the Local Courts);
- it requires the courts to set a minimum term for each offence, rather than a single non-parole period for the aggregate head sentence (which appears to have complicated the setting of cumulative sentences); and
- it requires the courts to state reasons for setting an additional term that exceeds one-third of the minimum term (whereas the non-parole period before the introduction of the *Sentencing Act* was often less than three-quarters of the head sentence, without the requirement of a special justification).

It has been shown that a very significant proportion of custodial sentences in the higher courts make use of the "special circumstances" provision in s 5, and also that it has formed the ground of a considerable body of appeals against sentence. Regardless of whether the section was envisaged as setting a norm for sentencers, it has in practice served more of an advisory role.

It appears, then, that the traditional aims of punishment inform both the application and interpretation of s 5(2) of the *Sentencing Act* 1989. Offender characteristics which may amount to mitigating factors within established sentencing principles, such as youth and rehabilitative prospects, are most likely to trigger a finding of "special

circumstances", and a consequent reduction of the minimum term in favour of a longer additional term. In accordance with this underlying trend, offences which attract general deterrence as the paramount consideration in the sentencing process will be less likely to warrant departing from the one-third statutory formula unless there is clear evidence of demonstrated rehabilitation.

It is arguable, then, that the expanding case law on the meaning of "special circumstances" has served as a means of allowing scope for the exercise of traditional judicial discretion. In an area such as sentencing, which throughout our common law history has been characterised by the exercise of considerable discretion, it is perhaps not surprising that this should happen. It is questionable whether an expanding jurisprudence on the meaning of "special circumstances" is an appropriate means of exercising such discretion. In this context, it should be noted that the Court of Criminal Appeal itself has on several occasions called for legislative review and clarification of s 5(2). For example in *R v Close*, Hunt CJ at CL observed that –

> It is true that this Court has over the years since the introduction of the *Sentencing Act* endeavoured to meet the oddity of s 5(2) by giving an ever wider meaning to the phrase "special circumstances", in order to restore the valuable availability of supervision during the frequently protracted and difficult period when the offender re-enters the community, and in order to meet all of the many situations which the draftsman of s 5(2) clearly overlooked; this, however, is a patchwork approach, and it is not of inexhaustible utility (p 63–64).

Indeed more recently, Hunt CJ at CL has expressed the view in *R v Pollock* NSW CCA, unreported, 20 May 1993, at p 7 that the Legislature's "continued silence must now be construed as deliberate".

One thing is certain: the continued confusion and uncertainty resulting from the application of "special circumstances" will not be resolved until there is a precise statutory definition of the phrase, or else a frank statutory recognition of the present de facto wide judicial discretion to vary the one-third rule under the Act. And this confusion and uncertainty does little to assist courts in achieving consistency in imposing sentence.

Appendix I

1992 COURT OF CRIMINAL APPEAL JUDGMENTS SPECIAL CIRCUMSTANCES

(a) *Successful Cases: 42 individuals referred to in 39 judgments.*

Prisoner's Appeals:

R v Andrews (Michael William) NSW CCA, unreported 19 March 1992

R v Bannerman (Peter Phillip) NSW CCA, unreported 28 October 1992

R v BCG and MBH NSW CCA, unreported 15 December 1992

R v Bidner (Neil Carl) NSW CCA, unreported 8 September 1992

R v Bo Too (Moses) and Maireriki (Mahu) NSW CCA, unreported 16 July 1992

R v Brown (Wayne Carl) NSW CCA, unreported 24 November 1992

R v Burrows (Darryl John) NSW CCA, unreported 30 June 1992

R v Burton (Ronald Jack) NSW CCA, unreported 17 December 1992

* R v Charskey (Gerald Herman) NSW CCA, unreported 11 August 1992

R v Close (Trevor John) NSW CCA, unreported 6 November 1992

R v DeGiorgio (Alfred) NSW CCA, unreported 5 November 1992

R v Falzon (James) and Pullen (Mark) NSW CCA, unreported 20 February 1992

R v Franks (Stephen John) NSW CCA, unreported 24 November 1992

R v Fry (Lee-anne Robyn) NSW CCA, unreported 14 August 1992

R v GJQ NSW CCA, unreported 17 December 1992

R v Hajjo (Mohamed Hakem) NSW CCA, unreported 31 August 1992

R v Hallacoglu (Ugur) NSW CCA, unreported 1 September 1992

R v Horton (Damien) NSW CCA, unreported 12 May 1992

R v Lentz (Albert) NSW CCA, unreported 17 July 1992

R v Little (John Charles) NSW CCA, unreported 6 July 1992

* R v Lowe (Reese Peter) NSW CCA, unreported 19 February 1992

R v Maruca (Edward Paul) NSW CCA, unreported 10 September 1992

R v Matthews (Timothy John) NSW CCA, unreported 11 June 1992

R v PFC NSW CCA, unreported 14 December 1992

* R v Ra (Joon Hong) NSW CCA, unreported 17 June 1992

R v Robertson (Andrew) NSW CCA, unreported 18 June 1992

R v Robinson (Robert John) NSW CCA, unreported 26 November 1992

R v Rudd (Stephen William) NSW CCA, unreported 23 April 1992

R v Sanchez (Adolf) NSW CCA, unreported 19 May 1992

* R v Scales (Lindsay John) NSW CCA, unreported 4 August 1992

R v Simpson (Michael Gordon) NSW CCA, unreported 18 June 1992

R v Stair (Richard Noel) NSW CCA, unreported 27 February 1992

R v Taouk (Hanna) NSW CCA, unreported 20 March 1992

R v Taylor (Christopher Harry) NSW CCA, unreported 18 June 1992

R v Thornberry (Raymond) NSW CCA, unreported 18 February 1992

R v Wells (Dale Clifford) NSW CCA, unreported 6 August 1992

Crown Appeals:

R v Hunter (Steven Robert) NSW CCA, unreported 12 August 1992

* R v KSF NSW CCA, unreported 10 August 1992

R v Wotherspoon (Leo Patrick) NSW CCA, unreported 4 December 1992

* indicates the five judgments found which employed terms other than "special circumstances", such as "peculiar circumstances".

(b) *Unsuccessful Cases: 38 individuals referred to in 35 judgments.*

R v Allen (James) NSW CCA, unreported 25 February 1992

R v Astill (Stephen Lorne) NSW CCA, unreported 1 October 1992

R v Barling (Sharon Denise) NSW CCA, unreported 26 November 1992

R v Bang (Seung Ho) NSW CCA, unreported 1 September 1992

R v Begnell (Stephen John) NSW CCA, unreported 26 November 1992

R v Breedon (Darren William) NSW CCA, unreported 3 December 1992

R v Bougaard (Kerwin Basil) NSW CCA, unreported 24 November 1992

R v Charlton (Geoffrey Trevor) NSW CCA, unreported 18 December 1992

R v Congdon (Glendon John) NSW CCA, unreported 14 July 1992

R v Cook (Brett Andrew) NSW CCA, unreported 20 March 1992

R v Donovan (Wayne Bruce) NSW CCA, unreported 9 September 1992

R v Dunia (Mahmoud Ali) NSW CCA, unreported 4 November 1992

R v Evans (Cecil James) NSW CCA, unreported 1 September 1992

R v Falconetti (Giovanni) NSW CCA, unreported 24 March 1992

R v Gibbs (Frank William) NSW CCA, unreported 16 June 1992

R v Hietikko (Heikki Veli) NSW CCA, unreported 18 June 1992

R v Holland (Glen Roderick) NSW CCA, unreported 5 August 1992

R v Kirby (Debra) NSW CCA, unreported 14 May 1992

R v Larkham (Stuart John) NSW CCA, unreported 30 November 1992

R v Loughnan (Jason) NSW CCA, unreported 14 July 1992

R v Ly (Chanh Nghia) and Nguyen (Loc Van) NSW CCA, unreported 16 December 1992

R v Mclear (John Andrew) NSW CCA, unreported 1 September 1992

R v Mitchell (John William) NSW CCA, unreported 3 December 1992

R v Niukapu (Lesley Irvine) and Tuira (John Terata) NSW CCA, unreported 6 August 1992

R v Oughton (Kenneth) and Marshall (Alexander) NSW CCA, unreported 10 September 1992

R v Palmer (Daniel James) NSW CCA, unreported 4 September 1992

R v Pantelakis (George) NSW CCA, unreported 8 September 1992

R v PJP NSW CCA, unreported 9 July 1992

R v Simpson (Verna Lee) NSW CCA, unreported 24 March 1992

R v Shinner (Peter Alan) NSW CCA, unreported 10 July 1992

R v Skoglund (Finn) NSW CCA, unreported 14 April 1992

R v Stenzel (Lindsay Cecil) NSW CCA, unreported 18 February 1992

R v Van Den Bos (Sjoerd) NSW CCA, unreported 10 September 1992

R v Williams (Terrence John) NSW CCA, unreported 25 November 1992

R v Worthington (Darren Ronald) NSW CCA, unreported 11 August 1992