SENTENCING FOR MULTIPLE OFFENCES IN WESTERN AUSTRALIA

Marianne Wells

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Preface

The sentencing aspect of criminal jurisdiction has increasingly attracted academic and judicial attention. About 15% of the cases reported in the Australian Criminal Reports now involve sentencing – a far cry from the days when one could peruse a whole volume of state law reports and, probably, ten volumes of the Commonwealth Law Reports without encountering more than a handful of such cases.

For all that, a surprising volume of material remains unreported. Yet, as Ms Marianne Wells’s Research Report reveals, some quite fundamental shifts in sentencing principle may be taking place, unheralded except in the darkest corners of the Supreme Court Library and unperceived except by the most astute and dedicated specialist practitioners.

The first, very important, value of this work, then, lies in the very fact that 140 unreported cases of the Western Australian Court of Criminal Appeal are exposed to the light of day, and become truly (not just notionally) accessible to scholars and practitioners. However, the greater interest obviously lies in the subject matter of those cases and the principles they draw out.

When sentencing multiple offenders, two important guidelines have been the “one transaction rule” and the “totality principle”. At the operational level of actually imposing sentences, these guidelines translate into the issue of when to make terms of imprisonment concurrent and when cumulative, when to go where the arithmetic then takes one and when to change the total sentence. These are not easy matters to resolve in individual cases, let alone with some consistency across a widespread sample.

With regard to the one transaction rule, Ms Wells’s research demonstrates the tensions and illogicalities under which it still labours. To the extent that the one transaction rule is discussed at all (and it is interesting to note her observations about the paucity of such discussion), there seems to be little analysis beyond that of whether the different crimes charged occurred at one time or were of one type or involved one victim. Yet “proportionality [in sentencing] requires the sentencer to match the severity of the punishment to the seriousness of the offence”. That being so, it is seldom going to be enough to look for unity of the kinds mentioned.

Ms Wells argues that what the courts must do is to analyse the actual crime-event (not merely the crime-type) to see whether a particular element is being double-counted for sentencing purposes. For example, where there is restraint of a victim so as to facilitate a sexual assault, clearly it would be double-counting that factor not to treat the deprivation of liberty charge as part of the
one transaction with the sexual assault charge. That being so, the rule requires concurrent sentences. Similarly, many fact situations involving both possession and cultivation of drugs would, if cumulative sentences were imposed, tend to involve double-counting the possession, which frequently is integral to the cultivation – even though, in that example, there would not necessarily be any unity of time or offence-type.

The reasoning process is not an easy one, requiring as it does careful dissection of crime events, rather than the semi-automatic application of rather imprecise guidelines. Ms Wells's point is that there is a lack of consistency in the application of the one transaction rule in Western Australia precisely because the easy route has been taken, often without sufficient thought as to the underlying purpose of the one transaction rule.

With regard to the totality principle, Ms Wells is able to identify a sea change in its application in this State – emerging only through so far unreported judgments. It is this. Whereas the principle has traditionally been regarded as a means of limiting what would otherwise be very long sentences, it is now no less a principle for upward movement. As she puts it: the courts are working from the "top down" rather than from the "bottom up". This means that a view may first be reached as to the appropriate sentence for the particular course of conduct or series of offences committed by the offender, and thereafter a method may be found of putting it together from the available menu of sentences.

If this is happening, it is contrary to the spirit of the courts' own quite explicit rules as to, for example, setting an appropriate sentence first and only thereafter addressing the distinct question of eligibility for parole. And, as stated, it certainly turns the totality principle on its head.

Thomas (Principles of Sentencing), who first articulated the principle, has always discussed it in terms of its being a limiting doctrine. Ashworth (Sentencing and Penal Policy) likewise never contemplates that it might be the basis for upward movement in the total sentence. Fox and Freiberg (Sentencing: State and Federal Law in Victoria) are the only scholars who have even contemplated the possibility that it might be a two-edged sword. In a throwaway line they state: "This can be an upward adjustment as well as a downward one" (page 372). However, no authority is cited for this 1985 proposition, and all the examples they use refer to downward adjustments.

The fact is that the Western Australian Court of Criminal Appeal seems to have been the first to take up this line of development. Ms Wells's point is that this has been done without sufficiently rigorous analysis of the underlying logic. The principle, in both its original and its developing form, has been altogether too much "a pragmatic tool" – with all the uncertainty and unpredictability which this implies.
This Report, then, opens up issues of sentencing principle which seem hitherto to have been somewhat obscured from full scrutiny and analysis. That can only be to the good. Sentencing generally – whether it be the production-line sentencing of busy metropolitan magistrates’ courts or the more considered deliberations of the higher courts in relation to more serious offenders – is at the cutting edge of penal policy and administration. With prison populations continuing to increase and the costs of imprisonment escalating, all rules and practices should be scrutinised critically. This Research Report represents the Crime Research Centre’s contribution to this desirable process.

This work derives originally from Ms Wells’s honours thesis written for her LLB degree, which was awarded in 1991. Ms Wells then worked further upon the topic while a research assistant at the Centre and in consultation with the academic staff of the Centre. This publication also represents, therefore, tangible evidence of the mutual benefit to the Law School and the Centre in melding aspects of their activities.

R. W. Harding
Director
Crime Research Centre

May 1992
1. Introduction

When a person convicted of more than one offence is sentenced to imprisonment, the trial judge or magistrate has a discretion whether to make the sentences cumulative or concurrent. The Criminal Code gives no guidance as to when cumulative or concurrent sentences are appropriate, so that in terms of legislative criteria the discretion is apparently unfettered. It is generally accepted that a term of imprisonment cannot be made cumulative on a life sentence, but otherwise there are few limitations on the exercise of the discretion.

There are, however, two judicially developed principles, known as the "one transaction rule" and the "totality principle", which are widely accepted as indicative of whether sentences should be cumulative or concurrent. According to the one transaction rule, concurrent sentences should be imposed for offences which form part of one transaction. The totality principle suggests that the sentencer should not be content with simply adding up the sentences but should take one last look at the total sentence, to ensure that the total is not excessive in relation to the total criminality. If the total sentence is regarded as excessive, the sentencer should either reduce some of the sentences or make them concurrent.

The aim of this report is to analyse the basis of these principles and the way in which they are applied in Western Australia. The general framework for this analysis is the way in which the principle of proportionality in sentencing

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1 Section 20 of the Criminal Code and s.150 of the Justices Act 1902.
2 See, for example, Fortune v. Parre (1964) 14 Australian Criminal Reports 289; Foy (1962) 46 Criminal Appeal Reports 13; Farrow (1979) 2 Australian Criminal Reports 266; Talaska (1985) 19 Australian Criminal Reports 383.
applies to multiple offenders.\textsuperscript{4} The concept of proportionality requires matching the severity of the punishment to the seriousness of the offence.\textsuperscript{5} At the outset it is acknowledged that there is considerable theoretical and practical difficulty in assessing the seriousness of a single offence. When there are a number of offences, the difficulties are magnified. On the one hand, logic may suggest that the sentences should be cumulative: if concurrent sentences are imposed the offender receives no additional punishment for the second and further offence, thus suggesting that the total sentence is not proportionate to the total seriousness of the conduct. On the other hand, it is practically impossible, in many cases, to accumulate all sentences. Does this mean that multiple offenders receive a "discount for bulk offending"?\textsuperscript{6}

The utility of focusing attention on a particular type of offender depends, to some extent, on the prevalence of that type of offender in the criminal justice system. It is difficult to estimate from published statistics the extent to which the courts are faced with sentencing multiple offenders. For example, the statistics published by the Australian Bureau of Statistics on sentencing in the Higher Courts indicate that, in 1988-89, the average number of offences per person, for offenders sentenced to imprisonment, was 2.8.\textsuperscript{7} This figure gives little indication of the prevalence of multiple offending as it is possible that a small number of offenders account for a large number of offences. However, data supplied to the Crime Research Centre for the 1990 calendar year give a better indication of the extent of multiple offending. As Table 1 shows, in that year 772 distinct persons were sentenced to imprisonment for 2,878 offences. Slightly less than half of the offenders (47.4\%) were sentenced for only one offence and more than three-quarters (77.8\%) were sentenced for three or fewer offences. A small number of offenders (48: 6.2\%) were convicted of 43\% (1,240) of offences for which imprisonment was imposed. Thus, although a small number of offenders accounted for a large number of offences, in more than half of the cases (406: 52.6\%) the court was required to sentence the offender for more than one offence: see Table 1.

For particular types of offence the prevalence of multiple offending is greater. For example, 123 offenders were sentenced for at least one sex offence; and in almost three-quarters of cases (74.6\%) the offender was sentenced for more than one offence. More than a third (36.5\%) were sentenced for four or more offences,

\textsuperscript{4} The term "multiple offender" as used in this report, refers to any person sentenced for more than one offence when that person is already serving or liable to serve a term of imprisonment. The term does not include recidivist offenders (that is, persons who commit a further offence after completing a sentence).

\textsuperscript{5} See below, section 3.1.

\textsuperscript{6} Ashworth supra n 3, p.260.

\textsuperscript{7} Derived from Table 3 and Table 12, Court Statistics: Higher Criminal Courts Western Australia 1988-1989, Australian Bureau of Statistics, Catalogue No. 4501.5.
Table 1: Number of offences for distinct persons sentenced to imprisonment

<table>
<thead>
<tr>
<th>Number of Offences</th>
<th>Distinct Persons</th>
<th>% of Distinct Persons</th>
<th>Offences</th>
<th>% of Offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>366</td>
<td>47.4</td>
<td>366</td>
<td>12.7</td>
</tr>
<tr>
<td>2</td>
<td>166</td>
<td>21.5</td>
<td>332</td>
<td>11.5</td>
</tr>
<tr>
<td>3</td>
<td>69</td>
<td>8.9</td>
<td>207</td>
<td>7.2</td>
</tr>
<tr>
<td>4 to 10</td>
<td>123</td>
<td>15.9</td>
<td>733</td>
<td>25.5</td>
</tr>
<tr>
<td>more than 10</td>
<td>48</td>
<td>6.2</td>
<td>1240</td>
<td>43.1</td>
</tr>
<tr>
<td>Total</td>
<td>772</td>
<td>99.9</td>
<td>2878</td>
<td>100.0</td>
</tr>
</tbody>
</table>

compared to less than a quarter (22.1%) of all imprisoned offenders. For offenders convicted of at least one break and enter offence (253 offenders),\(^8\) in almost two-thirds of cases (65.1%) the offender was sentenced for more than one offence, and 31.2% were sentenced for more than four offences.

These figures underestimate the extent to which the court is required to sentence multiple offenders. An offender who is charged on two or more separate indictments is counted as a distinct person for each indictment. However, the question of whether the sentences should be cumulative or concurrent arises whether that offender is sentenced for all the offences at the same time, or appears for sentencing on different occasions. These figures, therefore, do not take into account the extent to which multiple offenders are charged on separate indictments – a situation to which the totality principal is potentially relevant.

This report is based on research into appeals against sentence in the Western Australian Court of Criminal Appeal for which judgment was handed down during the three-year period from 1 July 1988 to 30 June 1991. Perhaps the major criticism that may be made of sentencing practice is that the Court rarely analyses in any detail why cumulative or concurrent sentences are appropriate. All too often, the Court supports cumulative sentences by simply asserting either that the offences were separate and distinct, or that, although offences committed closely together in time are normally regarded as one transaction, this does not necessarily mean that they form one transaction. Rationalisations such as these give no guidance as to when cumulative or concurrent sentences are appropriate.

In other cases concurrent or cumulative sentences were upheld or imposed without any reference to all to the one transaction rule or the totality principle. Of course, the Court is unlikely to discuss the principles if the question of

\(^8\) There is some overlap between these two categories of break and enter offenders and sex offenders, as a person convicted of a number of offences which included at least one sex offence and at least one break and enter offence would be included in both categories.
concurrency is not raised in the grounds of appeal. However, the fact that in a significant number of cases sentences were automatically made concurrent without any discussion of these principles prompts the question of why concurrent sentences were upheld or regarded as appropriate. Thus this report goes further than simply analysing the cases in which the one transaction rule and the totality principle have been applied by the Court. The objective is to analyse the way in which different types of offences are committed and sentenced in an attempt to determine whether cumulative or concurrent sentences are appropriate.

Focusing attention on the way different offences are committed inevitably raises questions as to whether the charges laid in particular cases were appropriate. The choice of charges is a matter for the prosecutor, and a detailed discussion of the exercise of prosecutorial discretion is beyond the scope of this report. Although guidelines for the exercise of that discretion have been promulgated in some jurisdictions, such guidelines typically address the question of when to charge an offender rather than what offences to charge. Where the choice of charges is addressed, the guidelines suggest that the prosecutor should select charges which adequately reflect the nature and extent of the criminal conduct and which will provide the court with an appropriate basis for sentence. In some instances of multiple offending the question that arises is whether it is necessary to charge every offence that is open on the facts in order to adequately reflect the seriousness of the conduct.

The procedural rules relating to joinder of counts in an indictment also have considerable impact on the way in which certain types of offenders come before the courts for sentencing. Although the rules apply generally to all offences, they have particular impact for offenders charged with sex offences. Thus the rules are discussed primarily in that context.

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2. The One Transaction Rule

Thomas’s statement of the one transaction rule is that “where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive”.\(^{10}\) This “single transaction” concept has been formulated in different terms, such as “one multi-faceted course of criminal conduct”,\(^ {11}\) “[a] continuing criminal operation”\(^ {12}\) and various other forms;\(^ {13}\) but there seems to be general acceptance for a broad principle that, when offences are committed concurrently, the sentences in respect of those offences should run concurrently.

The rule is easy to state but difficult to apply. Part of the difficulty stems from a certain ambiguity as to the fundamental basis of the rule. Why does the fact that offences are committed concurrently justify concurrent sentences? Does the rule rest on some penological theory or is it a pragmatic rule which is applied to prevent sentences for multiple offences becoming too long?

Thomas states that “[t]he essence of the one transaction rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest”.\(^ {14}\) He does not define what is meant by “the same legally protected interest”, but cites examples of the same series of blows constituting both assault occasioning bodily harm and wilful ill-treatment of a child, or the same act constituting malicious wounding and indecent assault. The difficulty with the concept of “the same legally protected interest” is that it is capable of a range of interpretations. Using Thomas’s example of malicious wounding and indecent assault, the legally protected interest could be described as a right to bodily integrity, which suggests that both offences violate the same interest. On the other hand, malicious wounding could be regarded as violating a right to safety and indecent assault as violating a right to privacy in which case different interests are violated.

Ashworth refers to a similar concept of offences which violate “different kinds of legal prohibition” and cites, as examples, offences against property and

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\(^{10}\) Thomas supra n 3, p.53.

\(^{11}\) Tichy (1982) 6 Australian Criminal Reports 117, 126.

\(^{12}\) Hatch (1979) 31 NSR (2d) 110, 113 (CA) cited in Ruby supra n 3, p.293.

\(^{13}\) See generally Ruby supra n 3, pp.293-4.

\(^{14}\) Thomas supra n 3, p.53.
offences against the person.\textsuperscript{15} This concept is arguably as difficult to interpret as the concept of the same legally protected interest. Every offence violates a different kind of legal prohibition, in the sense that an offence is, by definition, a violation of a legal prohibition. Aside from the difficulty involved in interpreting these concepts, neither of these suggested rationales for the one transaction rule in fact explains the basis of the rule. To state that the rule applies when the offences violate the same legally protected interest is to state how the rule operates, not why it exists in the first place. The practical difficulty in applying these concepts can be seen in cases involving assault.

In \textit{Esteban v. Wolpers}\textsuperscript{16} the offender had been sentenced to two cumulative terms of 3 months each for assaulting two customs officers. The offences occurred within ten minutes of each other. On appeal, Nicholson J held that the sentences should be concurrent because the offences

\ldots could not be characterised as separate invasions of the community's right to peace and order. They are not truly two or more incursions in criminal conduct. In my view they are rightly to be seen as facets of a course of criminal conduct.\textsuperscript{17}

By comparison, in \textit{Delacey}\textsuperscript{18} it was held that sentences for two offences of assaulting police officers with intent to prevent an arrest should have been made cumulative. Brinsden J stated:

It may be said that [the two offences] were part of the same transaction in the sense that together [they] amounted to an effort by the applicant to prevent the arrest of his friend...but they represented two invasions of separate legally protected interests.\textsuperscript{19}

These cases illustrate the range of interpretations that concepts such as "the same legally protected interest" or "different kinds of legal prohibition" can be given. Nicholson J interpreted the interest as the community's right to peace and order; Brinsden J apparently interpreted the interest as an individual's right to safety. Thus the broad interpretation favoured by Nicholson J justified concurrent sentences, whereas the narrow interpretation favoured by Brinsden J justified cumulative sentences. The utility of these concepts in explaining either the fundamental basis of the one transaction rule or its application is questionable.

\textsuperscript{15} Ashworth supra n 3, p.255.
\textsuperscript{16} \textit{Esteban v. Wolpers} (unreported) SC 16 November 1988 no. 7376.
\textsuperscript{17} Ibid., at p.9 of his Honour's judgment.
\textsuperscript{18} \textit{Delacey} (unreported) CCA 31 May 1989 no. 7687.
\textsuperscript{19} Ibid., at p.7 of his Honour's judgment.
Aside from the concepts referred to above, Thomas cites a number of general principles, drawn from frequently recurring situations, which indicate whether the offences form part of one transaction. Thus, if similar offences are committed within a short space of time they are likely to be regarded as one transaction, especially if the offences involve the same victim. If different victims are involved or if the offences are different in type they are less likely to be regarded as one transaction. Burglary accompanied by violence to the inhabitant of the building, for example, is generally not regarded as forming one transaction.

These principles focus on what may be described as three different elements of concurrence – concurrence in time, type of offence and victim. These elements of concurrence are a useful starting point in analysing the seriousness of the conduct. However, as general principles they have a number of disadvantages. Firstly, there is the practical difficulty in determining what is a sufficiently close period of time, or what is sufficient similarity in type of offence, to justify treating the offences as one transaction. Ashworth suggests that the rule that burglary accompanied by violence does not form one transaction is justified because the offender should be labelled as both a property offender and a violent offender. This suggests a broad distinction between types of offence that may not be appropriate in other cases. For example, should sex offences be treated as offences of violence so that concurrent sentences should be imposed for a sex offence accompanied by violence? Similarly, if all the offences involve drugs, does that constitute sufficient similarity to justify treating the offences as one transaction or should a distinction be made between different types of drug offences?

Secondly, these principles ignore the fact that the very nature of some types of crime events means that multiple offences generally involve the same victim; whereas for others it is rare for multiple offences to involve the same victim. Some multiple offences are commonly committed within a short period of time; others over a long period of time. Thus a principle which is appropriate in one case may not necessarily be appropriate in another. However, it is not uncommon for sentencers to apply the one transaction rule merely on the basis that the offences were committed within a short period of time, and to support the application of that principle by reference to cases involving completely different offences.

Finally, there is a tendency to treat these principles as if they are the only matters relevant to the question of whether the sentences should be cumulative or concurrent. This is particularly true of the element of concurrence in time, which often appears to be the only factor that the courts consider when determining whether cumulative or concurrent sentences are appropriate. The

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20 Ashworth supra n 3, p.255.
limitations of these principles are illustrated by the case of Shaw, which involved offences of violence committed against the same victim within a relatively short period of time.

Shaw was convicted of aggravated indecent assault and doing grievous bodily harm; he was sentenced to 4 years concurrent on each count. The facts were that the complainant accepted an offer from Shaw to drive her home. While in the car he made sexual advances, including squeezing the complainant’s breast through her clothing. She requested him to stop the car and, when he eventually did so, she attempted to get out. Shaw then pulled her towards him, placed both hands around her throat, and began to squeeze, pushing her head down towards his legs. The complainant fought back and Shaw desisted, telling her to get out of the car. This is a summarised version of the facts stated by Brinsden J as relating to the first count of aggravated indecent assault. As the complainant attempted to get out of the car, Shaw grabbed her by the hair and pulled her back into the vehicle. He then pulled out a knife and stabbed her four times in the upper back, which caused internal bleeding and penetrated her lung. These were the facts relating to the second count of doing grievous bodily harm.

All members of the Court of Criminal Appeal held that the sentences should have been cumulative. However, the discussion of why cumulative sentences were appropriate is brief. Malcolm CJ simply agreed with Brinsden and Rowland JJJ that the sentences should have been cumulative. Brinsden J referred to Thomas’s Principles of Sentencing and then stated:

But the fact that offences are committed simultaneously, or close together in time, does not necessarily mean they amount to a single transaction... In my view this is a case where the acts which constituted [the] second count, amounted to an offence sufficiently unconnected with what had occurred before to deserve a cumulative sentence.

Rowland J stated:

These are two discrete offences, each being very serious, and it is clear that each could justify a term of imprisonment of four years. To direct that they be served concurrently, in my view, is wrong.

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22 Ibid., p.346.
23 Ibid.
24 Ibid., p.347.
25 Ibid., p.350.
The Court emphasised that the offences were separate and distinct, but it is arguable that the offences were inextricably connected in that the bodily harm which was the subject of the circumstance of aggravation for the charge of indecent assault was the same bodily harm which was relied upon for the offence of doing grievous bodily harm. The facts which constituted the offence of aggravated indecent assault were identified by Brinsden J as the acts leading up to the complainant’s second attempt to get out of the car. Rowland J referred to this offence as “a sexual [sic] assault with physical violence causing bodily harm when the applicant attempted to strangle the girl...”.26 However, there is authority for the proposition that putting somebody in a headlock in such a manner as to produce a sensation of pain is not, in itself, sufficient to satisfy the definition of “bodily harm” for the purpose of the offence of assault occasioning bodily harm.27 If attempting to strangle a person does not amount to bodily harm for the purpose of that offence, it is difficult to see why it can amount to bodily harm for the purpose of aggravated indecent assault. If the bodily harm relied on was the injury which resulted from the stabbing, there is an element of double punishment in that the same facts which gave rise to one offence also formed the circumstance of aggravation of the other offence.

Even if the attempt to strangle the complainant was sufficient bodily harm for the circumstance of aggravation, it is difficult to avoid the conclusion that the Court’s view of the seriousness of the first offence was affected by all the circumstances of the event. If the events which occurred after the complainant attempted to get out of the car are ignored, the sentence of 4 years, or 3 years as substituted by the Court of Criminal Appeal, seems excessive for an offence which amounted to squeezing the complainant’s breast and putting her in a headlock.

The Shaw case also illustrates the impact that the statutory maximum penalty may have on the way the sentence is structured. The Court was clearly of the opinion that the total sentence appropriate in all the circumstances was 7 years. However, the maximum penalty for doing grievous bodily harm is 7 years and the maximum for aggravated indecent assault is 6 years. Given the Court’s traditional reluctance to impose the maximum penalty,28 the desired total of 7 years could only be achieved by making the sentences cumulative. Thus in some cases the question of the application of the one transaction rule may be influenced by the limitations that the statutory maxima impose on the total sentence.

26 Ibid., p.350.
28 In Beugger (1979) Western Australian Reports 65 the Court held that the maximum penalty was not reserved for the worst offence of the kind dealt with which could be imagined but for the worst type of case falling within the prohibition. However, even where the Court accepts that the case is of the worst type, it is unusual for the maximum penalty to be imposed.
It is this tension between imposing sentences that are proportionate to the individual offences and at the same time attempting to achieve the appropriate total sentence that creates difficulty in sentencing multiple offenders. On the one hand, if concurrent sentences are imposed the offender appears to receive no greater punishment than the person who commits only one offence. On the other hand, cumulative sentences may result in a total sentence that is more severe than is warranted by the total seriousness of the conduct. It is suggested that rather than resorting to assertions that offences committed closely together in time, or involving the same victim, form one transaction, it is necessary to analyse the dynamics of criminal events to determine the effect that the number of offences has on the total seriousness of the conduct. This type of analysis is undertaken in Chapter 3.
3. Offence Analysis: The Dynamics of Crime Events in Drug, Sexual Assault and Fraud Cases

3.1. Introduction

Research into sentencing judgments, undertaken for this report, indicated that in many cases sentences are made cumulative or concurrent with little or no discussion of the one transaction rule. When the application of the rule is referred to, the discussion often amounts to little more than assertions that concurrence in time, type or victim indicates that they should be regarded as one transaction. The analysis of the offences in this chapter is aimed at determining whether cumulative or concurrent sentences are appropriate by assessing the effect that these elements of concurrence have on the seriousness of the conduct. It is necessary, therefore, to make some preliminary comments on the concept of proportionality and offence seriousness.

Proportionality requires the sentencer to match the severity of the punishment with the seriousness of the offence. The seriousness of an offence consists of two elements: the harm done or risked and the culpability, or blameworthiness, of the offender.29 The concept of harm involves a number of aspects. Firstly, there is harm in the form of physical damage or injury or tangible loss caused to the victim of the offence. Examples of such harms are property damage, bodily harm or the loss of money through theft. Many offences require a particular level of damage or injury as an element of the offence, but that level of damage may be defined relatively broadly. For example, the offence of doing grievous bodily harm requires bodily injury of a kind that is likely to endanger life or cause permanent injury to health, but there are different levels of injury which may satisfy the definition. Thus there is a distinction between the generalised level of harm that is a necessary element of the offence and the actual level of harm that is caused in any particular instance.

A second type of harm is intangible harm caused to the victim. For example, a significant aspect of the harm involved in break and enter is the invasion of the privacy and sanctity of the dwelling and the fear which many people have of

being victimised in their own homes.\footnote{Fox and Freiberg supra n 3, p.544; Cheshire (unreported) CCA 7 November 1989 no. 7924, Pidgeon J, at pp.1-2 of his Honour’s judgment.} A further type of intangible harm is the potential damage or injury that is threatened by some behaviour. Many offences are designed to outlaw behaviour which is likely to cause damage or injury, and the seriousness of the offence is based on the potential to cause serious damage. 

Driving offences such as careless driving and dangerous driving are illustrations of this type of offence.

A third type of harm is harm in the form of a threat to the structure of society. This type of harm is perhaps an element of all offences. Laws are designed for the protection of society, and there is a threat to society when any law is not obeyed. However, for some offences this type of harm may appear to be the only, or the most significant, form of harm, whereas for other offences this type of harm may be overshadowed by the actual damage or injury that is the basis of the offence. Drug offences and other so-called victimless crimes are, perhaps, the best illustration of offences of which the harm involved is primarily the threat to society. It is often argued, for example, that marijuana use causes no harm or injury and therefore marijuana use should be decriminalised. Whatever the merits of this argument, as long as marijuana use remains an offence there is an element of harm involved simply by committing the offence.

The foregoing discussion is not intended to do more than provide a brief outline of some of the types of harm involved in different offences. Opinions may differ as to what is the real harm involved in any given offence or how different types of harm may be ranked. However, it is argued that it is not possible to assess offence seriousness without considering the type of harm involved. It is not uncommon to find offence seriousness discussed as if an offence has an intrinsic level of seriousness which is unrelated to the actual harm involved. Exactly how this intrinsic level of seriousness is ascertained is unclear. However, one can say that murder is more serious than assault because the harm done is more serious, not simply because of some notion of the intrinsic level of seriousness. If it is not the harm involved in an offence that differentiates the seriousness of one offence from another, it is difficult to give any sensible meaning to the concept of seriousness.

The second element of offence seriousness is the culpability or blameworthiness of the offender. The concept of culpability involves the offender’s awareness, motivation and intention in relation to the offence. Some offences include an element of intention as part of the definition of the offence. However, the concept of culpability is more extensive than the mental element involved in an offence, as it includes motivation and foresight of the possible consequences. For example, intention to commit some offence is an element of the offence of break and enter, but it is not necessary for the Crown to prove intention to commit a
particular offence. However, for the purpose of ranking the seriousness of the
offence of break and enter, the motivation for the entry is relevant. Thus, a
person who breaks into a house for the purpose of assaulting the inhabitant may
be regarded as more culpable than the person who breaks and enters for the
purpose of theft.

Similarly, foresight as to the possible consequences may be irrelevant to a
finding of guilt but be taken into consideration in assessing the culpability of the
offender. Thus, a person who breaks in knowing that the house is occupied may
be regarded as more culpable than the person who breaks in believing that it is
vacant. Although violence may not actually be intended, if the offender is aware
that the house is occupied, violence is a foreseeable possibility. This would make
this offender’s culpability greater than that of the offender who believes that the
house is vacant.

The concept of culpability also includes such things as provocation, which is
traditionally regarded as an excuse or “defence”. Provocation may reduce the
culpability of the offender when it is not an excuse in law or when the acts
which constituted the provocation were not sufficient to satisfy the legal
definition of that excuse.

The relationship between these two elements of harm and culpability, and
particularly the question of which element is more significant in assessing
offence seriousness, poses considerable difficulty. This difficulty is highlighted
in assessing the seriousness of attempts compared to completed offences. It is a
fundamental principle of the criminal law that a person should not be punished
solely for having a “guilty mind”; the law requires an act. This is true even of an
attempted offence: there must be some act “that is more than merely
preparatory to the commission of the offence”. However, although the harm
done is generally regarded as the most significant factor in determining the
sentence, this may not be the case in punishing attempts. The problem is
illustrated by the case of Kuczynski.

Kuczynski was charged, inter alia, with doing grievous bodily harm with intent
under section 294 of the Criminal Code. He was found not guilty of that offence
but guilty of the alternative offence of attempting to do grievous bodily harm
with intent and sentenced to 6 years’ imprisonment. The significance of the

32 There are practical problems in determining the offender’s intent if the intended offence is not
charged or is charged but not proven. See generally, Fox and Freiberg supra n 3, p.543. The
discussion in this section proceeds on the assumption that the sentencer is properly satisfied that the
intent to commit the particular offence existed at the time of breaking and entering.
33 Section 4 Criminal Code.
34 Kuczynski (1990) 2 Western Australian Reports 316.
element of intent is indicated by the maximum penalty being 20 years under section 294, compared to 7 years for the offence of doing grievous bodily harm under section 297, of which intention is not an element. As intention to commit an offence is a necessary element of an attempt, it followed that a verdict of attempting to commit the offence constituted by section 297 was not open. However, it also followed from the jury's verdict that they did not consider the harm done to the victim sufficient to satisfy the definition of grievous bodily harm. Thus the sentence of 6 years, although clearly open given the maximum penalty of 10 years for an attempt to do grievous bodily harm with intent, would appear to be primarily attributable to the offender's intention or culpability, rather than the harm actually done. The maximum penalty for doing grievous bodily harm is 7 years; for lesser harms, such as assault occasioning bodily harm, the maximum is 5 years.

In the remainder of this chapter drug offences, sex offences and fraud and forgery offences are analysed in an attempt to ascertain how the fact that a number of offences are involved affects the seriousness of the offender's conduct. Break and enter offences are also discussed in the section on sex offences. These offences were chosen because a significant number of the cases studied involved these offences. It is suggested, however, that this type of analysis may be applied to other offences.

3.2. Drug Offences

3.2.1. Possession Offences Generally

Possession offences pose considerable problems in attempting to develop a theoretical framework for sentencing multiple offenders. The chief difficulty is that possession is not an act and possession offences are usually regarded as committed when they are detected. Thus there is frequently an element of concurrence in time in offences involving possession, simply because the possession offence is detected at the same time as another offence. In addition to this element of concurrence, offences involving possession are frequently similar in type, if not identical, and are often victimless crimes in that no physical harm has occurred. If similarity in type of offence and victim and the period of time in which the offences are committed are an indication that there is one transaction, it may be assumed that possession offences would normally constitute one transaction. The validity of this assumption will be considered in the context of drug offences, which are the main type of possession offence for which imprisonment is commonly imposed.

35 Section 554 of the Criminal Code provides that, unless otherwise specified, the penalty for an attempt is one half the penalty for the completed offence.

3.2.2. Importation, Cultivation and Possession

The real vice at which the drugs legislation is aimed is probably drug use. However, if only use was prohibited it is unlikely that anyone would ever be convicted. The legislation, therefore, prohibits every stage of the process, from conspiring to import through to importation or cultivation, possession, sale and use. Possession is the connecting link between the stages of importation or cultivation and sale or use. Possession is not necessary for the offence of importation to be made out, but in practice it appears common for the arrest to be made once the importation is complete and the offender is in possession of the drugs. In that instance, possession is the almost inevitable result of importation; it is concurrent with, but extends beyond, the importation.

Rinaldi suggests that, when an offender is convicted of both importation and possession offences in relation to the same parcel of drugs, the sentences are normally made concurrent. This appears to be the practice in Western Australia, although the rationale for this practice was not discussed in any of the cases studied. The practice may be justified by applying the general principle that concurrent sentences should be imposed for offences which are committed at the same time. However, given the artificiality of determining when the possession offence is committed, it is suggested that a better basis for the principle is that possession of the drug immediately following importation does not add to the overall seriousness of the conduct.

Similarly, if cultivation proceeds to the harvesting of the drug, possession is the almost inevitable result. The extent to which the cultivation has proceeded may be relevant to the seriousness of the offence and, if so, would be reflected in the sentence. If that is the case, the sentence for the possession offence should be concurrent. The fact of possession is an indication of the stage to which the cultivation has proceeded, but does not, of itself, add to the seriousness of the conduct.

The cases studied suggest that, if the possession offence relates to material which is harvested from the plantation, concurrent sentences are generally

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37 This is not to suggest that use is the most serious drug offence but rather that the legislation aims to outlaw drug use. Thus, distribution, particularly commercial distribution, is arguably the most serious of the drug offences.

38 Importation generally, including possession of prohibited imports, is covered by s.233B(1) of the Customs Act 1901 (Cth). Possession, cultivation and sale are covered by ss.6 and 7 of the Misuse of Drugs Act 1981 (WA).


40 See Murray (unreported) CCA 19 September 1988 no. 7289; Cotrell (1989) 42 Australian Criminal Reports 31; Shrestha (unreported) CCA 21 June 1990 no. 8330; El-Asmar (unreported) CCA 25 July 1990 no. 8384; Huat (1990) 49 Australian Criminal Reports 378; Medina (unreported) CCA 3 September 1990 no. 8464.
imposed.41 In *Pizzata, Mazzone and Morabito*42 three co-offenders were given concurrent sentences for offences of cultivation of cannabis with intent to sell or supply and possession, with intent,43 of material harvested from the plantation. In addition, Morabito was sentenced for a further offence of possession relating to a separate parcel of cannabis which was found in his car. The sentence for this offence was made cumulative, on the basis that Morabito appeared to be taking away that amount for his own use. On appeal the sentence was made concurrent, on the basis that there was insufficient evidence to infer that that was Morabito’s purpose. However, it is questionable whether a cumulative sentence was justified irrespective of the offender’s intent. It is difficult to see how the seriousness of the conduct was increased by the fact that the offender may have intended to use some of the drug himself.

The practice of imposing concurrent sentences for possession and cultivation is not uniformly applied. As with all cases involving multiple offenders, the Court is unlikely to interfere with cumulative sentences if the overall total is regarded as within the range of the trial judge’s discretion.44

3.2.3. Possession and Sale

Under the Western Australian *Misuse of Drugs Act 1981*, possession with intent to sell or supply renders the offender liable to a greater penalty than possession *simpliciter*.45 There is an element of double punishment involved when both possession with intent to sell and supply and actual selling are charged, because the intent to sell renders the person liable to greater punishment on the possession count and the actual sale incurs a separate penalty. This alone would tend to suggest that the sentences should be concurrent but, in addition, it is arguable that possession immediately prior to or after a sale does not add to the seriousness of the sale. When the possession offence relates to the balance

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43 For simplicity, “with intent to sell or supply” is abbreviated in the discussion to “with intent”.

44 See, for example, Noonan supra n 41 (appeal against cumulative sentences of 6 months for cultivation of cannabis with intent to sell or supply, 6 months for possession of cannabis with intent and 3 years for possession of heroin with intent dismissed); Stol (1989) 44 Australian Criminal Reports 137 (appeal against a total sentence of 6 years for two offences of cultivation of cannabis, one possession offence and one selling offence allowed and concurrent terms totalling 18 months with a fine of $15,000 imposed). The question whether the sentences should be cumulative or concurrent was not specifically raised in either of these cases as the appeal was on the ground that the total sentence was manifestly excessive.

45 Section 34 Misuse of Drugs Act 1981 (WA).
remaining after the sale, the Court of Criminal Appeal has held that the one
transaction rule should apply.\textsuperscript{46}

The Court stated in \textit{Koushappis},\textsuperscript{47} however, that the position would not
necessarily be the same if there were subsequent sales from the one supply.\textsuperscript{48}
Cumulative sentences for multiple selling offences may be justified on the basis
that the conduct involved is more serious. The distribution of the drug is one of
the more serious aspects of involvement with drugs, and the greater the number
of sales the more serious the conduct involved. In practice, it would seem from
the cases studied that charges in the one indictment of multiple selling offences
are relatively rare. Convictions for selling drugs generally result from
admissions made by the offender or sales detected by undercover police officers.
In the latter case an arrest is likely to be made once the sale is concluded.

Multiple sales were, however, charged in \textit{McMartin}\textsuperscript{49} where the offender sold
seven grams of heroin to an undercover agent one day and arranged to sell a
larger quantity the next day. He was arrested after the second sale of 270.5
grams. The trial judge treated the sales as one transaction and imposed
concurrent sentences of 4 years on each count. On appeal by the Crown, the
Court of Criminal Appeal increased the sentences but left them concurrent,
stating “because of the related circumstances and the so-called totality principle
we would order that the sentences...be served concurrently”.\textsuperscript{50} On the facts of
\textit{McMartin} it is suggested that the sentences were rightly made concurrent; there
was essentially one arrangement to sell to the same person albeit effected by a
preliminary sale of a “taster”. It does not necessarily follow that multiple sales
involving different persons should receive concurrent sentences.

\textbf{3.2.4. Offences Involving Different Drugs}

It is a difficult question whether the fact that different drugs are involved
justifies cumulative sentences. In theory, the culpability of an offender who
deals with two different drugs is, arguably, greater than that of a person who
deals with a comparable quantity of one drug. The blameworthiness of an
offender who flouts two separate laws may be regarded as greater than that of
an offender who breaches only one law. The drugs legislation prohibits dealing
in any given drug; hence possession of two separate drugs involves two
separate breaches. In practice, much will depend on the quantity of the drug or
drugs involved, and there is, perhaps, little to be gained by attempting to

\textsuperscript{46} \textit{Koushappis} (1988) 34 Australian Criminal Reports 419.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid., p.422.
\textsuperscript{49} \textit{McMartin} (unreported) CCA 13 February 1990 no. 8062.
\textsuperscript{50} Ibid., at p.12 of the joint judgment.
analyse the offences without reference to quantity. However, if cumulative sentences are justified because different drugs are involved, the principle should apply whether the offences involve possession, sale or other dealings.

Consistently with the view that multiple sales of the same drug justify cumulative sentences, multiple sales of different drugs would also warrant cumulative sentences. The Court of Criminal Appeal has upheld cumulative sentences for multiple sales of different drugs even when the sales were made to the same person.\(^{51}\) Similarly, the Court has imposed cumulative sentences for offences involving possession of one drug and conspiracy to import another.\(^{52}\) The cases involving possession of different drugs, however, indicate some inconsistency on the question of whether the fact that different drugs are involved justifies cumulative sentences.

In *Allen*\(^{53}\) the offender was convicted of two counts of possession of cannabis with intent and one count of possession of amphetamine with intent. The offender was a passenger in a car which was stopped by police. He was searched and cannabis material was found on his person. The car itself was then searched and the amphetamine discovered. Next his house was searched and further cannabis material found there and in a rear shed. Cumulative sentences were imposed for each count, but on appeal the Crown conceded that the sentences for possession of cannabis should have been concurrent. The appeal on this ground was accordingly allowed.\(^{54}\)

However, in *Heatley*\(^{55}\) an appeal against sentences of imprisonment for offences of possession of cannabis with intent and possession of amphetamine with intent was allowed, and a probation order combined with a community service order made. Wallace J stated\(^{56}\) that if a prison sentence was the only option, then the two terms should have been concurrent, citing *Allen* in support of this proposition. The statement was admittedly *obiter*, but even so *Allen* does not

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51 See, for example, *Borsa* (unreported) CCA 14 June 1991 no. 8921 (cumulative sentences upheld for selling cannabis and supplying heroin to the same undercover agent on two separate occasions separated by two weeks).

52 *Millar* (unreported) CCA 11 January 1990 no. 8011 (concurrent sentences of 6 months for possession of cannabis with intent to sell and supply and 12 years for conspiracy to import heroin were made cumulative on appeal).

53 *Allen* (unreported) CCA 20 April 1990 no. 8206.

54 It is not clear from the judgment to which of the three parcels of cannabis the two offences related. Nor is it clear which offences the Crown's concession related to because the judgment refers to the concession that "the sentences imposed in respect of counts 1 and 3 should have been concurrent". In a later passage the Court referred to making the sentences on counts 1 and 2 concurrent. However, the inference is that it was the sentences for the cannabis offences which were made concurrent but cumulative on the sentence for possession of amphetamine.

55 *Heatley* (unreported) CCA 1 August 1990 no. 8416.

56 Ibid., at p.4 of his Honour's judgment.
support his Honour's statement. A cumulative sentence for the count involving a different drug was apparently upheld in Allen, and the sentences which were made concurrent on appeal related to offences involving the same drugs. Similarly, in Rintel\(^57\) cumulative sentences for possession of amphetamine and possession of heroin were upheld. However, this was apparently (per Malcolm CJ) on the basis of the different purposes for which the offender intended to supply the drugs rather than the fact that different drugs were involved.\(^58\)

### 3.2.5. Conspiracy Offences

In general, there is an element of concurrence in the offences when an agreement to do an act and the performance of that act are both charged, although, given the judicial criticism of charging both conspiracy and the substantive offence,\(^59\) such cases are rare. Both conspiracy and the substantive offence may be charged when the conspiracy is more extensive than the substantive offence to indicate that the totality of the criminal conduct is more extensive than that exhibited by the substantive offence alone. In that case it is suggested that, if a heavier sentence is imposed for the conspiracy offence, a concurrent sentence for the substantive offence is appropriate.\(^60\)

Conspiracy may be charged in order to attach liability to co-offenders, as, for example, when an agreement to sell or supply a drug is made but at the time of sale only one party to the agreement actually has possession.\(^61\) In this instance, the combination of conspiracy to sell and possession is analogous to the combination of sale and possession; for that reason the sentences should be concurrent. Similarly, if conspiracy to sell to one person and actual sale to another person are both charged, cumulative sentences would be justified as if two sales were involved.\(^62\)

The requirement that the conspiracy be particularised has the result that an indictment charging two conspiracies is not duplicitous if there are two separate

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57 Rintel (unreported) CCA 16 November 1990 no. 8594.
58 Ibid., at p.6 of his Honour's judgment.
60 See, for example, Shrestha supra n 40 (a sentence of 12 years for conspiracy to import heroin, concurrent with two terms of 7 years for importation and possession of heroin was reduced to 9 years on appeal). This case went on appeal to the High Court on the question of parole eligibility. See Shrestha (1991) 65 Australian Law Journal Reports 432.
61 This would appear to be the basis for the charges of conspiracy to sell or supply cannabis resin and possession of cannabis resin in Fardig (unreported) CCA 15 May 1990 no. 8241. In that case concurrent sentences of 4 years for the conspiracy offence and 3 years for the possession offence were imposed.
62 Cf Chan (1988) 38 Australian Criminal Reports 337 (concurrent sentences of 5 years for conspiracy to sell and sale of heroin made cumulative on a further term of 5 years for possession of heroin).
agreements relating to separate quantities of drugs.\textsuperscript{63} It is suggested that concurrent sentences are appropriate if substantially the same parties are involved in the conspiracy\textsuperscript{64} but, as with all cases involving drugs, greater emphasis may be placed on the total sentence than on the question of how that sentence is structured.

3.3. Sexual Assault

3.3.1. Introduction

The criminal procedure rules relating to the framing of indictments have considerable impact on the way in which cases of multiple sex offences come before the courts for sentencing. The High Court held in \textit{De Jesus}\textsuperscript{65} that a person charged with two or more sexual offences should not be tried on the one occasion for both or all offences where the evidence of one offence was not admissible against the other offence or offences. Following that decision, an indictment charging multiple counts of sexual assault against different victims will be relatively rare, unless the offences arise out of the same set of facts. In practice, this will usually mean that the offences are committed within a relatively short period of time.

On the other hand, when a number of similar offences are allegedly committed against the same victim over a period of time there will usually be sufficient nexus to allow joinder of the counts in one indictment. However, the Crown must be able to identify with sufficient particularity the evidence on which it relies to support each charge.\textsuperscript{66} This rule creates considerable difficulty in charging sex offences involving child abuse. The victim's evidence frequently indicates that there has been a relationship of abuse or incest over a period of time, but is not capable of identifying the times, dates or circumstances of each offence with sufficient particularity. These difficulties have prompted the Western Australian Government to introduce proposed legislation to create an offence of maintaining a sexual relationship with a child under 16 years of age.\textsuperscript{67}

The combination of the procedural rules and the way in which sex offences are committed has resulted in several distinct categories of case involving

\textsuperscript{63} Marinovich, Romeo and Ricciardello (1990) 46 Australian Criminal Reports 282.

\textsuperscript{64} In Marinovich, Romeo and Ricciardello, concurrent sentences of 12 years were imposed on each of the co-conspirators for each count of conspiracy to possess heroin with intent to sell or supply.

\textsuperscript{65} De Jesus (1986) 22 Australian Criminal Reports 375.

\textsuperscript{66} S (1989) 168 Commonwealth Law Reports 266; 45 Australian Criminal Reports 221.

\textsuperscript{67} \textit{Acts Amendment (Sexual Offences) Bill 1991}, C1 6. The proposed amendment creates an offence of having a sexual relationship with a child under the age of 16 years. The sexual relationship is constituted by three or more acts of the prohibited kind committed on separate days. However, it will not be necessary to specify the dates or in any way particularise the circumstances of the alleged acts.
multiple sexual offences can be identified. Where multiple offences involving the same victim are charged on the one indictment, they usually either relate to child sexual abuse extending over a period of time, or offences committed in a short period of time as part of one criminal event. Where there are different victims, the charges usually relate to offences committed as part of one criminal event and the perpetrators are often charged with other offences such as break and enter, assault or deprivation of liberty. Each of these categories will be considered in an attempt to elucidate whether cumulative or concurrent sentences are appropriate.

3.3.2. Multiple Offences Involving the Same Victim

There were a number of cases in the period studied where multiple counts of sexual assault against the same victim were charged on the basis that a number of acts of penetration took place in a short space of time, usually a matter of hours. In these cases the sentences were usually made concurrent, with little or no discussion of whether they formed one transaction. The fact that there are a number of acts of penetration is, itself, an indication of the seriousness of the event, particularly when there are different types of penetration such as anal, oral and vaginal. Therefore, to impose a sentence on each count which is appropriate for one act of penetration and make those sentences concurrent may underestimate the seriousness of the event.

On the other hand, an event consisting of two or more acts of penetration committed within a short period of time is, arguably, not as serious as two or more separate and distinct acts of penetration; therefore, to make each sentence cumulative would be disproportionate to the total conduct. It is likely, therefore, that the sentences imposed in this type of case took account of the fact that a number of acts of penetration had occurred. The courts in these cases imposed what was, in effect, an inflated concurrent sentence.

It is questionable, however, whether it is appropriate to charge a number of offences in this type of case. The offender, if convicted, is left with a record which may look more serious than it actually is. This attention to the legal definition of the offence of sexual assault rather than the reality of the conduct occasionally leads to rather extreme examples of charging practice. For example,

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68 Turan (1989) 2 Western Australian Reports 140 (concurrent sentences of 8 years imposed on each of two counts of aggravated sexual assault); Leering (unreported) CCA 21 December 1990 no. 8664.4 (concurrent sentences of 18 months imposed on each of five counts of aggravated sexual assault); Bridgman (unreported) CCA 12 February 1991 no. 8712 (concurrent sentences of 15 years 1 month for one count of aggravated sexual assault and 10 years for each of eight counts of sexual assault); Burns (unreported) CCA 5 April 1991 no. 8799 (concurrent sentences of 2 years 2 months imposed on each of two counts of sexual assault); Jensen (unreported) CCA 6 March 1991 no. 8802 (concurrent sentences of 9 years for each of two counts of sexual assault).

69 Inflated concurrent sentences are discussed in Chapter 4, Section 4.5.
in _Leering_70 the offender was charged with five counts of aggravated sexual assault because he held the victim down while his co-offender committed the acts of penetration. The number of counts arose because his co-offender's penis kept falling out.

The second type of case in which multiple offences involving the one victim arise is child sexual abuse.71 A significant difference between child abuse cases and other sexual assaults is that the abuse usually takes place within an established relationship. Abuse of trust is an important element in the seriousness of the harm done. The longer the relationship continues and the greater the number of acts of abuse which take place, the more serious the harm is likely to be. On the other hand, victims in child sexual abuse cases frequently do not suffer any physical harm (beyond that caused by the act of penetration) nor do they usually suffer from the threat or fear of physical harm which is an important element of the seriousness of sexual assault. This is not to suggest that child sexual abuse is necessarily any less serious than other forms of sexual assault. It merely suggests that it may not be appropriate to compare multiple sexual offences involving child abuse with other instances of multiple sexual assaults. From a practical point of view it is not possible to treat each offence as a separate transaction and make the sentences cumulative; the number of offences charged in these cases is frequently large.72 In theory also it is suggested that the offences are more correctly regarded as one transaction. The reality of the conduct is that there is a relationship of abuse, and it is somewhat artificial to divide the ongoing gravity of that relationship into a number of offences.

It is not possible from this research to derive any general rule as to whether the sentences in such cases are made cumulative or concurrent. Given the large number of offences which these cases frequently involve, the emphasis is usually on the total sentence rather than the way in which the total is structured.

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70 _Leering_ supra n 68.


72 See, for example, _Podirsky (No. 2)_ op. cit. (24 convictions of unlawful carnal knowledge and 2 convictions of aggravated sexual assault); _Page v. Evans_ op. cit. (18 convictions of unlawful carnal knowledge); _Fancourt_ op. cit. (17 convictions); _Fraser_ op. cit. (16 convictions); _Dawes_ op. cit. (16 convictions).
3.3.3. Multiple Sex Offences Involving Different Victims

As previously stated, the rules governing joinder of counts in an indictment have the result that cases involving multiple sexual offences against different victims committed on separate occasions are relatively rare. On the occasions that such cases do arise the sentences may be made concurrent by the application of the totality principle, but there is little justification for treating the offences as one transaction.\textsuperscript{73}

Thus, when multiple sexual offences involving more than one victim are charged in the one indictment, the offences will usually have been committed on one occasion. Such cases are typically particularly serious instances of sexual assault. The offender is frequently in company and armed; the victims are usually restrained in some way or at a physical disadvantage due to age, youth or health. Because of the serious nature of the event, it is not uncommon for a number of different types of offences to be committed such as other, non-sexual, assaults, break and enter, or theft offences.

To apply all of the generally accepted principles relating to multiple offenders would, if the appropriate proportionate sentence is imposed for each offence, often result in excessively long sentences. For example, in \textit{Riley}\textsuperscript{74} the offender was convicted of entering a dwelling house with intent, robbery, two counts of assault, deprivation of liberty and three counts of sexual assault.\textsuperscript{75} In \textit{Trow}\textsuperscript{76} the offender was convicted of breaking and entering a building with intent, two counts of aggravated sexual assault, two counts of deprivation of liberty and

\begin{tabular}{lcc}
\hline
Sentence & Time & Order of Sentence \\
\hline
Enter Dwelling with Intent & 1 yr & conc \\
Robbery & 6 yrs & conc \\
Assault & 2 yrs & cum \\
Assault & 6 mths & cum \\
Deprivation of Liberty & 1 yr & conc \\
Agg Sexual Assault & 7 yrs & cum \\
Agg Sexual Assault & 7 yrs & conc \\
Agg Sexual Assault & 7 yrs & conc \\
\hline
Total Sentence & 15 yrs & 6 mths \\
\hline
\end{tabular}

\textsuperscript{73} See, for example, \textit{Klawins} (unreported) CCA 24 November 1989 no. 7960. In that case it was argued on appeal that sentences for offences of aggravated sexual assault and sexual assault should have been made concurrent. Given that the offences involved different victims and were committed 12 months apart, it is not surprising that the appeal was not successful.

\textsuperscript{74} \textit{Riley} (unreported) CCA 10 July 1990 no. 8360.

\textsuperscript{75} The sentences imposed on Riley were:

\textsuperscript{76} \textit{Trow} (unreported) CCA 22 December 1988 no. 7444.
doing grievous bodily harm. The application of the accepted principles in this type of case is arbitrary; it is simply not possible to accumulate each sentence that the principles suggest should be cumulative.

The fact that concurrent sentences are imposed when cumulative sentences might otherwise be regarded as appropriate may suggest that multiple offenders in such cases are undersentenced. However, this view rests on a number of questionable assumptions. The first is that it assumes that two offences, of any particular type, are twice as serious as one offence. Research into public perceptions of offence seriousness has been more concerned with the relative seriousness of different offences than with the cumulative seriousness of similar offences. Indeed, there are indications that for some offences, such as rape, two offences may be regarded as more than twice as serious as one offence.

The second assumption is that the relationship between the length of the sentence and the severity of the punishment is linear; that is, if the sentence is doubled the severity of the punishment is also doubled. There has been little research on the cumulative seriousness of imprisonment, but it is possible that as the length of the term increases the greater is the impact which each additional month or year has on the severity of the sentence. However, perhaps a more fundamental question is whether two offences committed as part of one event are capable of comparison with those same offences committed in isolation. It may be that any attempt to compare the conduct involving multiple offences with an isolated offence is fundamentally flawed.

3.3.4. Multiple Offences Involving Sexual Assault and Other Offences

The cases considered in the previous categories consisted of multiple counts of sexual assault either on the same victim or different victims. Another type of multiple offender is the person charged with a sexual offence and other offences. Given the rules relating to joinder of counts in an indictment, those other offences are likely to arise out of the same set of facts and are commonly

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77 The sentences imposed on Trow were:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Break &amp; Enter with Intent</td>
<td>18 mths</td>
</tr>
<tr>
<td>Deprivation of Liberty</td>
<td>5 yrs</td>
</tr>
<tr>
<td>Deprivation of Liberty</td>
<td>5 yrs</td>
</tr>
<tr>
<td>Agg Sexual Assault</td>
<td>12 yrs</td>
</tr>
<tr>
<td>Agg Sexual Assault</td>
<td>12 yrs</td>
</tr>
<tr>
<td>Doing GBH</td>
<td>6 yrs</td>
</tr>
<tr>
<td><strong>Total Sentence</strong></td>
<td><strong>18 yrs</strong></td>
</tr>
</tbody>
</table>


committed within a short period of time. The other offences most commonly charged along with sexual assault are break and enter, non-sexual assaults and deprivation of liberty.

3.3.4.a. Sexual Assault and Break and Enter

One of the most frequently cited principles relating to sentencing multiple offenders is that burglary accompanied by violence to the occupant of the dwelling does not form one transaction.\textsuperscript{80} It is suggested, however, that in determining whether cumulative sentences are justified, it is necessary to consider how the seriousness of the break and enter offence was assessed. Although there is general similarity between all break and enter offences, there are significant differences in levels of seriousness depending on the purpose of the break and enter and the extent to which that purpose was accomplished.

It was suggested in the discussion of offence seriousness that the offence the offender intends to commit is relevant to the offender's culpability. Break and enter with intent to assault may be regarded as more serious than break and enter with intent to steal, because the offender's culpability is greater. This suggests a theoretical reason why the seriousness of break and enter with intent to steal is not necessarily comparable to the seriousness of break and enter with intent to assault. In practice, there is a further reason why sentences for the two types of offence should not be compared. Generally, in break, enter and steal cases the theft is not charged separately, but the value of the property stolen or damage done will usually be taken into account and be a significant factor in determining the sentence. In break, enter and assault cases, the assault is usually the subject of a separate count.\textsuperscript{81} A sentence for housebreaking which takes into account the seriousness of the actual harm done should not be compared to a sentence for housebreaking where the actual harm done is separately charged.

The second factor which should be taken into account in assessing the seriousness of the offence is the extent to which the offender's purpose was accomplished. The harm involved in break and enter with intent to assault consists, in part, in the threat that is involved. If the intended assault takes place, the threat of harm merges with the actual harm or injury caused. A person should not be punished both for the threat of an assault and the actual assault, any more than a person should be punished for both a completed offence and the attempt to commit that offence. This reasoning suggests that when break and enter and sexual assault are both charged, the sentence for the break and enter offence should be either concurrent with the sentence for the sexual assault or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{80} Thomas supra n 3, pp.54-5; Ashworth supra n 3, p.255.
\item \textsuperscript{81} Fox and Freiberg supra n 3, p.543 citing J. W. Heaslip and J. T. Hassett, \textit{Indictable Offences in Victoria}, Director of Public Prosecutions, Melbourne (1983), p.152. The cases studied indicate that the practice in Western Australia is the same, although it is possible that the composite offence of break, enter and steal is charged under s. 403 of the Criminal Code in some cases.
\end{itemize}
\end{footnotesize}
shorter than the sentence which would normally be imposed for the offence of break and enter with intent to assault.

Thus the question whether cumulative sentences are justified in cases involving break and enter and sexual assault depends less on assertions that burglary accompanied by violence does not form one transaction than a determination of how the sentence for the break and enter offence is arrived at. Although the courts frequently speak of a “tariff” for break and enter offences, it is suggested that comparisons between sentences for different types of break and enter may not be appropriate.

The cases studied, however, indicate that such comparisons are sometimes made. For example, the sentence imposed for a break and enter offence in *Loaring* ⁸² has been referred to in subsequent cases as an indication of the range of sentence for break and enter with intent to sexually assault. ⁸³ In *Loaring* the offender deliberately set out to rape somebody and made several attempts to break into dwellings during the course of which he indecently assaulted a woman who had alighted from her car to open some gates. He eventually succeeded in breaking into a dwelling, although his intended sexual assault was foiled because of the resourcefulness of the victim. He did, however, indecently assault her while armed and was convicted and sentenced to 2 years for aggravated indecent assault and 12 months concurrent for break and enter, in addition to concurrent sentences for two counts of attempted break and enter and an indecent assault.⁸⁴ The total sentence imposed by the trial judge was thus 2 years.

On appeal by the Crown the Court stated:

> Breaking and entering a flat in the night time with intent sexually to assault the inmate, other than in the most exceptional circumstances, which are not present here, must result in a sentence of imprisonment of substantially more than twelve months. An appropriate penalty for this offence, in our opinion, is four years...⁸⁵

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⁸² *Loaring* (unreported) CCA 9 May 1989 no. 7651.

⁸³ See, for example, *Hall* (unreported) CCA 2 April 1990 no. 8189; *Frain* (unreported) CCA 1 May 1990 no. 8233.

⁸⁴ The sentences imposed on *Loaring* at first instance were:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempt Break &amp; Enter</td>
<td>6 mths</td>
</tr>
<tr>
<td>Attempt Break &amp; Enter</td>
<td>conc</td>
</tr>
<tr>
<td>Indecent Assault</td>
<td>12 mths</td>
</tr>
<tr>
<td>Break &amp; Enter Dwelling</td>
<td>12 mths</td>
</tr>
<tr>
<td>Agg Indecent Assault</td>
<td>2 yrs</td>
</tr>
<tr>
<td><strong>Total Sentence</strong></td>
<td><strong>2 yrs</strong></td>
</tr>
</tbody>
</table>

⁸⁵ *Loaring* supra n 82, at p.7 of the joint judgment.
The appeal was allowed, and the sentence for the break and enter offence increased to 3 years and 3 months. This was made cumulative on the sentences for the first three counts, which were also ordered to run cumulatively rather than concurrently. The total sentence imposed by the Court for these counts was thus 5 years 3 months. The Court then stated that it was not necessary to interfere with the sentence for the aggravated indecent assault, having regard to the total sentence imposed. That sentence was ordered to run concurrently, although the Court accepted the view that burglary accompanied by violence does not form a single transaction.

Loaring was cited by Seaman J in Hall, where the offender was sentenced to 1 year for break and enter and 6 years cumulative for sexual assault of the inhabitant. The appeal in Hall was on the ground that the total sentence was manifestly excessive, and the question whether the sentences should have been concurrent was not raised. Seaman J held that the sentence of 1 year for the break and enter offence was not manifestly excessive and, indeed, was at the lower end of the range given Loaring.

It is not disputed that the sentence of 1 year would not appear to be excessive, given the range of sentences imposed for break and enter offences which involve a sexual assault. What is questioned is whether Loaring is an appropriate case to cite as an indication of the range. In Loaring the offender apparently had a clear intent to sexually assault somebody, and broke in for that purpose. However, the sexual assault did not actually take place. It is conceded that an indecent assault was committed, but it is suggested that this was a case where the threat component of the break and enter offence did not fully materialise and, for that reason, it was appropriate that the sentence for the break and enter offence take into account the seriousness of the harm threatened. By contrast, in Hall, where the threat materialised, the seriousness of the harm was arguably taken into consideration in the sentence for the sexual assault offence, which was made cumulative on the sentence for the break and enter offence.

3.3.4. Sexual Assault and Other Assaults

One of the difficulties involved in sentencing multiple offences arises when aggravated sexual assault (or indecent assault) is charged along with an offence involving bodily harm, and the circumstance of aggravation relied on is itself bodily harm. The difficulty lies in separating the bodily harm which is the circumstance of aggravation of the sexual or indecent assault from the bodily harm which relates to the assault offence. The problem was illustrated by the

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86 The reduction from 4 years was to take into account time spent in custody prior to trial.
87 Hall supra n 83.
case of Shaw\textsuperscript{88} which was discussed in Chapter 2 and is also illustrated by the case of Davis and Dinah.\textsuperscript{89}

In Davis and Dinah two co-offenders were initially charged with causing grievous bodily harm and aggravated indecent assault. The facts were that a bottle thrown at the complainant hit her on the head, knocked her unconscious and caused bleeding to the head. She was then indecently assaulted and during that assault suffered considerable injury.

Dinah failed to appear at the hearing and the matter proceeded against Davis alone. Davis was found not guilty of doing grievous bodily harm but guilty on the alternative offence of assault occasioning bodily harm, the act which constituted the assault being the throwing of the bottle. He was also found guilty of aggravated indecent assault, the circumstance of aggravation being the bodily harm which the complainant suffered during the indecent assault. Dinah was subsequently indicted and found guilty of the same two offences of assault occasioning bodily harm and aggravated indecent assault. However, as he was not convicted of the bottle throwing incident, the facts that grounded the assault offence were the injuries which the complainant suffered during the indecent assault. The circumstance of aggravation of the indecent assault was that he was in company.

Thus, the injuries suffered by the complainant during the indecent assault constituted a circumstance of aggravation of indecent assault in Davis's case and the bodily harm for the offence of assault occasioning bodily harm in Dinah's case. This was recognised by the Court of Criminal Appeal, and it was partly for that reason that the sentences imposed on Dinah were ordered to run concurrently.

The difficulty was highlighted in that case because there were co-offenders each charged initially with the same offences. It will not always be so obvious that the same bodily harm is the basis for both a circumstance of aggravation and a separate offence. The difficulties involved in separating the bodily harm attributable to the assault from the bodily harm which is a circumstance of aggravation could be avoided if the circumstance of aggravation is limited to harm which results from the indecent or sexual assault itself. It is not difficult to imagine circumstances where the actual indecent assault or act of penetration itself causes bodily harm. If the bodily harm results from other acts it should be the subject of a separate count.

\textsuperscript{88} Shaw supra n 21.

\textsuperscript{89} Davis and Dinah (1989) 44 Australian Criminal Reports 113.
3.3.4.c. Sexual Assault and Deprivation of Liberty

The offence of deprivation of liberty may range from an abduction during which the victim is subjected to a terrifying ordeal to mere restraint of the victim while another offence is committed. The length of the period of time which the offence spans, the way the victim is treated during that time and the degree of fear generated are all matters which are relevant to the seriousness of the offence. No general principle can be stated which adequately deals with the question whether the sentence for any offence committed during the period of abduction should be cumulative or concurrent; much will depend on an analysis of the facts to ascertain what is the real gravamen of the conduct. The essential point is that, if the offences committed during the period of abduction affect the seriousness of the offence of deprivation of liberty and are taken into account in the sentence for that offence, cumulative sentences should not be imposed for the other offences. To impose cumulative sentences would result in double punishment.

In the cases studied, deprivation of liberty was commonly charged in conjunction with sexual assaults and break and enter offences.\(^{90}\) Although it was not always possible to ascertain from the judgments exactly what facts grounded the offence, it appeared that in many cases the deprivation of liberty amounted to mere restraint rather than a terrifying ordeal. Concurrent sentences were generally imposed, and, it is suggested, rightly so. In these cases the restraint of the victim is a matter which affects the seriousness of the offence committed while the victim was restrained. Indeed, it is questionable whether it is appropriate or necessary to charge deprivation of liberty when it essentially amounts to restraining the victim for the purpose of committing another offence.

3.4. Fraud and Forgery Offences

In cases involving multiple offences of fraud or forgery or analogous offences, the person is often sentenced for a considerable number of offences. However, the number of offences involved may do little more than indicate that there was a well thought out and effective scheme.\(^{91}\) If there is such a scheme, it may involve a number of offences against the same victim or the same modus operandi employed against different victims. The scheme may involve a number of steps each of which is an offence as, for example, when money is obtained on the basis of a forged document: the offences of forging, uttering and obtaining money by false pretences may be charged for each transaction in the scheme. A commonsense approach to offences of this type may suggest that there is really

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\(^{90}\) Deprivation of liberty was charged in conjunction with sexual assault in Barrett (unreported) CCA 21 November 1988 no. 7385; Deakin (unreported) CCA 14 February 1990 no. 8054; Lerring supra n 68; Bridgman supra n 68; Hutson (unreported) CCA 5 March 1991 no. 8748 and in conjunction with break and enter offences in Trow supra n 76; Howett (unreported) CCA 20 February 1989 no. 7521; Christsensen (unreported) CCA 23 June 1989 no. 7721; Riley supra n 74; Cox (unreported) CCA 9 August 1990 no. 8418; Ireland (unreported) CCA 23 November 1990 no. 8601.

\(^{91}\) Roberts-Pearson (unreported) CCA 6 May 1991 no. 8850, Rowland J at p.8 of his Honour’s judgment.
only one criminal event, one multi-faceted course of criminal conduct. The number of offences merely indicates the extent to which the scheme has been planned and successfully executed and indicates, along with other factors, the seriousness of the conduct.

The practical limitation on treating such a scheme as one transaction and imposing concurrent sentences may be that the statutory maximum penalty for any one offence is less than the sentence which is considered appropriate for the total criminality. Given the constraints of the maximum penalties and the number of offences which are frequently involved, it is perhaps not surprising that in cases involving multiple offences of fraud or analogous offences the courts emphasise the total sentence rather than the way in which the sentence is structured.92

It is possible that underlying the decision in the Del Piano case,93 is the perception of the majority judges of what was the appropriate total sentence. Del Piano was convicted of 18 counts of corruptly receiving a secret commission under section 529(a) of the Criminal Code, one count of forgery under section 473 and one count of attempting to pervert the course of justice under section 143 ("the justice offence"). A sentence of 12 months was imposed for each offence, the first five of which were made cumulative, giving a total sentence of 5 years. The corruption offences related to the payments made to Del Piano by one Caratti, in consideration of Del Piano using his influence on the board of directors of the company of which Del Piano was a director to award contracts to Caratti. The justice offence related to an attempt by Del Piano to counsel

92 See, for example, Keirls (unreported) CCA 7 November 1989 no. 7922. The trial judge imposed concurrent terms of 3½ years for three offences involving false pretences arising out of a complex and dishonest course of conduct which netted $300,000. As the 3½ year term exceeded the then maximum under section 499 of the Criminal Code, the sentences were restructured on appeal to arrive at the same total of 3½ years. Seaman J accepted Crown counsel's submission that it is the total sentence with which the court is concerned.

In Grein [1989] Western Australian Reports 178; (1988) 35 Australian Criminal Reports 76, the offender pleaded guilty to 11 counts of forgery, 11 counts of uttering, two counts of obtaining money ($61,244) by false pretences and one count of attempting to obtain money by a false pretence. The convictions resulted from an elaborate scheme to defraud an insurance company by faking life insurance policies to obtain a broker's commission. The total sentence of 4 years was structured as 12 months, cumulative, on each of the forgery and uttering counts relating to the first faked policy, 2 years cumulative for one of the false pretences offences and 12 months concurrent on each of the remaining counts. A Crown appeal against the inadequacy of sentence was dismissed as it had not been demonstrated that the aggregate term was manifestly inadequate.

In Roberts-Pearson op. cit., a scheme to defraud various banks by opening accounts in false names resulted in a net loss to the banks of approximately $8,500. The total sentence of 4 years (after credit for time spent in custody) imposed by the trial judge for the 36 offences involved was regarded as manifestly excessive and reduced to 2½ years, and the sentences on the individual counts rearranged to reach that result.

In Wilson (unreported) CCA 20 October 1988 no. 7325, a total sentence of 2½ years was regarded as appropriate for 22 offences of stealing money as a servant and the sentences structured to reach that result.

93 Del Piano (1989) 45 Australian Criminal Reports 199.
Caratti to destroy or falsify evidence in relation to the corruption offences. The forgery offence was unrelated; the only connection with the other offences was that part of the funds corruptly received was apparently used to purchase antique furniture, a receipt for which was forged for the purpose of avoiding capital gains tax.

The Crown appeal was based both on the inadequacy of the total sentence and on the ground that the sentences for the forgery and justice offences should have been cumulative. Both Malcolm CJ and Brinsden J held that the sentences for these offences should have been cumulative. The forgery offence was clearly unrelated, and both judges held that the justice offence was separate and serious and deserving of a separate term of imprisonment. It is suggested, however, that the rationale of the case is the view taken by the majority judges of what was the appropriate total sentence. Had the trial judge achieved the same total sentence by making only three of the corruption sentences concurrent and the sentences for the forgery and justice offences cumulative, the result on appeal may not have been any different. Both Malcolm CJ and Brinsden J considered that a total of 5 years for the course of conduct involved in the corruption offences was not inadequate. Had a total sentence of 3 years been imposed for the corruption offences, it is possible that this would have been regarded as sufficiently inadequate to demonstrate error in the sentencing discretion.

The emphasis on total sentence avoids the need to attempt to assess the individual seriousness of each separate offence which is committed as part of a scheme. In fraud cases the scheme is usually divided up into different offences with the basis for each offence being the acquisition of a sum of money. This may have the result that a person who acquires a large sum in one transaction is convicted of only one offence while a person who acquires a smaller sum through a number of transactions is convicted of a number of offences. It is conceded that the amount of money involved is not the only indication of the seriousness of the criminality: several transactions to acquire a sum of money may be regarded as more serious than a single transaction which results in the acquisition of the same amount. The culpability of the offender is greater because of the repeated manifestation of the intention to break the law. However, it is suggested that this greater level of criminality would be better recognised as a factor which goes to the seriousness of the overall conduct rather than by charging and convicting the offender of every separate transaction. Global penalties have particular attraction in this type of case. Indeed, cases involving one of the most common types of fraud – social security fraud – were

94 Ibid., Malcolm CJ, p.204; Brinsden J, p.211. See also Valentino (unreported) CCA 10 June 1991 no. 8912 where cumulative sentences were upheld for two offences under the Commonwealth Bankruptcy Act 1966 of disposing of property with intent to defraud the creditors and making a false statement in a public examination. The second offence related to lying about the proceeds of the sale of the matrimonial home; the first offence related to the sale.

excluded from the research for this report primarily because the legislation provides for the imposition of a global penalty.

The artificiality involved in dividing up the conduct on the basis of the amounts of money involved is illustrated by the case of Bushe-Jones. In that case the offender was convicted of four offences of official corruption involving a total "bribe" of $18,000. Two of the offences resulted from an approach by the offender for a "loan" to buy a boat for $10,000 on the understanding that the "loan" was not to be repaid. The "loan" was made in two separate amounts of $5,000 and thus gave rise to two separate offences. It could be argued that this was one transaction which was effected by two separate payments. On appeal the Crown thus conceded that the sentences for these two offences should have been concurrent. On the other hand, it could be argued that the entire relationship wherein the offender took bribes in consideration of using his influence in favour of the other person evidenced one period of criminality, i.e. in relation to the total bribe of $18,000.

The limitation of treating fraud offences committed as part of one scheme as a single transaction lies in determining what is necessary to establish that such a scheme exists. In some cases the level of planning and preparation will be clear. In others the offences will merely be an indication that the same technique was used against different victims.

In Kurth v. Thompson a total sentence of 32 months, consisting of eight cumulative terms of 4 months each for offences involving obtaining money by false pretences, was upheld, and the submission that the sentences should have been concurrent rejected. Brinsden J stated that it was incorrect to regard the offences as a continuous transaction, for each offence was a separate offence, committed on a separate day and at a separate place involving a separate conscious decision to defraud the victim. Although the comment as to why the offences in this case did not form one transaction could be made of many cases involving schemes, the facts in this case merely indicated that the same method of obtaining money was used in each offence.

3.5. Summary

In determining whether concurrent or cumulative sentences are appropriate for offences which are committed as part of one criminal event, the courts generally focus on three different elements of concurrence: concurrence in time, type of offence and victim. Of these three elements, concurrence in time is the factor

98 His Honour also held that the total sentence was not manifestly excessive, a result which may seem surprising in comparison to some of the cases discussed above, given that the total amount obtained in this case was $285.36. The total sentence may perhaps be explained by the offender's considerable prior record of false pretences offences committed apparently to sustain a drug habit.
cited most frequently. As the analysis of the offences in this chapter shows, this element of concurrence is an inadequate and arbitrary guide for applying the one transaction rule. In offences involving possession of drugs, the time at which the offence is committed is largely determined by the time when the offence is detected, with the result that multiple drug offences are often automatically treated as having been "committed" at the same time. Similarly, cultivation and importation are ongoing offences that often culminate in the commission of a further offence. Again there is an element of concurrence in time simply because of the way the offence is committed.

With sex offences the question whether the offences were committed at the same time is largely determined by the procedural rules relating to joinder of counts in an indictment. Where counts are joined but different victims are involved, the offences will almost always have been committed as part of one event and frequently have involved other offences of violence. When the offences are committed against the same victim, they will usually either involve child sexual abuse and be committed over a long period of time, or arise as a result of a number of different acts of penetration committed within a short period of time.

In determining whether cumulative or concurrent sentences are appropriate, it is suggested that it is necessary to analyse different offences separately in order to assess how the number and type of offences affect the seriousness of the conduct. It is conceded that this type of analysis creates its own difficulties and does not provide any easy answers to the question whether cumulative or concurrent sentences are justified. Nonetheless, it does at least focus attention on what is the real seriousness of the conduct and how that conduct may be compared to other offences. One of the difficulties in incorporating multiple offenders into a sentencing system that is essentially based on single offences lies in determining whether an offence that is committed as part of a criminal event can be compared to an isolated instance of that offence. Part of the difficulty stems from focusing on the legal definition of an offence rather than the behaviour that constitutes the offence. For example, all offences of break and enter with intent require a certain behaviour for the offence to be made out. However, there are different levels of seriousness depending on what was the purpose for the break and enter and whether that purpose was fulfilled. Thus it is, perhaps, inappropriate to compare sentences for break and enter as if all break and enter offences are essentially the same.

In many instances of multiple offending, there is considerable difficulty in dividing up the seriousness of the total conduct into the various offences which are committed. In such cases the courts emphasise that it is the total sentence with which the court is concerned rather than the way in which that total sentence is structured. This emphasis on the total sentence is also seen in the application of the totality principle, which is the focus of the next chapter.
4. The Totality Principle

4.1. Introduction

Thomas's statement of the totality principle is in these terms:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate".\(^{99}\)

The principle is well established in Australia.\(^{100}\) It applies in all circumstances where a person may become liable to more than one sentence, whether that person is sentenced in one court for a number of offences or is sentenced in different courts and already liable to a term of imprisonment.\(^{101}\) It has also been held to apply when offences are committed within a short period of time in different states and the offender has already served a term of imprisonment in one state before being convicted and sentenced for the offences committed in the other state.\(^{102}\)

Traditionally, the totality principle is seen as a limiting principle, a means of reducing a total sentence that would otherwise be regarded as excessive. Thomas states that "the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive".\(^{103}\) Thus, on the accepted application of the principle, it only comes into play once the sentencer has imposed appropriate proportionate sentences for each of the individual offences and has determined whether those sentences should be cumulative or concurrent in accordance with accepted principles. The traditional application of the principle is illustrated by the case of Magee,\(^{104}\) discussed further below.\(^{105}\) In that case the offender was convicted of two counts of rape and sentenced to cumulative terms of 7 years and 8 years. On appeal, Wickham J held that the

\(^{99}\) Thomas supra n 3, p.56.
\(^{101}\) Thomas supra n 3, p.57.
\(^{102}\) Mill supra n 100.
\(^{103}\) Thomas supra n 3, p.57.
\(^{104}\) Magee [1980] Western Australian Reports 117.
\(^{105}\) See section 4.4.1.
total sentence of 15 years was excessive even though each of the individual sentences was correct, when considered separately, and even though the circumstances of the offences meant that the two sentences were rightly made cumulative. His Honour restructured the total sentence by imposing cumulative terms of 6 years for each count.

Research into the sentencing judgments of the Western Australian Court of Criminal Appeal suggests, however, that the Court is applying the totality principle not only as a mechanism for reducing an excessive sentence, but also as a means of increasing an otherwise inadequate sentence. Further, the Court appears to regard the consideration of the total sentence as more than merely the “final duty” of the sentencer; on the contrary, it is a primary consideration.

This departure from the traditional application of the totality principle has been brought about, it is suggested, by the Court’s interpretation of the principle as requiring proportionality between the total sentence and the total conduct. In this way, the Western Australian Court seems to have given a new slant to a well-known doctrine. Given the difficulty with the concept of proportionality, it is, perhaps, worthwhile to clarify how the concept of proportionality may apply to the totality principle.

4.2. The Totality Principle and Proportionality

The totality principle is often stated as requiring proportionality between the total sentence and the total criminality. Thus it is frequently said that, even though the individual sentences were appropriate and proportionate to the seriousness of the offences, the total sentence is excessive and offends the totality principle. However, there is considerable conceptual difficulty in explaining why, if each individual sentence is proportionate to the offence for which it is imposed, their sum is disproportionate to the total seriousness of the conduct.

To illustrate the problem, a distinction may be drawn between two different types of multiple offender: first, an offender who commits a number of offences as part of one criminal event and, second, an offender who commits a number of unrelated offences. As an example of the first type of multiple offender, consider a person who is convicted of a number of offences committed as part of one criminal event. Let us say that the offender breaks into a house, assaults one of the inhabitants and sexually assaults another; following conviction, he is sentenced to 3 years for the break and enter, 2 years cumulative for the assault and 5 years cumulative for the sexual assault – a total sentence of 10 years. If each of these sentences is proportionate to the individual offences, how is it possible that the total sentence of 10 years is disproportionate to the total conduct?

One possible explanation is that one or more of the individual sentences was, in fact, excessive or should not have been made cumulative. The appropriate
proportionate sentence for any given offence is usually expressed as a range of sentences, or tariff, rather than a particular term. If the tariff for break and enter was, say, 1 to 3 years, the 3-year term in the illustration may be regarded as not disproportionate because it falls within the normal range of sentences. Similarly, the sentences for the assault and sexual assault offences may also be within the normal ranges of sentences for those offences. However, the fact that each sentence is not disproportionate does not necessarily mean that it is the appropriate proportionate sentence for that offence in the circumstances. This is, of course, true of all sentences but the problems are exacerbated with multiple offences.

The tariff may also be inappropriate because it is based on the range of sentences for that offence committed in isolation and not as part of a criminal event. In the previous chapter it was suggested that the seriousness of an offence committed in isolation may not be the same as the seriousness of that offence when committed as part of one criminal event. In the discussion of break and enter offences, particularly, it was suggested that the seriousness of break and enter with intent to assault differs depending on whether the assault actually takes place. Thus, although the sentence of 3 years in the illustration is within the range of sentences for break and enter generally, this range may not be appropriate as a guide.

Underlying both of these suggested explanations for the application of the totality principle in this case is the fact that one or more of the individual sentences was, in fact, excessive. However, Thomas’s statement of the principle is that it applies when the individual sentences are properly calculated and rightly made consecutive. Thus the basic condition required for the application of the totality principle is not fulfilled. Sentencing is not an exact science, and there is obviously considerable difficulty in determining what is the exactly proportionate sentence in any given case. However, it is suggested that when the totality principle is applied to offences which form part of one criminal event, the courts may be impliedly recognising that one or more of the individual sentences is excessive. In short, it is suggested that in this type of case it is a contradiction to say that each of the individual sentences was appropriate and proportionate but that the total is nevertheless disproportionate to the total conduct. If the total sentence is disproportionate, then either one or more of the individual sentences was excessive or the sentences should not have been made cumulative.

A different problem with proportionality arises in the case of a multiple offender who commits a number of unrelated offences, such as a number of offences of a similar type or a number of completely different offences. Consider, for example, a person who breaks and enters six different houses on different days and is sentenced to 2 years for each housebreaking. The one transaction rule would not appear to apply in this case, and if all the sentences were made cumulative the total sentence would be 12 years. The question, again, is how is it possible that the 12-year sentence is disproportionate to the total conduct?
The suggestion that the application of the totality principle is an implicit recognition by the courts that one or more of the sentences was excessive would not apply in this type of case. It is assumed, for the sake of illustration, that the sentence of 2 years is the appropriate proportionate sentence. However, one way in which this sentence may be regarded as disproportionate is in comparison to more serious offences.¹⁰⁶ A 12-year term may be appropriate, say, for manslaughter or a particularly nasty rape.¹⁰⁷ Having regard to the seriousness of those offences, the 12-year term for housebreaking is disproportionate. In this instance proportionality is used in the sense of relative proportionality, or proportionality between different classes of offence, rather than proportionality between the sentence and the offence. This concept of relative proportionality is, perhaps, the basis for what Thomas calls the “first limb” of the totality principle, which is that -

...a cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved...¹⁰⁸

The essence of the first limb is to maintain some recognisable relationship between the total sentence and the most serious offence involved.¹⁰⁹ This limb is formulated somewhat differently to the concept of relative proportionality, in that it requires a comparison between the total sentence and the usual range of sentences for the most serious offence involved, rather than a comparison between different classes of offence. However, the first limb is, perhaps, an attempt to give practical meaning to the concept of relative proportionality. By tying the total sentence to the normal range for one class of offence, there is an implicit recognition that a number of offences of one class of offence may not be as serious as a single instance of a more serious class of offence.

The difficulty, however, lies in selecting the most serious offence as the limitation on the total sentence. If the normal range of sentences is based on single instances of that offence, it is difficult to see why a total sentence for a number of offences would be disproportionate merely because it exceeds the normal range. In addition, if the offences are different in type the most serious offence may not be representative of the conduct. If a person commits one sexual assault and 12 housebreakings why should the total sentence be constrained by the level of sentences for sexual assault? Although the first limb is, perhaps,

¹⁰⁶ Ashworth supra n 3, pp.260-5.
¹⁰⁷ The term “rape” is used in this discussion for convenience although the offence, in Western Australia, is now more properly described as sexual penetration without consent.
¹⁰⁸ Thomas supra n 3, p.57.
¹⁰⁹ Ibid., p.59.
based on a concept of relative proportionality, in practice it is a pragmatic tool – a point of reference without which the sentencer “would be lost in a sea of conflicting considerations”.110

Thomas suggests that the totality principle has a second limb, which is that a cumulative sentence may offend the totality principle “if its effect is to impose on the offender ‘a crushing sentence’ not in keeping with his record and prospects”.111 This limb is not concerned with proportionality at all, being based on considerations of compassion, mercy and the recognition that an excessive sentence of imprisonment can destroy any prospects of rehabilitation. This aspect of the totality principle is considered later in this chapter.

In summary, the totality principle incorporates a concept of proportionality in the sense of proportionality between different classes of offences. However, it is one thing to say that, even though all the sentences are appropriate and proportionate to the individual offences and rightly made cumulative, the total is excessive by reference to a more serious offence; it is quite another to say that, in the same circumstances, the total is excessive by reference to the total conduct involved. If the sentence is reduced because it exceeds the normal range of sentences for a more serious offence, it does not necessarily follow that the reduced sentence is proportionate to the total conduct. On the contrary, it suggests that the offender is receiving a “discount for bulk offending”.112

This distinction between relative proportionality, on the one hand, and proportionality between the total sentence and the total conduct on the other, is one that is not always made, with considerable impact on the way the totality principle is applied in practice. In the discussion that follows, it is suggested that by interpreting the totality principle as requiring proportionality between the total sentence and the total conduct, without any reference to the concept of relative proportionality, the Court of Criminal Appeal has significantly changed the basis for the application of the principle. Instead of being a limiting principle that is applied in the final stages of the sentencing process, the totality principle has become a mechanism for both increasing and reducing the total sentence.

4.3. The Totality Principle in Practice in Western Australia

The research into the sentencing judgments of the Court of Criminal Appeal suggests that the Court is applying the totality principle in the sense that the total sentence should not be disproportionate to the total conduct. The cases suggest that this is not simply a shorthand way of saying that the total sentence exceeds the range of sentences for a more serious offence and is therefore

110 Ashworth supra n 3, p.266.
111 Thomas supra n 3, p.56.
112 Ashworth supra n 3, p.260.
disproportionate. Instead the Court is focusing firstly, and in some cases entirely, on the total sentence. This may be loosely described as “top down” sentencing: 113 the Court selects the appropriate total sentence and then structures the individual sentences to fit. Under the conventional “bottom up” approach to sentencing, the court sets separate sentences for each individual offence and then makes concurrency orders, or reduces some of the sentences, if the total otherwise would be excessive. It is not suggested that the different approaches would necessarily result in different total sentences. What is significant about the “top down” approach is the considerably greater role which it gives the totality principle in the sentencing process.

The interpretation of the totality principle as meaning proportionality between the total sentence and the total conduct is illustrated by the case of Podirsky. 114 In that case, Malcolm CJ said:

I am of the opinion that the sentence imposed by the learned judge was manifestly inadequate. In my opinion a total sentence proportionate to the gravity of these offences after taking the mitigating factors into account, would be 10 years. This reflects the application of the “totality” principle in the light of all the circumstances. 115

Podirsky involved a Crown appeal against the inadequacy of both the total sentence and the individual sentences imposed for a number of convictions of aggravated sexual assault and unlawful carnal knowledge. It is somewhat ironic that the totality principle was applied or referred to on appeal by the Crown. If the total sentence is manifestly inadequate, it can hardly be correct to say that the sentences on the individual counts were correctly calculated and rightly made cumulative. It would seem, with respect, that what his Honour meant by the “totality principle” was simply that the total sentence was inadequate, a conclusion which could have been reached without reference to the totality principle. 116

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113 The author cannot claim originality for this terminology. It was used by the Minister for Corrective Services (NSW) in the context of the sentencer setting first the head sentence and then a minimum term. See J. Basten, “Legislation Comment: The Sentencing Act 1989 (NSW)” (1990) 14 Criminal Law Journal 42, p.46.

114 Podirsky supra n 71.

115 Ibid., p.412.

116 See also Ekbert (unreported) CCA 4 October 1989 no. 7882. Malcolm CJ said it was appropriate that the sentences should be concurrent and went on to say, at p.6 of his Honour’s Judgment, “That error produced a total effective sentence of 18 months which, in my opinion, was excessive and went beyond what was required for [sic] in terms of the totality principle”.

In Rintel supra n 57, Malcolm CJ said, at pp.6-7 of his Honour’s judgment, that a “total sentence of imprisonment for 9 years [for two offences involving possession of drugs] did not offend the
A similar case is *Del Piano*,\(^{117}\) which also involved a Crown appeal against the inadequacy of the sentence and, like *Podirskey*, involved a number of similar offences. *Del Piano* was sentenced to 12 months on each of 18 counts of corruptly receiving a secret commission, one count of forgery and one count of attempting to pervert the course of justice. The sentences on the first five counts were made cumulative and the remainder concurrent. Malcolm CJ stated that a total sentence of 5 years for the corruption charges was not manifestly inadequate\(^{118}\) and then considered whether the sentence for the forgery charge should have been made cumulative. His Honour said:

> In my opinion, unless the application of the totality principle *required* the sentence for the forgery offence to be served concurrently, any sentence imposed should have been directed to be served cumulatively.\(^{119}\) (emphasis added)

In a later passage his Honour said:

> In my view both the forgery offence and the attempt to pervert the course of justice were offences which required separate demonstrations by the court that such conduct will not be tolerated. In the present case this could only be achieved by making the sentences imposed in respect of them cumulative upon the sentences imposed in respect of the corruptly receiving offences. The question is whether the totality principle would operate in this case to *prevent* that demonstration by making these two additional sentences concurrent so that no effective additional punishment was imposed in respect of them.\(^{120}\) (emphasis added)

His Honour's approach illustrates the greater impact that the totality principle has on the sentencing process in the "top down" approach to sentencing. Under

\(^{117}\) *Del Piano* supra n 93, noted at (1991) 15 Criminal Law Journal 226.

\(^{118}\) Ibid., p.204.

\(^{119}\) Ibid.

\(^{120}\) Ibid.
the conventional, or "bottom up", approach the totality principle only comes into operation once the individual sentences are correctly calculated and rightly made cumulative. At that stage the court should take a last look at the sentence to see whether it is just and appropriate. Thus, on the facts of Del Piano, the conventional approach would be to determine whether cumulative sentences were appropriate and only then to consider whether the totality principle applies. Malcolm CJ, on the other hand, appears to regard the totality principle as having more than a mere limiting role but, instead, as acting in some way to prevent cumulative sentences even though they may be regarded as appropriate. This gives the totality principle a greater impact in the sentencing process. Instead of being a matter to be decided once the sentence has been determined and made concurrent or cumulative as appropriate, it becomes necessary to consider the totality principle as part of the question whether cumulative sentences are, in fact, appropriate.

The "top down" approach is also seen when the Court is required to re-sentence offenders after a successful Crown appeal. For example, in McHutchison the offender was convicted of five break and enter offences and one count of unlawful use of a motor vehicle. The sentencing judge discharged him, under section 19(8) of the Criminal Code, upon his entering into a recognisance conditioned on him appearing for sentence some nine months later. The Crown appealed against both the legality and appropriateness of this disposition, and the bulk of the joint judgment is concerned with the nature and scope of a section 19(8) recognisance. The Court held that the use of a recognisance in this case was inappropriate and that an appropriate disposition was imprisonment for a term of 18 months, or 12 months after mitigating factors and time spent in custody were taken into account. However, the court made no attempt to set separate sentences for any of the six offences involved, and simply imposed 12 months concurrent for each offence.

The emphasis on the total sentence is also seen in cases where the Court of Criminal Appeal has endorsed the practice of determining the total sentence and then structuring the individual sentences to fit. On other occasions the Court has specifically stated that it is the total sentence with which the Court is concerned. Reference has also been made to the fact that it is the "total

121 See, for example, McHutchison (1990) 48 Australian Criminal Reports 179, noted at (1991) 15 Criminal Law Journal 299; Gozenton (unreported) CCA 5 August 1991 no. 8977.
122 McHutchison op. cit.
123 Ibid., pp.195-6.
124 See, for example, Ferry (unreported) CCA 3 June 1990 no. 8296; Horndige (unreported) CCA 11 April 1990 no. 8195; Wilson supra n 92; Welford (unreported) CCA 1 June 1989 no. 7696; Clifton (unreported) CCA 15 March 1990 no. 8142.
125 Squires (unreported) CCA 18 October 1988 no. 7322; Keirle supra n 92.
sentencing package” which is important when one offender has appealed on the ground of disparity with a co-offender’s sentence. The emphasis on the total sentence is also seen in cases involving sentencing in different courts. In this circumstance Malcolm CJ has stated that the sentence is required “to impose sentences which, viewed globally, would represent a proportionate punishment for the total chapter of criminality involved in the whole series of offences”.  

This emphasis on the total sentence suggests that the Court is applying, or sanctioning, what is, in effect, a de facto general (global) sentence. A general sentence is a single sentence imposed on all the counts in the indictment which is intended to reflect the overall criminality of the convictions. The advantage of the general sentence is said to be that it avoids the artificiality of imposing separate sentences on each count and then structuring those sentences to achieve the appropriate total. There is considerable logic in the view that if it is necessary to adjust multiple sentences to achieve a total which does not offend the totality principle, the Court may just as well impose a global sentence. However, this is precisely where the genuine general sentence differs from a de facto general sentence.

The disadvantages of general sentences are that they make the task of assessing the appropriateness of the sentence more difficult and restrict the extent to which comparison can be made between cases. On the question of comparison between cases, it is true that, with a de facto general sentence, comparison of the individual sentences is still possible. However, the criticism that is made of de facto general sentences is that, precisely because the Court focuses almost entirely on the total sentence, comparison of the individual sentences with other cases may not be appropriate. Indeed, the position is arguably worse if the Court is still required to set individual sentences but does not trouble to ensure that they are individually appropriate. As to the question of the appropriateness of the total sentence, this criticism applies equally to genuine and de facto general sentences. Thus the Court’s emphasis on the total sentence has all the disadvantages of general sentences but none of the advantages.

Despite these criticisms general sentences may have distinct advantages in certain circumstances. For example, with break and enter offences, multiple counts are relatively common and the number of offences is often considerable.

126 Cox supra n 90.
127 Aik supra n 116 at p.5 of his Honour’s judgment.
130 Ibid., p.344.
In *Cheshire*,\(^{131}\) the Court of Criminal Appeal set out a guideline for sentencing break and enter offences, but that guideline was based on the range of sentences for a single offence of break and enter. The development of a guideline for general sentences which took into account the effect on the sentence of the number of offences committed may aid comparison and the achievement of consistency and parity in sentencing. Comparisons between cases involving other offences, such as fraud and forgery offences or sex offences, which typically involve a number of counts of similar offences, may also benefit from the development of general sentence guidelines.

In summary, it is suggested that under the "top down" approach to sentencing the totality principle has a greater impact on the sentencing process. On the conventional approach the sentencer is required to impose separate sentences for each offence, and decide whether those sentences should be cumulative or concurrent. Once the total sentence is arrived at, the sentencer should take one last look at the total to see that it is appropriate to the total conduct. If the sentence exceeds the normal range of sentences for the most serious offence, or if it exceeds the range of sentences for a more serious class of offence, the totality principle may be applied to reduce the total sentence.

On the approach taken by the Court of Criminal Appeal the totality principle becomes the primary determinant of whether the total sentence is appropriate; considerations of whether the individual sentences are correctly calculated and rightly made cumulative are subsumed in the general question of whether the total sentence is appropriate. Thus, for the principle to be applied, it is not necessary to show that the total sentence exceeds the normal range for either the most serious offence or a more serious offence. It is enough that the Court regards the total sentence as excessive or inadequate. This change of emphasis clearly gives the Court greater scope to interfere with the exercise of the sentencing judge's discretion. The Court has repeatedly stated\(^{132}\) that it will not interfere with that discretion merely because the Court would have imposed a different sentence; it is necessary to show that the sentencer erred in the exercise of the discretion or that the sentence was so manifestly inadequate or excessive as to demonstrate error in the sentencing process.\(^{133}\) The fact that the Court can intervene because the total sentence was inadequate or excessive, when the individual sentences are appropriate and rightly made cumulative, indicates the greater flexibility that this interpretation of the totality principle gives, but arguably renders the principle devoid of any real meaning.

\(^{131}\) *Cheshire* supra n 30.

\(^{132}\) See, for example, *Wilson* supra n 92; *Grant* (unreported) CCA 13 February 1990 no. 8060; *Deakin* supra n 90.

\(^{133}\) *Cranston* (1936) 55 Commonwealth Law Reports 509, 519.
The greater impact of the totality principle is also seen in the extent to which it is applied as a means of increasing the total sentence. The principle is traditionally seen as a means of reducing the sentence. However, in both Podirsky and Del Piano the totality principle was applied to increase the sentence. The application of the totality principle as a means of increasing the sentence clearly illustrates the extent to which the interpretation placed on the principle by the Court differs from Thomas’s formulation of the rule. If the sentence is manifestly inadequate, the question whether it exceeds the normal range of sentences for that class of offence does not even arise.

In sentencing multiple offenders, it is clearly necessary for the court to have regard to the total sentence. As Ashworth notes, the concept of proportionality which underlies the sentencing process should not be eroded by an “untrammelled approach to consecutive sentencing”.134 It is possible, however, that focusing on the total sentence, to the exclusion of the individual sentences and the general principles concerning when sentences should be concurrent or cumulative, is also capable of eroding the concept of proportionality. In McHutchison,135 the Court imposed concurrent terms of 12 months for each of five break and enter offences and one offence of unlawful use of a motor vehicle. The Court did not discuss whether cumulative sentences should have been imposed nor compare this sentence to the range of sentences for break and enter offences suggested in Cheshire.136

The fundamental aim of the first limb of the totality principle is that the sentencer should not entirely disregard the total sentence. It is suggested that, equally, the Court should not focus on the total sentence to the exclusion of the individual sentences and the question whether the offences form part of one transaction.

4.4. The Second Limb of the Totality Principle

The second limb of Thomas’s totality principle is that a cumulative sentence may offend the totality principle “if its effect is to impose on the offender ‘a crushing sentence’ not in keeping with his record and prospects”.137 This limb, according to Thomas, is an extension of the practice of mitigation or, in Ashworth’s words, it is “in effect, a last throwback to individualization”.138 The crushing sentence principle is sometimes expressed in the somewhat colloquial form of “enough is enough”. This form of expression is frequently used by sentencers in Western

134 Ashworth supra n 3, p.269.
135 McHutchison supra n 121.
136 Cheshire supra n 30. See also the casenote McHutchison supra n 121, pp.304-5.
137 Thomas supra n 3, pp.57-8.
138 Ashworth supra n 3, p.266.
Australia although some of the judgments of the Court of Criminal Appeal raise doubts as to whether the principle that "enough is enough" is exactly the same as Thomas's crushing sentence principle.

4.4.1. The Principle that "Enough is Enough"

The principle that "enough is enough" appears to stem from the judgment of Wickham J in Magee, where his Honour referred to his own earlier judgment in Thomson. In Magee the offender was convicted of two counts of rape committed against the same complainant but separated in time by 16 days. He was sentenced on the first offence to 7 years with a minimum term of 5 years and on the second offence to 8 years cumulative with a minimum term of 5 years. Wickham J, with whom Burt CJ and Wallace J agreed, held that:

[T]he aggregate sentence of 15 years' imprisonment with a minimum term of 10 years [was] excessive. Each of the head sentences of seven years and eight years respectively, when considered separately, was correct, but when added together, as they properly were, the result [was] a head sentence which [fell] outside the general pattern of sentencing in relation to crimes of this type...

With reference to the minimum term of 9 years, after remissions, his Honour said:

This, in my opinion, is longer than is necessary to meet the various purposes of criminal punishment – retribution, deterrence and reformation. A custodial term which is longer than is necessary is too long and is not in the public interest. In addition to the matter of public expense, one of the purposes of sentencing might be frustrated in that the offender might come out of prison worse than he went in and thus be more likely rather than less likely to be a continuing community problem.

Further, citing his own remarks in Thomson, Wickham J stated:

In the area of sentencing, enough to meet all the various considerations is enough. More than enough is wrong because the excess is not only purposeless but might be harmful in that the prisoner might become hopeless, aggressive or otherwise intractable,
and thus one of the purposes of punishment will be defeated through making it more rather than less likely that he will eventually offend again.\textsuperscript{143}

It appears from the first passage cited above that his Honour was, in effect, applying the first limb of the totality principle: that the head sentence was excessive because it fell outside the general pattern of sentences for similar crimes. The second passage suggests proportionality: a sentence which is more than that required by the various purposes of punishment is a disproportionate sentence. The third passage suggests that the "enough is enough" principle prevents the imposition of a "crushing" sentence.

There is thus some uncertainty as to what is the basis for the so-called principle of "enough is enough". This uncertainty has not been reduced by more recent decisions of the Court of Criminal Appeal. For example, in \textit{Abbott and Ors},\textsuperscript{144} the Court stated:

\begin{quote}
The totality principle, which incorporates the idea that "enough is enough", also recognises that an accumulation of sentences may have a "crushing effect" which may be counter-productive.\textsuperscript{145}
\end{quote}

This seems to imply that the principle of "enough is enough" is distinct from the principle that a crushing sentence should not normally be imposed. This uncertainty is unfortunate, especially as it is becoming increasingly common for magistrates and trial judges to refer to "applying the principle of enough is enough" in their reasons for sentence. The uncertainty also creates difficulty in determining whether one sentencer can impose a sentence which is cumulative on a sentence imposed on some previous occasion if the earlier sentencer has applied the totality principle.

The logic of imposing a cumulative sentence when an earlier sentencer has applied the totality principle depends to some extent on the meaning given to the totality principle and the reason for its application by the earlier sentencer. If the totality principle is interpreted as meaning proportionality between the total conduct and the total sentence, there is no reason in logic why a later sentencer cannot impose a cumulative sentence. The seriousness of the total conduct is increased by the offences with which the later sentencer is dealing. If, however, the totality principle is applied to avoid an otherwise crushing sentence, it seems somewhat illogical to impose a further cumulative sentence.

\begin{flushright}
\textsuperscript{143} Ibid.
\textsuperscript{144} \textit{Abbott and Ors} (unreported) CCA 1 September 1989 no. 7814.
\textsuperscript{145} Ibid., at p.208 of the judgment.
\end{flushright}
In *Khan v. Mansell*\(^{146}\) the offender was convicted of a number of offences committed in the course of one month. He was sentenced in the Supreme Court to 9\(\frac{1}{2}\) years for four counts of aggravated sexual assault. Later, he was sentenced in the District Court for three offences of break and enter and one attempted break and enter. The total sentence of 12 months imposed in the District Court was made concurrent with the Supreme Court sentence. Finally, he was sentenced in the Court of Petty Sessions to 12 months for three *Police Act* offences; this sentence was made cumulative on the Supreme Court sentence. Malcolm CJ held that the District Court judge had applied the totality principle in the sense that "enough was enough" by the appellant serving a sentence of 9\(\frac{1}{2}\) years, and concluded that the magistrate had failed to consider the totality principle. The sentences imposed by the magistrate were reduced, and ordered to run concurrently with the sentence imposed by the Supreme Court.

However, in *Badat v. Miller and Dawson*\(^{147}\) Franklyn J held that *Khan v. Mansell* was distinguishable and that the fact that one sentencer had applied the totality principle did not prevent a later sentencer imposing a cumulative sentence. In *Badat v. Miller* the offender was sentenced in the District Court to a total of 4 years for 13 break and enter offences, one forgery and one uttering offence as well as for a breach of probation. He was subsequently sentenced in the Court of Petty Sessions to a total of 9 months for one break and enter offence, seven forgery offences and seven uttering offences. This sentence was made cumulative on the District Court sentence. Franklyn J accepted that the District Court judge's reference to "the fact that if he imposed cumulative terms the appellant would be imprisoned until middle aged" meant that it was appropriate to assume that the District Court judge had applied, without mentioning it, the totality principle. However, his Honour saw no reason to conclude or assume that the District Court judge had applied the totality principle "in the sense that the sentence so imposed is 'enough' no matter what other offences of the same nature the appellant may have committed".\(^{148}\)

In summary, the cases suggest at least three different meanings to the so-called "enough is enough" principle. The first is that it simply means proportionality: enough punishment is proportionate punishment, too much punishment is disproportionate. The second meaning is that "enough is enough" has the same meaning as "crushing". The third meaning is that "enough is enough" means little more than an intuitive judgment that any additional punishment for the offences in question is unnecessary. In effect, this is a form of discount to the sentence simply on the basis that there are a number of offences involved. The

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147 *Badat v. Miller and Dawson* (unreported) SC 27 October 1989 no. 7905.

148 Ibid., at p.6 of his Honour's judgment.
chief difficulty with such a principle, if it does rely on intuitive judgment, lies in assessing whether that judgment is appropriate.

4.4.2. Crushing

Thomas suggests that the "crushing sentence" principle primarily applies to young men facing their first, or their first substantial, prison sentence, but is not limited to those cases and may also apply when any offender is facing a substantial prison term. However, as those facing substantial prison terms are likely to have been sentenced to such terms for serious or particularly heinous crimes, the likelihood of invoking the court's sympathy or mercy is perhaps remote.

It is clearly not possible to quantify the meaning of "crushing". In Millar, Brinsden J considered that a 12½-year term for offences of possession of cannabis with intent and conspiracy to import heroin was not a crushing sentence. By contrast, in Pryor, a total sentence of 12½ years, consisting of 5 years for unlawful wounding and 7½ years, cumulative, for armed robbery, was regarded as a crushing sentence and the sentence for the unlawful wounding was reduced to 2½ years. In Grant, a sentence of 2½ years for assaulting a prison officer was regarded as "too much" and reduced to 2 years.

It is clear that the existence of a prior record, even a substantial prior record, will not necessarily prevent the court reducing the sentence in the exercise of mercy. Pryor had a prior record of 82 convictions and owed 2,619 days to the Parole Board, so clearly was not facing his first substantial period of imprisonment. Similarly, in Abbott and Ors the sentences imposed on two of the offenders for assault and deprivation of liberty were reduced, even though both offenders were currently serving substantial terms of imprisonment. However, the fact that the principle is applied by the courts in the exercise of mercy suggests that

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149 Thomas supra n 3, p.58.
150 See, for example, Ireland supra n 90. A 12-year sentence for a number of offences, including eight armed robberies and two attempted armed robberies, made cumulative on a sentence of 5 years that the offender was already serving, was not regarded as a "crushing" sentence. It was clear that the sentencing judge had already scaled down the sentences so as not to impose a crushing sentence for what Wallace and Seaman JJ described as "the warfare he waged against the community in this State".
151 Millar (unreported) CCA 11 January 1990 no. 8011.
152 Pryor (unreported) CCA 14 February 1990 no. 8065.
153 Grant supra n 132.
154 Abbott and Ors supra n 144.
155 Brendon Abbot and Stephen Burnett.
156 See also Hansen v. Lambrecht (unreported) SC 4 December 1990 no. 8629; Cheshire supra n 30.
there is little to be gained from analysing the cases because much will depend on
the facts of each case.

4.5. Totality and the Tariff

If the sentencer determines that the totality principle applies, he or she has the
option of reducing some of the sentences or making some of them concurrent in
order to reduce the total sentence. It is generally accepted\textsuperscript{157} that it is better to
make some of the sentences concurrent rather than to reduce any of the
sentences. It is preferable to maintain proportionality, if possible, between the
individual sentences and offences. In circumstances where only two or three
offences are involved, however, the sentencer may not have any option but to
reduce one or more of those sentences below what is considered the normal
range for that type of offence. In this circumstance partly concurrent sentences
have particular attraction as they allow the sentencer to impose the appropriate
proportionate sentence for each offence and still achieve the desired total
sentence. However, despite a number of calls by the Court of Criminal
Appeal\textsuperscript{158} for the Criminal Code to be amended to enable the courts to make
sentences partly concurrent, this sentencing option is not available in Western
Australia. It is suggested that, as long as the present parole regime remains in
force, such an option is unlikely to be provided; the practical problems involved
in attempting to graft partly concurrent sentences onto the present parole
provisions are immense.\textsuperscript{159}

An alternative method of achieving the desired total sentence is to impose what
is known as an "inflated concurrent sentence". This type of sentence may take
the form of multiple concurrent sentences each proportionate to the total
conduct or one inflated sentence which takes account of the total conduct and a
number of lesser concurrent sentences. The usual criticism of inflated concurrent
sentences is the perceived inequity which may result from a successful appeal
against conviction on one of the counts.\textsuperscript{160} In the case of equal concurrent
sentences, a successful appeal against one conviction may have the result that
the offender is left with the same total sentence. If one inflated sentence and
lesser concurrent sentences are imposed, a successful appeal against the first
conviction may result in an inadequate sentence.

It is arguable, however, that the perceived disadvantages of inflated concurrent
sentences are not as insurmountable as they appear. In the case of equal

\textsuperscript{157} Thomas supra n 3, p.57; Ashworth supra n 3, p.268.

\textsuperscript{158} See, for example, Mickelberg (1984) 13 Australian Criminal Reports 365; Magee supra n 104; Pryor
supra n 152; Ruscynski, Shipley and Taylor supra n 41.

\textsuperscript{159} See below, section 5.3.

\textsuperscript{160} See Rinaldi supra n 39, p.62; Warner "General Sentences" supra n 128, p.343.
concurrent sentences, it is open to the offender to appeal against the sentence at the same time as the appeal against conviction. Similarly, it is open to the Crown to appeal against a sentence if a successful appeal against the conviction on one count is likely to result in a sentence which would be regarded as inadequate. In Western Australia it is not even necessary for the Crown to appeal, as the court has the power to increase the sentence on one count when an appeal against a conviction on another count is allowed.161

However, the practical disadvantage of inflated concurrent sentences is the distorting effect that such sentences have on the tariff. This potential to distort the tariff is illustrated by the case of Smedley.162 Smedley was sentenced to 8 years 5 months for armed robbery and 6 years 6 months, concurrent, for break and enter. The offences involved a vicious attack on a couple in their home in the middle of the night, during which Smedley stole $16. On appeal it was argued that the sentence was excessive because the break and enter offence was the more serious offence and the robbery was an afterthought. Malcolm CJ held that the total sentence was not manifestly excessive although the way it was structured was "debatable".163 Similarly, Kennedy J held that the total sentence was within the limits of the exercise of a proper discretion regardless of how the individual sentences were structured.164

The sentence of 6 years 6 months imposed for the break and enter offence was the longest sentence imposed for a break and enter offence in any of the cases studied. Most sentences were in the range of 1 to 3 years. It is conceded that, if this sentence was cited to the Court as an indication of the range of sentences for break and enter, the Court would, in all likelihood, take into account the circumstances in which it was imposed. However, if inflated sentences are frequently imposed, the tariff becomes distorted to the extent that it is no longer possible to distinguish an inflated sentence from the normal range of sentences.

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161 See s.693(1) of the Criminal Code (WA) which was amended in 1982 to reverse the effect of the decision of the High Court in Ryan (1982) 149 Commonwealth Law Reports 1. In that case the High Court held that s.569(1) of the Crimes Act 1958 (Vic), which was in substantially similar terms to s.693(1) prior to the amendment, did not authorise the appellate court to increase the sentence on a count which was not the subject of an appeal. The power given under s.693(1) was utilised by the Court of Criminal Appeal in Padrisk (No. 2) supra n 71.

162 Smedley (unreported) CCA 20 February 1990 no. 8077.

163 Ibid., at pp.2-3 of his Honour's judgment.

164 Ibid., at p.9 of his Honour's judgment.
5. Parole and the Multiple Offender

5.1. Introduction

There are many aspects of the present parole provisions that are worthy of discussion in the context of the impact that the provisions have on multiple offenders. The current parole legislation is complex, and if the following discussion seems unduly technical it is because the practical operation of the provisions does not appear to be readily understood. Much of the difficulty stems from the incorporation of "automatic remissions" into the parole provisions. The theoretical and practical difficulties that this creates are not limited to multiple offenders: there is a fundamental difficulty in explaining how a sentence is proportionate to the seriousness of an offence if a portion of that sentence is automatically remitted. However, as this report is concerned with multiple offenders the discussion is, as far as possible, limited to the impact of the parole provisions on such offenders.

5.2. Operation of the Act

In June 1988 the Offenders Probation and Parole Act\textsuperscript{165} was amended to change the nature of the parole eligibility decision. Rather than the trial judge setting both a "head" sentence and a minimum term, the judge is required to impose a sentence appropriate to the seriousness of the offence and then determine whether the offender is to be eligible for parole. If a parole eligibility order is made, release on parole is virtually automatic and the date of release is calculated by reference to a statutory formula. As a general rule the offender serves one-third of the term in prison (the "non-parole period") and one-third on parole, and one-third of the sentence is automatically remitted. However, the "one-third rule" is subject to the parole period not being more than 2 years (or less than 6 months). Thus, where the sentence is in excess of 6 years' imprisonment, the statutory formula provides that the non-parole period is 2 years less than two-thirds of the term.\textsuperscript{166} For example, a 6-year term is served as 2 years in prison, 2 years on parole and 2 years remitted.\textsuperscript{167} A 9-year term is served as 4 years in prison, 2 years on parole and 3 years remitted.

If an offender is sentenced to multiple cumulative terms of imprisonment, the practical effect of the parole provisions is the same as if the offender had been

\textsuperscript{165} Now the Offenders Community Corrections Act 1963 (WA) ("OCCA").

\textsuperscript{166} Section 37A(2)(b) OCCA.

\textsuperscript{167} Section 37A(2)(a) OCCA.
sentenced to one term equal to the aggregate of the separate sentences. However, rather than simply aggregating the sentences and then applying the formula, the legislation achieves this result by requiring that both the non-parole periods and the parole periods of each separate term are served in the order that the "head" sentences\(^\text{168}\) are ordered to run.\(^\text{169}\) If this would result in a parole period of more than 2 years, the offender is required to serve an additional period in prison, called the "extended service period",\(^\text{170}\) until such time as the date of release on parole would result in no more than 2 years on parole. For example, an offender sentenced to three cumulative terms of 3 years each serves three cumulative non-parole periods of 1 year each, then an extended service period of 1 year, followed by 2 years on parole, whilst 3 years of the sentence is remitted. The time in prison is the same as it would have been if the sentence had been a single term of 9 years.

Under the old parole provisions, the sentencer was able to stipulate the period in prison which he or she considered appropriate. However, the Court of Criminal Appeal has stated on a number of occasions\(^\text{171}\) that, under the new provisions, the sentencer should not attempt to set a head sentence by calculating the actual period in custody which is considered appropriate and working back from that to the head sentence. Similarly, the sentencer should not fix a lower sentence than demanded by the gravity of the case and at the same time decline to make a parole eligibility order. The correct course is to set the proportionate sentence and only then to determine whether the offender should be eligible for parole. This raises a question whether the sentencer can give any consideration at all to the actual period to be served in custody. For example, can the mere fact of a refusal to make a parole eligibility order mean that the resulting sentence is a crushing sentence for the purpose of the totality principle?

The crushing sentence principle emphasises the period of time which is spent in prison. For example, in Magee,\(^\text{172}\) discussed in Chapter 4, Wickham J considered both the head sentence of 15 years and the minimum term of 9 years, after remissions, when applying the principle of "enough is enough". It was in relation to the minimum term that his Honour commented that an excessive sentence may frustrate one of the purposes of sentencing in that "the offender might come out of prison worse than he went in". Thus there is considerable

\(^{168}\) The term "head" sentence is usually used in contradistinction to a minimum term and is, therefore, not strictly correct to apply to the sentence imposed under the present parole provisions. It is used in the discussion to distinguish the sentence imposed prior to remissions or parole.

\(^{169}\) Section 38 OCCA.

\(^{170}\) Section 41(2c) and s.39(4) OCCA.

\(^{171}\) See, for example, Archibald (1989) 40 Australian Criminal Reports 228; Wilson supra n 92; Swain (1989) 41 Australian Criminal Reports 214.

\(^{172}\) Magee supra n 104.
force in the argument that an additional period in prison of 2 years, as a result of a refusal to order parole eligibility, may turn the sentence into a crushing one. This argument, however, was not raised in any of the cases studied, although a somewhat similar argument was raised and rejected in the Shaw 173 case.

The argument in the Shaw case was raised by the Crown as the basis of an application to extend the time in which to appeal against the inadequacy of the sentence. Shaw was denied parole eligibility by the trial judge, and for some reason the Crown was unaware of his application to appeal the refusal until the time for lodgment of a cross-appeal had elapsed. The Crown then applied for an extension of time, arguing that they had not previously appealed the inadequacy of the sentences on the basis that the appeal would not have been successful because Shaw had not received parole. In effect, the Crown’s argument was that a 4-year term without parole, which would have resulted in 32 months in prison, would not have been regarded as manifestly inadequate, but a 4-year term with parole, resulting in 16 months in prison, was manifestly inadequate.

Rowland J suggested that implicit in this reasoning was a mistaken view of the operation of the parole provisions.174 All the members of the Court reiterated that the correct approach to determining parole eligibility was to impose the appropriate sentence and then consider whether a parole eligibility order was appropriate. However, both Malcolm CJ and Brinsden J stated that they would not have allowed Shaw’s appeal unless the Crown was given leave to appeal, because “to do so would result in inadequate punishment since he would become entitled to be considered for parole in 16 months from sentence”.175 In the result both Shaw’s appeal and the Crown’s cross-appeal were allowed, and the sentence structured so that the actual period in custody was exactly the same.

Thus there is a certain degree of confusion as to the extent to which the sentencer can take into account the actual period to be served in custody. It is suggested, however, that there is a distinction between using the period to be served in prison as the basis for calculating the sentence, and considering whether the sentence is crushing because the period in prison is longer than it would have been if parole had been ordered. As the focus of the crushing sentence principle is the actual period to be served in prison, logic suggests that it is appropriate to consider whether increasing that period results in a crushing sentence.

173 Shaw supra n 21.
174 Ibid., p.350.
175 Ibid., Brinsden J at p.348 with whom Malcolm CJ agreed.
Although it is suggested that the denial of parole eligibility may be relevant to the question of whether the sentence is a crushing one, there may be no basis for this argument if parole eligibility orders are made with respect to some, but not all, of the terms. The reason for this is that, once an offender has received the maximum parole eligibility of 2 years on some of the terms of imprisonment, the total period to be served in custody remains the same irrespective of whether parole eligibility orders are made with respect to other terms. Thus, once an offender has received parole eligibility orders with respect to terms that, in total, equal or exceed 6 years, it is irrelevant, with one qualification, whether any further orders are made.

This aspect of the legislation is illustrated by the case of *Kuczynski*. In that case the offender was sentenced on three separate occasions to terms of 2, 6½ and 7½ years respectively. On the first term, imposed prior to the new parole provisions coming into force, the trial judge set a minimum term of 18 months. A parole eligibility order was made with respect to the second term, but not the third. Kuczynski appealed, inter alia, against the refusal to order parole eligibility on the third term. An apparent argument that the mere fact that one sentencer had ordered parole eligibility meant that the later sentencer should have made a similar order was rejected. The Court then stated, correctly, that the maximum period of parole is 2 years but went on to say, incorrectly, that the only effect of parole eligibility would have been to reduce the time spent in custody by 2 years. In fact, a parole eligibility order on the third term would have had no effect on the period to be served in custody. Without parole on the third term the offender would serve 8 years 10 months in prison and 2 years on parole. With parole, he would serve 6 years 10 months, being the sum of the minimum term and two non-parole periods, and then an extended service period of 2 years giving the same total period of 8 years 10 months in prison. Therefore, although total denial of parole would have the effect of increasing the period to be served in custody by 2 years, partial denial of parole, in this case, would have no effect on the length of the period to be served in custody.

The qualification to this is the availability of remissions for good behaviour. Under regulations made pursuant to the Act an offender is entitled to earn up to three days per month remission as an incentive to good behaviour. However, this form of remission, known generally as the 10% remission, is only available to offenders for whom a minimum term has been imposed under the old provisions or a parole eligibility order has been made under the new provisions. The remission is deducted from the minimum term or non-parole period as

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176 *Kuczynski* supra n 34.
177 Reg 46 Offenders Community Corrections Regulations 1991.
appropriate. Thus, in Kuczynski’s case he would have been entitled to earn an additional remission of approximately 6 months.\textsuperscript{178}

There are other criticisms of the parole provisions. For example, it was stated above that the practical effect of a number of cumulative sentences is the same as the effect of a single term equal to the aggregate of the sentences. While this is true if the offender successfully completes parole, the way that the sentence is structured may have a differential impact on the offender if parole is breached. An offender who successfully completes a parole period is deemed to have served the full sentence,\textsuperscript{179} including the portion of the sentence remitted. However, if parole is cancelled the offender becomes liable to serve the unexpired portion of the sentence less a credit for “clean street time”. The effect of this provision is that an offender sentenced to a number of cumulative terms may be better off, after breaching parole, and depending on when the breach takes place, than an offender sentenced to a similar total sentence but structured as a single term.

5.3. Parole and Partly Concurrent Sentences

Reference was made in the previous chapter to partly concurrent sentences as a means of achieving proportionality in sentencing. It was suggested that the practical problems involved in attempting to graft partly concurrent sentences onto the present parole provisions are immense. The chief problem is that if a sentencer attempts to achieve a desired total sentence by overlapping the head sentences, the result may be an unworkable sentence: there is a good chance that the second term would commence during the parole period, or the remitted period, of the first term. Alternatively, the sentencer may overlap the terms to achieve the practical effect of the desired total sentence, but in that case the resulting head sentence may not equal the desired total. These problems are illustrated in Figures 1 and 2,\textsuperscript{180} using the sentences imposed in \textit{Pryor}.\textsuperscript{181}

Pryor was sentenced to $7\frac{1}{2}$ years for armed robbery and 5 years concurrent for unlawful wounding. Wallace J, expressing regret that the Court did not have the power to make sentences partly concurrent, suggested that the appropriate total

\textsuperscript{178} The fact that this remission is not available to offenders for whom no minimum term has been set or no parole eligibility order made appears to be something of an anomaly. The remission is an incentive to good behaviour in prison but it does not follow that offenders who have not received parole eligibility are any more likely to be troublesome prisoners than offenders who have been made eligible for parole. This apparent inequity is aggravated by the fact that misbehaviour on the part of a non-parolee while in prison may result in a loss of the one-third “automatic” remission, while parole prisoners are virtually guaranteed the one-third remission.

\textsuperscript{179} Section 43 OCCA.

\textsuperscript{180} The author acknowledges the assistance provided by Matthew Bowen in preparing these graphics.

\textsuperscript{181} \textit{Pryor} supra n 152.
sentence was 10 years. However, had the two sentences been overlapped to equal the desired total of 10 years the resulting sentence would have been served as shown in Figure 1. The second sentence would have commenced at the end of the first parole period – clearly an unworkable sentence.

**Figure 1:** Overlapping $7\frac{1}{2}$- and 5-year sentences to achieve head sentence of 10 years

![Diagram showing overlapping sentences to achieve 10-year sentence](image)

An alternative approach may be to overlap the sentences to achieve the practical effect of a 10-year term, which would have the result illustrated in Figure 2.

**Figure 2:** Overlapping $7\frac{1}{2}$- and 5-year sentences to equate non-parole period to a sentence of 10 years

![Diagram showing overlapping sentences to achieve 10-year non-parole period](image)

A 10-year sentence is served as 4 years 8 months in prison, 2 years on parole, 3 years 4 months remitted. Thus, to achieve a total non-parole period of 4 years 8
months, using the terms imposed on Pryor, the second sentence would need to start at the end of the first non-parole period. The result is clearly a workable sentence, but the total head sentence (8 years) no longer equals the desired total of 10 years. In addition, the result is reached by focusing on the actual period to be served in custody, which conflicts with the proper approach to the question of parole eligibility.

This illustration is relatively straightforward, involving as it does only two sentences. The problems are magnified as the number of sentences increases or when parole eligibility orders are made with respect to some of the terms but not others.

5.4. Summary

Underlying many of the problems that arise under the current parole regime is the incorporation of automatic remissions into the provisions. Automatic remissions pose considerable theoretical difficulty in applying a concept of proportionality in sentencing. What does it mean to say that a sentence is the appropriate proportionate sentence if a portion of that sentence is remitted? This difficulty is not, of course, limited to multiple offenders. However, the perceived necessity to maintain the remission system, and particularly the manner in which remissions have been built into the parole provisions, results in unnecessarily complex legislation. The practical problems that the legislation creates are more severe for multiple offenders.

The Court of Criminal Appeal has stressed that the correct approach to the decision whether an offender is to be eligible for parole is to impose a sentence proportionate to the seriousness of the offence, and only then decide whether a parole eligibility order is appropriate. Thus the sentencer is obliged to ignore the actual period to be served in custody, which precludes a consideration of whether denial of parole eligibility can result in a crushing sentence. This is unfortunate, as the focus of the crushing sentence principle is the period that the offender is required to serve in prison. In addition, it is possible that multiple offenders may, in fact, serve a longer period in custody than anticipated. It is possible that sentencers implicitly select the proportionate sentence on the basis of the period in custody. However, when the total sentence exceeds 6 years, the total period in custody is not simply the sum of the non-parole periods of each separate sentence. Further, the way the sentence is structured may have a differential impact if the offender breaches parole.

The fact that the second non-parole period is required to commence at the end of the first non-parole period to achieve the desired total non-parole period results from the choice of 10 years as the appropriate term. If, for example, Wallace J had suggested a term of more than 10 years, the second sentence would need to commence some time after the end of the first non-parole period. If a term of less than 10 years had been selected the non-parole periods would overlap; the second sentence would commence some time during the non-parole period of the first sentence.
Once remissions are created they are notoriously difficult to remove. It is unfortunate that incorporating remissions into the parole provisions unduly complicates the legislation.
Multiple offending is commonplace in Western Australia. At least one in every two offenders sentenced to imprisonment in the Higher Courts is sentenced for more than one offence. It is therefore not merely appropriate, but necessary, that the principles and practice of sentencing such offenders be the subject of analysis and research. The research undertaken for this report indicated that, although there is general acceptance of the principles identified by Thomas as the one transaction rule and the totality principle, the practical application of those principles is a matter of considerable difficulty.

The essential difficulty with the one transaction rule lies in determining the scope of the transaction. Various sub-rules have been suggested, such as the fact that the offences are all of the same type or involve the same victim or are committed within a short space of time, as indicators that the offences should be regarded as forming one transaction. These factors are useful aids in analysing the seriousness of the criminal conduct. However, they have limited utility when treated as rules capable of general application, primarily because different offences are committed and charged differently. Therefore, rather than attempting to develop rules that can be applied in all types of case, it is suggested that a better approach is to analyse how different types of offences are committed and charged in an attempt to assess the overall seriousness of the conduct. This report focused on three different types of offences: drug offences, sex offences and fraud and forgery offences. It is suggested that this approach could be applied to other types of offence.

To focus attention on the way offences are committed and charged is inevitably to raise questions of whether the charges laid in some cases were appropriate. In many criminal events, the conduct is capable of giving rise to a variety of charges. If the court is required to impose a sentence that is proportionate to the seriousness of the offences, it follows that the charges laid should reflect the seriousness of the conduct. Although this report was not primarily concerned with charging practice, there were occasions when some of the offences which were charged seemed unnecessary or inappropriate. One such example was the number of cases in which the offence of deprivation of liberty was charged in conjunction with a sexual assault offence. Although the factual basis for the charge, in some cases, was difficult to determine, it often appeared that the offence was constituted by nothing more than the victim being restrained in some way while the sexual assault was committed. Thus, it is questionable whether it was necessary to charge deprivation of liberty: the restraint of the victim is a matter that can be taken into account in sentencing for the sexual assault offence.

The point is made because it illustrates the need to focus on the conduct involved when analysing offence seriousness. All offences of a particular type
are constituted by the same legal elements. However, the criminal conduct that forms the basis of the offence may vary considerably from case to case. For example, all offences of armed robbery require proof of the same legal elements. However, there is considerable variety in the ways that offence can be committed. Thus, when comparing the seriousness of different offences, whether for the purposes of guideline judgments or public perceptions of offence seriousness or for other purposes, it is important that the comparisons be made between similar conduct rather than legal definitions of offences.

Different problems in analysing the seriousness of the criminal conduct arise with the totality principle. The fundamental difficulty is determining how offenders convicted of a number of unrelated offences can be brought within a sentencing system that is primarily focussed on isolated offences. If proportionality is adopted as the main aim of the sentencing system, how can that concept be applied to multiple offenders? Proportionality requires that the severity of the punishment be appropriate for the seriousness of the offence. The concept also requires that offences of different levels of seriousness are sentenced accordingly. Thus, one aspect of the totality principle appears to be based on a recognition that a number of instances of one type of offence may still be less serious than a single instance of a more serious offence. This concept of relative proportionality appears to be the basis for what Thomas describes as the first limb of the totality principle. The second limb, that the principle is applied to reduce a sentence that might otherwise be "crushing", is not concerned with proportionality: it is applied by the courts in the exercise of mercy.

The traditional interpretation of the totality principle is that it is not directly concerned with achieving proportionality between the total sentence and the total seriousness of the conduct. It is a limiting principle; it is applied by the court when merely adding up the separate sentences would result in a total sentence that is excessive when compared to the range of sentences for a more serious offence. However, the research indicated that the Court of Criminal Appeal is interpreting the totality principle as maintaining a direct link between the total sentence and the total seriousness of the conduct. Thus, in applying the totality principle, the Court is simply asking: Is the total sentence appropriate? This approach, which was described as "top-down" sentencing, gives the totality principle considerably greater scope for application. It enables the Court to interfere with the exercise of the trial judge's discretion, even though the individual sentences were appropriate and rightly made cumulative, and the trial judge apparently applied the totality principle. It allows the Court to apply the principle as a means of increasing the sentence, which is a considerable departure from its traditional operation as a limiting principle.

There are obvious advantages in widening the scope for the application of the totality principle. However, there are also disadvantages in placing too much emphasis on the total sentence. There is a danger that the appropriateness of the individual sentences may be ignored if the total is not regarded as inadequate or excessive. Clearly, the Court should not ignore the total sentence; on the other
hand, it is suggested that the Court should not emphasise the total sentence to the exclusion of the question whether the individual sentences are appropriate and rightly made cumulative or concurrent.

The difficult questions that are raised by the sentencing of multiple offenders are perhaps more extreme, but otherwise no different to the questions posed in sentencing any other type of offender. How do we measure the seriousness of the conduct? How do we assess the severity of the punishment? In short, how do we give practical application to the concept of proportionality? Perhaps the difficulty in applying the principle to multiple offenders is based on uncertainty as to how to answer these questions even in simple cases. We need to address these issues. Otherwise, the one transaction rule and the totality principle could simply become part of the rhetoric of sentencing: formulae adopted by the courts but devoid of any predictive value or real meaning.
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