

FACTORS AFFECTING SENTENCING DECISIONS IN RAPE CASES

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IN RAPE CASES**

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NCJRS

AUG 23 1977

ACQUISITIONS

**Canberra February 1976
Australian Institute of Criminology**

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Published and printed by the Australian
Institute of Criminology, 10-16 Colbee
Court, Phillip, ACT, Australia, 2606

The J.V. Barry Memorial Library has catalogued this work
as follows:

NEWTON, John Elwell

345.94077

Factors affecting sentencing decisions in rape
cases, by J.E. Newton. Canberra, Australian Institute
of Criminology, 1976.

38 p., tables. 30 cm.

Bibliographical footnotes.

1. Rape - Australia. 2. Sentences (Criminal procedure) -
Australia. I. Australian Institute of Criminology.
II. Title.

ISBN 0 642 93216 6

INTRODUCTION

At a time when it is generally accepted that the incidence of rape is increasing throughout Australia, public attention is focusing on the responses of the various agencies whose task it is to apprehend the offender, carry out the prosecution function at all levels of the criminal justice system and prescribe the appropriate punishment. More interest is now also being shown in attempts to assist the rape victim both in her contacts with the traditional agencies referred to above and also in her psychological rehabilitation after what may often be an emotional trauma of unprecedented degree.

The current social and political movement towards acceptance of a new role for women in society is undoubtedly partially responsible for this growing concern with respect to the social consequences stemming from an increase in rape and allied offences. By establishing rape crisis centres in Brisbane, Sydney and Melbourne, concerned women are attempting to provide the sympathetic atmosphere and degree of emotional support for the rape victim which are allegedly so conspicuously absent in contacts with police and court officials. The formation of such centres and the resultant publicity that has followed their activities may be partly responsible for the establishment within the police forces of units trained to handle the rape victim in a more helpful, sympathetic and understanding manner than has hitherto been evident.

The existing and projected activities of these organisations and individuals undoubtedly perform a significant role in the criminal justice system's approach to the problem of rape. However, it is beyond the scope of this paper to examine the area of assistance to the rape victim. Rather, it is intended to look at that area concerning the other major participant in the crime - the offender himself. In particular it is intended to examine some of the more important principles that have recently been enunciated by Australian courts in arriving at sentencing decisions in rape cases. Judicial attitudes to the treatment of persons convicted of rape reveal a basically consistent approach to the imposition of penalty. There are often, however, factors inherent in the commission of an individual offence which are of sufficient importance to substantially affect the disposition of the case.

Several attempts have been made to codify and tabulate individual and collective factors considered relevant in the sentencing process in rape cases. Two of these devices aimed at assisting in the formulation of penalty will be looked at

in the context of assessment of appropriate penalty and the problems associated with the use of such sentencing aids will be examined. Because of the shortcomings of such attempts to indicate degrees of gravity of an offence of rape it is suggested that to ascertain the true approach of courts to sentencing in such cases recourse must be had to the principles enunciated in individual cases.

FACTORS IN SENTENCING IN RAPE CASES

Two recent studies published in the Australian and New Zealand Journal of Criminology provide interesting material in the field of sentencing criteria in rape cases.

E. J. Hodgins, et al¹, has devised a table incorporating various relevant sentencing factors that are intended to give some useful indication of the gravity of an offence.² Such factors as the degree of violence, the degree of provocation, incitement of co-operation by the victim, the circumstances of the meeting between the victim and the defendant, the moral background of the girl and the background of the offender are isolated and degrees of gradation within each factor are developed so as to provide scales by which the most appropriate sentence may be ascertained. The compound table thus devised appears in Figure 1.³

There are problems associated with this type of sentencing guide, most of which stem from the acknowledged discretionary nature of the function of a judge at this stage of the criminal justice process. For it must be recognised that in addition to those factors identified in the compound table reproduced in Figure 1, a trial judge required to pronounce sentence on a person convicted of rape has further considerations to weigh in fixing penalty. The judgment of Williams J. in the Queensland Court of Criminal Appeal decision in Vates⁴ emphasises two of the more obvious categories of such considerations. Firstly, the facts in a particular case may be subject to varying interpretations and it is not often the case that a jury is requested by the trial judge to indicate which interpretation of the facts has been accepted by it in arriving at its verdict of guilty.⁵ Consequently, the trial judge may feel disposed to adopt the interpretation of the facts most favourable to the defendant, or conversely, an interpretation may be preferred which is not necessarily that most favourable to the defendant but which appears to the trial judge to be that which is the most reasonable in the circumstances to adopt.

Fox and O'Brien⁶ have suggested that '[w]here the verdict is as consistent with one view of the facts as another, it is preferable..., that the sentencer should form his own view

A COMPOUND GUIDE TO RAPE SENTENCING

| Violence | The Offence | | The Offender |
|-----------------------|----------------------------------|---|--|
| | Victim's Co-operation | Meeting Circumstances | |
| A. No violence | Unambiguously consents initially | Casual hotel meeting | Respectable, no prior convictions |
| B. Threats only | Signs interpreted as consent | Street pick-up | Good reputation, but specific personal problem |
| C. Pushed around only | Encourages sexual intimacy | Meets victim at social function, takes her home | 1 - 2 prior convictions |
| D. Moderate struggle | Provocative, aware of effect | Fraudulent pick-up, but girl goes willingly | Considerable number of priors |
| E. Forcible restraint | Provocative, unaware of effect | Meets victim at social function, lures her away | Extensive delinquency and/or sexual priors |
| F. Violent struggle | Unsuspecting, social companion | Legitimate, pre-arranged outing | Full rape prior |
| G. Punching, beating | Totally non-provoking | Attack without warning | Institutionalised; psychopathic |

Figure 1

of the facts and not question the jury.⁷ The same evidentiary standards as expected to be applied by the jury must be applied by the trial judge in accepting one version of the facts of the case. Even so, where a Court of Criminal Appeal is considering an application for leave to appeal against sentence, there may exist sufficient doubt as to which version of the facts has been accepted by the trial judge in formulating penalty as to invalidate the use of a sentencing guide. Usually, it could be expected that the Appellate Tribunal will know the version acted upon by the trial judge by virtue of the contents of the latter's report. However, the thoroughness and completeness of such reports can be expected to vary from case to case and it cannot be presumed that all such reports adequately reveal all relevant facts acted upon by the trial judge in assessing sentence.

The second type of consideration referred to by Williams J. concerns the numerous aspects associated with punishment. The remedial, the punitive, the retributive, and the deterrent aspects of punishment must all be weighed and balanced by a trial judge in arriving at a base for his decision as to sentence.⁸ Although the compound table in Figure 1 does allude to the existence of these various aspects of punishment by categorising the offender's background in such a way that appropriate punishment in terms of that particular category may be arrived at, the table does not extend to include reference to what may perhaps be an extraneous, although over-riding, consideration such as the necessity to deter others who may offend in the future. This question of general deterrence is of special significance in rape cases, as will be seen later.

The second of the two recent studies referred to above is that by Ross Barber⁹ in which various characteristics of the offenders, victims and crime-situations pertaining to rape cases in Queensland during 1957 to 1967 were collated. Consideration was then given to the question whether such characteristics had any effect on the severity of the sentence imposed by the trial judge. Barber was able to conclude that '[t]he investigation of the sentencing patterns in rape cases in Queensland during the 1957-67 (inclusive) period in no way indicated that there is anything seriously wrong with the present method of passing sentence on convicted criminals in Queensland.'¹⁰ This conclusion was apparently made in the context of consistency in sentencing practice by the Queensland Supreme Court.

As was the case with Hodgens' study, Barber makes little reference to the judgments themselves in isolating the various factors of each case which may have influenced the relevant sentencing decision. Thus, there exists no express mention as to whether, for example, the extent of intoxication of the defendant¹¹ was taken into account in assessing penalty, or whether such factor had a mitigating or aggravating effect on sentence. Accordingly, the statistical

presentation of the effect of such factors upon the length of sentence imposed may not necessarily reflect an accurate indice as the effect of one factor may have been expressly negatived by the effect of others considered by the trial judge to be of greater moment in the circumstances of a particular case. Again, to record a Table¹² showing the length of sentence by the virginity of the victim may be misleading if other factors, such as the degree of violence used by the defendant, are obviously of evidentiary significance in several cases.

It would appear that the fine balancing of all the matters referred to by Williams J. in Vates (supra) once more limits the usefulness of statistical investigations into sentencing and judicial attitudes. It is submitted that of greater importance in looking at influencing factors in the sentencing process are the stated principles adopted by the judges themselves.

GENERAL APPROACH OF THE COURTS

Policy of Deterrence

Sentencing policy in relation to rape cases in England places the emphasis on deterrence in the majority of cases. This conclusion is reached by D. A. Thomas in his work Principles of Sentencing.¹³ Thomas demonstrates that the range of sentences for rape lies between about ten years' imprisonment and two to three years' imprisonment.¹⁴ Sentences in the upper part of the range are considered appropriate in cases where substantial violence is used to subdue the victim and also in cases where groups of men have raped a girl. Sentences within the lower part of the range are imposed in those cases where there is some element of invitation or provocative behaviour on the part of the victim. It appears that the age of the victim is not particularly significant although violation of a woman in her own home is treated as being more serious. In the latter type of case the victim tends to be an elderly woman.

Those factors identified by Thomas as being of signal importance with regard to sentencing have been similarly noted by the late Sir John Barry. In a work entitled The Courts and Criminal Punishment¹⁵ Sir John also identified a further factor which warrants the imposition of a severe sentence in rape cases, namely the case where a relationship of trust has been abused.

[i]n a civilised society it is a fundamental aspect of human dignity that the female must not be abused as an instrument for the satisfaction of aggressive lust.

Hence rape must attract a long sentence of imprisonment where there are features which make it a gross and insufferable outrage, as when great violence has been used, or a group of young men have, each in turn, gratified their passion upon a female made helpless by the combined strength of her assailants. Other sexual crimes where the victims are of tender years, or there was a relationship of trust, parental or magistral or custodial, must also bring severe sentences. Atrocious violence done to inoffensive strangers or helpless children, resulting in grave injuries must be similarly punished. In such cases the criminal behaviour supplies presumptive proof of that the offenders are unfit to be at large and the outraged conscience of the community demands that the judge shall express its detestation of the offence by condign punishment.¹⁶

Implied in these remarks of Sir John Barry is a balancing of some of the purposes of punishment with the necessary penalty to suit facts of an individual case. The retributive aspect of punishment is justified by the criminal behaviour of the offender; the feelings of the community are given recognition through the order of the court.

The question of when certain purposes of punishment should be given precedence over others has been partly answered by the Victorian Full Court in Williscroft and Others.¹⁷

The purpose of punishment are manifold and each element will assume a different significance not only in different crimes but in the individual commission of each crime. General deterrence and retribution are elements that must assume greater importance when the crime in question is a serious one, has been committed in a particularly grave form, and its contemporary prevalence is the cause of considerable community disquiet.¹⁸

Here, then, is direct judicial reference to the fact that some crimes and various commissions of crimes call for the acknowledgement of a particular aspect of the philosophy of punishment in preference to others. Where this reference is to a certain crime it can be seen that individual factors associated with the commission of the offence and with the background of the offender and victim will adopt correspondingly less significance in the determination of penalty.

The next obvious point requiring determination is whether the offence of rape is considered by the courts to be one of those crimes that warrants the application of a particular aspect of punishment over the more individual measures that may take cognisance of the needs of the offender with regard to such considerations as his rehabilitation and, perhaps, treatment. The Tasmanian Court of Criminal Appeal in Bowden¹⁹ positively identified the offence of rape as being of this nature:

[t]here are some crimes which irrespective of the youth and previous good character of the offender must be visited with a long gaol sentence, and rape is one of them.²⁰

It is important to recognise at this stage that, although owing to this classification of the crime of rape the deterrent aspect of punishment is emphasised by the courts, other aspects do assume some degree of relevance in appropriate cases. However, these other aspects are of secondary importance only and it is extremely rare for them to displace the aspect of deterrence as the primary consideration of the sentencer.

When speaking of the 'deterrent' aspect of punishment, two types of deterrence are actually being invoked. In the dissenting judgment in Williscroft's case (supra), Starke J. commented that

depending on the circumstances and the nature of the crime, sometimes more weight will be given to the reformatory element than to deterrence, and sometimes the opposite will be the case. Deterrence, of course, has two aspects; one in deterrence of the actual offenders, and the other in deterrence of other people who might be minded to commit similar crimes.²¹

This approach had previously been adopted by the Tasmanian Court of Criminal Appeal. In the case of Austin²² the Court stated that in sentencing offenders convicted for rape full effect must be given to both general deterrence and deterrence of the particular offender as predominant principles of punishment.

Prevalence of the Offence

Contemporary prevalence of a crime in a particular area may affect to some extent the sentence imposed in an individual case. In this respect the remarks of Adam and Crockett JJ. in Williscroft's case²³ will be recalled where considerable community disquiet at the contemporary prevalence of a crime was seen as justifying greater importance being attached to the element of general deterrence.

The increasing incidence of rape is not a peculiarly Australian phenomenon. In a recent address, Duncan Chappell²⁴ noted that in relation to the offence of rape in the United States

action and concern about this crime has (sic) been further stimulated by the apparent startling increase in the incidence of this type of sexual assault. During the past decade forcible rape rates have more than doubled, the

pace of increase becoming more rapid since 1967 and in the early 1970's reaching a speed outstripping all other major categories of violent crime.²⁵

J. Kraus²⁶ has noted that

[i]n literature, an increasing incidence of individual and/or gang rapes was reported from Western Germany (Harman, 1964; Schramm, 1965; Rasch, 1968), the U.S.A. (Perlman, 1964), Czechoslovakia (Styblo, 1966), and Japan (Higuchi, 1963); a generally increasing incidence of rapes (presumably involving also juveniles) was reported from the U.S.A. (Lunden, 1967) and the U.K. (McClintock and Avison, 1968). The absence of an increase of both individual and gang rapes has been reported only from New Zealand (Department of Justice, 1968).²⁷

With respect to New South Wales during the period 1956-1969 Kraus discovered that

A highly significant increase was found for the rates of rape. When the rates of rape were broken down into 'individual' and 'pack' rapes, both types of rape showed a highly significant increase, but the rates of 'pack' rapes were found to have increased 2.5 times faster than the rates of 'individual' rapes. The proportion of 'pack' rapes in the total number of rapes increased from 0 per cent in 1956-1958 to 61 per cent in 1967-1969. Compared with adult rates, the juvenile rates of charges of rape showed a four times larger increase; adult rates increased by 192 per cent, juvenile rates by 773 per cent.²⁸

Barber has shown that convictions for rape and attempted rape have rapidly increased in Queensland during the past ten years and that the increase in convictions for rape and attempted rape is greater than the population increase over the same period.²⁹

Figure 2 shows the number of persons convicted of rape in the various Australian States during the period stated in the second column.

| State | Period | Number of Persons Convicted of Rape |
|-------------------|-----------|-------------------------------------|
| N.S.W. | 1973 | 32 |
| Victoria | 1971 | 31 (including attempted rape) |
| Queensland | 1971-1972 | 39 (including attempted rape) |
| South Australia | 1972 | 4 (including attempted rape) |
| Western Australia | 1973 | 9 |
| Tasmania | 1972 | 4 |

Figure 2³⁰

The number of persons sentenced to imprisonment for rape by Australian Capital Territory courts during the period from 1969 to 1974 totalled seven.³¹

Of course, any comment involving the acceptance of the reliability of statistics concerning rape must involve some degree of speculation due to an acknowledged, but unquantified, increase in the number of victims prepared to report offences.³²

Despite the widespread practice of judges in commenting on the prevalence of an offence during their deliberations as to formulation of penalty, there exists little judicial comment as to the extent to which prevalence can be considered a relevant sentencing factor. Two South Australian decisions involving cases other than rape indicate that there must be a relatively circumscribed limit as to the use of prevalence as an aggravating factor.

In the case of Giles v Barnes³³ the defendant, who was not represented, pleaded guilty to stealing two blocks of chocolate worth 60c. from a supermarket. The Special Magistrate in sentencing made the following remarks.

Anyone who commits this offence after the numerous recent warnings which have been given by this Court and the publicity given to them and the sentences imposed, giving effect to these warnings, is simply asking to be sent to gaol.

It gives me no pleasure to send a young man with a wife and young family to gaol, but due to the extreme prevalence of this type of offence, it has become necessary to do so.³⁴

Bray C.J. recognized the validity of considering the factor of prevalence to be justification for increasing the normal range of penalty but was careful to point out that this approach could not be applied to an extreme. His Honour stated

There is no doubt that the prevalence of a particular offence in a particular locality may justify Courts in raising the normal standard of penalty for such an offence in that locality ... This, however, is only one of the factors to be considered in imposing punishment on a particular offender for a particular offence, and can seldom, if ever, be the dominant one. The circumstances peculiar to the particular offender and the particular offence must always be taken into account, as well as the general nature of the crime. Anything in the nature of a rule of thumb is to be deprecated and must be avoided ... To say therefore that the norm of punishment is being raised because of the prevalence of the particular offence can never be to enunciate a determinate principle capable of deciding in itself the particular penalty to be imposed on the particular defendant.³⁵

These remarks of Bray C.J. were adopted by Walters J. in Martin v Scotland.³⁶ In that case Walters J. added that

the prevalence of a particular offence can only be a proper consideration so long as it does not result in the offender being made the 'scapegoat of other people who have committed similar crimes but have not been caught and convicted' (cf. R. v Withers³⁷, per MacKinnon J. at p. 54). Moreover, if it becomes necessary to 'make an example' of a particular offender, it should be in the case of one whose offending is over rather than under the average.³⁸

It is interesting to note that the Tasmanian Court of Criminal Appeal has recently stated that although accused persons frequently commit perjury when giving evidence in their own defence but are seldom charged, let alone convicted, of perjury, where such a person is so charged, those facts, if they have any weight, weigh against the accused.³⁹

Thus, although it is not uncommon for judges to comment upon the prevalence of an offence when sentencing, there exists little authority to suggest that this factor in itself is of sufficient importance to affect materially the quantum of punishment in an individual case. This, it is submitted, is as it should be for submissions made by the prosecution on this point are extremely difficult to counter by the defendant and they may also be inaccurate or present a misleading picture as to the real extent of prevalence of an offence. It should be unthinkable that a defendant should have his sentence increased by the operation of the effect on the judge's mind of such a factor when the information as to prevalence submitted by the prosecution may be incapable of being challenged by a defendant and when it may be incomplete or inaccurate. Although in theory the prosecution could be required to call sworn evidence of the factor of prevalence thereby allowing the defendant to cross-examine the prosecution witness, it is not uncommon for figures to be placed before the trial judge (often at the latter's request) whose accuracy may be extremely difficult to disprove.

PACK RAPE

Although this paper is not primarily concerned with the peculiar problems presented by cases involving multiple offenders in rape cases, some brief comment should be made with respect to judicial attitudes towards examples of pack rape and sentencing policy in relation thereto.

Barber has suggested that the type of defendant convicted of taking part in pack rapes in Queensland shares similar characteristics in terms of immediate sexual needs and desires with the type of male that Kinsey found turning to

prostitutes.⁴⁰ Thus a desire for certain types of sexual activity (such as oral-genital contact), the need to satisfy a group psychology factor of joint participation in observing sexual activity, and a tendency towards sadism are characteristics common to both groups.

It will be recalled that both D. A. Thomas and Sir John Barry (supra) distinguished cases where groups of men have raped a girl as instances where sentences in the upper part of the range are considered appropriate. Even cases involving no violence towards the victim attract severe sentences where groups of men are involved in the commission of the offence. Sentences imposed or upheld by the Court of Criminal Appeal of New South Wales illustrate this point.

In Flaherty and others⁴¹ sentences of ten years, eight years, six years and four years were imposed on nine young men convicted or raping a girl on the bank of a creek in an isolated location in Sydney. The sentences varied according to the parts played in the crime by the various defendants. Those responsible for the original abduction of the victim received the heavier penalties, whilst those who happened along at a later stage were treated more leniently. Wallace A.-C.J. noted that

There was no suggestion of mass abduction in the ordinary sense and in all cases there was no measure of the brutality which is sometimes seen in these cases. Here the girl sustained no appreciable injuries or bruises and after three hours beside the creek bank she was driven home. The case is not at all like that where a girl of very tender age is abducted and borne off and treated with complete brutality.⁴²

In the case of Avery and Others⁴³ two defendants received sentences of eight years' imprisonment and two were sentenced to imprisonment for five years. Despite the fact that the two victims had been drinking in an hotel with at least some of those convicted,

the gravity of the matter is seen by the fact that no less than eight accused persons were indicted together at this trial.⁴⁴

The sentences were upheld.

In Bourke and Others⁴⁵

the facts show a serious case of rape coupled with violence towards the two men who attempted to assist the victim and an attack on them with a heavy screwdriver. But there was no physical violence done to the girl, and apart from the acts of intercourse themselves, she suffered no physical harm. Drink entered into the crime in no small measure. However, this was a premeditated crime of rape, preceded by a plan to lure the girl from the hotel to a lonely place ...⁴⁶

Sentences of ten years' imprisonment in the case of the three worst offenders and a proportionately reduced sentence of eight years in the case of a fourth offender were imposed.

Where one or some of the participants in a pack rape use violence in subduing the victim, it can be expected that such behaviour will attract appropriately more severe punishment. The effect of this and other factors will be considered in relation to individual rape cases.

INDIVIDUAL RAPE CASES

Violence

The case of rape which exhibits aspects of violence towards the victim is likely to attract a penalty commensurate to the degree of violence used. At a point of the range approaching an extreme is the case of Anthony.⁴⁷ The appellant, who was aged 40, had been convicted of raping one girl and carnally knowing another girl aged 11. The appellant had been convicted of murdering his wife, the offence taking place only 16 days prior to the commission of these offences, and for which he was eventually sentenced to penal servitude for life. Threats were made by the appellant against his two victims, and the use of an axe, a knife and a rifle were used for this purpose. Following the commission of the two offences the victims were abducted and confined (at times by way of chains) to a bush camp where they were forced to live a crude existence for a period of 16 days. During this time further acts of intercourse occurred with the older girl and further attempts were made to carnally know the younger girl. Despite the threats to use the axe, knife and rifle, and despite the use of chains to hold the girls, neither victim appeared to have suffered permanent harm. The appellant was sentenced to 16 years' and five years' penal servitude, to be served concurrently.

It will be noted that Anthony's case (supra), although possessing a serious degree of both violence and threatened violence, did not result in any significant degree of harm to either victim. Despite the controversy as to whether a court should take into consideration in assessing penalty the fact that adverse effects may have been occasioned to a victim, it appears that such a factor will be considered as relevant in certain circumstances. For instance, the Victorian Full Court in Webb⁴⁸ held that it is permissible for a court in determining sentence to take into account any detrimental, prejudicial or deleterious effect that may have been produced on the victim by the commission of the offence. In that case there was evidence that considerable anguish had been experienced by the victim and by the victim's husband as to the possible paternity of a child born to her some eight

months after the act of rape had taken place. The victim, aged 23, whilst attempting to change a wheel of her car, managed to lock the keys inside the vehicle. The applicant offered to drive the victim to her residence but instead drove her beyond her home and forcibly raped her on the front seat of his car. The evidence disclosed that no advances had been made by the victim towards the applicant, and the fact that she was ill-treated physically, apart from the rape was among the considerations of the circumstances of aggravation in the case. The applicant was sentenced to ten years' imprisonment for rape with mitigating circumstances.⁴⁹ In awarding the maximum penalty for the offence, the court fixed no minimum term to be served by the applicant.

The issue of whether a convicted person should be sentenced having regard to the effects of the commission of the offence upon the victim is not one for consideration in this paper. However, it is suggested that broadening the scope of payment of compensation to the victim of crime in relation to both the amount involved and the conditions under which it is to be awarded would to a large degree remove this particular problem from the field of sentencing policy.

A further example of the attitude of the courts towards cases of rape involving an element of violence is that of Donald Le Roy Varner.⁵⁰ In this case the appellant engaged a young woman in conversation when she was walking home at night. Having found out where she lived, he offered her a lift home which she declined. Whilst the victim was walking through a park shortly thereafter the appellant alighted from his vehicle, followed her across the park, and raped her using some degree of violence to effect submission. Several days later the appellant offered a second victim, an 18 year old female student, a lift in his vehicle. During the course of their journey the vehicle was driven off the road and onto a dirt track. As the girl opened a door to escape from the vehicle the appellant placed both his hands around the girl's neck and after a brief struggle she succeeded in breaking away and making her escape. In the course of his judgment Street, C.J. stated

It is clear enough that the Appellant has on each of those two occasions manifested a violent tendency towards women. As has been said many times, the community has a particular abhorrence of crimes of violence. A sentence of ten years on the rape charge is undoubtedly a heavy sentence, but it is the view of the Court that heavy sentences are justified where violence is manifested against the persons of other peaceable members of the community.⁵¹

A further example of the refusal of a Criminal Appeal Court to interfere with an acknowledged heavy sentence is provided in the Victorian case of Townsend⁵² where sentences of eight years for one count of rape, five years for a second count of rape, to be served concurrently, and one year consecutive

for a third count, being robbery with violence, were upheld. In this case the applicant was almost 17 at the time the offences were committed. The 16 year old victim was followed by the applicant at night for some distance as she made her way home, and, realising her predicament, took what she thought was an opportunity to escape but was chased, caught and held. The applicant threatened to kill the girl if she screamed or attempted to escape. After performing various acts of indecency and holding what the victim believed to be a knife against her neck, the applicant succeeded in having sexual intercourse with the girl. The applicant then dragged the victim across a street into a shed, obtained some rope, tied the girl's wrists together and threatened to kill her if she was not there the following day. The contents of the victim's handbag were emptied and a gold ring taken by the applicant. A further act of intercourse occurred before the girl was able to effect her escape.

Evidence showed that the applicant had spent a considerable part of his life in institutions, and in fact at the time of his arrest was at large after escaping from custody. Psychiatric reports showed him to be retarded, immature and at times aggressive. Medication was required to control the aggressive tendencies and medical evidence was to the effect that if the necessary treatment was not available and not administered the applicant should be considered a danger to both himself and to others. The Court of Criminal Appeal held that although the sentences may have been slightly longer than might have been imposed, they nevertheless were not manifestly excessive nor had the trial judge acted on wrong principles in imposing them.

Such offences involving a significant degree of violence towards the victim can usually be expected to attract penalties in the vicinity of ten years' imprisonment. The courts have clearly exhibited their determination to discourage acts of violence and brutality towards women and girls by men prepared to use these means in achieving gratification of their desires.

Provocative or Foolish Behaviour by Victim

In cases where the rape victim may be considered to have contributed to her own downfall the courts are prepared to adopt a more lenient attitude towards the offender. D. A. Thomas⁵³ cites a number of English cases where the victim had behaved foolishly and in consequence the courts imposed light prison sentences. In Walker⁵⁴ a student nurse had gone to the appellant's flat after a dance and was raped. Because the girl had been prepared to share the appellant's company in the privacy of his own room the court imposed a sentence of three years' imprisonment. In Gahan⁵⁵ the victim had accepted an invitation to go out with the appellant in a van with a mattress in the back and by permitting some degree

of intimacy had to a certain extent offered the appellant encouragement. In this case the penalty was two years' imprisonment.

Two recent Queensland cases show that this type of behaviour attracts a similar approach by Australian courts. Both cases contained evidence of little or no violence and both involved the acceptance of lifts by the victim in panel van vehicles driven by strangers. Thus, in Condon⁵⁶ the victim had entered a panel van occupied by two youths ostensibly to be driven to her place of residence. Instead, she was taken to an isolated location and raped by one of the youths. The convicted youth was sentenced to three years' imprisonment with a recommendation that he serve one year before becoming eligible for parole. Similarly, in the case of Gorman⁵⁷ the victim had entered a panel van after leaving a city swimming pool and instead of being driven home had been taken to a bushland setting and raped. There was evidence of minor violence occasioned to the victim. The convicted youth was sentenced to four years' imprisonment, the trial judge making no recommendation with respect to parole.

This type of case which involves either a degree of encouragement by the victim or behaviour on her part which is foolish and may tend towards encouragement of the offender, will usually result in the court taking these factors into account in determining penalty. However, where a case involves an aspect of sufficient relevance, such as the use of violence by the defendant, provocative or foolish behaviour of the victim is correspondingly reduced in importance as a mitigating factor.

For instance, violent behaviour on the part of the rapist will off-set the foolish conduct of the victim. In Murphy⁵⁸ the girl victim had hitch-hiked a ride and was consequently threatened with a knife at her throat, told that her attacker was the Wanda Beach murderer, assaulted about the breasts, forced to perform acts of gross indecency, tied to the steering wheel of the offender's motor vehicle and finally raped. McClemens, C.J. at C.L. commented that although hitch-hiking perhaps may be regarded as an act of unutterable foolishness,

Foolishness does not justify what happened to her subsequently.⁵⁹

The defendant was sentenced to eight years' penal servitude for the offence of rape with the fixing of a three year non-parole period.

A similar case is that of Mills⁶⁰ where again the victim had acted foolishly by getting into a car at night with a stranger. The victim was subsequently threatened with a knife and raped. Evidence disclosed that submission of the victim was effected not so much through fear that the offender would use the knife

but through the recognition by the victim of the disturbed psychological state of the offender. A sentence of five years' penal servitude was substituted for one of three years and an 18 months' non-parole period was set.

Other circumstances may well exist to off-set the mitigating effect of provocation on the part of the victim. The obvious youth and naivety of the victim could possibly act in certain circumstances to negate any foolishness on her part in encouraging an offender.

The Queensland Court of Criminal Appeal in the case of Ives⁶¹ reduced from six years to four years the term of imprisonment imposed upon a young man convicted of rape. On the one hand, the applicant struck the girl on the face to make her submit, although it appeared that she had suffered no serious physical or psychological harm. On the other hand, the applicant was a young man who had been told by a youth who had had intercourse with the girl that she 'would be an easy mark'. The applicant had been present at a hamburger shop when a discussion took place in the presence of the victim about her having to remove all her clothes at the game of 'strip-jack-naked'. With this background, including the consumption of liquor by the party, the girl accompanied several youths (including the applicant) to a remote area.

This case clearly reveals the balancing of two of the considerations mentioned by Thomas (supra) - the use of violence as against the foolish behaviour of the victim. The behaviour of the victim had clearly contributed to the commission of the offence, however the offender, by resorting to the use of violence to subdue the girl, had acted to partly remove the factor of encouragement. Had no violence been used by the offender it is likely that the sentence would have been further reduced and the conduct of the victim assumed a correspondingly greater role in determination of penalty.

Victim at Home

The seriousness with which a court views an attack upon a woman in the sanctity of her own home is demonstrated by a recent decision of the Queensland Court of Criminal Appeal. In Giffin⁶² that Court upheld a sentence of 12 years' imprisonment imposed on a man found guilty of raping a married woman into whose home he had intruded at the dead of night while she was asleep in bed. No violence had been used during the incident and there was no evidence of physical detriment having been occasioned to the victim. The Court of Criminal Appeal supported the statement of the trial judge that the offence was committed while the accused

invaded the sanctuary of a woman's home in the dead of night at a time when any woman in Australia is entitled to believe she is safe and in a place where she is entitled to be safe.⁶³

This factor was considered by the Court of Criminal Appeal to be a 'most important circumstance.'⁶⁴ The rationale behind the emphasis upon the sanctity of the home of a woman is obvious and, although cases involving the invasion of a victim's home are not common, offenders in this category can expect to receive sentences in the upper part of the range even though violence is not used to subdue the victim.

In the case of Fissentzidis⁶⁵ the appellant gained access to the home of a married woman who was with her five weeks' old baby. The woman was intimidated with a pistol and was finally forced to have sexual intercourse with the offender. During this time an associate of the appellant was engaged in stealing property from the house. The appellant had a long record of stealing offences and sexual crimes. In these circumstances a penalty was imposed of 14 years' penal servitude with the fixing of a non-parole period of eight years. Clearly more factors were involved here than the intrusion into the victim's home. However, this factor undoubtedly affected the court's decision to uphold the severe penalty awarded by the trial judge.

Alcohol

The question of whether drunkenness of an offender is capable of preventing the formation of specific intent to commit rape is beyond the scope of this paper.⁶⁶ The effect on determination of penalty by intoxication, however, calls for some comment.

Although it is not unusual for the defence in a rape case to stress that the consumption of alcohol played some part in the commission of the offence, there is little to suggest that the courts are prepared to accept this reason as constituting a circumstance of mitigation.

In Lovegrove⁶⁷ a married woman, who was a mother, was forcibly dragged into some bushes by the defendant at night. The defendant, who was 28 and whose mother was a full blood Aborigine, grasped the victim around the throat and raped her. In sentencing the appellant to imprisonment with hard labour for four years and eight months, Muirhead J. stated

Your counsel tells me, and this I must accept, that you are addicted to liquor, that you habitually drink during most of your spare time and that you have to some extent been brutalised by your roving type of life and by the necessity of depending entirely on your own resources. I accept the fact that you would not have committed this crime but for the effect of the liquor you consumed but I am afraid that the law would cease to be a protection to the public if this was regarded as an excuse rather than an explanation.⁶⁸

In Williams,⁶⁹ the Queensland Court of Criminal Appeal heard an appeal by the Attorney-General against a sentence of four years' probation, which order included a direction for the payment of \$150 compensation to the victim, imposed for the offence of attempted rape. The offender, aged 21 years, was of good character and standing prior to the commission of the offence. The Court of Criminal Appeal acknowledged that, but for the consumption of alcohol (which in itself was not in keeping with the character of the offender), the incident would not have taken place. However, this factor was seen as in no way justifying or excusing the behaviour of the offender and a sentence of imprisonment with hard labour for three years was substituted for the probation order.⁷⁰

In the light of this approach by the courts it is submitted that mitigation will seldom be obtained through reliance on the effect of alcohol on the behaviour of the offender in a rape case. By viewing drunkenness as an explanation rather than as an excuse the courts have indicated their attitude on this point and the effect of liquor cannot be viewed as a factor that is likely to influence penalties.

Sexual Deviation

The rape offence committed by a defendant who can be considered as a sexual deviant has consistently attracted a penalty designed to protect the community at large.

In Turner⁷¹ the appellant was convicted of rape which he carried out while hiding in a women's lavatory. Although the defence of insanity was not raised at the trial, psychiatric evidence was given that indicated that the offender had exhibited sexual deviance for a long period prior to the offence. Following his arrest the appellant had been placed under the control of the Parramatta Psychiatric Centre. Street, A.-C.J., expressed the view that

Notwithstanding the absence of any prior convictions it is an offence of a nature which cannot be tolerated and in my view, six years represents a very proper assessment of the sentence to be imposed.⁷²

This case was considered appropriate for the setting of no non-parole period. It was the opinion of the court that review of the appellant's position would more properly be made by the Minister who was empowered to release Turner on licence provided that the latter entered a mental institution.

In Murphy (supra)⁷³ McClemens C.J. said that although the accused may have been under psychological stress at the time the offence was committed, the victim

was entitled to be protected, and the courts have indicated by their sentences that this type of behaviour cannot be justified in a civilised community.⁷⁴

The same judge expressed regret in Mills (supra)⁷⁵ that no provision existed at the present time for the making of a hospital order in which

This man could be kept out of the community and under treatment for a long time, and compulsorily.⁷⁶

It may well be that a significant proportion of persons convicted of rape are psychologically abnormal.⁷⁷ It appears that lengthy terms of imprisonment are considered appropriate in such cases in order to ensure the protection of the community.

Psychopathy has been recently considered in Canada by the Supreme Court of Alberta in relation to a case involving rape, buggery and the forcible seizure of two persons. In Leech⁷⁸ evidence was adduced that the defendant was suffering from a psychopathic personality in which

we see a picture of a dangerous maladjusted personality. The psychopath is asocial. His conduct often brings him into conflict with society. The psychopath is driven by primitive desires and exaggerated craving for excitement. In his self-centred search for pleasure he ignores the restrictions of his culture. The psychopath is highly impulsive. He is a man for whom the moment is a segment of time detached from all others. His actions are unplanned and guided by whims. The psychopath is aggressive. He has learned few socialised ways of coping with frustration. The psychopath feels little, if any, guilt. He can commit the most appalling acts, yet do them without remorse. He has a warped capacity for love. His emotional relations when they exist are meagre, fleeting, and designed to satisfy his own desires. The last two traits, guiltlessness and lovelessness, conspicuously mark the psychopath as different from other men.⁷⁹

Although a psychopath may be incapable of feeling guilt, this is not to say that such a person is unable to appreciate the nature and quality of his act. Such was the situation in Leech's case (supra) where the defendant was found to be quite capable of knowing that his acts were wrong. The question of assessing sentence was made more difficult by the nature of the defendant's disorder of the mind. MacDonald, J., noted that the defendant would be a very serious danger to the public if at large, and consequently, should be kept in an institution for as long as he might be dangerous. On the other hand, there exists no proven treatment for the condition and the court was limited to expressing hope and recommending that the defendant be given whatever medical treatment may be required to reduce the danger resulting from the disorder. MacDonald, J., considered that life imprisonment was demanded, and recommended that no clemency nor reduction in the sentence should be considered, save only in the presence of strong and

convincing medical evidence that he had ceased to be a dangerous person. The defendant was sentenced to life imprisonment on the rape charge, 14 years on the buggery charge, five years' imprisonment on each count of forcible seizure; all sentences were ordered to run concurrently.

The circumstances in which a sentence of life imprisonment in rape cases in Canada may be appropriate were significantly broadened in the case of Hill.⁸⁰ The facts of the case were appalling. Under circumstances indicating planning and deliberation, the defendant went at night to a home where the victim (a 14-year-old virgin) was baby-sitting. After assaulting her with his fists he forcibly stripped her of all her clothes, and, although she was menstruating, raped her. The defendant then forced the girl, unclothed except for a jacket she had put on, to go outside with the evident intention of taking her somewhere in his car. When she attempted to escape, the defendant caught the girl and forced her back into the house. The girl then attempted to telephone for assistance but was knocked to the floor and stabbed with a knife repeatedly in the face and about the throat until the knife broke. As a result, the victim was expected to lose the sight of one eye. The defendant fled the house abandoning the girl.

Here, the psychiatric evidence did not point to psychopathy, and the defendant was found not to be insane or psychotic. Rather, it was shown that the defendant suffered from a personality disorder manifested in impulsiveness, low stress tolerance, anger which could not be handled properly and difficulty in knowing his own sexual identity. A psychiatrist and a psychologist called on behalf of the defendant said he was dangerous to the community and both gave guarded prognoses as to when, if ever, the defendant could be considered safe to be at large.

The Ontario Court of Appeal held that when an offender has been convicted of a serious crime in itself justifying the imposing of a substantial sentence, and when that defendant suffers from some mental or personality disorder rendering him a danger to the community but not subjecting him to confinement in a mental institution, and further when it is uncertain when, if ever, he will be cured of his affliction, the appropriate sentence is one of life. Accordingly, the defendant's sentence was altered from imprisonment for 12 years to imprisonment for life.

In Hill's case (supra) Mr. Justice Jessup noted that a sentence of life imprisonment in such circumstances amounts to an indefinite sentence under which the Parole Board can release the defendant to the community when it is satisfied, upon adequate psychiatric examination, that it is in the interests of the offender and of the community for him to return to society.⁸¹

Whereas both abovementioned Canadian cases involved sentences of life imprisonment and thereby enabled the appropriate authorities to determine at what stage the defendants could be safely allowed to return to the community, an indeterminate sentence, or what is in effect an indeterminate sentence, should be imposed only in those cases where the court is given the statutory power to order preventive detention. The reason for this principle is clearly shown in the New Zealand case of Metcalfe.⁸² In that case the appellant, a boy aged 17 years with no previous convictions of any sort, pleaded guilty to having raped a schoolgirl aged 16 years. He was sentenced to 14 years' imprisonment which was the maximum for the offence. The reasons of the sentencing judge, and reference to the appellant's background, appear in the Court of Appeal judgment delivered by North, J.

The learned sentencing judge said that in spite of his youth and his clean record, and even although this was not a gang rape, he would have thought that a proper sentence would have been five years' imprisonment, but he said there were special circumstances peculiar to this case which, in his opinion, called for the imposition of the maximum sentence, namely 14 years. The applicant was below average intelligence. He had been sent to a special school and at the age of 15 his mental capacity was said to be that of a ten-year-old. Not only was he mentally retarded, but from the age of seven, he, along with his brothers and sister, had been subjected to indecent assaults by a man who was supposed to be a friend of the family. It was said he had been similarly assaulted by his own father, who was said to be a homosexual, and who had indoctrinated his son on sexual matters.⁸³

Psychiatric evidence showed that the appellant would be a serious menace to girls and women so long as sexual urges occupied his attention, which might be for 15 years or more.

The sentencing judge considered that he must regard the appellant as incapable of reformation and for that reason felt that he was obliged to put aside the 'humanitarian considerations springing from reformatory principles'.⁸⁴ This was a case in which the preventive aspect of punishment was considered to be of paramount importance.

The New Zealand Court of Appeal quashed the sentence of 14 years' imprisonment and substituted in lieu thereof a sentence of five years' imprisonment. The main reason for the Court of Appeal's interfering with the sentence was that the sentencing judge had intended to impose an indeterminate sentence based on considerations which were predominantly and essentially preventive and this was not a proper course for him to take in the absence of statutory authority.

What undoubtedly influenced the Court of Appeal in its decision was the realisation what the Mental Health Act 1911 (as amended)

enabled, if necessary, the detaining in an institution for mentally defective persons those who require supervision for their own protection or in the public interest.⁸⁵

It is thus apparent that the courts of Canada and New Zealand, as well as Australia, recognize the advantages of non-judicial supervision of such offenders in that the protection of the community can be better achieved through detaining dangerous cases until the mental condition that causes violent sex attacks can be controlled or cured. Of course, the disadvantages and dangers of such detention and treatment are not within the scope of this paper.⁸⁶ However, it should be borne in mind that the rights of persons detained indefinitely have not always been closely protected, and that instances of improper detention are not unknown in Australia and other countries.

Age

Although in Flaherty⁸⁷ the New South Wales Court of Criminal Appeal considered that the age of the accused was a factor capable of affecting penalty in those rape cases where the offender is young, it is clear that in general offenders aged 17 years and above can expect scant leniency because of their youth. Rape, and particularly pack rape, is significantly committed by youths. The findings of Kraus reveal that

the very high increase in the rates of rape is confined to the juvenile population.⁸⁸

Thus, contrasting judicial attitudes may be discerned. In Flaherty's case (supra) Wallace, A.-C.J. stated that

An important factor in the present case is the youth of the appellants. As earlier stated, their ages ranged at the time of the crime from sixteen to nineteen or twenty years, and whilst they must be punished, and appropriately punished, it is universally acknowledged that a young age is an important factor for consideration when sentencing convicted persons.⁸⁹

Asprey, J.A.⁹⁰ and Taylor, J.⁹¹ also referred to the need to take age into account when sentencing young offenders.

On the other hand, because of the seriousness with which the offence of rape is viewed by the courts, the age of the offender has been held to be not a valid reason for not imposing lengthy terms of imprisonment.⁹² In the case of Davy⁹³ the New South Wales Court of Criminal Appeal in a joint judgment⁹⁴ stated

Despite the youth of the Appellants, we think that His Honour's sentences must be sustained. After all, the

large majority of crimes of this nature are committed by young men in company and age has ceased, in our view, to be a valid reason for inflicting light sentences.⁹⁵

The age of the victim may be an aggravating factor, particularly in cases where the offence is committed by an older man on a young girl as in Anthony (supra), or where a young man rapes an older woman as in Jones⁹⁶ where the court commented that the complainant was old enough to be the mother of each accused.

The sentencing options in rape cases involving children or young persons as defendants may be limited or influenced by legislation relating to the jurisdictions of juvenile courts. This situation does not arise in New South Wales for in that State, where a child or young person under the age of 18 years has pleaded guilty to, or been convicted of rape, the judge must sentence him according to law.⁹⁷ However, in Queensland,⁹⁸ South Australia,⁹⁹ Western Australia,¹⁰⁰ Victoria,¹⁰¹ and Tasmania¹⁰² the situation is somewhat different, and sentencing options are affected by legislation.

CONCLUSION

It is suggested that a study of judicial attitudes with respect to rape cases reveals a general pattern of sentencing decisions which emphasise the aspect of deterrence as the primary consideration. Within the ambit of this broad approach courts give recognition to factors such as the use of violence, the circumstances and behaviour of the victim and the degree of mental ill-health of the defendant in terms of sexual deviance.

However, because of the incalculable balancing of factors by a sentencing court, it may not be possible to attempt to predict the quantum of punishment by the use of tabulated scales which attempt to grade relevant circumstances of each case.

Of greater assistance in discerning attitudes to sentencing rape offenders, it is submitted, is an examination of those factors considered by the courts to constitute sufficient importance to influence the sentencing option within the primary aim of deterrence. Preventive measures are of particular importance in cases involving a threat to the safety of the community to warrant recognition through indeterminate sentences. Individualised measures aimed at the reformation or rehabilitation of the offender are not entirely excluded from the sentencing process, but of necessity within the terms of the general policy of deterrence, are considered of secondary relevance only.

FOOTNOTES

1. E. J. Hodgens, I. H. McFadyen, R. J. Failla, F. M. Daly.
2. Australian and New Zealand Journal of Criminology (Dec. 1972): 5,4. 225
3. Ibid p. 240
4. Unreported decision of the Queensland Court of Criminal Appeal C.A. No. 139 of 1973 handed down on 2 November, 1973. 'One can well imagine the Attorney-General's attitude in feeling that the matter should be further investigated by this Court. However, it is for this Court to consider whether the learned trial Judge erred in imposing a penalty which was manifestly inadequate. On sentence many matters go through a Judge's mind before he decides what shall be the appropriate sentence. He has to consider the numerous aspects associated with punishment, the remedial, the punitive or retributive or deterrence. He has to make a fine balance of all of these and come to the conclusion whether, in a case such as this, gaol is, or is not appropriate. In my view the learned Judge carefully weighed all relevant matters and came to the conclusion that this was a case in which gaol was not the appropriate punishment. In my view his decision cannot be disturbed, bearing in mind the wide range of views open upon the facts in this particular case, I think it would be wrong for this Court, unable to recapture fully the atmosphere of the trial, to interfere. I would dismiss the appeal.'
5. See, however, the case of Clarke and Wilton [1959] V.R. 645 where the jury was asked specific questions by the trial judge to ascertain whether the two accused were acting in concert in the commission of the acts which caused a child's death, whether it was in the power of each of the accused to have prevented those acts, and whether each accused was under the duties of a parent towards the child. The Victorian Full Court (Herring, C.J., O'Bryan and Dean, JJ.), held that 'the justification for asking the jury to answer questions in addition to a general verdict if the verdict is one of guilty, is well established in this country. It has been done on a number of occasions and never criticised.' at p. 654
6. Richard G. Fox, Bernard M. O'Brien, Fact-Finding For Sentencers, original paper presented at the seminar The Magistrates' Court 1975 and Beyond held at the Australian Institute of Criminology, Canberra, 9 May, 1975. See (1975) 10 Melbourne University Law Review p. 163.

7. Ibid p. 177
8. See D. A. Thomas Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience. Alabama Law Review Volume 20, No. 2, Summer 1968. 'The Statutory structure of sentencing in England is such that these aims are seen by the Court as generally irreconcilable, and it follows that in many cases the sentencer must make a preliminary policy decision between a deterrent sentence, usually imprisonment, and a rehabilitative measure such as probation or one of the other individualised measures mentioned earlier. In the light of this policy decision, the details of the sentence are worked out. If the primary decision favours deterrence, expressed in the form of a sentence of imprisonment, the length of the sentence will be calculated in terms of the offender's responsibility - the gravity of the offence and the existence of mitigating factors - rather than his needs in terms of rehabilitation. Where the primary decision favours individualisation, the details of the sentence will be determined in the light of the offender's needs in terms of training and supervision, rather than the gravity of the offence. The secondary decision in each case involves the application of different concepts and principles. It follows that sentencing policy may be found in three contexts - policy governing the basic choice between deterrence and individualisation; policy governing the detailed application of deterrence in terms of the process of calculating the length of sentence of imprisonment to be imposed; and policy governing the choice between various individualised measures.'
9. Australian and New Zealand Journal of Criminology (September 1974): 7,3. 157
10. Ibid p. 172
11. Ibid p. 159
12. Ibid Table 6 p. 162
13. D. A. Thomas Principles of Sentencing Cambridge Studies in Criminology Volume XXVII Heinemann, London, 1970.
14. Ibid p. 109
15. 1969, New Zealand Government Printer
16. Ibid p. 26
17. [1975] V.R. 292
18. Ibid p. 299 From the joint judgment of Adam and Crocket JJ.
19. [1968] Tas. S.R. 192 (N.C. 15)

20. Ibid
21. [1975] V.R. 292 at p. 303
22. Unreported case of the Tasmanian Court of Criminal Appeal, but see Australian Legal Monthly Digest, December, 1971.
23. [1975] V.R. 292 at p. 299
24. Director, Law and Justice Study Centre, Battelle Memorial Institute, Seattle, Washington, U.S.A.
25. Forcible Rape and The Criminal Justice System: Surveying Present Practices and Projecting Future Trends.
Presented as a keynote address at the 6th University of Alabama Symposium on Justice and the Behaviour Sciences, Rape - Research, Action, Prevention held at The University of Alabama, Tuscaloosa, Alabama, January 20-22, 1975.
26. Department of Child-Welfare and Social Welfare of N.S.W.
27. Trends in the Rates of Murder, Manslaughter and Rape among Male Juveniles (N.S.W. 1956-69), Australian and New Zealand Journal of Criminology (September 1972): 5,3. p. 146 at p. 154
28. Ibid pp. 154-155
29. R. N. Barber, Prostitution and the Increasing Number of Convictions for Rape in Queensland, Australian and New Zealand Journal of Criminology (1969): 2,3. p. 169
30. Sources:- N.S.W. Bureau of Crime Statistics and Research
Statistical Report 21 Table IX

Victorian Year Book 1974 p. 609

Statistics of Queensland 1971-2
Table 43, p. 47

Statistical Register of South Australia 1972-3
Table 6 p. 4

Statistics of Western Australia 1973
Table 74, p. 51

Statistics of Tasmania 1972 p. 37
31. The Future of Corrective Services in the A.C.T., a discussion paper prepared at the direction of the Minister for the Capital Territory. Table 2.
32. The Bulletin 31 Aug 74

p30 The exact scale of the thing is difficult to assess. In America, where even the FBI reckons

only one rape in six gets reported, it works out at about one rape a minute - and some experts put it much higher.

Crime In The United States 1973, CM Kelley, USGPO

p13 This offense is a violent crime against the person, and of all the Crime Index Offenses, law enforcement administrators recognise that this offense is probably one of the most under-reported crimes due primarily to fear and/or embarrassment on the part of victims.

Crime And The Community, PR Wilson & JW Brown, Q Uni Press, 1973

p88 When reportability was analyzed in terms of type of offense, it was found that burglary was the most frequently reported case, with the police being notified in 82 per cent of the cases reported in the survey. This was followed by sex offenses, of which 71 per cent were reported...

A National Strategy To Reduce Crime, National Advisory Commission On Criminal Justice Standards And Goals, 1973

p21 In the case of rape, the resulting picture from victimisation surveys may not be as clear as for other offenses, owing to the reluctance of victims to identify incidents. However, the interview technique may be more successful in eliciting information than the official reporting process. Discreet and indirect approaches to the incident are expected to overcome a good deal of the reporting problem.

Law And Order In Australia, P Ward & G Woods, Angus & Robertson, 1972

p94 The official figures on rape therefore tend to show only a fraction of the total number of rape incidents particularly those where the assailant is known (at least by sight) to the victim and where, if physical injury is not present, the victim appears to be of good character or capable of withstanding tough cross-examination without completely losing control.

'Forcible Rape And The Criminal Justice System: Surveying Practices And Projecting Future Trends'. Chappell D.

p11 Victimization studies have established that the rate of commission of forcible rape in the

community far outstrips the reported rate. Estimates of the gap between the two rates vary: the National Victimization Study conducted in 1967 for the President's Crime Commission suggested a ratio of between three and four actual rapes for each one reported. A more recent LEAA Pilot Survey in two American cities suggested a two to one ratio, possibly indicating a change in victim reporting behaviour since 1967. Clearly, a comparatively minor change in this behaviour could produce quite a major impact upon the statistics of forcible rape.

Holmstrom LL, Burgess AW

'Rape: The Victim And The Criminal Justice System'.
International Journal of Criminology and Penology, v.3
No 2 (May): 101-110. 1975.

p103 Only a minority of women in the present study contacted the police completely on their own; specifically, only 14 out of 61 did so.

Burgess AW, Holmstrom LL. 'The Rape Victim In The Emergency Ward'. American Journal of Nursing, v.73 No 10 (Oct): 1740-1745.

p1741 Most of the rape cases we have seen at Boston City Hospital were referred to the police.

Morris N, Hawkins G. The Honest Politician's Guide to Crime Control. Melbourne: Sun Books Pty Ltd.

p60 ...the victim survey conducted by the National Opinion Research Center of the University of Chicago for the President's Crime Commission shows the rate of forcible rape reported to the NORC to be three and a half times the UCR rate. And the 1968 UCR says that 'of all the Crime Index Offenses, law enforcement administrators recognise that this offense is probably the most under-reported crime due primarily to fear and/or embarrassment on the part of the victims.' Yet at the same time the UCR points out that '18 per cent of all reported forcible rapes reported to police were determined by investigation to be unfounded'. This somewhat discrepant finding suggests that 'fear and/or embarrassment' about matters of this kind are by no means universal.

34. Ibid p. 179
35. Ibid p. 181
36. [1972] 2 S.A.S.R. 271
37. (1935) 25 Cr. App. R. 53
38. [1972] 2 S.A.S.R. 271 at 272
39. Sherlock 28/8/75. (Tasmanian Court of Criminal Appeal).
(1975) A.L.M.D. p. 18.
40. R. N. Barber, Prostitution and the Increasing Number of
Convictions for Rape in Queensland, Australian and New
Zealand Journal of Criminology (1969): 2, 3 p. 169 at
p. 173
41. [1968] 3 N.S.W.R. 734
42. Ibid p. 738
43. [1965] N.S.W.R. 1419
44. Ibid p. 1425 per Herron, C.J. and Asprey, J.
45. [1970] 1 N.S.W.R. 767
46. Ibid at p. 776 per Herron, C.J., Sugermann J. A., and
Taylor, J.
47. Unreported decision of the N.S.W. Court of Criminal
Appeal No. 63 of 1974
48. [1971] V.R. 147
49. Section 44(2) of the Victorian Crimes Act provides that
if on the trial of any person charged with rape the
jury are satisfied that the offence charged has
been committed but that there were circumstances
connected with the commission of the crime which
appear to mitigate the offence the jury may return
as their verdict that such person is guilty of the
offence so charged with mitigating circumstances.
50. Unreported decision of the N.S.W. Court of Criminal
Appeal No. 106 of 1974
51. Ibid
52. Unreported decision of the Victorian Full Court, 30 July,
1974.
53. Op. cit. Thomas p. 110

54. 1-12-66, 2707/66
55. 23-4-68, 5379/67
56. Unreported decision of the Queensland Supreme Court, 6 June, 1973, before Matthews J.
57. Unreported decision of the Queensland Supreme Court, 26 June, 1973
58. Unreported decision of the N.S.W. Court of Criminal Appeal No. 213/74
59. Ibid
60. Unreported decision of the N.S.W. Court of Criminal Appeal No. 209/74
61. [1973] Qd.R. 128
62. [1971] Qd.R. 12
63. Ibid p. 24
64. Ibid
65. Unreported decision of the N.S.W. Court of Criminal Appeal No. 36 of 1974
66. See DPP v Morgan [1975] 2 All E.R. 347 where the House of Lords held that if an accused person charged with rape in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape.
67. Unreported decision of the Northern Territory Supreme Court S.C.C. No. 99 of 1974
68. Ibid
69. [1965] Qd.R. 86
70. See also O'Donnell [1974] 7 S.A.S.R. 114
71. Unreported decision of the N.S.W. Court of Criminal Appeal No. 22 of 1974
72. Ibid
73. Unreported decision of the N.S.W. Court of Criminal Appeal No. 213/74
74. Ibid

75. Unreported decision of the N.S.W. Court of Criminal Appeal No. 209/74
76. Ibid
77. See e.g., E. J. Hodgins, et al, The Offence of Rape in Victoria, Australian and New Zealand Journal of Criminology (December, 1972) 5,4 p. 228
of the 37 offenders who were interviewed, 8 (28%) admitted having received treatment at either a mental or psychiatric clinic and it is likely that an even higher proportion ought to have some psychological help. In any case, even the base figure of 28% indicates a considerable degree of mental disturbance in the sample of the study.
78. Supreme Court of Alberta. Coram MacDonald, J., December 18, 1972. See ... The Criminal Law Quarterly, Volume 15, Number 2, February, 1973, p. 110, Canada Law Book Limited.
79. Ibid
80. Ontario Court of Appeal. Coram Jessup, Arnup and Martin, JJ.A., November 7, 1973. See The Criminal Law Quarterly, Volume 16, Number 3, p. 252, May, 1974
81. See Thomas, Principles of Sentencing, pp. 272-279
82. 1962 N.Z.L.R. 1009 Coram Barrowclough, C.J., Gresson, P., North, J., Cleary, J., Hutchison, J.
83. Ibid p. 1012
84. Ibid p. 1013
85. The Court of Appeal was also of the opinion that the evidence and material which the sentencing judge had before him was insufficient to justify the view that the applicant was so incapable of reformation that the protection of the public demanded his detention for a period up to 14 years:
To say that this youth, now only 18 years of age, is beyond redemption seems to us to be a confession of failure in an age when great advances have occurred in psychiatric knowledge and treatment.
At p. 1015
86. See, e.g., Freiberg, A., Disposition of Persons Involved in Criminal Proceedings Under Proposed Mental Health Ordinance For The Australian Capital Territory. Discussion Paper for Seminar on a proposed Mental Health Ordinance for The Australian Capital Territory, held at Canberra, September 26-27, 1975

87. 89 W.N. (Pt. 1) (N.S.W.) 141
88. Op. cit. Kraus p. 149
89. 89 W.N. (Pt. 1) (N.S.W.) 141 at p. 146
90. Ibid p. 154
91. Ibid p. 160
92. See Bowden [1968] Tas. S.R. 192 (N.C. 15)
93. [1964] N.S.W.R. 40
94. Herron, C.J., Maguire and Walsh JJ.
95. Ibid p. 52
96. [1971] 1 N.S.W.L.R. 613
97. Child Welfare Act, 1939-1969 (N.S.W.), s. 87(1)
98. Section 63(1) of the Queensland Children's Services Act 1965-1973 provides that when a child is convicted of an offence for which he would be liable, were he not a child, to imprisonment with hard labour for life (or is convicted of a number of other prescribed offences, including attempted rape), the court may, in its discretion, order that such child be detained during Her Majesty's pleasure in such place and on such conditions as the Minister may, from time to time, direct.
99. In South Australia the position is governed by the Juvenile Courts Act, 1971-1974. Depending on whether the juvenile defendant is under the age 16 years or has attained that age but had not attained the age of 18 years on the date of the alleged offence, his case will be dealt with in differing ways. In the former situation the child shall not be charged with the offence of rape or attempted rape, but a complaint may be laid against the child alleging that he is in need of care and control. If the child has been arrested and subsequently appears before a juvenile court, that court may either proceed to hear and determine the complaint or adjourn the hearing to be dealt with by a juvenile aid panel. It is likely that because of the serious nature of the offences of rape and attempted rape a juvenile aid panel would not deal with such cases. A juvenile court which has found a child guilty of the offence of rape or attempted rape following a plea of guilty or a summary hearing or determination may deal with the child under the powers conferred by the Juvenile Courts Act, 1971-1974 or may commit the child for sentence to the Supreme Court. If a matter is dealt with by a juvenile

court that court may make an order dismissing the complaint and discharging the child, discharging the child upon his entering into a recognizance upon certain conditions, or placing the child under the care and control of the Minister for a period of not less than one year but expiring on or before the day on which the child attains the age of 18 years.

The manner in which alleged offences committed by children over the age of 16 years but under the age of 18 years are to be dealt with is provided for by section 43 of the Juvenile Courts Act, 1971-1974. The proceedings are to be heard and determined before a juvenile court and the available disposition options are fourfold. The court may dismiss the charge and discharge the child, impose a fine of up to one hundred dollars (or if a lesser maximum fine is prescribed for the offence, a fine not exceeding that maximum), discharge the child upon his entering into a recognizance upon certain conditions, or place the child under the care and control of the Minister for a period, specified by the court, of not less than one nor more than two years.

100. In Western Australia the Children's Court is empowered to hear and determine a complaint of an offence alleged to have been committed by a child. Alternatively, a Children's Court may exercise such powers and jurisdiction, only, as are conferred upon a Court of Petty Sessions in respect of the examination and committed for trial of persons charged with indictable offences. If, having heard and determined a complaint of rape or attempted rape brought against a child who is over the age of 14 years, a Children's Court, if the child is found guilty of the offence, may refrain from recording a conviction and commit the child for sentence to the Supreme Court of Western Australia. If a child over the age of 14 years pleads guilty to the offence of rape or attempted rape a Children's Court may record the conviction and commit the child for sentence to the Supreme Court of Western Australia.

In those cases where a child has been committed for sentence to the Supreme Court pursuant to the provisions of section 20(3) of the Child Welfare Act 1947-1973, that court is empowered to impose a penalty or make an order that may either be imposed or made with respect to a person over the age of 18 years who has been convicted on indictment of rape or attempted rape, or that may be imposed or made by a Children's Court under the Act.

A Children's Court, in dealing with a child, is required to have regard to the future welfare of the child. The power of a Children's Court to make an order of imprisonment in respect of a child is governed by section 34A.

That section provides that a sentence of imprisonment exceeding three months shall not be imposed, in respect of any one offence, on a child aged 14 years and under the age of 16 years. Furthermore, a sentence of imprisonment exceeding six months may not be imposed, in respect of any one offence, on a child aged 16 years or more. The power to order cumulative sentences on children is restricted to imposing a total of three months' imprisonment if the child is under the age of 16 years and six months' imprisonment if the child is aged 16 years or more. In sentencing a child to imprisonment a court may direct that the term be served in a penal institution established by the Department for Community Welfare for the imprisonment of children.

If a child is found guilty of rape or attempted rape a court, in lieu of sentencing the child to imprisonment may, pursuant to the provision of section 34:

- (a) commit such child to the care of the Department for treatment, discipline and training until he attains the age of 18 years, or during such shorter period as the Court may think sufficient; or
- (b) order the parent to give security for the good behaviour of such child until the child attains the age of 18 years, or during such shorter period as the court may think sufficient, and upon being satisfied that such security has been given, may dismiss the charge; or
- (c) adjourn the case on a near relative undertaking to punish the child in such reasonable or moderate manner as the court may approve, and on being satisfied that such punishment has been duly inflicted may dismiss the charge; or
- (d) release the child on probation on such conditions, if any, as the court may order, and in such case the child shall be subject to the supervision of the Department until he attains the age of 18 years, or during such shorter period as the court may think sufficient; or
- (e) discharge the child upon his entering into his own recognizance, with or without sureties, in such amount as the court thinks fit, that he will keep the peace and be of good behaviour for a term not exceeding one year; or
- (f) impose on the child a fine not exceeding five hundred dollars:

Provided that no order for security shall be made against a parent under this section unless such parent has been

summoned to attend before the court and has had an opportunity of being heard.

Provided also that, in the case of a child committed to the care of the Department for treatment, discipline and training, the Department, with the approval of the Minister, may release the child on parole under the supervision of a probation officer, or other officer of the Department.

In Williams, King and Ramsey the question arose as to the circumstances in which a Children's Court should exercise its discretion to commit a child for sentence to the appropriate higher court. The three appellants, aged 16, 17 and 17 years respectively, had been convicted by a Children's Court of attempted rape. The Magistrate had discharged each appellant on his own recognizance in the sum of \$500, with two sureties, to keep the peace and be of good behaviour for one year. The Attorney-General appealed by way of order to review. The victim, who was under 16 years, had been assaulted in succession by six young men and had been struck in the face by one of her attackers. In these circumstances the Court of Criminal Appeal held that the powers of the Children's Court to impose appropriate sentences were so plainly inadequate that the Magistrate should have committed the appellants to a higher court for sentence. Although the Court of Criminal Appeal conceded that the Children's Court may have failed to exercise its discretion to commit the appellants to a higher court for sentence because of a fear that such action would be interpreted as an indication that heavy prison sentences were appropriate, it was observed that the only correct inference from such committal would have been that the appropriate order or penalty was within the ambit of the power possessed by the superior court.

101. In Victoria, pursuant to the Children's Court Act 1973, a child charged with rape or attempted rape comes within the jurisdiction of the Children's Court which is empowered to hear and summarily determine the charge. If, before any evidence is given in support of the charge, the parent of the child or the child himself objects to the charge being dealt with summarily by the Children's Court, that court is required to hear and inquire into the charge as if it has no jurisdiction finally to determine the charge and may commit the child for trial or discharge him. Similarly, if the Children's Court considers for any special reason that a particular case is unsuitable for summary determination, it may commit the child for trial in the appropriate higher court.

Where a child has been charged before a Children's Court with an indictable offence which that court has heard

and determined in accordance with the Children's Court Act 1973, and the charge has been proved to the satisfaction of the court, the court may -

- (a) without convicting him, dismiss the information; or
- (b) without convicting him, adjourn the proceedings for a specified period not exceeding two years and not extending beyond his 18th birthday on condition that he will during that period be of good behaviour and comply with such other conditions, if any, as the court thinks proper to impose; or
- (c) without convicting him, release him on probation for a specified term not exceeding three years and not extending beyond his 18th birthday; or
- (d) whether convicting him or not order him to pay a penalty not exceeding \$100; or
- (e) whether convicting him or not, discharge him conditionally on his entering into a recognizance in a nominal sum, whether with or without a surety or sureties, to be of good behaviour and to observe such other conditions, if any, as the court thinks proper to impose and to appear for punishment, if called upon, within a specified period not exceeding two years and before his 18th birthday; or
- (f) upon convicting him for an offence for which apart from this section a sentence of imprisonment may be imposed otherwise than in default of payment of a fine -
 - (i) if he is under the age of 15 years at the date of conviction - admit to the care of the Department; or
 - (ii) if he is of or over the age of 15 years at the date of conviction - sentence him to be detained in a youth training centre for a specified period not exceeding two years, or if convicted by a Children's Court on any occasion of two or more such offences without affecting the jurisdiction of the court to sentence him to a separate period of detention for each such offence, order in respect of all such offences, or in respect of any two or more of them, that the child be detained in a youth training centre for a period to be known as an 'aggregate period' which shall be specified but shall not exceed three years;
- (g) where the court is satisfied by the evidence before it that the child answers to any of the descriptions

set out in section 31 of the Social Welfare Act 1970, without convicting him, order that he be admitted to the care of the Department as a child or young person in need of care and protection in all respects as if he were brought before the court under section 32 of that Act or may make a supervision order in respect of the child such order to remain in force for a specified period not exceeding three years and not extending beyond his 18th birthday.

A Children's Court is empowered to sentence a child to a separate period of detention for separate offences, but in no case is the aggregate of the periods of detention to be served cumulatively to exceed three years. It is further provided that where the court deals with a child in any manner provided in section 26(1), (supra), it may in addition order the child to pay such damages, compensation and costs, or any one or more of them, as the court thinks reasonable.

102. The position in Tasmania is governed by the Child Welfare Act 1960-1972. Pursuant to this Act where a child who has attained the age of 14 years is charged before a Children's Court with attempted rape, that court shall hear and determine the charge as if it were a charge for an offence punishable on summary conviction, provided that the child or his parent or guardian does not object to this course of action. Where a Children's Court hears and determines a charge of attempted rape brought against a child who has attained the age of 14 years, and such child is found guilty, the court may, without prejudice to the exercise of any other powers it may have, order the child to be imprisoned or impose on him a fine not exceeding one hundred dollars.

It should be noted that certain restrictions on the punishment of children affect both the provisions discussed above and those provisions which relate to children convicted of rape. A Children's Court cannot order a child who has not attained the age of 16 years to be imprisoned for any offence, or to be committed to prison in default of payment of a fine, damages or costs. In the case of a child who has attained the age of 16 years, a Children's Court cannot, in sentencing such a child, impose a term of imprisonment that exceeds, or any terms of imprisonment that in the aggregate exceed, a period of two years. Where a child is convicted on indictment, the court may, in addition to or in lieu of exercising any other powers exercisable by it -

- (a) make a supervision order in respect of the child;
or

(b) make an order declaring the child to be a ward of the State,

and, for the purposes of the Tasmanian Criminal Code, the making of any such order shall be deemed to be a sentence.