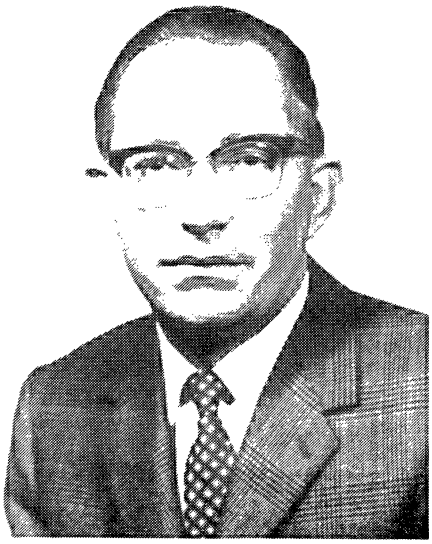

SENTENCING FOR MAJOR MARIJUANA OFFENCES

By Fiori Rinaldi

If 1970 is accepted as the year when concern over narcotic drugs first surfaced in Australia then one of the features of the legislation of that time was that a uniform penalty (typically ten years' imprisonment) was available for offences concerned with trafficking irrespective of the drug involved. Much can be said in favour of having available very few legislative penalty categories and allowing the judiciary to develop sentencing patterns for gradations of crimes. This "modern" method of minimum legislative involvement in sentencing finds expression in the United Kingdom in legislation on theft (1968)[2] and criminal damage (1971); an older (1924) and more striking example exists in Tasmania where s. 389(3) provides a uniform maximum sentence of twenty-one years' imprisonment for virtually every offence under the Criminal Code. When first confronted with sentencing drug offenders Courts often claimed to be embarrassed by the single maximum penalty available in respect of all drug offences and expressed doubts as to whether that maximum was to be reserved for the worst case involving the worst drug or whether all drugs caught by the legislation were to be treated equally so that a very bad case involving cannabis[3] should qualify for the same sentence as a very bad case involving heroin. To meet this problem the various Australian legislatures amended their drug laws to make it clear that whereas imprisonment for ten years might (typically) be imposed for trafficking in cannabis much higher penalties (typically twenty-five years) should be available for offences relating to cannabis derivatives[4] and hard drugs.

Except perhaps in New South Wales, sentences imposed for offences involving cannabis derivatives do not appear to be any higher today than when the maximum penalty for such offences was only ten years, suggesting that courts are determined to reserve long prison sentences for involvement with hard drugs. This factor might in part explain the lack of public outcry when Victoria's Premier announced during October 1980[5] that his Government was preparing legislation that would have the effect of classifying cannabis derivatives with cannabis[6] for the purposes of penalty and that as a consequence the maximum penalty for crimes involving these derivatives would be reduced to ten years' imprisonment.

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The fact that legislatures have made it clear that they consider imprisonment for ten years to be appropriate for offences associated with dealing in cannabis simpliciter does not mean that Courts have necessarily taken that legislation literally. Whereas courts in New South Wales and Western Australia (and sometimes also Queensland) appeal almost as a matter of course to the relevant legislation to justify high prison sentences even when a moderate quantity of cannabis is involved, courts in South Australia and the Australian Capital Territory rarely impose a prison sentence for trading in cannabis and the courts of Victoria and Tasmania do not impose very severe penalties.

Courts in most Australian jurisdictions have said that drug trafficking is a major evil, and courts of some jurisdictions have added what many see as a naive remark that trafficking can be stamped out by heavy deterrent sentences. As far as cannabis itself is concerned courts in South Australia have refused to acknowledge that its use is particularly damaging, but courts in New South Wales take a different attitude even though admitting that "evidence that a given narcotic drug is extremely destructive is a matter which would influence the penalty for illicit dealing"[7]. Without signs of embarrassment courts in New South Wales often tell offenders convicted of cannabis offences that they deserve very severe prison sentences for "trading in death", citing in support decisions of the Court of Criminal Appeal which in fact (and perhaps unknown to the sentencing judge) concerned not cannabis offences but offences involving heroin[8] and hallicigents[9]. At times the Court of Criminal Appeal itself has citied these earlier "hard drug" cases to justify a heavy-handed "deterrent" approach for sentencing marijuana offenders[10].

The highest penalties for straight-out marijuana offences are attracted for large-scale importation and cultivation. For these offences the maximum penalty of ten years has been used against offenders in New South Wales, but no penalty in excess of seven years appears to have been imposed in other jurisdictions. Again, in some States a sentence of three years' imprisonment is not unusual for trafficking in a modest quantity of cannabis (400 grammes or more) but a penalty of that magnitude is rarely chosen in other States for other than the worst cases of trafficking in marijuana[11]. In view of the essentially homogenous living conditions and moral aspirations which characterise the people of Australia visitors to this country are always astounded when told that although almost identical

drug legislation operates throughout the country that legislation is applied in radically different ways by State courts. The purpose of this paper is to draw attention to those differences since these are not widely known even to groups that might be expected above others to know how our drug laws are being administered: lawyers, judges and politicans. The extent of this ignorance seems to be reflected in the fact that the numerous Law Reform Commission reports produced in Australia in recent years each failed to highlight this most fundamental of points. That most of the cases which have challenged the severity of sentence (and which are mentioned in this paper) involve penalties imposed in New South Wales, Western Australia and Queensland is clear testimony that judges (and appeal courts) in those three States adopt a much more punitive approach towards marijuana offenders than elsewhere in Australia.

(a) Importation of cannabis

Given Australia's large and virtually unpatrolled coastline, it is probably no more a risky undertaking to smuggle boatloads of cannabis than to use clandestine flights for smuggling hashish or hard drugs.[12] Sometimes, however, mechanical breakdowns or freak occurrences lead to the chance discovery of a shipload of some tons of imported cannabis either in leaf form or as Buddha sticks. Three examples are offered to illustrate that the importation of maijuana is almost certainly taking place on a rather large scale.

On 9th June, 1978 the *Anoa*, a forty-five foot motor sailer unloaded 2.73 tonnes of Buddha sticks at a wharf near Port Macquarie in Northern New South Wales. That boat had left Cairns some weeks earlier and had collected the Buddha sticks from a wreck on Polkinghorne Reef at the eastern end of the New Guinea Archipelago. Evidence showed that the Buddha sticks were part of a load of some five tonnes which had been purchased in Thailand for smuggling into Australia on board a vessel called the *Choryo Maru* but that that vessel had been forced by engine trouble to off-load its entire cargo, choosing a wrecked Japanese ship on Polinghorne Reef as a temporary storage depot. Of the fourteen persons charged with conspiracy to import cannabis in contravention of the Customs Act s.233B(1)(b), some pleaded guilty, others were convicted after trial and some were acquitted. The then maximum penalty of ten years' imprisonment was imposed upon five of the offenders. Some of these subsequently appealed and in two instances the Court of Criminal Appeal, New South Wales reduced the sentences to imprisonment for eight years with minimum terms of four years—*Lawrence & Ors* (17th April 1980). Moffitt P. remarked during the course of his judgment:

"There is no rule that the maximum penalty is to be reserved for the most devilish instance of crime that judicial imagination can conceive, so that rarely, if ever, should the maximum be imposed. The primary task of the trial judge is to impose a sentence appropriate to the criminality of the prisoner's conduct, paying due regard to subjective considerations. If the criminality is so great that the maximum is warranted, it does not become a wrong sentence because differences can be pointed to by making a comparison with another prisoner whose crime also warranted the maximum sentence being imposed. In terms the legislation does no more than prohibit a longer sentence than that stated being imposed. A judge might well consider that a crime such as the present, because of the enormous quantity of drugs involved, the lengthy and sustained planning and implementation and the vast financial rewards involed and the enormous detriment to the whole community was worse than other crimes which have attracted greater penalties."

A similar approach to the justification of maximum penalties was also adopted in their joint judgment by Nagle C.J. at C.L. and Yeldham J.:

"We are of opinion that the trial judge, who carefully weighted the relative involvement of the various conspirators . . . was justified in sentencing De Graaff to the maximum term of imprisonment notwithstanding that his involvement, serious though it was, was less than that of Riley and perhaps of one or two of the other conspirators. Plainly the conspiracy involving as it did the importation into this country of such a large quantity of cannabis was one of the worst types imaginable and the maximum sentence imposed upon Riley, one of the principal conspirators, was eminently justified. But we do not think that it necessarily follows that another conspirator, whose involvement was somewhat less serious, should for that reason receive less than the maximum sentence. The part played by De Graaff, Cann and others may properly be described as conduct deserving of such a sentence".

To justify high sentences for the large-scale importation of drugs, Nagle C.J. at C.L. and Yeldham J. cited with approval comments on the deterrent effect of such sentences which had been made by the Full Court of the Federal Court when increasing to nine years a sentence for importing Buddha sticks in *Tait & Bartley* (1970) 24 ALR 473, at p. 485:

"On the other hand, the deterrent aspect of punishment is of primary importance in cases of this kind. The sentence should demonstrate to others tempted to engage in lawlessness on a vast scale that the punishment to be imposed will be calculated to protect society from the deliberate attack made upon it. When an organized, costly and complex offence is contemplated, the risk of apprehension and the severity of punishment is evaluated; and thus there can be no other class of case in which the deterrent effect of punishment can more confidently be assumed to operate. Those who deliberately choose to run the risk of punishment in order to acquire a profit from the venture cannot point to mitigating circumstances of the sort which stand the chance offender in good stead. The extent to which a sentence recedes from the maximum in cases of this kind is limited by the necessity to impose sentences of unequivocal severity as the most efficient means available to the courts to enforce the relevant prohibition."

Although not on the same scale as the *Anoa* venture, another significant smuggling case involved the power yatch *Charma* which late in 1975 brought nearly 100,000 Buddha sticks from Thailand. The *Charma*, like the *Anoa*, fell victim to engine trouble. This required connections in Australia to hire another vessel at the port of Derby in Western Australia to locate the *Charma* which was then sunk at sea after transferring the drugs to the hired vessel which took them to Point Torment some miles north of Derby. Of the five offenders involved the two ringleaders were, after sentence reductions that were made on appeal, awarded sentences of five and a half years imprisonment, and the remainder received lesser sentences. The Court of Criminal Appeal, Western Australia noted that attitudes towards cannabis had changed in recent years, and observed:

"All counsel for the applicants laid stress on current opinion, both of scientists and people generally, regarding the use and abuse of cannabis. It is not a new drug, but one with an extensive history. There is pressure in some places for its use to be legalised. According to technical bulletins, the earlier fears that its use might lead to "escalation" to heroin and "hard" drugs has not been substantiated. It seems accepted that cannabis, unlike alcohol and certain other drugs such as heroin, is not a drug of addiction as it does not produce physical dependence. The extent of the harm to human beings which results from its use, whether sporadic or regular, may still be uncertain. But it remains a prohibited narcotic drug proscribed under heavy penalties and it is the duty of all courts to uphold the enforce the will of Parliament as expressed in its statutes."[13]

A third cannabis importation case found its way to the High Court on appeal from a decision of the Supreme Court of the Northern Territory. In *Bull*[14] a quantity of marijuana was loaded on the vessel *Mariana* at Bali in Indonesia, but this was dumped overboard approaching Darwin on 1st March 1973 when it became clear that the vessel was under the surveillance of an Australian Army helicopter which was co-operating with Customs authorities. Several suitcases contained 310 kg of cannabis, and proved to have been part of the cargo of the *Mariana,* were subsequently recovered fromthe sea by Customs officers. The offence of importing had not been completed but those aboard the *Mariana* were convicted of possessing prohibited imports contrary to Customs Act s.233B(1)(a), an offence carrying the same maximum penalty as importing cannabis. A majority of the High Court reduced by two years the sentence of five years and two months which had been imposed upon one of the offenders who had not been shown to their satisfaction to have been equally involved with the other two who (making allowance for pre-trial custody) had been given identical sentences by the trial judge.

It is not clear whether the major proportion of Buddha sticks sold in Australia is imported by sea, but it is a fact that importers regularly engage couriers to bring Buddha sticks by air generally in small quantities worth $50,000 to $100,000 but sometimes in much larger quantities. A few examples will illustrate this method of importation.

In *Garside* (Court of Criminal Appeal, Sydney 17th May, 1979) the female appellant brought as part of her luggage on a flight which arrived in Sydney from South East Asia on 3rd November, 1977 some 66,000 Buddha sticks—described in court proceedings as Thai sticks and weighing more than half a tonne. Although convicted of having possession of prohibited imports *without reasonable excuse* the appellant (who was not believed by the jury) claimed that she was ignorant of the presence of any drugs in a number of bags which she said she had arranged to take through Customs for a friend. That friend who was described as an unemployed mother of three young children and who was in receipt of social service benefits was said by the appellant to have engaged her to act as nanny to her three children during a holiday in Asia in exchange for a free trip plus a wage of fifty dollars per week. The court accepted that the friend was the instigator of the importation and this is indicated by the penalty imposed upon her—imprisonment for four years with a minimum term of twenty-one months upheld against the appellant. The Chief Justice (with whose remarks the other members of the Court agreed) commented:

"Those who bring drugs into this country in quantities—in any quantities at all—must expect to face a stern attitude on the part of the criminal courts. A quantity such as this being brought in for distribution into the country, with its potential for destruction of the health—indeed, even lives—of users is such as to demand a heavy sentence in the pursuit of the suppression of this evil and abhorrent traffic".

Some 6,400 Buddha sticks (weighing slightly more than 80 kilos) were involved in *Olsen* (Court of Criminal Appeal, Melbourne 29th August, 1978). These had been sent by air from Bangkok concealed in the frames of paintings. The trial judge released the respondent on a bond but this was altered to imprisonment for two years with a minimum term of six months following a Crown appeal against inadequacy of sentence. But for the fact that the case had taken almost two years to finalise almost certainly a higher penalty would have been substituted. The respondent had been convicted of a charge laid under Customs Act s.233B(1)(c) of being in possession without reasonable cause of a prohibited import—cannabis. The version of his story which was most in his favour was that for a reward of $500 he had undertaken to collect the paintings from the Custom's bond store and that he had been told that they contained 500 Buddha sticks. Since he did not give evidence it was difficult for the trial judge to form any firm view of the appellant's involvement but the trial judge might have been influenced by an opinion volunteered by a psychologist that "the respondent would not involve himself in a project of a larger size". In the absence of evidence by the respondent, that opinion could, of course, have no probative value whatever regarding what particulars the respondent in fact knew about the "art consignment" which he collected.

The Court of Criminal Appeal, Sydney affirmed a sentence of imprisonment for seven and a half years with parole eligibility after three and a half years in *Broadhurst* (16th November, 1978) which involved importation of what was described as "a very substantial quantity of cannabis in the form of Buddha sticks". It seems that the appellant was merely a courier who had been given in Bangkok some suitcases (containing Buddha sticks) to take to Fiji on a flight that went through Sydney. It was apparently the intention of the principals that when the suitcases reached Fiji another courier would be engaged to take them to Sydney. The appellant was apprehended in the transit lounge of Sydney airport, and claimed to be ignorant of the content of the suitcases which he was taking to Fiji in exchange for a fee of $2,000. The Court noted that the penalty for importing cannabis was ten years' imprisonment and remarked:

"It has now become an established pattern of sentencing to pass heavy sentences upon couriers notwithstanding clear earlier records".[15]

In *Leith* (1978) 2 Crim.L.J. 29 the appellant (whose co-accused had been acquitted) was sentenced to seven years imprisonment for conspiracy to import cannabis and also for being knowingly concerned in the importation of cannabis. With the active help of a senior narcotics agent the appellant had acquired immunity so that he was able for some three years to "walk-through" customs' check points at Melbourne Airport without being searched for drugs. The conspiracy charge largely covered conduct associated with various "walk-through" incidents, but the second count of being knowingly concerned in the importation of cannabis involved importing some 58 kg. of Buddha sticks concealed in an old Ford Galaxie car which had been purchased in Bangkok as part of the importation scheme. The sentence of seven years was seen by the Court of Criminal Appeal, Melbourne as not less than was deserved—the co-operative senior narcotics agent was sentenced to a total of twelve years' imprisonment, but his criminality had extended also to stealing a sizeable quantity of hashish from a safe of the Narcotics Bureau.[16]

Le Cerf (1975) 8 ALR 349 is a rare South Australian case involving sentencing for possessing prohibited imports—2400 Buddha sticks weighing 45.4 kg. The offender was seen to occupy a position which was not "in the upper echelons" in an organization concerned to import and distribute drugs, but he was told by Wells J. that "a man who participates in such an organization at any level . . . must expect, and will receive, a heavy penalty" and he then imposed what he described as a "substantial" term of imprisonment—two and a half years with parole eligibility after twelve months.[17] Even though penalties for cannabis offences are much lower in South Australia than in most other parts of Australia an early drug decision of the Full Court of that State urged trial judges to try and help their brother judges in other States to develop uniform deterrent policies for sentencing offenders convicted for Federal drug offences. More specifically the Court said in *Jackson and Bennett* (1972) 4 S.A.S.R. 81, at p. 91:

"When exercising Federal jurisdiction [a judge] will remember that Australia is one country and that policies laid down elsewhere in Australia by superior courts, although not technically binding on him, ought to receive a very great attention by him, as it is desirable that there should be similarity of

approach by sentencing authorities with respect to Federal offences"[18]

In *Jackson and Bennett* the first applicant had received a sentence of three years' imprisonment with parole eligibility after twelve months for importing 45.2 kg. of cannabis, and his co-offender a sentence of nine months with parole eligibility after three months for being knowingly concerned in the importation of that particular parcel of cannabis. The drug had been sent by air by the first applicant from Bali to a fictitious address where it was to be collected by the second applicant who was to receive $100 for his part in the scheme.

The trial judge in *Edwards* (Court of Criminal Appeal, Perth 1st October, 1976) believed that the twenty-one year old appellant had found (a few days before his arrest) some 3600 Buddha sticks in a package on a raft which had been washed up on a beach. Instead of reporting his find to the police the applicant was unable to resist an urge to attempt to sell the drugs which were worth between $40,000 and $50,000. The Court of Criminal Appeal refused to interfere with a sentence of four years imprisonment with parole eligibility after fifteen months, the Chief Justice (with whom Burt J. agreed) asserting that "the relatively short minimum term reflects the acceptance of the asserted fact that [the appellant] found the drug by chance".[19]

The twenty-three-year old female courier in *Farrell* (Court of Criminal Appeal, Sydney 9th February, 1978) brought some 10 kg. of Buddha sticks (presumably about 600) in her luggage on a flight from Bangkok to Sydney, and for this she received a sentence of five years' imprisonment with parole eligibility after two years. She claimed to have been paid $500 in advance for acting as a courier, and apparently there was a suggestion that she would receive a further sum "in the order of a few thousand dollars" after the successful completion of her venture. When sentencing, the trial judge had said, after noting her previously blameless character and her "adherence both to the morality as well as the principles in which she had been instructed by her church":

"Those who play the vital role of couriers of narcotic goods have been warned time and again that they face heavy penalties. The drug traffic cannot continue without them and they must be punished in such a fashion as to deter both them and others from engaging in the traffic."[20]

With a street value in excess of ten dollars and a purchase cost in Bangkok of less than a dollar the prospect of high profits acts as temptation for small-time dealers to smuggle relatively small quantities of Buddha sticks. When these are not dealt with in courts of summary jurisdiction they can expect penalties approaching those awarded to couriers who bring in reasonably large quantities of Buddha sticks. As an illustration we might consider *Marshall* (Court of Criminal Appeal, Sydney 20th December 1974) where the youthful appellant had smuggled 267 Buddha sticks by taping them to his body. The appellant was reminded that the seriousness of being a drug pusher was forcefully put by the Supreme Court of Queensland in *Howarth* [1973] Qd R 431, (1973) 21 FLR 400, at 405 (a case involving importation of almost five kilos of cannabis) and the Court refused to reduce a sentence of imprisonment of four years with parole eligibility after twelve months.

(b) Cultivation of Cannabis

Perhaps the easiest method for becoming a millionaire in Australia is to organise a wholesale outlet for marijuana and to arrange for a grower to cultivate a crop of about half a hectare to satisfy that wholesale outlet. The country being so vast, and so many areas being all but inaccessible, the chance that the grower might be detected must be slight.

The standard Australian maximum penalty for cultivation of cannabis is ten years' imprisonment and/or a fine of $100,000. Life imprisonment or a fine of $100,000 is available in Queensland[21] but penalties exceeding five years' imprisonment have not been imposed in that State.

On only a single occasion has a penalty of ten years' imprisonment been imposed in Australia for cultivating cannabis —the crop in that case consisting of some 200,000 plants.[22] Typically "cultivators" who are paid wages and to whom a reasonable bounty after harvest is promised by the "owner" are prosecuted, and the "owner" escapes detection. Marijuana plantations are apparently sometimes purchased by undisclosed principals in the names of cultivators.[23] Even though conveyance and settlement might have been arranged through a reputable firm of solicitors the use of fictitious names by purchasers of a projected marijuana plantation might make it impossible to determine the identity of the proprietor.[24]

Provided that a thousand or more plants are being cultivated (street value can be as high as $1000 per plant) a prison sentence of from three to seven years can be expected by a cultivator. Offenders with small plantings of less than a hundred plants might have their cases tried in a court of petty sessions. The jurisdiction of those courts varies from State to State but the highest maximum that can be awarded by any such court in Australia is two years imprisonment for a single offence.

The acknowledged virtue of permitting appellate review of sentences is the avoidance of disparity, with equally placed offenders who commit the same offence expecting very similar penalties. Another virtue is that a tribunal of judges drawn from the highest court of the State is able to examine policy matters on a regular basis and the vary those sentencing policies which cannot be seen to be justified. The Court of Criminal Appeal of New South Wales certainly strives very hard to avoid sentencing disparity, but it appears to have made little or no effort in recent years to re-examine the validity of its sentencing policies for sentencing marijuana cultivators and traffickers which were developed almost ten years ago. This failure to re-examine penalties means that much higher penalties are awarded in that State than elsewhere in Australia. An almost slavish adherence by the Court of Criminal Appeal to the "tariff" which was seen to have developed in previous cases is instanced by the Court's recent decision in *Oliver* [1980] 4 Crim L.J. 238. In that case the trial judge had sentenced a "cultivator" to imprisonment for three years with a non-parole period of twelve months. The Crown appealed against the "inadequacy" of that sentence, stressing the large-scale nature of the cultivation—the police raid had seized from the "cultivator" almost one tonne of harvested cannabis and it was estimated that the farm of almost one hectare contained at the time nearly twenty tonnes of flourishing plants, with a market value of several million dollars. After the Court had examined several of its earlier decisions to satisfy itself of the established tariff this appeal was upheld and the penalty was increased to seven years' imprisonment with a non-parole period of three years. The Court commented as follows on its procedure of looking to previous decisions:

"The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing. Full weight is to be given to the collective wisdom of other sentencing judges in interpreting and carrying out the policy of the legislature. The collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand. This is not to suggest that sentences are to be arbitrarily dictated by mathematical application of statistics. There is an enormous difference between recognising and giving weight to the general pattern as a manifestation of the collective wisdom of sentencing judges on the one hand and, on the other hand, forcing sentencing into a straight jacket of computerisation".

The Court cannot but be commended for its desire to give sentences the appearance of rationality but one must harbour

strong suspicions that current penalties for marijuana offences in New South Wales are not so much to be attributed to any "collective wisdom" of the judges of that State but are rather the result of judges being too ready to apply statistics rather than subjecting to critical examination the inordinately high tariffs which have developed. One would have thought that even a superficial examination of those cases in which the current sentencing policy was developed would show above all else that they were cases where judges wrongly transported to the sentencing of marijuana offenders (without argument) reasons which had been developed in other cases to justify high sentences for offences involving trafficking in hard drugs. If the reasons which have given New South Wales its high marijuana sentences are unsound then cases where those reasons have been applied ought not to be treated as illustrating any "collective wisdom" which ought to be respected by today's judges.

The court's comment in *Oliver* that marijuana cultivators had in the past received relatively severe sentences was seen to be more than established by three earlier cases which the Court summarised as follows:

"In *Constantinou* (19th December, 1975) this Court dismissed an appeal against a sentence of 6 years, with a non-parole period of 2 years and 2 months, imposed by the District Court upon a 49 year-old farmer who was found to be growing approximately 2000 Indian hemp plants in addition to having a quantity of harvested Indian hemp in his possession preparatory to transmission to the market. The appellant was of good character with no prior convictions. There were strong subjective circumstances in his favour. This Court agreed with the approach of the District Court that the crime was one of great seriousness.

In *Sergi* (13th February, 1976) this Court dismissed an appeal against a sentence of 6 years, with a non-parole period of 3 years, for selling Indian hemp. Once again the appellant [Aged 58] was of good character, with no prior convictions and strong subjective circumstances. He had planted about 4000 Indian hemp plants on his farm and concealed the Indian hemp in a crop of corn. This Court agreed with the view of the sentencing Judge that—

'. . . the drug subculture is largely the responsibility of the wholesale grower and supplier.

The planting of a large quantity of marijuana for great and quick monetary return is both deliberate and mercenary, a decision taken after weighing the benefits against the consequences of detection and does not carry with it any measure of extenuation which a crime of passion sometimes attracts.

In my view the social consequences of the accused's actions in this case so outweigh the considerations personal to the offender as to require a severe deterrent penalty.'

In *Cascio* (3rd March, 1978), the Crown appealed against the inadequacy of a sentence of 5½ years, with a 1½ year non-parole period, for selling Indian hemp. In that case, again, the respondent was of good character with no prior convictions and strong subjective circumstances in his favour. He had cultivated on his farm about half an acre of Indian hemp within a larger paddock of corn and another area of 2½ acres in an irrigation paddock near a river. A further quantity of harvested and dried Indian hemp was found on the farm. The respondent had been sending Indian hemp to Sydney and the police found some $19,500 in cash which the respondent had received. The trial Judge, both in his reasons and in his report to the Court of Criminal Appeal, described the case as coming 'close to one which would require the maximum sentence'. His Honour took into account, however, matters personal to the accused and finally selected the sentence and non-parole period of 3½ years should be specified in place of the 18 months which was described as falling 'very significantly short' of what was appropriate for an offence that the Judge regarded as involving such serious elements."

Significantly milder is the approach adopted in Victoria. The Chief Justice of that State does not encourage judges to make public the reasons for their sentencing decisions, and when presiding over the Court of Criminal Appeal he is typically cautious not to suggest the reasons which lead him to interfere with the sentence of a trial judge. Victoria's courts have had to bear strong criticism for this anti-rational approach to sentencing[25] but criticism has not brought any reaction from the Court of Criminal Appeal. During August 1979 the Chief Justice (with those judgment the other members of the Court of Criminal Appeal agreed) reduced four sentences which had been imposed by trial judges on cultivators of marijuana.[26] The bare facts relating to the plantations whose cultivators were appealing against excessive sentences were briefly summarised as follows by the Chief Justice:

"In the case of Piscitelli it was said that there were some 9000 plants on his land; in the case of De Maria there were just under 4000 plants; in the case of Tabeg somewhere between 5000 and 7000 plants, and in the case of Karayilan about 17,000 plants."

The Chief Justice considered that higher prison sentences ought to be reduced to five years with a minimum term of three years in each case except in the case of De Maria where a penalty of four years' imprisonment with a minimum term of two years was substituted. No reason was offered for interfering with the sentences chosen by the trial judges which had ranged from five years to seven years imprisonment—presumably the trial judges also had not attempted to justify the sentences which they had selected.

In *Macri & Ors* [1980] 4 Crim L.J. 47 three co-offenders in Western Australia appealed against sentences imposed after conviction of cultivating some ten thousand marijuana plants. The Court of Criminal Appeal substituted sentences of imprisonment for six years with a minimum term of three and a half years for two offenders and five years with a minimum term of two years and two months for the third offender who had "already spent a considerable time in custody following his arrest". In that case the plants were said to be worth more than three million dollars and the story submitted by Counsel on behalf of one of the offenders was disbelieved by the trial judge as one of the most incredible he had heard for some time—it had been submitted that the secretive cultivator believed that the plants were being grown as pig food.

As severe as sentences imposed in New South Wales was the sentence of seven years imprisonment endorsed by the Court of Criminal Appeal, Brisbane in *Schelack* (No. 88 of 1977), a cultivation case where almost 500 kg. of cannabis was seized. More recently imprisonment for five years was attracted in Queensland in a much more severe cultivation case.

Only one appeal is known to the author involving a person who had been severely sentenced for raising a medium-sized marijuana crop. In *Henley* (Court of Criminal Appeal, Sydney 23rd February, 1979) a sentence of four and a half years with a non-parole period of two years was imposed upon the applicant who had been caught red-handed with some 450 seedlings which he was transporting at the time from his nursery for planting out. In addition to the cannabis seedlings he was also in possession of 140 Buddha sticks which had been acquired "for an investment". He was aged 40 and had spent much of the previous ten years in prison for serious offences. To appreciate the different treatment given to marijuana offenders in various States perhaps *Henley* should be contrasted with *Phillips* (1971) 3 SASR 85 where the offender was given a suspended sentence of two years and a fine of $250 for cultivating more than a hundred cannabis plants in a glasshouse rented for that purpose. It is unlikely that the marijuana pedlar in *D'Agostino v. French* (1978) 2 Crim L.J. 98 had not cultivated

the 100 kg. of cannabis discovered in his vehicle; a magistrate in South Australia refused in that case to grant a suspended sentence but imposed instead imprisonment for four months, a sentence confirmed on appeal.[26A]

Small "backyard cultivation" of cannabis for the offender's own use, or for supplying to friends is more often than not dealt with in courts of summary jurisdiction and nominal penalties are typically imposed. A standard case is provided by *Fursman v. Jeffery* (1970) 64 QJPR 39 where even though the amount of cannabis grown was described as "substantial" a prison sentence of three months was reduced to a fine of $300 largely because the court was convinced that the appellant intended to supply the drug only to friends and that he did not expect any monetary gain.[27] Perhaps an anomolous Queensland case is *Pethebridge* (19th November, 1976) where the total harvest of a crop appears to have been about three kilos but where the Court of Criminal Appeal refused to disturb a prison sentence of two and a half years; the anomaly might be thought to disappear when it is considered that the appellant had grown the marijuana for sale and was charged with the offence of "possession for sale", an offence where severe prison sentences are not uncommon if the offender possesses more than about 400 grammes.

(c) Trafficking in cannabis

Penalties imposed in different Australian jurisdictions show greater variation for trafficking offences than for other offences involving cannabis or its derivatives. For some time the lowest penalties have been those in the Australian Capital Territory and a very recent decision in the Supreme Court of that Territory might be interpreted to mean that only large dealers with complex sale outlets can expect to receive a term of imprisonment. In *Foster* (21st October 1980) the amount of cannabis seized by the police was some 20 kg. and it was admitted that part of this was to be traded "for goods rather than money". Without imposing any penalty Kelly J. released the offender to be of good behaviour for two years, the bond conditioned by payment of $500 to the Commonwealth at the rate of $5 per week. Following this decision it is unlikely that magistrates will allow any but the most outrageous cases of cannabis dealing to be tried on indictment, and unlikely also that they will select imprisonment as a proper punishment for cases dealt with summarily—the jurisdiction of magistrates to dispose of cases summarily extends in the Australian Capital Territory to any offence, punishable by imprisonment of not more than ten years which is also the maximum for cannabis offences.

In jurisdictions outside the Australian Captial Territory trafficking in cannabis seems to be handled at a summary level as a matter of course only when less than 200 grammes are involved, other offenders being at risk of attracting penalties in excess of two years' imprisonment. In deciding whether to assume jurisdiction over a case involving trafficking in cannabis, magistrates obtain some help from the following advice given by Lucas J. in *Elphick*:[28]

"[T]he discretion to decide whether a charge under s. 130 of the Health Act is to be tried summarily or on indictment is conferred solely upon the magistrate. It is quite evident, from the nature of the penalties provided, that the legislature regards offences of this type as serious . . . In every case it falls to the magistrate to decide whether a charge is to be dealt with summarily or not.

I am of the opinion that in matters of this serious nature a magistrate ought to hear sworn evidence before he comes to a decision. A statement made by a prosecutor, which may be abbreviated, is not in my opinion a sufficient foundation for the making of such a decision. The procedure which should be followed is that in the first instance the hearing of a charge . . . should be treated as if it were a committal proceeding in the case of an indictable offence. No plea should be taken at the outset. At the end of the evidence for the prosecution the magistrate should decide whether a prima facie case has been established: if it has not, the accused person should be discharged; if it has, the magistrate should then direct his mind to the question whether the accused should be prosecuted on indictment or dealt with summarily . . .

This may seem to be a cumbrous procedure, and perhaps it will sometimes involve a waste of time. However, in the absence of any special procedure being authorized by the legislature, it seems to me that it is the only way in which the provisions . . . can properly be carried into effect."

A feature which at one time divided the judiciary on whether small time dealers in cannabis ought to be imprisoned was doubt about the harmfulness of cannabis. In South Australia, where penalties have traditionally been mild and where imprisonment is unusual, sentencers were told in *Beresford*[29] that they ought not to sentence a cannabis offender without first calling evidence on the nature and effect of cannabis. This curious requirement made prosecution for dealing in cannabis unnecessarily cumbersome but it was only dropped in 1976 by which time the Chief Justice was of the view that all sentencers in South Australia must have become aware that cannabis was generally accepted to be "the least harmful" of the drugs covered by that State's drug legislation.[30] The current position in South Australia is that even a magistrate might impose a prison sentence for dealing in cannabis, but such a sentence has virtually no chance of surviving an appeal against severity if at the time of its imposition the magistrate has not publicly announced that he regards cannabis as the least serious of drugs caught by the Narcotic and Psychotropic Drugs Act and that there are special features which prevent a fine or probation order from being appropriate dispositions.[31]

Judges in New South Wales have tended to voice opinions that the use of cannabis is a pernicious evil but more often than not they have justified very heavy sentences by dwelling not on the harmfulness of cannabis but by drawing attention to the heavy penalties provided by the legislature. A typical example is provided by *Sumegi* (1st June, 1973) where the Court of Criminal Appeal said when confirming a sentence of four and a half years imprisonment for selling cannabis (a total of thirty pounds in possession):

"Once it is accepted that the policy of the legislation is to suppress traffic in cannabis and that criminal elements seek to satisfy a market for it, those who traffic in it contrary to the law are part of the serious web of criminality which pervades the whole "drug scene". The punishment can and must take account of this". (per Kerr C.J., Nagle and O'Brien JJ.)

Views similar to those expressed in *Sumegi* had earlier been stated forcefully in *Peel*,[32] a case involving cannabis resin. In that case the Court of Criminal Appeal of New South Wales told sentencers that their personal view of the harmlessness of marijuana is not a proper ground for overriding Parliament's demand that drug offences be treated as very serious crimes evidenced by the high penalties prescribed. A not dissimilar approach was adopted by the Court of Criminal Appeal of Western Australia in *Forsyth* (10th November, 1977) a case which also involved trafficking in cannabis resin. Burt CJ. noted that Parliament had provided the most severe punishment found anywhere in the law (other than death and life imprisonment) and he commented: "It is . . . not for the judicial arm of government to question that judgement".

The general attitude adopted by the Court of Criminal Appeal of New South Wales in relation to sentencing marijuana pedlars is probably clearer than that for any other crime—a rigid tariff ought to be respected with a prison sentence of three and a half years being regarded as "unduly lenient" even in the presence of "powerful subjective factors". In *Smith & Ors*[33] a Crown appeal in which this sentencing policy was unam-

biguously affirmed, the Court quashed sentences of periodic detention (weekend imprisonment) awarded by the trial judge and substituted prison sentences of three and a half years with non-parole periods of eighteen months. The four respondents (aged between eighteen and twenty) had pleaded guilty to dealing in Indian hemp. Quantities held varied from one and a half kilogrammes to none at all in the case of one respondent who confessed however that he had within a period of six months sold five kilogrammes. Two of the respondents had previously been convicted and fined for possession of Indian hemp; the other two had no previous drug convictions. Without making any distinction for the different drugs involved, the Court drew upon several of its own unreported decisions to emphasise the need for deterrent sentences in drug trafficking cases. A typical extract from several cited by the Court is reproduced:

"It has been said many times in this Court that the drug traffic will not be tolerated and whenever a trafficker in drugs comes before the Court he can expect to be dealt with severely. Broken men and women at the end of the drug chain whose lives so often come before the Court provide ample justification for the Court fixing heavy penalties on an occasion when any criminal is found to have participated in the distribution of drugs."[34]

Large-scale dealers can, of course, expect much higher penalties than were meted out to the offenders in *Smith & Ors* and indeed imprisonment for seven years (with parole eligibility after three years) was endorsed by the Court of Criminal Appeal in *Alexiou* (6th October, 1978) where a wholesale dealer had rented an apartment for use as a warehouse and had stored in it a large quantity of cannabis.[35] However, in view of the "powerful subjective factors" which were exhibited by the respondents, *Smith & Ors* must be treated in New South Wales as laying down the virtual minimum penalty for youthful offenders involved in a modest way in pedling marijuana, and the appraoch adopted in that case has consistently been followed in subsequent decisions.[36] Notwithstanding this there must remain instances where because of the special circumstances a trial judge will hesitate to describe as a drug pedlar an offender clearly involved in only a single transaction, and in those circumstances the Court of Criminal Appeal has not increased sentences which were lower than those substituted in *Smith & Ors*. One such case is *Jones*[37] where the respondent, a non-user of drugs, had pleaded guilty to selling Indian hemp and had been sentenced to twelve months imprisonment with a non-parole period of six months. Although commenting that the trial judge had "taken what was indeed a lenient view" the Court of Criminal Appeal did not disturb what it described as a lenient sentence. The Court did however refer to a schedule of penalties imposed over the previous five years for trafficking in marijuana and commented that this schedule "did little to encourage any anticipation of a softening of the Court's attitude to these crimes".

Jones must be distinguished from situations where a Court of Criminal Appeal has refused to disturb a non-custodial sentence primarily on the basis of fairness as occasionally happens when it is demonstrated that although the sentence was indeed inadequate the respondent has for some months satisfactorily complied with the conditions of the non-custodial order. This approach has been forced upon appeal courts in relation to most of the serious offences in the criminal calendar; with used not only in cases involving marijuana but also in cases involving more harmful drugs such as LSD[38] and even morphine.[39] Yet even in these cases where appeals have been dismissed on a technical ground rather than because of the lack of merit the Court of Criminal Appeal has usually found time to offer a homily advising respondents how lucky they were to receive their inadequate sentences. Thus in *Evans and Geraghty*[40] where two go-betweens attempted to supply cannabis (to an excise officer who had posed as a purchaser) the Court of Criminal Appeal of Queensland reminded the respondents that some four months earlier when the trial judge had granted them probation he had emphasised that any breach of their probation orders would lead to a long gaol sentence. Wanstall J. told the respondents: "It is my view that as a general rule those who take part in the distribution of dangerous drugs should be sentenced to a term of imprisonment even if they are young and even if it is their first offence against the law; but there must be room for consideration of special circumstances". Hoare J. added: "Having regard to the policy of the Legislature as indicated by the relevant legislation, as a generality persons convicted of offences involving the distribution of dangerous drugs should ordinarily be sentenced to a substantial term of imprisonment."

Although they may have been somewhat more lenient at one time, since 1973 Queensland's penalties for peddling marijuana have been almost identical with those of New South Wales. This claim is reinforced if one views the actual period spent in prison as the hard penalty rather than the length of the sentence awarded. Because of differences in the manner in which parole is granted, a Queensland prison sentence of somewhat less than two years normally results in the offender spending as much time in prison as an offender awarded a sentence of three years in New South Wales. Even if the head sentence is taken as the raw measure of a penalty's severity imprisonment for four years was upheld in Queensland in *Sawyers* 19th October, 1979) where a cannabis trader was found in possession of almost two thousand dollars, the proceeds of sales. In the course of determining a series of Crown appeals against sentence the Queensland Court of Criminal Appeal has stressed that severe prison sentences must be the order of the day for peddling marijuana.

In *Neville*[41] the respondent (aged twenty-three) had been convicted of having in his possession for sale 4216 grammes of Indian hemp. The possession was but momentary because of prompt police intervention. He claimed that his profit for acting as go-between in an arranged sale at $320 per pound would be to receive a quarter of a pound of the drug. Influenced by subjective factors—a submission that the respondent had employment waiting for him and that he could live with his parents—the trial judge made a probation order. This was replaced on appeal by imprisonment for eighteen months. That nothing but a prison sentence is generally appropriate for drug trafficking seems to have presented itself as a truism to Douglas J., with whose judgment the other members of the Court agreed. In particular he commented:

"The conviction was in respect of a common offence. It is an offence in respect of which severe punishments are usually given, both from the punitive point of view and from the deterrent point of view. I think it was quite inappropriate to grant the respondent probation, and I think he should have been sent to prison."

In *Alford*[42] the respondent who had prior convictions for drug offences (one of possessing and one of selling) was sentenced in a magistrates court to nine months imprisonment for possessing for sale an unspecified quantity of Indian hemp. Because by the time the appeal was decided the respondent had almost completed serving the sentence imposed by the magistrate [but presumably also because of inhibitions placed upon the appeal court by an unappealed sentence which had been awarded to a co-offender] the Court of Criminal Appeal limited its increase in penalty by substituting a sentence of eighteen months imprisonment. Douglas J. reflected that although the offence had been tried summarily the maximum penalty provided by the legislature on a trial before the Supreme Court was life imprisonment. He observed that a

sentence of only nine months imprisonment was "not in accord with the pattern of sentencing" and added that such a lenient sentence "is not sufficient to punish the respondent nor does it take care of the deterrent aspect".

In *Fordham*[43] the Court of Criminal Appeal substituted a prison sentence of three years. That case differed from usual cases in that the respondent was a man aged forty-three and he had been convicted both in 1974 and in 1975 for possessing dangerous drugs—he had been fined in each case. The circumstances of his present offences were that he engaged a room at a motel in Townsville from which he sold a quantity of cannabis (described as ten deals) for three hundred dollars. The proceeds of sale were in the respondent's possession when he was charged as was also a quantity of cannabis which when added to the quantity sold, weighed 1050 grammes.

Sentencing symmetry in Queensland might well in in a process of disruption, as the result of the intrusion of the decision in *Snell & McGregor*.[44] In that case probation orders were granted by the trial judge to the two respondents (aged nineteen at the time of their offences). They had pleaded guilty to possession of cannabis (45 'deals' with a street value of $1350) and the trial judge had been impressed with their lack of a prior criminal record and their excellent employment records and prospects—both were apprentices. In refusing to disturb the trial judge's probation order the Court seems to have been influenced strongly by what had hitherto been regarded as an irrelevancy—"the possibility of rehabilitation" demonstrated in reports by probation officers which showed that during their three months on probation the respondents were "responding well" to probation. The basis for refusing to intervene was much weaker than that which existed in *Evans and Geraghty* where a probation order was also upheld and where Wanstall J. (as he then was) recognised that "there must be room for consideration of special circumstances" even though insisting that as a general rule imprisonment was the appropriate punishment for marijuana pedlars "even if they are young and even if it is their first offence against the law".

If the Court was anxious in *Snell & McGregor* to radically alter its policy for sentencing marijuana pedlars it is disappointing that a Court of more than three judges was not convened to pass judgment on this very important issue. As things stand *Snell & McGregor* was ignored by a differently constituted Court in *Kemister* (2nd March, 1979). In that case after noting that marijuana trafficking cases had been "comparatively rare" in the Court of Criminal Appeal since penalties were increased late in 1976, the Court stressed that "it seems to be desirable to endeavour as far as possible for this Court to reconcile its sentences". The Court examined two recent cases which had come before it and concluded that a sentence of four years' imprisonment was appropriate for a twenty-eight-year-old who was "virtually a first offender" and who had a satisfactory work record. The quantity of marijuana in his possession was about two kilos.

In *Hay* (17th October, 1977), one of the cases which was used by the Court in *Kemister* as a comparative guide, the appellant had in his possession 432 grammes of marijuana, amounting to '23 deals'. At a subjective level it is impossible to distinguish that appellant from the respondents in *Snell and McGregor*—he was a youth with no previous convictions and was an active member of a surf lifesaving club. The Court, again constituted by three different judges drew attention to the severe penalties substituted by the legislature during 1976 and after distinguishing the factual situation from that exhibited in the only other case which had to that date come before the Court since penalties were increased, reduced the trial judge's sentence from five years' to three years' imprisonment. If six Queensland judges are of the view that they are required to impose severe penalties for trafficking in significant quantities of marijuana irrespective of subjective factors peculiar to the offender and three judges see this as an offence which can sometimes be dealt with by an individualised sentence then confusion must prevail and justice cannot be seen to be done.

The approach adopted by Western Australian courts towards cannabis traffickers is hard to distinguish from that in New South Wales, with a prison sentence of three years being described as "extremely lenient" when 5.5 kg. of cannabis was involved[45] and that same penalty being approved for possession of 400 grammes.[46] A similar penalty was selected by the trial judge in a case which involved on 25.05 grammes which barely qualified as a "trafficable quantity", but that savage punishment was replaced with a fine by the Court of Criminal Appeal.[47] Where signs of professionalism are detected in marijuana dealing sentences of imprisonment for four years do not seem to be uncommon.[48]

Just as marijuana pedlars are sometimes imprisoned in South Australia, with sentences as high as eighteen months for very bad trafficking cases,[49] so also should a dealer in Victoria not rule out completely the possibility of imprisonment. That very few appeals to the Court of Criminal Appeal against a prison sentence are known to the author suggests that in Victoria such prison sentences must be very rare indeed for trafficking in cannabis. In *Hansen* (15th February, 1980) the female appellant had been sentenced to imprisonment for eighteen months with parole eligibility after nine months. A police raid had discovered some three kilos of cannabis at her home and also almost $2000 cash proceeds from cannabis sales. The Court (Fullagar J. dessenting) refused to concede that the appellant qualified as a "trafficker in the accepted sense". After noting that she was the mother of four young children who needed her care the majority concluded that a probation order was a more appropriate disposition, particularly as the appellant had a crime-free record and was "certainly not a criminal in any sense of the word". Given that Victoria's sentencers are notorious for the favouritism which they show towards women offenders it is not inapposite to reproduce the quaint homily addressed to the successful appellant by the presiding judge (Starke J.):

"One hears from time to time that people who are treated with leniency as you have been treated, when they get out of Court they laugh about it and take the attitude that they have put it over the Court. Now if that is your attitude I want to make it abundantly clear that if you do offend again there will be no way that anything would be done to you other than a long sentence of imprisonment. Do you understand that?"

It cannot be asserted that Victoria's police have been directed to overlook completely the laws against cannabis peddling. Indeed undercover agents were used by the police during 1977 to trap the director of the Cannabis Research Foundation and chairman of the Australian Marijuana Party into agreeing to sell a quantity of cannabis.[50] In the event a substantial fine of $3000 (in default imprisonment for six months) was imposed—*Billington* (31st July, 1980). It is of interest that when a publicity campaign was launched by the "Dope Smokers' Union" of South Australia to popularise the smoking of marijuana two principals who were convicted of trafficking offences were given respective prison sentences of twelve months and six months (followed by suspended sentences of identical lengths).[51]

It is difficult to justify the very sharp sentencing disparities for marijuana offences which exist between Australian jurisdictions. The author is inclined to believe that the vicious punishments used in New South Wales, Western Australia and Queensland serve no constructive end and he suspects that they might have led to evils which do not exist where marijuana is tolerated— the control of distribution by ruthless gangs able to buy

police protection. That the "fabric of society" shows no signs of disintegrating in the Australian Capital Territory, South Australia and Victoria where marijuana offences are not prosecuted vigorously might suggest that there is not really a need to use the heavy hand of the criminal law in other Australian jurisdictions. A major communication problem seems to be the great barrier to desirable changes—lawyers, judges and politicians tend to adopt an attitude which shows little interest in what is happening in jurisdictions outside their own[52] and scholars appear to have difficulty in stating the differences which exist between jurisdictions, a difficulty due in great measure to the unavailability of court decisions which have all but been ignored by the editors of Australian law reports.[53]