

SENTENCING MURDERERS IN NEW SOUTH WALES: A JUDICIAL PERPLEXITY

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Summary

Judicial discretion in the sentencing of murderers was introduced into New South Wales by a 1982 amendment to s.19 of the Crimes Act 1900 (NSW). Unfortunately, the wording of the amended provision was such as to attract differing judicial interpretations from the outset. It was only recently that the Court of Criminal Appeal resolved the matter in favour of a particular interpretation. However, that interpretation of the provision has created grave difficulties of application in practice; difficulties which can only be adequately removed by further legislative reform.

I. INTRODUCTION

It has been just over four years since the abolition of a mandatory sentence for persons convicted of murder in New South Wales. In order to appreciate how this was achieved, we must first examine s.442 of the Crimes Act 1900 (NSW),¹ sub-section (1) of which states, in part, that “[w]here by any section of this Act an offender is made liable to penal servitude for life..., the judge may nevertheless pass a sentence of either penal servitude or imprisonment of less duration.” The judge is accordingly given an unfettered discretion in deciding on the appropriate penalty to be imposed, up to and including penal servitude for life. Until 1982, the one exception to the application of s.442 was the offence of murder, s.19 of the Crimes Act expressly providing that a person found guilty of that offence shall be liable to penal servitude for life and that “the provisions of s.442 shall not be in force

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1 No. 40 of 1900.

in respect of the sentence to be passed under this section.” A judge had therefore no choice but to impose a sentence of penal servitude for life once a person had been convicted of murder.

The Crimes (Homicide) Amendment Act 1982 (NSW)² removed the mandatory nature of the sentence for murderers by adding to s.19, after the clause excluding from applicability the provisions of s.442, the words: -

unless it appears to the Judge that the persons culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise.

The effect of this proviso is to render the penalty for adult³ murderers one of penal servitude for life except in cases where the judge finds mitigating circumstances which significantly diminish the offender's culpability for murder. Hence the sentencing process for murderers begins with a *prima facie* requirement that the life sentence is the appropriate penalty. This is to be contrasted with cases involving juvenile murderers⁴ or persons convicted of manslaughter⁵ where the sentencing discretion stipulated in s.442 applies without any such restriction.

The 1982 amendment to s.19 was applauded in legal circles and appears to have been generally accepted by the public.⁶ Apart from this positive response, there were some initial reservations expressed concerning the phraseology of the new proviso. For instance, it was felt that the word “diminished” might create some confusion with the defence of diminished responsibility;⁷ the term “significantly” was vague and perhaps unduly limiting;⁸ and there was concern that the phrase “proved in evidence at the trial or otherwise” was sufficiently wide to include material which the judge had, say, derived from discussions with his friends in a social setting.⁹ However, as the judges were soon to discover, the greatest difficulty of interpreting the new proviso lay in the phrase “culpability for the crime”. It was the uncertainty surrounding the meaning of these words which led Street CJ to state that “[t]he result produced by the draftsman has delighted the

2 No. 24 of 1982 which was assented to on 23 April 1982 and came into effect in relation to persons arraigned for murder on or after 14 May 1982.

3 *I.e.*, persons who are eighteen years old and above at the time of the commission of the offence. For persons above 10 and under 18 years of age who have been convicted of murder, s.87(1) of the Child Welfare Act 1939 (as amended by Act No. 14 of 1955) provides that “...sentence may be passed in all respects as though s.19 of the Crimes Act 1900, as amended by subsequent Acts, did not contain a provision excluding the application of s.442 of that Act in respect of the sentence to be passed under the said s.19.”

4 *Ibid*.

5 See s.24, Crimes Act, note 1 *supra*.

6 See D. Weisbrot, “Homicide Law Reform in New South Wales” (1982) 6 *Crim L J* 248.

7 See R. Lansdowne, “Homicide Law Reform: New South Wales”, (1982) 7 *LSB* 80, 81. The defence of diminished responsibility is spelt out in s.23A of the Crimes Act, note 1 *supra*. For the defence to succeed thereby reducing the charge from murder to manslaughter, the accused must show that he “was suffering from such abnormality of mind... as substantially impaired his mental responsibility” for the killing.

8 *Ibid*.

9 See G. Woods, “The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales”, (1983) 57 *ALJ* 161, 165.

semanticists, perplexed the judges called upon to interpret it, and appalled those who had looked for a clear and enlightened legislation..."¹⁰

This article begins with a critical evaluation of the differing views given by the judges on the meaning of the term "culpability" in the context of s.19 of the Crimes Act. After indicating what the prevailing view is, the discussion focuses on the practical difficulties arising from attributing "culpability" with that view. Finally, it will be suggested that there are strong reasons why the wording of s.19 is in urgent need of legislative reformulation.

II. THE MEANING OF "CULPABILITY"

The key players in the judicial debate as to what the word "culpability" meant were Street CJ on the one hand and Samuels JA, Nagle CJ at CL, Miles and Lee JJ on the other. The setting for this debate primarily comprised two Court of Criminal Appeal cases, namely, *R. v. Burke*¹¹ which was decided in 1983 and *R. v. Bell*¹² resolved two years later.

Burke was the first case to consider the application of the sentencing discretion introduced by the 1982 amendment. The relevant facts were that Burke and another, Nolan, had set out in a car to commit robbery. While Nolan waited at the wheel of the car, Burke armed himself with a semi-automatic rifle and entered the house of the victim. After a brief scuffle, Burke's rifle discharged causing the victim's death. Burke was convicted of murder while Nolan was found guilty of manslaughter. With regard to the sentence to be imposed on Burke, the trial judge, Roden J, decided that neither the fact that the victim offered resistance nor the fact that Burke did not set out to kill or injure the victim were mitigating circumstances to be taken into account under the new sentencing provision.¹³ However, his Honour was prepared to consider the offender's youth and history of drug addiction even though, in his view, the amended legislation was designed primarily to meet cases in which there were mitigating circumstances leading up to and surrounding the offence itself. Nonetheless, his Honour sentenced Burke to penal servitude for life on the basis that he had killed in the course of an attempted robbery in the victim's home employing a loaded semi-automatic rifle. Burke appealed against both his conviction and sentence.

It was at the Court of Criminal Appeal stage of *Burke* where the judicial debate began in earnest over the meaning of the word "culpability" appearing in the amended provision. Street CJ was prepared to go much further than Roden J had done at the trial. The learned Chief Justice defined "culpability" in terms of "the extent of the liability to criminal judgment."¹⁴

10 *R.v. Burke* [1983] 2 NSWLR 93, 96.

11 *Ibid.*

12 [1985] 2 NSWLR 466.

13 (24 June 1982, unreported). For a comment on the trial decision, see (1983) 7 *Crim LJ* 228.

14 *Burke*, note 10 *supra*, 99.

He amplified this definition by stating that if that liability extended greatly then great would be the culpability as well as the sentence. Conversely, if that liability extended restrictedly then the offender's culpability would be correspondingly restricted and so would his sentence.¹⁵ His Honour's expression "liability to criminal judgment" may be equated with "deserving punishment" which is one of two meanings of the word "culpability" given by the *Oxford Dictionary* and referred to in various judgments on this issue.¹⁶

The consequence of this definition was to make the measurement of culpability concomitant with the measurement of the sentence such that any factor bearing on one would be relevant to the other. The practical effect of this approach was, in the words of the Chief Justice, to make

any consideration customarily weighed in the prisoner's favour in sentencing adjudication... capable of being regarded as relevant in determination of the existence of mitigating circumstances significantly diminishing the prisoner's culpability for the crime. If that particular consideration would lead to a reduction of the sentence from the maximum of life, then it is necessarily a mitigating circumstance significantly diminishing culpability.¹⁷

Thus, according to this approach, the new proviso to s.19 required the judge to initially regard the life sentence as the appropriate penalty for murder. Having done so, the judge was then permitted to consider all the factors which are conventionally taken into account under sentencing practice in order to decide whether the offender deserved a less severe sentence.¹⁸

The judges who took a differing view to Street CJ interpreted "culpability" to mean "blameworthiness".¹⁹ This was the second meaning given in the *Oxford Dictionary* and was held to be preferable to the first meaning of "deserving punishment" since s.19 already presupposed the need to punish a person whose guilt of the crime of murder had been established.²⁰ These judges construed the term "culpability" in s.19 as contemplating varying degrees of blameworthiness for the crime of murder. As such, they felt that the culpability of the offender was capable of being weighed in order to determine whether, in the circumstances, a penalty less than the life sentence was appropriate.²¹

¹⁵ *Ibid.*

¹⁶ *E.g.* see *R. v. Murray* [1982] 1 NSWLR 740 (Sup.Ct), 746; *Burke*, note 10 *supra*, 106, per Miles J; and *Bell*, note 12 *supra*, 482 per Lee J.

¹⁷ *Burke, Id.*, 99 Street CJ took the opportunity to reaffirm his approach in the subsequent Court of Criminal Appeal case of *R. v. McDonald* [1984] 1 NSWLR 428.

¹⁸ Another example of this approach is contained in the following passage by Roden J in the Supreme Court case of *R. v. McDonald* (1 September 1982, unreported: "One guide to a determination of whether the mitigating factors in any particular case operate so as sufficiently to diminish the offender's culpability to bring the provision of s.442 into play, is whether a fixed term sentence could be designed which is sufficient to reflect the gravity of the offence whilst representing significant leniency when compared with the practical effect of a life sentence."

¹⁹ *E.g.* Cross J in *Murray*, note 16 *supra*; Nagle CJ at CL and Miles J in *Burke*, note 10 *supra*, and Samuels JA and Lee J in *Bell*, note 12 *supra*.

²⁰ *Bell, Id.*, 482 per Lee J. Another reason for preferring "blameworthiness" to "deserving punishment" was that the latter meaning was regarded as being outmoded; see *Murray, Id.*, 746; and Miles J in *Burke, Id.*, 106.

²¹ *Bell, Id.*, 482 per Lee J.

The effect of defining “culpability” in this way was to make the sentencing process for the crime of murder unlike that for any other offence. In deciding on the penalty for murder, the judge had to work through a two-fold²² inquiry, described by Miles J in *Burke* as follows:

[the judge has] initially to determine whether the mandatory sentence may be avoided by a consideration of whether there has been a substantial diminution in the quality of blameworthiness attaching to the prisoner in respect of the commission of the crime, and further, but only when it has already been decided that the mandatory sentence need not apply and the quantum of any lesser sentence has still to be determined, to evaluate the usual range of considerations going to mitigation.²³

Under this approach, the range of mitigating circumstances going to the degree of blameworthiness was invariably narrower than the range of circumstances which could be taken into account when deciding on the appropriate sentence. The judges who supported this approach saw no theoretical difficulty with the notion, embodied therein, that the discretion to reduce the penalty for murder from the maximum of penal servitude for life was not to be available until it had been established that the case had gone beyond a certain threshold point. This point was crossed when the judge was satisfied that there were certain mitigating circumstances which were found to have significantly diminished the offender’s culpability for the crime.²⁴

The debate over the meaning of “culpability” under s.19 was ultimately resolved by a majority decision in favour of blameworthiness in the case of *Bell*. The essential facts were that Bell had an altercation with one Crankshaw in a hotel lounge-bar which ended in their struggling on the floor. After being ordered off the premises, Bell proceeded to her own home where she secured a loaded rifle and then returned with it to the hotel. Positioning herself just outside the hotel, Bell saw Crankshaw in the lounge-bar and fired a shot at her. She missed but the bullet struck the deceased, Blackmore, who died of the gunshot wound two days later. Bell was convicted of murder and sentenced to penal servitude for life. In the course of deciding on the appropriate sentence, the trial judge, Maxwell J, considered at length the competing judicial views in the earlier case of *Burke* and opined that Miles J’s approach was preferable to that of the Chief Justice.²⁵ This opinion was eventually endorsed by Samuels JA and Lee J when the case came before the Court of Criminal Appeal.

This conclusion was inevitable given the particular way in which the new proviso to that section was worded. As was pointed out in various judgments, if the legislative intention was to have the courts construe the word “culpability” in terms of “deserving punishment” so as to allow the unfettered discretion under s.442 of the Crimes Act to apply, all that was required of the draftsman was to repeal the old exclusion clause in s.19 (that

22 Samuels JA in *Bell*, note 12 *supra*, 476-477, preferred the expression “two-stage” process.

23 Note 10 *supra*, 105-106.

24 *Burke, Id.*, 106-107 per Miles J.

25 (1984) 14 *A Crim R* 56 (Sup. Ct).

is, the clause excluding the operation of s.442) from affecting the determination of the sentence for murder.²⁶

Some support for this position is also contained in the parliamentary speeches accompanying the Crimes (Homicide) Amendment Bill. For instance, at the second reading of the Bill, the Attorney-General and Minister of Justice gave as an example the case of an armed robber cold-bloodedly killing a nightwatchman who got in his way.²⁷ In the Supreme Court case of *R. v. Murray*, Cross J referred to this part of the speech and observed that the Minister had not considered mitigating factors such as subsequent penitence, terminal cancer or any factors unrelated to the commission of the murder which might empower the court to reduce the sentence from penal servitude for life.²⁸ Furthermore, it is noteworthy that the following passage from the Nagle Report, with its connotations of degrees of culpability for murder as well as its use of the term “blame”, was said in Parliament to contain the primary reason for amending s.19:

Whereas some offences are brutal, callous and sadistic and deserve the greatest public opprobrium [sic], others are committed in extenuating circumstances which considerably reduce the moral blame attributable to the wrongdoer... In some cases juries, when convicting an offender of murder, request that he should be dealt with leniently. Judges have no power to do so, but are obliged to sentence an offender of this type to life imprisonment.²⁹

It was precisely the phraseology of the amended s.19 which eventually caused Street CJ in *Bell* to relent in his preferred interpretation of that provision.³⁰ Even earlier on, in the case of *Burke*, his Honour acknowledged that the term “culpability” was enigmatic, if taken at face value, and therefore chose to interpret it in the context of what he considered to be “the need, or ‘the mischief’ to which the amendment was directed and that is capable of being sensibly and meaningfully applied in practice.”³¹ This perceived need or mischief will be examined later on in the discussion advocating legislative reform to s.19. For now, we shall observe why the learned Chief Justice regarded the majority approach to be incapable of sensible and meaningful application in practice.

III. MITIGATING CIRCUMSTANCES AFFECTING BLAMEWORTHINESS

Having decided that “culpability” should be construed as blameworthiness, virtually all the judges who took this view immediately went on to anticipate “great difficulties and differences of opinion among

²⁶ *Murray*, note 16 *supra* 746; *Burke, Id.*, 106 per Miles J; *Bell*, note 12 *supra*, 481-482 per Lee J.

²⁷ NSW Parl. Debs (Hansard), 11 March 1982, 2484.

²⁸ Note 16 *supra*, 746-747.

²⁹ *Report of the Royal Commission into New South Wales Prisons* (Vols I-III, 1978), 331-332, and cited in NSW Parl. Debs (Hansard), 1 April 1982, 3203.

³⁰ Note 12 *supra*, 471.

³¹ Note 10 *supra*, 99.

judges”³² in determining the types of mitigating circumstances which could be regarded as significantly diminishing the offender’s culpability for murder.³³ Since the wording of s.19 did not provide any clarification on this issue, it became necessary for the judges to suggest a formula which could effectively delineate the mitigating circumstances which affected blameworthiness from those which were relevant only when the appropriate sentence was being decided.

A number of such formulae has already been suggested, the most popular appearing to be the one by Hunt J in *R v. Hewitt*³⁴ who said that circumstances “totally unconnected with the commission of the crime” must be excluded for the purposes of s.19. An expression of this same test, but framed in positive terms, treated a mitigating factor as affecting blameworthiness only if it was “causally [sic] connected with the crime.”³⁵ Another proposal was that only those factors which were present “at the time of the commission of the offence” as opposed to factors which arose subsequent to its commission were to be considered by the judge in deciding whether the offender’s culpability had been significantly diminished so as to warrant a reduction of sentence.³⁶ Lee J in *Bell* opined that all of these tests were too loose and vague and suggested his own formulation in terms of whether the mitigating circumstance “can sensibly be seen to have an actual bearing upon the commission of the crime.”³⁷ Yet another proposal was made by Samuels JA in *Bell* who construed as applicable only those “circumstances which influenced the conduct constituting the commission of the murder and the relevant state of the accused’s mind.”³⁸

Other attempts to differentiate mitigating circumstances which affect the offender’s blameworthiness from those which do not will, without doubt, be made in future cases. What may be gleaned from the existing judicial formulations is that a mitigating factor must possess the following two qualities before it can qualify to be considered under s.19: (i) it must be present at the time the offence was committed and (ii) it must have either affected the offender’s conduct or state of mind to such a degree that it could be said that his or her blameworthiness for the offence would have been significantly greater had that mitigating factor not been present and operating when the offence was committed.

This extrapolation is by no means a conclusive pronouncement of the law and it awaits future judicial endorsement. However, it is derived from the

32 *Bell*, note 12 *supra*, 482 per Lee J.

33 See *Burke*, note 10 *supra*, 101 per Nagle CJ at CL and 106-107 per Miles J; *Bell Id.*, 479 per Samuels JA and 482 per Lee J.

34 (14 December 1982, unreported), and approved of in *Burke, Id.*, 101, 107 per Nagle CJ at CL and Miles J respectively. See also Samuels JA in *Bell, Id.*, 479.

35 *R. v. Bell* note 25 *supra*, 63 per Maxwell J and approved of by Samuels JA in *Bell, Ibid*. An expression having the same effect is “contributed to the crime”; per Nagle CJ at CL in *Burke, Ibid*.

36 *Murray*, note 16 *supra*, 747-748 which was approved of by Miles J. in *Burke Id.*, 106.

37 Note 12 *supra*, 484. With due respect, it is submitted that this alternative proposal adds little by way of clarification.

38 *Id.*, 479.

various existing judicial statements on the matter and provides a working premise upon which to evaluate the correctness of the courts in deciding which factors should be included for the purposes of s.19 and which should not. While the judges have been careful to state that each case must depend on its own particular facts,³⁹ they have ventured to list a number of mitigating circumstances which do and do not go to the question of blameworthiness. Some of these circumstances will now be examined in the light of the extrapolation described above.

One might have thought that the requirement of a mitigating factor being present at the time the offence was committed would pose little difficulty in application. Unfortunately, this has not always been the case. For example, it has been held that subsequent penitence in the form, say, of a guilty plea or signs of strong remorse, does not qualify as affecting blameworthiness.⁴⁰ Yet, in *Bell*, Lee J entertained the possibility of events involving penitence which, although occurring after the murder, might be relevant to blameworthiness. He gave the illustration of a loving parent of a grossly deformed child who killed that child to prevent it from further suffering and then at a later date attempted suicide.⁴¹ His Honour opined that, in these circumstances, the unsuccessful attempt at suicide would affect blameworthiness if it demonstrated the moral conflict experienced by the parent up to and at the time of the commission of the crime. While the particular facts of this illustration indicate the narrow scope in which subsequent penitence might have an effect on blameworthiness, it does nevertheless raise the question as to why a guilty plea, assisting the police with their investigations⁴² or other signs of subsequent penitence cannot amount to evidence demonstrating a similar conflict within the offender which was present at the time the crime was committed. Likewise, it has been emphatically stated that the subsequent discovery of terminal illness in the offender is irrelevant to the question of blameworthiness.⁴³ Surely, however, it would be so relevant if medical evidence revealed that the illness was present at the time of the offence and had affected the accused's behaviour then.⁴⁴

By contrast to subsequent events, the courts appear more willing to accept mitigating circumstances which existed prior to the commission of the crime as falling under s.19 provided that these circumstances also persisted at the time when the crime was committed. Thus prior addiction to alcohol or other drugs has been held to be such a factor but only if the consequences of such

39 E.g. see Nagle CJ at CL in *Burke*, note 10 *supra*, 101; and Lee J in *Bell*, *Id.*, 482-483.

40 *Murray*, note 16 *supra*, 748; Miles J in *Burke*, *Id.*, 107; Samuels JA in *Bell*, *Id.*, 479.

41 *Id.*, 479.

42 This factor was rejected out of hand by Miles J in *Burke*, note 10 *supra*, 107; and by Samuels JA in *Bell*, *Id.*, 479.

43 *Murray*, note 16 *supra*, 746; Samuels JA in *Bell*, *Ibid*

44 A subsequent event which does not appear to pose any controversy is a cure of drug addiction after the commission of the crime: per Miles J. in *Burke*, *Id.*, 107 and Samuels JA in *Bell*, *Id.*, 479. Other examples would be the adverse effect on an offender's dependants or the fact that the offender was pregnant at the time of the trial.

addiction were shown to have influenced the offender's conduct at the time of killing.⁴⁵ So too, it has been held that a previous record unblemished by violence might constitute evidence from which the extent of passion surrounding the murder might be assessed and a determination arrived at in favour of the offender.⁴⁶ More generally, the courts have ruled that the deprived life and upbringing of an offender might have exerted a causative influence over his criminal conduct so as to become relevant to the assessment of culpability.⁴⁷

The upshot of the preceding discussion concerning mitigating circumstances, both subsequent and prior to the commission of the offence, is that the courts cannot simply dismiss any such factor out of hand. Each factor should be carefully examined in order to decide whether it was present at the time of offence. Although there may be evidentiary difficulties in arriving at such a decision they are not insurmountable and could be confidently left in the hands of the judges. However, there is much less confidence in our judges when it comes to their determination of the second requirement in the previously stated extrapolation, namely, the extent to which the mitigating factor affected the offender's culpability for the crime. This necessarily involves assigning to the particular factor under consideration some weighted degree of influence over the blameworthiness of the offender. A number of difficulties immediately arise in relation to this exercise. To begin with, how does one measure the effect of factors such as prior drug addiction or a deprived life on the culpability of a person other than in very broad terms? Can a mitigating factor standing on its own without the support of other factors affecting blameworthiness ever be taken as a circumstance which significantly diminishes culpability?⁴⁸ What of aggravating circumstances: do they counter-balance the effect of mitigating factors which diminish culpability? Although judicial clarification appears to be wanting on this issue, there is no reason why aggravating factors which heighten the offender's blameworthiness will not be taken into account by the courts for the purpose of s.19. If this is so, how might a judge conclude on a case involving an offender whose mental responsibility for murder is diminished (but insufficient for the defence of diminished responsibility to succeed)⁴⁹ and who turns out to be professional hitman? Or what of a case where there was credible evidence of self-defence (but not satisfying the partial defence of excessive use of force)⁵⁰ but the force used was exceptionally vicious? Section 19 itself fails to throw any light on these problems except to make the somewhat perfunctory note that mitigating

45 *Burke*, note 10 *supra*, 107 per Miles J and qualified by Samuels JA in *Bell, Id.*, 477.

46 *Burke, Id.*, 101 per Nagle CJ at CL and qualified by Samuels JA in *Bell*, 478. *Cf.* per Miles J in *Burke, Id.*, and Lee J in *Bell, Ibid.*, and Lee J. in *Bell, Id.*, 484.

47 *Burke, Ibid.*, per Nagle CJ at CL; Samuels JA and Lee J. in *Bell, Id.*, 478-479 and 482 respectively.

48 In this connection, see Lee J in *Bell, Id.*, 488 in relation to the ingestion of drugs and/or alcohol.

49 See *Murray*, note 16 *supra*, 748. For the defence of diminished responsibility see note 7 *supra*.

50 See *Murray, Ibid.*, *Bell*, note 12 *supra*, 485.

circumstances need only to “significantly” diminish, as opposed to “substantially” diminish the offender’s culpability.⁵¹

Given this state of affairs, it is little wonder that judges have felt compelled to couch their decisions by reference to “the general and social mores of the time”.⁵² What precisely these mores are and who decides which mores should prevail over others in the event of conflict are some of the difficulties encountered when the judges enter into this nebulous area.⁵³ Furthermore, there is the cogent criticism made in recent times that our judges are poorly equipped to perform their task of sentencing due to their general lack of access to relevant information concerning *inter alia* how both the offence and the offender are viewed by the community at large.⁵⁴ Given that what is being decided upon is whether the offender should be punished with the harsh indeterminate sentence of penal servitude for life, it is altogether unfortunate that there exists such a great uncertainty over the application of the new proviso to s.19 in practice.

IV. A NEED FOR REFORM

The law as it now stands in relation to the sentencing of murderers in New South Wales is therefore in an entirely unsatisfactory state. While the courts are making a valiant effort to give practical effect to the wording of s.19, they are facing grave difficulties in so doing. These difficulties are the result of what has been described as an exercise in “technical intellectualism”, namely, the selection from all the factors customarily taken into account in sentencing of only some factors and using those factors alone to determine whether a departure from the life sentence is permissible. In the words of Street CJ:

It is to be borne in mind that the law here is dealing with so solemn a topic as the imposition of a gaol term stretching many years into the future, in consequence of the gravely serious crime of murder. It must surely be recognized as quite unsatisfactory to require a judge to analyze out some of the overall complex of circumstances to create a category of circumstances and to weigh that category in deciding whether less than life is justified; moreover, the unsatisfactory aspects are escalated when it is seen that this must be done before the judge is able to evaluate the whole of the circumstances governing sentence when once the initial hurdle presented by the category has been overcome. The uncertainty that pervades the ascertainment of this category involves... a requirement of technical intellectualism being imported into the judicial evaluation.⁵⁵

51 The courts have interpreted “significantly” under s.19 to mean “other than trivial” (per Cross J in *Murray, Id.*, 746) or “effectively” (per Street CJ in *Burke*, note 10 *supra*, 99-100).

52 *Burke, Id.*, 101 per Nagle CJ at CL. A similar proposition was made by Lusher J in *R. v. Adams* (25 November 1982, unreported) when he said of the mitigating factors going to blameworthiness that “much depends on the moral and ethical approach involved”. This statement was approved of by Miles J in *Burke, Id.*, 107 and by Samuels JA in *Bell*, note 12 *supra*, 479. See also Lee J in *Bell, Id.*, 485 who stated that “[c]ommunity attitudes and mores play a real part in any concept of blameworthiness.”

53 See generally, W. Chambliss, and R. Seidman, *Law, Order and Power* (1971); R. Quinney, *Critique of Legal Order: Crime Control in a Capitalist Society* (1974).

54 See P. Sallmann, and J. Willis, “Taking Sentencing Seriously” (1984) 17 *ANZJ Crim* 133.

55 *Bell*, note 2 *supra*, 470.

Such an exercise is also a clear regression from enlightened sentencing theory which requires the courts to consider the whole range of factors which have been judicially established over the years as being pertinent to the determination of the appropriate sentence.⁵⁶ In the same vein, s.19 has the effect of basing the punishment of murderers almost entirely on retribution, with hardly any room for specific deterrence and none whatsoever for rehabilitation.⁵⁷

It is quite plausible that the Legislature intended s.19 to be construed in the way suggested by Street CJ and did not anticipate the strict interpretation that was eventually given to the provision by the courts.⁵⁸ If the judges had some difficulty in deciding on the proper meaning to be given to the word “culpability”, the legislators would have *a fortiori* been so perplexed had they applied their minds to it. In any event, even if the legislators had fully understood and endorsed the effect of s.19 as currently interpreted by the courts, it is submitted that it was quite unnecessary for them to have taken such a strong line against murderers in order to avoid being seen as unduly compassionate towards such offenders. Given that it was public outcry which gave rise to the abolition of the mandatory life sentence for murderers in the first place,⁵⁹ it would be reasonable to conclude that the political climate was such that any public revulsion towards the crime of murder would have been pacified by legislation which made penal servitude for life the most appropriate sentence and which retained the label “murderer” for this heinous crime. A community which viewed killings in the course of domestic altercations⁶⁰ as deserving of less punishment would also be one which demanded that other cases having strong claims to mitigation should be dealt with in the same lenient fashion.⁶¹

The above reasons alone should amply support Street CJ’s call for the legislative reform of s.19.⁶² But there are other cogent grounds which could be canvassed as well. Foremost amongst these is the one that whenever a life sentence is imposed, the Executive assumes direct sentencing powers, in the form of either a remission⁶³ or a release on licence,⁶⁴ over the liberty of the convicted murderer. Since the exercise of such powers by the Executive is

⁵⁶ *Id.*, 468 per Street CJ.

⁵⁷ *Id.*, 469-470 per Street CJ.

⁵⁸ In fact, the architect of the amended s.19 himself did not contemplate such an interpretation; see G. Woods, “Sentencing for Murder: The New South Wales Crimes (Homicide) Amendment Act, 1982; and a Comment on the Chamberlain Case”, (Paper presented at the 54th ANZAAS Congress, Canberra, 17 May 1984) 3.

⁵⁹ For a brief history of the events leading up to the 1982 amendments, see Weisbrot, note 6 *supra*, 250-251. See also Lansdowne, note 7 *supra*.

⁶⁰ It was primarily due to the public campaigns to free persons such as Violet Roberts and Georgia Hill who had been convicted of murdering their husbands which brought the need to amend the law relating to the sentencing of murderers into sharp focus.

⁶¹ Street CJ in *Bell*, note 12 *supra*, 470-471 gives a few examples of such cases.

⁶² *Id.*, 471.

⁶³ See s.462, Crimes Act, note 1 *supra*, as amended by the Crimes (Further Amendment Act 1983, No.131 of 1983.

⁶⁴ See s. 463, Crimes Act, *Ibid*, as amended by the Crimes (Further Amendment) Act 1983, *Ibid*.

devoid of the traditional safeguards associated with the primary sentencing body, the courts, s.19 should be framed in a way which enables the courts the fullest opportunity of determining whether or not the life sentence should be imposed. This point has been vividly presented by the learned Chief Justice in the following way:

[W]ith all its defects, the judicial process is that which is best calculated to protect the rights of the individual. A public hearing in which all of the relevant ingredients are canvassed, analysed and evaluated in open court, in which the evidence is critically examined, a proceeding involving the presiding judge stating the reasons for the sentence, and, above all, the unrestricted publicity of the sentencing process and the sentencing act all combine as a significant protection against the exercise of arbitrary power. These considerations have always been regarded as sounding a cautionary note against removing from judges the primary responsibility for sentencing and passing it over to a parole authority.⁶⁵

The other reasons for rewriting s.19 are pragmatic in nature and include reducing the number of often protracted murder trials by the acceptance of guilty pleas;⁶⁶ an increased avoidance over the use of the life sentence the indeterminate nature of which can have permanently damaging effects on the prisoner;⁶⁷ and relieving the current congestion in prisons as a result of having fewer cases of life imprisonment.⁶⁸

V. CONCLUSION

This article has outlined the many difficulties confronting judges in New South Wales whenever they are called upon to sentence murderers. These difficulties could have been avoided had s.19 of the Crimes Act been drafted in the following terms: -

Whosoever commits the crime of murder shall be liable to penal servitude for life.

The provisions of s.442 shall not be in force with respect to the sentence passed under this section unless it appears to the Judge, having regard to mitigating circumstances whether disclosed by evidence in the trial or otherwise,⁶⁹ that a sentence of less duration is appropriate.

This reformulation would require the judge to regard penal servitude for life as the proper sentence to be inflicted on a convicted murderer. The judge is, however, permitted to depart from imposing that sentence should a review of all the conventional sentencing criteria indicate that a lesser penalty ought to be given instead.

⁶⁵ See *R. v. Page* [1977] 2 NSWLR 173, 174-175 per Street CJ and reaffirmed by the learned Chief Justice in *Burke*, note 10 *supra*, 95-96. See also A. Freiberg, and D. Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (1975), 143.

⁶⁶ Elaborated upon by Street CJ in *Bell*, note 12 *supra*, 468.

⁶⁷ See Frieberg and Biles, note 63 *supra*, 125-127; R. Sapsford, "Life Sentence Prisoners: Psychological Changes during Sentence" (1978) 18 *Brit J Crim* 128.

⁶⁸ See G. Woods and J. Andrews, "Homicide Law Reform in New South Wales". (Paper presented at the Criminal Injustice System Conference, Sydney, 28 February, and 1 March 1981), 3.

⁶⁹ This clause relating to evidence is retained to facilitate judicial development of this aspect of sentencing; see Woods, note 9 *supra*, 164-165. Some development of this nature has already taken place as a result of the current inclusion of this clause in s.19: see *Murray*, note 16 *supra*, 745, 747; and *Burke*, note 10 *supra*, 100.

The proposed amendment to s.19 could be further improved by making a slight alteration to s.442(1) of the Crimes Act. At present, that sub-section provides the judge with an unfettered discretion to impose a custodial sentence "of less duration" than penal servitude for life. Although the import of these words is clear, there remains every danger that a convicted murderer may, while escaping the life sentence, be given a fixed but far more lengthy sentence. This is because the courts have consistently refused to interpret the life sentence as something other than incarcerating the offender for the duration of his or her natural life.⁷⁰ However, in practice, the average length of custody for such a prisoner is just under fourteen years.⁷¹ Thus an offender who is given a fixed sentence of, say, thirty or forty years' imprisonment would be in a far worse position compared to one who had been given a life sentence.⁷² In order to avoid this disparity, it is suggested that s.442(1) should be amended to stipulate a maximum ceiling of fifteen⁷³ years' imprisonment.

Until the proposed changes to sections 19 and 442 are implemented, the judges will continue to struggle with the "technical intellectualism" created by s.19. What is more objectionable is the fact that this is being done at the expense of persons who, although found guilty of murder, may well be deserving of far less punishment than the sentences which are currently being meted out by the courts. Reform is therefore urgently required in this area of sentencing.

70 For example, see *R. v. Johnson and Johnson* (24 October 1975 (CCA), unreported), extracts of which appear in I. Potas, *Sentencing Violent Offenders in New South Wales* (1980), 1002-1003. See also *Burke, Ibid.*

71 See Freiberg and Biles, note 65 *supra*, 61.

72 Since the 1982 amendment, there has been at least two cases where the offender received a sentence of twenty-five years' imprisonment; see *R. v. Spendlove* (31 July 1984, unreported) and *R. v. Wakeling* (4 April 1985, unreported).

73 This suggested duration takes into account the effect of the relevant provisions under Part III of the new *Probation and Parole Act* 1983 (NSW), No. 194 of 1983. See G. Williams, *Textbook of Criminal Law* (2nd Ed.; 1983) 247.