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Chapter 13

IMPRISONMENT

§13.1. Imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction, or combination of sanctions, is appropriate to the offence and the offender. The creation of the conditional sentence suggests a desire to reduce incarceration. As a corollary, section 718.2 of the Criminal Code¹ is intended to expand the use of restorative justice principles in sentencing. It is a response to the problem of over-incarceration. Although Canada's rate of incarceration has gone down since the 1990s, it remains higher than that of many Western European countries.² The recent amendments to the Criminal Code mandating a number of mandatory minimum sentences are likely to increase Canada's rate of incarceration.³

§13.2. Imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation and rehabilitation. Unfortunately, there is widespread consensus that imprisonment has not been successful in achieving some of these goals.

§13.3. In Canada, the continuing overemphasis on incarceration may be partly due to the perception that the restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. The Supreme Court of Canada has stated flatly that a sentence focused on restorative justice is not necessarily a "lighter" punishment. Restorative justice assumes that all things are related and that crime disrupts the harmony that existed, or should have existed, prior to its occurrence. The appropriateness of a particular sanction is determined largely by the needs of the victims and the community, as well as the offender. The focus is on those closely affected by the crime. Restorative justice necessarily involves some form of restitution and reintegration into the community. Offenders must take responsibility for their actions. Incarceration, by comparison, obviates any need to accept responsibility.

§13.4. Clearly, when a sentence is one of imprisonment, the protection of society is accomplished in an absolute sense by preventing an offender from repeating his unlawful acts upon society during the term of his imprisonment. But that is not its only purpose. We assume the sentence will deter the offender from committing other offences upon his release, and also deter others from committing the same or similar offences.

§13.5. There is nothing else to be said for imprisonment except that there are cases, regrettably, for which no other penalty seems appropriate. It is regrettable for the reason that oftentimes, incarceration will have a negative impact on the individual. As noted in a recent case at the British Columbia Court of Appeal, the offender, a long-time drug addict, began his addiction to illicit drugs during his first term of imprisonment at a federal penitentiary.⁴

Unfortunately, jail may well make their anti-social tendency worse. This is not always the case; sometimes the experience of jail effects a real improvement. Nevertheless, I think it is well-accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and

¹ R.S.C. 1985, c. C-46.

² Correctional Service of Canada, *Speaker's Bureau: Speaker's Binder*, 2005.

³ See Chapter 7.

⁴ *Ladue*, [2011] B.C.J. No. 366, 271 C.C.C. (3d) 90, at para. 10 (B.C.C.A.), affd. [2012] S.C.J. No. 13, 2012 SCC 13 (S.C.C.).

supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, psychiatric treatment is very limited, if non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, and why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement.⁵

Moreover, the whole enterprise is appallingly expensive.

§13.6.Courts often reiterate that imprisonment provides opportunities for reform and rehabilitation. But scant evidence of this exists.⁶ Confessing to scepticism on this point, Cross notes that “[i]t is impossible to train men for freedom in a condition of captivity,”⁷ and suggests that the notion that people can be reformed by being sent to prison has had a baneful influence on the courts by encouraging them to impose prison sentences more frequently and to lengthen them in the name of rehabilitation. In any event, the possibility of reform is at best incidental in the case of imprisonment. Even if imprisonment does not permanently crush an imprisoned offender, it means loss of employment, temporary (if not permanent) loss of family, risk of harmful influences from other prisoners and few chances of future employment.⁸ A lasting stigma that attaches to those people who have been imprisoned does not seem to attach to those who have had other penal measures imposed on them.

§13.7.As Cross also says, “Small wonder then that prison has come to be regarded as the sentencer’s last resort.”⁹ Experience teaches us that there is a real danger that someone who is already a bad person and who has already been in conflict with the law will come out of prison considerably worse; penitentiary “has often been described as a college offering a post-graduate course in crime”.¹⁰ The courts have acknowledged that the current thinking is that non-violent offences should not attract custodial sentences. It is wrong, bearing in mind the penalties available, including fines, probation, orders for community service and others, to regard the imposition of something less than imprisonment as lenient.¹¹

A fine or order of community service, accompanied by supervised probation, can have a deterrent effect if substantial enough. ...

.....

... As long as they are severely punished, society will be better served by efforts to rehabilitate them outside the prison system.¹²

§13.8.Imposing a term of imprisonment of the proper length is very difficult, and no set of rules can do justice to the complexity of the task. There are some recurring notions that assist in reaching a just result.

⁵ *Dixon* (1975), 22 A.C.T.R. 13 (Sup. Ct. Austr. Cap. Terr.)

⁶ *Allen*, [1954] B.C.J. No. 90, 20 C.R. 301 (B.C.C.A.).

⁷ R. Cross, *Punishment, Prison and the Public: An Assessment of Penal Reform in Twentieth Century England by an Armchair Penologist* (London: Stevens, 1971), at p. 85.

⁸ *Kosh*, [1970] S.J. No. 260, 1 C.C.C. (2d) 290 (Sask. C.A.).

⁹ R. Cross, *Punishment, Prison and the Public: An Assessment of Penal Reform in Twentieth Century England by an Armchair Penologist* (London: Stevens, 1971), at p. 109.

¹⁰ *Denholm* (1970), 11 C.R.N.S. 380, at p. 383 (Sask. Dist. Ct.).

¹¹ *Ulrich*, [1989] S.J. No. 268, 75 Sask. R. 26 (Sask. C.A.).

¹² *Leask*, [1996] M.J. No. 586, 113 Man. R. (2d) 265, at p. 267 (Man. C.A.).