IMPRISONMENT AND RELEASE

*Judge Thomas R. Swabey**

There is a woeful lack of statistical information available to those who attempt to formulate opinions about the sentencing practices of the criminal courts in Canada. In particular, there is virtually no reliable information from which the relative success of the various sentencing alternatives employed by the courts in this country can be assessed. No definitive studies have been undertaken to attempt to demonstrate the superiority of one form of sentence over another. Very little follow-up information has been compiled relating to the rehabilitation of criminal offenders following sentences of the courts. And public opinion has not been accurately sampled to ascertain both how important the application of the criminal sanction might be in terms of deterring crime and what measure of retribution must be maintained in our laws in order to maintain respect for law and order in society.

In addition to a great dearth of information about the effectiveness of the various sentencing alternatives, there is no statistical information available for calculating with accuracy the actual frequency that one form of sentence is used by the courts in preference to other forms of sentence in cases involving any given class of offenders. Statistics Canada, being the statistical arm of the federal government, does gather statistics relating to sentencing dispositions of the criminal courts.[1] However, these statistics do not provide enough detail to enable any conclusions to be drawn regarding sentencing practices of the courts as they relate to any particular class of criminal offender. The R.C.M.P. receives from the numerous other police forces across the country, records of those offenders who have been convicted of indictable offences, but, again, this information is incomplete and in some instances can be misleading where one is attempting to isolate statistics relating to, say, first offenders, or any other particular class of offenders. In fact, to date no system of statistical retrieval from the courts has been established in this country with the capability of providing criminologists with sufficient detail about sentencing dispositions to permit accurate analysis of the sentencing process. Until such statistical detail is made available, one can do little more than speculate as to what is actually taking place and whether or not changes are required. To draw any firm conclusions based upon presently available statistics is foolish and could lead to changes in sentencing practices that would have a very adverse effect on law and order in our society.

It is with the above thoughts in mind that one must come to appraise

---

* Provincial Court Judge, Criminal Division, Ottawa, Ontario.

[1] STATISTICS CANADA, STATISTICS OF CRIMINAL AND OTHER OFFENCES (annual).

the Law Reform Commission's Working Paper on the subject of imprisonment and release.[2] The premises put forward in the introductory chapter of the Working Paper, upon which the whole thrust of the recommendations hinge, are unsupportable by available statistical information and represent conclusions based upon statistics that are incomplete and misleading. There is reason to believe that were the necessary statistical information available, quite different conclusions would result, especially in regard to present sentencing practices of the courts. The authors of the Working Paper have relied upon a piece of secondary research[3] carried out by members of the staff of the Law Reform Commission, who have had little or no practical experience relating to the courts and therefore no capacity to interpret accurately those statistics they were able to obtain as a basis for their study. The result is that there has been a very serious misrepresentation of the extent to which incarceration is used by the criminal courts of this country in dealing with the criminal offender.

As a basis for their recommendations, the authors of the Working Paper state:

> Close to one-half of the 4,000 persons sent to penitentiaries each year are serving sentences for having committed non-violent offences against property or the public order. Indeed, less than 20 percent of offenders are imprisoned for committing acts of violence against the person. Statistics reveal similar results in respect of provincial institutions.
>
> Almost 50 percent of prisoners in some provincial institutions were imprisoned because they could not pay fines.
>
> A study by the Commission showed that one out of every seven persons appearing in court for the first time in Canada and convicted of a non-violent offence against property was imprisoned. On a second conviction for a non-violent property offence almost 50 percent of offenders were imprisoned. In the light of this type of information we must ask, what do we hope to accomplish by using imprisonment?[4]

Such statements are obviously calculated to dramatically suggest a preoccupation by the courts with imprisonment. Were such statements capable of being supported by statistical demonstration, there would indeed be reason for alarm. However, when one examines the study referred to in paragraph three of the above-quoted excerpt from the Working Paper, it must be concluded that the authors have used journalistic rather than academic standards in deciding whether such statements could be made. By any academic standard the statistics gathered in the study fall short of demonstrating the conclusions expressed in the Working Paper, and, in one particular at least, the authors have misrepresented their own study: they

---

[2] THE LAW REFORM COMMISSION OF CANADA, IMPRISONMENT AND RELEASE, WORKING PAPER 11 (1975).

[3] The study referred to in the fourth paragraph of page 6 of the Working Paper made use of available statistics from secondary sources other than the courts themselves.

[4] *Supra* note 2, at 6.

maintain that one out of seven of all first offenders against property is sent to jail when in fact the Commission's study relates only to indictable offences.

The study relied on by the authors of the Working Paper for their assertion that one of seven persons appearing in court for the first time and convicted of a non-violent offence against property is imprisoned does not include summary conviction offences in its data or take into account previous convictions for summary conviction offences. In fact many of the offenders referred to by the Working Paper as "appearing in court for the first time" [5] may well have been before the court on one or more previous occasions in relation to summary conviction offences. Not only does the Criminal Code contain a substantial number of summary conviction offences relating to property, it might be expected that since these offences are less serious in nature, the incidents of imprisonment following conviction for them would be extremely low. Their inclusion in the statistical study of the Commission would have the effect of considerably lowering the ratio of imprisonment to other dispositions in the category of "persons appearing in court for the first time in Canada and convicted of a non-violent offence against property". [6] The fact that summary conviction offences were not considered by the Commission in its study means that the group referred to in the study as first offenders do not, in fact, represent all persons appearing in court for the first time. Previous convictions for summary conviction offences may well have dictated incarceration upon the initial conviction for an indictable offence in a substantial number of cases treated by the Commission's study as cases of first offenders. It is hardly accurate, for example, to maintain that an offender previously convicted one or more times of the summary conviction offence of taking an automobile without the owner's consent [7] is a first offender against property when he is subsequently sentenced for the first time on an indictable offence of auto theft. [8] Likewise, a trial judge sentencing an offender convicted of the indictable offence of mischief [9] is not dealing with a first offender where there is produced for his consideration a previous record relating to the summary conviction offence of damage to property. [10] Even had the authors of the Working Paper indicated that their study related to indictable offences only, the statements made about the sentencing of first offenders would still be misleading in failing to take into account the very proper consideration a judge gives to previous summary conviction offences where they relate to conduct similar to that which brings the offender to court on a first indictable offence. Surely an offender who has failed one or more times on probation following convictions for summary conviction offences cannot be considered, when subsequently convicted of an indictable offence, as a first offender against property.

---

[5] *Id.*
[6] *Id.*
[7] Criminal Code, R.S.C. 1970, c. C-34, § 295.
[8] *Id.* § 294.
[9] *Id.* § 387.
[10] *Id.* § 388.

The Commission's study does not accurately reflect the number of conditional and absolute discharges granted by the courts in cases involving property offences, and therefore the conclusion with regard to instances of incarceration is further distorted. There are no accurate statistics available relating to discharges. Many police forces across the country have been treating discharges as akin to acquittals and not, therefore, forwarding such records to the R.C.M.P. It is impossible to state with any accuracy just how many discharges are granted in cases involving first offenders against property, but one would think that the number is substantial and would certainly affect the ratio of first offenders imprisoned by the courts.

The study relied upon by the authors of the Working Paper also fails to appreciate the distinction between sentencing an offender convicted of a single offence and an offender convicted of several offences. Quite often the judge is dealing with an offender who, while perhaps being sentenced for the first time in a criminal court, is being sentenced for several offences, some of which have been committed while others were pending before the court. In such instances the offender can hardly be deemed a first offender, and yet the study relied upon includes such offenders for the purpose of calculating how many "persons appearing in court for the first time in Canada and convicted of a non-violent property offence" [11] are imprisoned. By using only the sentence imposed for the first recorded conviction the researchers justify including the multiple offender as a first offender. Quite properly the sentence of imprisonment which in these circumstances is frequently imposed on the first recorded conviction reflects the fact that the offender has committed further offences while awaiting trial and therefore has demonstrated a pattern of behaviour rather than an isolated departure from previously good behaviour. To consider such offenders as appearing for the first time in a criminal court is to ignore the fact that at the time of sentence the offender has already become a recidivist before the court.

A similar shortcoming of the study carried out by the Commission in support of the Working Paper is that included in the category of "first offenders against property" are those persons appearing in court for the first time on charges relating both to property and personal violence. In such instances the study uses the sentence imposed on the property offence as a statistic relating to a first time property offender. Quite often, however, the property offence and the offence involving personal violence are so related as to result in the sentence recorded for the property offence being influenced by the conduct directed towards personal violence. Thus, for example, where a person steals a car and then proceeds to drive to a store where he assaults and robs the proprietor, the sentence for the theft of the car may well reflect the fact that the motive for stealing the car was to further a course of conduct that included personal violence. Such an offender cannot rightly be said to be standing before the court simply and purely as a first offender against property.

[11] *Supra* note 2, at 6.

Although it is quite plain that, in speaking of first appearances in court, the authors intend the adult court, it would be most useful to know how many of those persons referred to as first offenders against property had previously been dealt with in Juvenile Court. A first offender with a juvenile record of failure to respond to probation is not really in the same category as a first offender without a juvenile record, and it has come to be recognized as quite proper for the sentencing judge to consider the juvenile record as part of the whole background of the offender that must be taken into account when deliberating upon sentence. From a practical standpoint it is futile to consider probation for a "first offender" where the pre-sentence report indicates complete failure of probation while he was a juvenile. Such being the case, the inclusion of flagrant juvenile offenders in the category of "first offenders" simply because they are appearing for the first time in adult court may have some legal validity but certainly tends to distort the statistics upon which reliance is placed for the proposition that imprisonment is too often employed before other means of rehabilitation have been attempted. This especially holds true for provinces such as Quebec where the adult age is eighteen and, thus, many persons appearing for the first time in the adult court have already demonstrated a clear pattern of criminality removing them from that class of offenders that should properly be considered "first offenders" for the purpose of studying the approach of the courts.

In asserting that almost fifty per cent of prisoners in some provincial institutions were imprisoned because they "could not pay fines" [12] the authors of the Working Paper assume that all persons in jail for non-payment of fines are there because they in fact could not pay their fines. Many such persons quite freely choose to serve the alternative jail sentence notwithstanding that they have the means to pay the fine. Many more have the means but simply refuse to pay. Any administrator of a provincial court can attest to the fact that there are a significant number of persons who quite voluntarily elect to serve a day or two in jail in order to save their hard-earned money, especially when this can be arranged to take place on a weekend. Given the present practices concerning release from jails, it is possible to serve a three-day sentence in one night by reporting in to commence serving the alternative jail sentence on a Friday afternoon. Because persons due to be released on a Sunday are in practice released on Saturday, a person committed to serve a three-day sentence on Friday afternoon will be released early Saturday morning after only one night in jail. This is so commonly elected by habitual traffic offenders in the city of Toronto that occasionally the local lock-up has been so taxed on weekends that prisoners have had to be moved elsewhere to make room for the "one-nighters". The statement in the Working Paper is therefore meaningless and misleading in that it attempts to convey the impression that our jails are half-filled with persons who "could not" pay fines.

[12] *Id.*

In making the statement that close to one-half of the four thousand persons sent to penitentiaries each year are serving sentences for having committed non-violent offences against property and public order, [13] the authors are being more simplistic than should be expected in a study of this sort. While the Commission may be able to demonstrate that these figures are supported by the warrants of commitment received by the penitentiaries in any given year, these persons, for the most part, find themselves in a penitentiary, not as a result of any one or two property offences, but rather because they have demonstrated a continuous pattern of criminal behaviour over many years, which probation and parole have been unable to alter. The figures used by the authors of the Working Paper, to be of any value or meaning, must be related to the total number of sentences of the courts in any given year for property offences. In considering the total number of sentences relating to property offences handed out by the courts in any one year, the fact that some two thousand offenders are sentenced to the penitentiary should not be so alarming unless one is taking the position that property offenders should never be sent to prison. The fact is that there are some property offenders who will not, or cannot, be rehabilitated by any means, and the demands of society that these persons be removed from the community are just as valid as similar demands made in relation to persistent offenders in other categories. Whether or not we should be concerned that some two thousand offenders against property are being sent to the penitentiary each year depends largely upon a detailed assessment of the background of each of these individuals. The Working Paper falls short of making this assessment, while, obviously, some judge did make this assessment for each individual before sending him to the penitentiary.

The shallow research supporting the sweeping conclusions contained in the opening chapter of the Working Paper is a disappointment. It is unfortunate that the Commission did not choose to use its resources to initiate some badly needed empirical research in this field. Instead, it has chosen to rely on a very incomplete statistical picture and in doing so has overlooked many considerations in arriving at the conclusions that form the basis for the recommendations put forward in the balance of the Working Paper. One must therefore consider the recommendations of the authors in light of the knowledge that an enormous amount of statistical information is missing and is required both to affirm the assumptions made and to demonstrate a reasonable prognosis for the changes suggested in the paper.

The main thrust of all the recommendations is towards eliminating incarceration as a sanction of the criminal law except in very limited circumstances. While there are some very compelling arguments against using imprisonment to the extent that it is used in this country, viable alternatives have yet to be developed which would permit large scale diversion of present prison populations into the community while at the same time preserving both public security and general respect for the law. The geographic ex-

[13] *Id.*

panse of Canada and its large areas of sparsely populated communities make uniformly effective community supervision of the criminal offender a very expensive proposition. Even in the large urban centers of this country, present levels of community supervision fall far short of that required to handle the additional caseload caused by the otherwise incarcerated recidivist. The authors of the Working Paper cite 14,000 dollars as being the cost of keeping a criminal offender in prison for one year, [14] but fail to estimate what the cost might be to successfully maintain that same person in the community. Given the present state of community resources, it is safe to say that any wholesale diversion into the community of our potential prison population will require massive increases in expenditures in the area of probation services, parole services, half-way houses, job-training centers, psychiatric and psychological counselling, and the many other support services necessary to assure reasonable prognosis for rehabilitation and proper surveillance and supervision during the rehabilitation process. In the end the real cost of keeping such offenders in the community may approach or even surpass that of keeping them in prison. Until such estimates are calculated it is not valid to hold out the high cost of keeping an offender in prison as an argument for using alternatives to incarceration. These alternatives, to be effective, may well prove to be more expensive.

The most striking feature of the proposed limitations upon prison sentences is the absence of any consideration of general or specific deterrence. General deterrence appears to have been completely discarded, while specific deterrence is only indirectly employed under the heading of "Denunciation". [15] While it might be argued that the vast majority of persons in our society are sufficiently deterred from anti-social behaviour by the social and legal implications of detection and apprehension, can it be said that the principle of general deterrence has no practical value in our society today? Assuming that the sentence of the court is capable of achieving general deterrence from certain types of conduct, is not imprisonment the most forceful and sometimes the only manner of achieving such deterrence? It must be recognized that no matter how high the risk of detection and apprehension, there will still be a small percentage of the population who will only be deterred from some forms of anti-social behaviour by the threat of the sanction itself. Unlike capital punishment, where it may be argued that most murders are committed in a heat of passion and therefore without regard for the sanction of the law, imprisonment and the threat of imprisonment are undoubtedly matters of concern to most persons who, disregarding the risks of detection and apprehension, are tempted to commit a crime. This is perhaps especially so in the case of property offences, where cool calculation usually prevails over impulsiveness and emotion. While our prison population is living evidence that some persons are not even deterred by the threat of imprisonment, it must not be assumed that the threat of imprisonment has

[14] *Id.*

[15] *Id.* at 12.

no deterrent value. Who is to say how many first offenders, having been placed on probation and being faced with the very real prospect of going to jail if convicted a second time, change their ways? Who is to speculate how many persons in our society refrain from certain forms of anti-social behaviour primarily because of the threat of imprisonment? There is certainly reason to believe that the threat of imprisonment is a deterrent in our society, and before abandoning this principle and the ultimate vehicle through which it is expressed, there must be clear evidence that the sanctions remaining will be sufficient to deter those presently deterred only by the threat of imprisonment. Just how many people can only be so deterred and how effective a deterrent imprisonment actually is should be made the subject of intensive study. The fact that the threat of imprisonment is in some degree a deterrent in society should be beyond question. The authors, in disregarding this fact, have apparently rejected the well established legal premise that the sentence of the court is not simply a matter between the state and the individual offender. Rather, it concerns the community as a whole and, where necessary, should seek to meet the needs of the community by attempting to deter similar conduct on the part of others.

Under the heading of "Separation" the Working Paper speaks of imprisonment as being justified where the offender represents a serious threat to the life or personal security of others. [16] However, the authors suggest imprisonment is "unjustifiable . . . for the purpose of isolating persons who have committed minor offences against property or the public order". [17] Just what is meant by "minor offences" is difficult to understand, especially when one remembers that the study carried out by the Commission, upon which the recommendations are based, relates only to indictable offences, which, by that very description, can hardly be said to be minor offences. A recidivist thief is more than a nuisance to society, although the authors do not feel that "separation or isolation can be justified because of a lack of other social resources to deal with persistent or annoying criminal conduct of a minor nature". [18] Apparently, society is simply to turn the other cheek in these instances.

In offering "Denunciation" as a criteria for imprisonment, [19] the authors of the Working Paper are really speaking of retribution, in the legal sense of that term. This is interesting, if for no other reason than because the courts have recently been down-playing retribution as a principle in the sentencing process. While the reasoning behind the recommendation appears to be sound, the formula put forward would result in the adoption of a system of sentencing employing minimum and maximum periods of incarceration, a practice which has been criticized for a number of years in jurisdictions such as the United States, where the indeterminate sentence has long been unpopular with the correctional authorities.

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

In dealing with "Wilful Default" the authors of the Working Paper offer a justification for imprisonment based upon wilful refusal either to pay fines or make restitution or a failure to abide by the terms of a probation order. [20] But even here they see the justification as extending only to short term incarceration as a "last resort". [21] Considering that all probation orders contain the provision that the offenders shall keep the peace and be of good behaviour, one can visualize a sort of judicial merry-go-round for the gentle recidivist who is able to avoid violence and denunciation but continues to thrive on the property of others. The greatest discomfort he is likely to encounter under this scheme of things is an infrequently applied short term of imprisonment for his wilful indiscretions. Under this plan "the last resort" is but a short interruption in a way of life.

In suggesting that maximum terms be reduced, the Working Paper cites the fact that the average sentence of the court for any given offence is far less than the maximum provided for in the Criminal Code. [22] But should this not be the case? Parliament in its wisdom has made the maximum penalties for any given offence high enough to encompass the most horrid instance of the crime and the most persistent recidivist. Why deprive the courts of the power to deal with these extremes so long as the averages suggest that the discretion presently vested in the courts is not being misused? The "wide deviations in particular cases" [23] referred to by the authors of the Working Paper can, for the most part, be rectified by either the appeal courts or the parole authority. Such deviations are frequently explainable by local conditions existing in the communities from which the offenders came; in such cases the deviations are justifiable if the sentencing process is to promote the well-being of the community as well as the interests of the individual offender. There is no evidence that the present maximum penalties provided for in the Criminal Code are contributing either to more frequent use or longer terms of incarceration than if the maximum penalties were reduced. At the same time the present maximum penalties provide an unmeasured security and deterrence in a society very conscious of the price of all things in life.

The authors of the Working Paper are obviously disturbed by the fact that prisons do not make good forums for rehabilitation. There is a good deal of evidence to suggest that this is so. However, the existence of prisons and the threat of imprisonment as a criminal sanction has an effect reaching beyond those who actually have the misfortune to be incarcerated. The ramifications of eliminating imprisonment as a potential penalty, in all but the few exceptions set out in the Working Paper, extend far beyond consideration of the best method of rehabilitating those who would otherwise be incarcerated. The sanctions of the criminal law must to some extent remain

---

[20] *Id.* at 13.
[21] *Id.* at 19.
[22] *Id.* at 22.
[23] *Id.*

visible in order to maintain public confidence. The criminal law must possess sufficient threat to control what might otherwise be widespread anti-social behaviour in society. There is a great danger that the limitations on incarceration that the authors of the Working Paper would impose upon our system of criminal justice would both overtax efforts to maintain peace and order in society and release inhibitions within society. The result might well be an increase rather than a decrease in our criminal population. The risk is one that should not be taken without a great deal more study and considerably more information about our present system.