CROSS

The ENGLISH SENTENCING SYSTEM

Third Edition

Butterworths

THE ENGLISH SENTENCING SYSTEM

By

SIR RUPERT CROSS, D.C.L., F.B.A.

Solicitor; Vinerian Professor of English Law in the University of Oxford and Fellow of All Souls College, Oxford

AND

ANDREW ASHWORTH, LL.B., B.C.L., Ph.D.

Fellow of Worcester College, Oxford

THIRD EDITION

LONDON
BUTTERWORTHS
1981

ENGLAND: BUTTERWORTH & CO. (PUBLISHERS) LTD.
LONDON: 88 KINGSWAY, WC2B 6AB

AUSTRALIA: BUTTERWORTHS PTY. LTD.
SYDNEY: 271–273 LANE COVE ROAD, NORTH RYDE, NSW 2113
ALSO AT MELBOURNE, BRISBANE
ADELAIDE AND PERTH

CANADA: BUTTERWORTH & CO. (CANADA) LTD.
TORONTO: 2265 MIDLAND AVENUE, SCARBOROUGH M1P 4S1

NEW ZEALAND: BUTTERWORTHS OF NEW ZEALAND LTD.
WELLINGTON: 33–35 CUMBERLAND PLACE

SOUTH AFRICA: BUTTERWORTH & CO. (SOUTH AFRICA) (PTY.) LTD.
DURBAN: 152–154 GALE STREET

U.S.A. BUTTERWORTH & CO. (PUBLISHERS) INC.
BOSTON: 10 TOWER OFFICE PARK, WOBURN, MASS. 01801

First Edition ..... *June 1971*
Second Edition ..... *March 1975*
Reprinted ..... *August 1976*
Third Edition ..... *July 1981*

ISBN — Casebound: 0 406 57014 0
Limp: 0 406 57015 9

Reproduced from copy supplied
printed and bound in Great Britain
by Billing and Sons Limited
Guildford, London, Oxford, Worcester

PREFACE TO THIRD EDITION

It is with deep sadness that I find myself writing this Preface alone. By the time of Sir Rupert's death in September 1980, we had completed the revision of Chapter III and part of Chapter I. My hope is that the remainder of the revision succeeds in reflecting the tremendous benefit (and pleasure) which I derived from working beside one of the most accomplished lawyers and textwriters of our time. We had discussed in broad terms the changes which were to be made to these other parts of the book. I have attempted to effect those changes.

The six years since the appearance of the Second Edition have seen a wide range of developments. Although the legislature has not, apart from the Criminal Law Act 1977, been particularly active on sentencing matters, the activities of the Court of Appeal (Criminal Division) have more than compensated for this. The tide of appellate decisions on sentencing rises each year, and there have been three noteworthy landmarks in the form of the publication of the second edition of David Thomas's *Principles of Sentencing* in 1979, the introduction of a new series of law reports devoted exclusively to sentencing cases (the Criminal Appeal Reports (Sentencing)), and the judgments of Lord LANE, C.J., in *Upton* and in *Bibi*. The reform bodies have also been active in this sphere: recent reports of the Law Commission and of the Criminal Law Revision Committee have sentencing implications, and two reports of the now defunct Advisory Council on the Penal System, on The Length of Prison Sentences and Sentences of Imprisonment: a Review of Maximum Penalties, have made significant and provocative contributions to debate about the sentencing system.

Both the structure of the book and its aims remain essentially the same as for previous editions. The main task has been one of bringing the text up to date, and it is hoped that the book reflects the

sentencing system at 1st October 1980. The form of Chapters I, II and IV has been little altered in the process of up-dating; the opening section of Chapter III remains unchanged, but there has been considerable re-writing in the remainder of Chapter III and in Chapter V.

ANDREW ASHWORTH

Worcester College,
Oxford,
March, 1981

PREFACE TO FIRST EDITION

This book is based on lectures given in the University of Oxford and primarily designed for candidates for a law degree who had opted, or were thinking of opting, for a paper on criminal law and penology; but it is hoped that the book may appeal to all those concerned with the penal system and indeed to all who are interested in the problems of punishment and sentencing. For this reason I have been deliberately "elementary" at certain points in my account of the law. The book is not a textbook, although the first two chapters contain about as much information concerning the law of sentencing as most students are likely to require; my aim has been to provoke thought and further reading. This accounts for the note on further reading in the appendices. I have deliberately made it brief and it has accordingly been necessary to be highly selective.

I lay no claim to originality of thought or research. So far as the thought is concerned, all that I have done which others have not done in works of a similar nature is to link the theories of punishment with sentencing practice, and to say something of the whys and wherefores of the latter. So far as research is concerned, the only out of the ordinary information on which the book is based is the response of a number of Queen's Bench Judges, Recorders, Chairmen of Sessions and Magistrates to a variety of oral and written questions. I wish to express my deep gratitude for this cooperation so willingly given by such busy men.

RUPERT CROSS

All Souls College
Oxford,
March, 1971.

TABLE OF CASES

CONTENTS

INTRODUCTION

The aim of the first two chapters of this book is to give a reasonably comprehensive account of the law and practice of sentencing in England and Wales with the exception of the practice followed by the Courts in fixing the length of a prison sentence. This is considered in Chapter IV after the different theories of punishment which influence it have been examined in Chapter III. In Chapter V we discuss some recent proposals for reform of the sentencing system.

At the beginning of Chapter V we raise the question, "Is the present English sentencing system too retributive?" The answer must of course be largely dependent on the meaning to be attached to the word "retributive"; but the question has a special contemporary relevance on account of the recent return to forms of retributivism, following widespread disillusionment with reformation and rehabilitation as aims of sentencing. Such research as has taken place has produced little evidence that sentences intended as reformative or rehabilitative are more effective in preventing reconvictions than other kinds of sentence. It is in this sense that some contemporary penologists refer to the decline of the rehabilitative ideal. There has also been a general decline in confidence in the ability of research to provide satisfactory evidence of the effectiveness of sentences, as awareness of the difficulties which beset thorough research has grown. Both sources of penological pessimism result partly from the building of artificially high hopes. For years we have all been too ready to say that the answer to some problem will be provided by research and all that we need to do is to contrive some short-term makeshift. It is essential to realise that there are sentencing problems which will probably never be solved by research, that in the case of others the research will be very long term, and that there are matters with regard to which it is difficult even to see how a satisfactory beginning to research can be made.

These changes in prevailing penal philosophy have led to some changes in the law and practice of sentencing—not great changes,

since the English sentencing system never abandoned retributivism and proportionality as leading principles and bears relatively few marks of the emphasis on rehabilitation and "effectiveness" which characterised penological debate in the 1960s and early 1970s. But some changes have taken place. In the 1960s short prison sentences were anathema to the advanced penologist because they contaminate the offender without reforming him; but now there is scepticism about the reformative and, as regards the individual offender, the greater deterrent effects, of longer sentences. The late 1970s saw many exhortations to sentencers to pass shorter prison sentences, and in 1980 the Lord Chief Justice added his authority to this movement. In the 1960s it was the unquestioned penological doctrine that, although it might be right for the judge to have the power of determining the maximum period for which an offender should be in custody or otherwise subject to state control, the executive should decide when the offender should be released from custody. This doctrine led to the introduction of parole, and it remained influential with the Advisory Council on the Penal System in 1974 when they recommended changes in the sentencing of young adult offenders (aged 17 to 21). But there is now widespread scepticism about the greater ability of those, such as prison governors, psychiatrists and social workers, to decide upon the optimum moment for release, not to mention reservations about the propriety of leaving such questions to be determined by them. In the 1960s there was optimism about the rehabilitative potential of the probation order; in the 1970s the use of probation declined substantially, and the ethos of "treatment" is now increasingly questioned. The arrival of the community service order may be said to be consistent with the philosophies of both the 1960s and the 1980s, since it contains variable elements of reform and retribution. The interaction of the different and changing views in this paragraph is reflected at various points in this book.

For the benefit of the occasional reader who is neither a lawyer nor a law student a few words may be added about the criminal courts and some of the other matters about which a rudimentary knowledge is assumed in the following pages.

The lower courts are Magistrates' Courts, which try summary offences and offences "triable either way". A summary offence is one which can generally only be tried by a Magistrates' Court; an offence "triable either way" is an indictable offence which may be tried either in a Magistrates' Court or in the Crown Court with a jury. According to the procedure introduced by the Criminal Law Act 1977, where a person appears before a Magistrates' Court charged with an offence triable either way, the Magistrates may

decide that the charge is so serious that it should be tried in the Crown Court; if they do not so decide, then the accused is asked whether he consents to be tried summarily or wishes to be tried by a jury, so that his wishes then determine mode of trial. The powers of Magistrates' Courts are now consolidated in the Magistrates' Courts Act 1980: the sentencing powers of Magistrates are in general limited to six months' imprisonment, but they may commit someone convicted of an indictable offence to the Crown Court if they think that the sentence which they can impose would be inadequate. A glance at Table I, in Appendix I, should suffice to show that the vast majority of crime in this country is tried by the Magistrates. The table is confined to offenders of 21 and over. When it is recalled that a great deal of crime is committed by persons under that age and that practically all offenders under seventeen are tried in Magistrates' Courts, it should not come as a shock for anyone to discover that nearly 98% of the offenders brought to trial each year are tried by Magistrates' Courts. The Crown Court tries indictable offences with a jury. Its judges are High Court judges, Circuit judges and Recorders, of whom the latter are almost all practising barristers or solicitors serving as judges on a part-time basis. The Crown Court, sitting without a jury, hears appeals from the decisions of Magistrates' Courts. It sits at various places on the six circuits into which the country is divided and, since the beginning of 1972, it has taken the place of Assizes and Quarter Sessions. Indictable offences were formerly tried by Quarter Sessions with a jury and appeals from Magistrates' Courts were heard by Quarter Sessions.

Appeals against convictions after trial with a jury in the Crown Court are heard by the Criminal Division of the Court of Appeal, since 1966 the successor of the Court of Criminal Appeal which used to hear appeals from convictions at Quarter Sessions and Assizes. Subject to the fulfilment of the necessary conditions, there is an appeal by the prosecution or the defendant from the Court of Appeal to the House of Lords.

Throughout this book the word "judge" should generally be taken to mean High Court judge, Circuit judge, Recorder or Magistrate.

The sources of the law relating to sentencing are, like the sources of the general criminal law, statutes and judicial decisions. The principal statute is the Powers of Criminal Courts Act 1973, although some provisions of the Criminal Justice Acts of 1948, 1967 and 1972 remain in force. In order to understand the law and practice of sentencing it is necessary, in addition to consulting text-books and periodicals, to refer to reports of Royal Commissions, Departmental and Interdepartmental committees, and white