The Appeal of Conditional Sentences of Imprisonment

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I. AN ARGUMENT FOR CONDITIONAL SENTENCES

In an earlier article,[1] I offered the view that courts need to find an appropriate role and methodology for the new conditional sentence of imprisonment. I argued that denunciation ought to be the focus of the custodial decision. This is not to say that a conditional sentence only serves this end but rather that the decision to use a conditional sentence should, in most cases, flow from the denunciatory objective, of denunciation. Here, I want to explore the meaning of denunciation and also consider how conditional sentence issues have been treated by some appellate courts.

The new conditional sentence of imprisonment was enacted by *Bill C-41*, which also contained the statements of "purpose", "objectives" and "principles". Significantly, the Bill entrenched restraint as a principle of sentencing. The Bill reflected Parliamentary encouragement to diminish Canada's attachment to incarceration as the anchor of our penal policy and offered the conditional sentence as one way of achieving this goal. However, the apparent statutory methodology for the conditional sentence is enigmatic. Where no minimum sentence is applicable, the original section 742.1[2] empowered a court to impose a conditional sentence which would permit service in the community if :

1. It has imposed a term of imprisonment of less than two years; and

2. Is "satisfied that serving the sentence in the community would not endanger the safety of the community".

Based on the qualification in section 718(c) that imprisonment only be imposed where necessary and the mandate in sections 718.2 (d) and (e) to canvass all available sanctions which are "reasonable in the circumstances", strict adherence to section 742.1 would produce a riddle : when is a necessary disposition of imprisonment not necessary?

To avoid either trivializing the new option or generating net-widening through the use of conditional sentences of imprisonment where a non-custodial sanction ought to have been imposed, I argued that the major role for the conditional sentence was to provide a potential community alternative in some situations where previously appellate courts had established presumptions of incarceration. Conditional sentences have no applicability to the graver categories of offences which mandate a penitentiary term, but only those offences which, by their nature, have persuaded appellate courts to declare that some incarceration should be the usual response. Some examples are theft and fraud by a person in a position of trust, trafficking in narcotics, assaults on children, sexual assaults by a person in a position of authority or trust, and the various driving offences causing bodily harm or death. In these cases, the principal impetus for a custodial presumption is the need to denounce because of the nature of the offence. Accordingly, for this group of cases, the conditional sentence decision should involve an assessment of whether there are factors relevant to the offence or the offender which ameliorate the need for service in custody as the vehicle for denunciation.

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1. See A. Manson, "Finding a Place for Conditional Sentences", (1997) 3 C.R. (5th) 283. For another analysis which extends to the important issues relating to breaches, see J. Gemmell, "The New Conditional Sentencing Regime", (1997) 39 Crim. L.Q. 334.

2. In less than eight months from the date of proclamation in force, this was amended by S.C. 1997, c. 18, s. 107.1. : see note 32 *infra*, and the related discussion.

The judge must consider whether the denunciatory demand of the situation is such that it can only be satisfied by incarceration. This raises two subsidiary questions which encompass, to some extent, the general purpose, objectives and principles of sentencing. First, can denunciation be achieved through non-custodial conditions. Secondly, are there circumstances which suggest that the usual denunciatory burden should not be shouldered by this particular offender. Certainly, there may also be some cases, especially those involving recidivists, where other considerations become prominent. For these cases, the conditional sentence decision, while still focusing on denunciation, will also involve issues of individual deterrence and rehabilitation. In fact, the conditional sentence of imprisonment may serve to promote various objectives while respecting the principles of restraint and proportionality. But the solution to the riddle, when is a necessary sentence of imprisonment not necessary, lies in a consideration of denunciation.

II. A MODERN CONCEPTION OF DENUNCIATION

Section 718(a) now provides that the denunciation of unlawful activity is one of the objectives of the imposition of penal sanctions. It is not self-evident that there is agreement about the inclusion of denunciation or about its meaning. *Bill C-19*, an aborted attempt at sentencing reform presented to Parliament in 1984, included a "declaration of purpose and principles of sentencing" which made no mention of denunciation.[3] In *R*. v. *Lyons*, LaForest, J. explained that a "rational system of sentencing" encompassed the goals of "prevention, deterrence, retribution and rehabilitation", without specific reference to denunciation.[4] The Sentencing Commission in its 1987 report included "denouncing blameworthy conduct" as one of the considerations which a court could take into account when applying the specified principles. To the Commission, the "paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender".[5] The Commission tended to view denunciation in the narrow condemnatory sense which focuses on communicating disapproval. In 1996, the Supreme Court distinguished between

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3. See section 199 of *Bill C-19*, to be known as the *Criminal Law Reform Act*, 1984 (1st reading on February 7, 1984; subsequently died on the order paper). The Bill proposed a new section 645 which declared the fundamental purpose of sentencing to be "the protection of the public" which was to be "furthered" by :

   (a) promoting respect for the law through the imposition of just sentences;
   (b) separating offenders from society, where necessary;
   (c) deterring the offender and other persons form committing offences;
   (d) promoting and providing for the redress to victims of offences or to the community; and
   (e) promoting and providing for opportunities for offenders to become law-abiding members of society.

4. *R*. v. *Lyons* (1987), 61 C.R. (3d) 1 at 24 (S.C.C.).

5. See *Report of the Canadian Sentencing Commission, Sentencing Reform : A Canadian Approach* (Ottawa : Supply and Services Canada, 1987) at 154-155.

retribution and denunciation in *R.* v. *M.(C.A.)*[6] and offered its view of the meaning of denunciation.

We should consider what denunciation could mean in the modern social context. Certainly, we are not talking solely about a judicial voice of condemnation. We ought to adopt a more contoured and expansive approach to denunciation which reflects the social and cultural role which sentencing and punishment play. My analysis begins with the Hegelian idea that the role of punishment is to "annul the crime, which otherwise would have been held valid, and to restore the right".[7] How can punishment restore except through the re-assertion of values in response to those which have been violated?[8] A surprisingly similar tone was struck by the Supreme Court of Canada in *M.(C.A.)* with its distinction between denunciation and retribution, its "legitimate sibling" :

> *Our criminal law is also a system of values. A sentence which expresses denunciation is simply a means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code*.[9]

This comment reflects the role of sentencing as a social and cultural institution.

The English writer Nicola Lacey has argued for a communitarian view of punishment.[10] The essential role of modern society should be to pursue "with equal concern the welfare and autonomy of each citizen" and to strive to create "an environment in which human beings may flourish and develop".[11] Within this conception, punishment becomes an important societal instrument with its central function geared to the re-affirmation of societal values. In commenting on the symbolic nature of punishment, Lacey observed :

> *An element of denunciation and disapproval would be an important feature in such punishments, and it might often be the case that the disadvantages meted out could*

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6. *R.* v. *M.(C.A.)* (1996), 46 C.R. (3d) 269.

7. G. W. F. Hegel, *Philosophy of Right* (Oxford : Clarendon Press, 1942) at 69, translated by T.M. Knox.

8. Hegel argued that punishment must involve more than simple compensation since sometimes compensation is impossible. Therefore, the idea of restoration must have a meaning which extends beyond any material restorative consequence.

9. See *R.* v. *M.(C.A.)*, *supra* note 5 at 310.

10. N. Lacy, *State Punishment : Political Principles and Community Values* (London : Routledge, 1988).

11. *Ibid.* at 198-199.

> *be both moderate and symbolic, supplemented by adequate practises of social compensation for victims.*[12]

In other words, the societal role of denunciation may involve more than condemnation. It can be linked to restoration through the pursuit of other values.

David Garland, one of the most thoughtful contemporary writers about punishment, makes a similar argument in addressing the larger cultural role of sentencing (or penality as he calls it) :

> *But penalty does more than just police the boundaries in which social relations take place : it also helps to define the nature and quality of the these relations themselves. Through its practises and its symbolic forms, penal practise helps give meaning and definition — as well as a certain tone and colouring — to the bonds which link individuals to each other and to society's central institutions.*[13]

The Supreme Court in *M.(C.A.)*, and the academic writing of Lacey and Garland all recognize the role which sentencing plays in asserting community values, broadly defined, as part of the denunciatory role. Thus, while denunciation condemns the violation of accepted norms, it can also serve to remind us of shared values. A community can re-assert its values by a combination of condemning the violation and compelling acts by the offender which express the importance of a shared value. This may occur when a sentence compels a public activity that promotes safety, expresses remorse, or educates about danger. Even when a sentence orders private compensation, the sentencing act takes place in public and conveys an underlying value. One case may involve the need to protect the vulnerable, while another may capture our common concern about safety and the dangers of impaired driving. Other values which fit neatly into the denunciatory equation are responsibility, remorse and reparation. As a community, we want to encourage accountability through the acceptance of responsibility. As a true reflection of harm done, we also want offenders to exhibit remorse and make some effort to repair harm where possible. All of these secondary objectives can reside within a modern conception of denunciation. As well, they are consistent with the purposes, objectives and principles of sentencing now contained in sections 718, 718.1 and 718.2. Regrettably, there will be cases where the kind of conduct and its consequential harm compels the court to conclude that an appropriate degree of denunciation can only be achieved through imprisonment. However, with respect to conditional sentences, the denunciatory demands of a particular offence can lead to an answer which satisfies those demands without incarceration but through other obligations.

III. JUDICIAL REACTIONS TO THE CONDITIONAL SENTENCE OF IMPRISONMENT

Since the proclamation in force of *Bill C-41* on September 3, 1996, trial judges have struggled with the statutory structure in numerous factual contexts relating to a

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12. *Ibid.* at 194.

13. D. Garland, *Punishment and Modern Society : A Study in Social Theory* (Oxford : Clarendon Press, 1990) at 271.

variety of offences.[14] These examples have provided useful insights into the appropriate role for the conditional sentence. Of course, sentences are the result of a web of factors and the result in one case may be distinguishable from others within the same category of offences. A small number of cases have now reached our provincial appellate courts. In general, both the Manitoba Court of Appeal and the Quebec Court of Appeal have recognized that the conditional sentence must be seen as a true alternative to imprisonment. The Manitoba Court of Appeal agreed that a conditional sentence was appropriate in a case of dangerous driving causing bodily harm remarking that Parliament has endorsed the "policy of keeping out of gaol those whose offences would previously have merited imprisonment for less than two years and who are not dangerous".[15] In Quebec, the Chief Judge dissented while the majority held that a 14 month conditional sentence was fit in response to a charge of driving while disqualified.[16] The accused had an extensive record for impaired driving but had been sober for 17 months. This disposition stresses the importance of alcohol dependence to culpability and is similar to the rationale behind a curative discharge. The same Court rejected a conditional discharge in the case of a man charged with obtaining the sexual services of a person under the age of 18.[17] The Court was especially concerned about the apparent lack of remorse. In *R.* v. *Matchett*, the New Brunswick Court of Appeal considered a case of theft by a bank employee and dismissed a Crown appeal against an eight month conditional sentence of imprisonment.[18] After setting out the new sentencing provisions, the Court remarked that Parliament "has moved in a positive way to provide the judiciary with an innovative

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14. Conditional sentences have been granted in cases of theft from an employer, fraud, sexual touching, sexual assault, gross indecency, dangerous driving causing bodily harm or death, assault causing bodily harm and assault with a weapon. Understandably the offence of sexual assault has been a source of controversy and a conditional sentence has been rejected in a number of instances. The most disturbing example is a British Columbia case in which the assault was marked by sadism with long-lasting psychological effects but, after hearing a joint submission setting the quantum at two years less a day, the judge accepted the argument that a conditional sentence was appropriate : see *R.* v. *Ursel*, B.C.S.C., per Boyle, J., released November 12, 1996; Crown appeal allowed, August 12, 1997. Judges have generally not employed the new alternative in cases of robbery (see *R.* v. *Syvret*, Ont. Ct., Gen. Div., per Trafford, J., released September 25, 1996) or hard drug trafficking (see *R.* v. *Ly and Nguyen*, Ont. C.A., released February 18, 1997). However, in *R.* v. *Ali*, an accused addict who offered for sale a small amount of crack cocaine and who had, with treatment, remained drug free for over a year, received a 4 month conditional sentence (per Fairgrieve, P.C.J, Ont.Ct., Prov. Div., released February 27, 1997). See also *R.* v. *Wheatley*, N.S.C.A., released April 21, 1997, in which a Crown appeal against a conditional sentence for trafficking in hashish was dismissed. Charges of laundering the proceeds of narcotics transactions involving millions of dollars resulted in a conditional sentence in *R.* v. *Sandberg*, per Kitchen, P.C.J., B.C. Prov. Ct., released March 26, 1997.

15. See *R.* v. *Arsiuta*, Manitoba Court of Appeal, released February 20, 1997, where a conditional sentence was used for the offence of dangerous driving causing bodily harm; cf. *R.* v. *Beardy* in which a conditional sentence was rejected by the Court for the offence of assault causing bodily harm committed by an offender with a record for violence in a domestic situation : released January 13, 1997.

16. See *R.* v. *Jean*, Quebec Court of Appeal, released March 18, 1997.

17. See *R.* v. *Maheu*, Quebec Court of Appeal, released February 6, 1997.

18. Released April 22, 1997.

measure" to enhance the "fairness and appropriateness of the system of sentencing". Although the Court listed a series of relevant factors, it did not articulate a clear decision-making methodology.

The principal issue remains one of methodology. The Ontario Court of Appeal has presented slightly different views. In the case of *Pierce*,[19] the accused had defrauded her employer of over $270000. The court was faced with the argument by the Crown that the statutory obligation to consider any danger to the safety of the community includes a consideration of general deterrence. The Court accepted that the intent of the new amendments was to encourage courts to be "more imaginative in structuring sentences that are less restrictive of the liberty of the persons". Further, it concluded that it was not necessary to determine definitively what community safety entailed so long as the traditional concerns about general deterrence, public confidence and denunciation were included in the custodial threshold decision. Methodologically, the Court advocated a one-stage decision-making process which involved all principles of sentencing and also suggested that the length of sentence would vary depending on whether it was to be served in custody or the community. These aspects of the decision seem to be a response to the earlier decision in *R*. v. *Scidmore*[20] which commented, without careful analysis, that a conditional sentence ought to follow whenever the statutory criteria are met. Surely, this was wrong and much of *Pierce* must be viewed in light of the perceived need to respond to *Scidmore*.

A more recent Ontario case decided by a differently constituted panel has attempted to resolve and reconcile some of the issues generated by *Pierce*. In *R*. v. *Wismayer*,[21] the appellant had been sentenced to 12 months imprisonment for the offence of touching a person under the age of 14 years for a sexual purpose. The victim was, for a short time, a foster child in the appellant's family home. The offender suffered from an obsessive compulsive disorder, social phobias and episodic alcohol abuse. By the time of the sentence appeal, he had spent four years on bail in psychiatric treatment. Expert evidence suggested that he had matured and developed some self-esteem and self-confidence as a result of commencing employment. The Court of Appeal accepted the submission that a conditional sentence of 12 months was an appropriate disposition which, through its conditions,[22] satisfied the denunciatory objective. While the Court questioned the role of general deterrence, it concluded that any general deterrent goal was satisfied by articulating as fit the 12 month term of imprisonment. The Court acknowledged the new alternative as a distinct sanction intended to reduce reliance on imprisonment especially in cases which would normally attract a jail sentence. While disavowing a "rigid

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19. *Pierce* (1997), 5 C.R. (5th) 171 (Ont.C.A.); leave to appeal to S.C.C. denied September 18, 1997.

20. *R.* v. *Scidmore* (1996), 3 C.R. (5th) 280 (Ont.C.A.) where the majority said that, with respect to sentences of less than two years "it is the intent of the legislature that the term be served in the community unless that would put the community at risk".

21. Reported as *R. W. (J.)* (1997), 5 C.R. (5th) 248 (Ont.C.A.).

22. The conditions included the continuation of psychiatric treatment, house arrest at his parents' home except for work and medical treatment, and a prohibition against being alone in the presence of a child under the age of 14.

two stage process", the Court held that the principle of restraint requires that all non-custodial sanctions be canvassed so that imprisonment will only be considered "where necessary". Then, because the new disposition is discretionary, the custodial decision involves a consideration of the wider objectives and principles of sentencing with the major consideration being danger to the safety of the community arising from the risk that the particular offender will re-offend. With respect to the custodial threshold, the Court observed that, because of its speculative nature, it would be rare that general deterrence would animate the decision to incarcerate and even then only when the offence is one which is clearly amenable to a general deterrent affect, like well-planned fraud by persons in positions of trust. The Court also cautioned about the use of incarceration solely as a specific deterrent relying on recent Canadian research which suggests a negative correlation between incarceration and recidivism.[23]

A majority of the Saskatchewan Court of Appeal in *R.* v. *McDonald*,[24] advocated a principled approach to conditional sentences which would situate it as a real alternative even though a conditional sentence in the circumstances was rejected by the majority. A 33-year old disabled aboriginal woman had been convicted of criminal negligence causing death. The trial judge recognized that this kind of offence carried a presumption of incarceration in the one to three year range. In an effort to conduct a proceeding which was, to some extent,[25] respectful of the aboriginal culture and traditions, the judge heard submissions from members of the northern community which addressed both the tragic consequences to the deceased's husband and children, as well as the offender's remorse and acceptance of responsibility and her success at complete abstinence from alcohol. He imposed a sentence of 9 months of electronically monitored house arrest, followed by a further 15 months of probation, to enable her to continue working and supporting her family.

Three years after the offence, the case came to the Court of Appeal. While the majority rejected the new option of a conditional sentence, which had not been available at trial, Mr. Justice Vancise wrote a compelling decision which started from the premise that "imprisonment has failed to achieve the objectives of deterrence and rehabilitation in any meaningful way and serves simply as a means of denouncing certain aberrant behaviour and as an expression of latent vengeance". He developed an analysis which

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23. Rosenberg, J.A. cited the tentative conclusions of the Corrections Utilization Study, "A Review of the National and International Literature and Recommendations for a National Study on Recidivism" (Canadian Centre for Justice Statistics, January, 1997).

24. *R.* v. *McDonald* (1997), 5 C.R. (5th) 189 (Sask.C.A.).

25. For a number of years, trial judges in various northern communities, principally in the Yukon, Saskatchewan and northern British Columbia, have been involving communities in constructing and administering sentences through what has become known as a sentencing circle. While the imposition of sentence remains within the authority of the trial judge, community elders, members and criminal justice professionals sit ostensibly as equals in a circle to discuss the offender and the offence in an effort to reach a consensus about disposition. In *McDonald*, the community leaders rejected the offer of a sentencing circle because they were concerned they did not have sufficient experience with process and the issues. Instead, the judge asked a number of community members to attend and express their views in open court.

gave effect both to the statutory structure and the recently entrenched principle of restraint. To avoid net-widening and to ensure that the new option is indeed an alternative, he decided that the judge must determine that imprisonment ordinarily would be the appropriate sanction. If not, another community-based sanction should be used. Only after taking into account the traditional mitigating and aggravating factors and concluding that imprisonment for less than two years is the appropriate disposition should a judge consider service in the community on conditions. At this point, the trial judge should consider such factors as whether supervision can be achieved without incarceration, whether incarceration would represent "meaningless punishment", whether the seriousness of the offence requires special conditions restricting liberty, and the availability of treatment resources. Vancise, J.A. concluded that the custodial threshold should be determined, after satisfying the statutory pre-conditions, by considering whether the nature of the offence or characteristics of the offender require segregation from the community, and whether there is a need for denunciatory sentencing. Although Lane, J.A. agreed with this mode of analysis, he concluded that the gravity of the offence indicated a sentence beyond the range of a conditional sentence.

These decisions present a number of common elements. First, it is clear that appellate courts recognize that the conditional sentence is a conditional sentence *of imprisonment* (emphasis added). Its applicability arises only in situations where previously the call would be incarceration. Restrictive provisions like house arrest, curfews, and electronic monitoring are consistent with this characterization. Only in *Pierce* has a court suggested that the length of a conditional sentence be left until the custodial decision has been resolved. This approach diminishes the idea of a conditional sentence of imprisonment and seems not to have attracted any support. Secondly, the option is discretionary and meeting the statutory pre-conditions does not guarantee a conditional sentence. Appellate courts seem concerned that the custodial decision not be divorced from the context of the recently-articulated statements of principle. *McDonald* and *Wismayer* have expressly restricted endangerment to a consideration of the particular offender.[26] All courts have recognized a role for denunciation in the custodial decision. Especially given the concerns expressed about the efficacy of general deterrence, denunciation may prove to be the best magnet for attracting broader considerations to the custodial decision. Denunciation can be interpreted as encompassing the whole expressive ambit of sentencing. Relevant values which underlie an appreciation of harm, and also the need to avoid and repair harm, can be packaged into the same message. Condemnation can be conveyed in ways that also encourage remorse, responsibility and reparation. The question remains : is incarceration of this offender necessary to achieve the usual denunciatory goal.

IV. PROPORTIONALITY

26. This approach has been followed more recently in *R.* v. *Oliver*, Ontario Court of Appeal, released May 5, 1997. On the basis of "denunciation and deterrence", a conditional sentence was rejected in a case of sexual assault over a three year period by a recreation program instructor while the victim was between 7 and 12 years old.

How does the conditional sentence of imprisonment square with section 718.1 and the statement that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender"? According to the sub-heading, this is a "fundamental principle". This characterization differs significantly from the Sentencing Commission recommendations. The Commission's proposals started with the declaration that the "paramount principle governing the determination of a sentence" is proportionality.[27] This reflected the attachment of the Commission to the philosophy of "just deserts".[28] The Criminal Code, however, has taken a different approach. It does not describe proportionality as "the" fundamental or over-arching principle. The new legislation suggests that proportionality is not the prescribed engine of sentencing but rather a brake on unjustifiably disproportionate sentencing. As a general rule, sentences ought to reflect the gravity of the offence and the reasonably foreseeable harm done. In this way, proportionality is "rooted in notions of fairness and justice".[29] According to Rosenberg, J.A. for the Ontario Court of Appeal :

> *Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good.*[30]

This view accepts that proportionality must take into account all relevant circumstances to ensure that an exemplary disposition does not unfairly burden the specific offender. Thus, proportionality is indeed a brake and not an engine. It ought not to trump a submission for a conditional sentence of imprisonment. Once it is decided that the sentence, considered in light of all applicable principles, ought to be a custodial term of less than two years, the next issue is the appropriateness of a conditional sentence. Proportionality does not enter the matrix. It has already been assessed and its role is not undermined by a decision to permit the sentence of imprisonment to be served pursuant to section 742.1 in the community.

V. A LAST MINUTE AMENDMENT

While courts were engaged in intense debates over conditional sentences, the government slipped an amendment through Parliament on the last day before the completion of its legislation session pending the federal election. Section 742.1(b) as amended[31] now requires the trial judge to be satisfied that :

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27. *Supra* note 4 at 154.

28. See Von Hirsch, *Past or Future Crimes : Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick, N.J. : Rutgers University Press, 1985) for a discussion of just deserts and the concepts of cardinal and ordinal ranking.

29. See the comments of Rosenberg, J.A. in *R.* v. *Priest* (1996), 1 C.R. (5th) 275 at 283-284.

30. *Ibid.* at 284.

31. S.C. 1997, c. 18, s. 107.1.

> *serving the sentence in the community would not endanger the safety of the community and is consistent with the objectives and principles contained in sections 718, 718.1 and 718.2.*

While it may be shocking that an amendment would be proposed and enacted without any debate outside of Parliament, the actual language probably does not detract from the ideas contained in the majority of appellate decisions. The custodial issue is discretionary and must be informed by the relevant principles. This does not mean that every articulated principle must be canvassed since some have little or no relevance at this stage. It simply means that the decision to incarcerate or suspend the incarceration must conform with the applicable principles relevant in the case. This will always include the principle of restraint and the need to denounce.