38/10; [2010] VSCA 183

SUPREME COURT OF VICTORIA — COURT OF APPEAL

CAMPISI v THE QUEEN

Maxwell P, Bongiorno JA and Beach AJA

12 July 2010

CRIMINAL LAW – APPEAL – SENTENCE – BLACKMAIL – JUDGE SENTENCED ON BASIS DIFFERENT FROM CROWN OPENING – NO NOTICE TO DEFENCE – BREACH OF NATURAL JUSTICE – NO DIFFERENT SENTENCE SHOULD HAVE BEEN PASSED – APPEAL DISMISSED: *CRIMES ACT* 1958 (VIC) S568(4).

C. was sentenced to a term of imprisonment for his role in an offence involving blackmail. C. pleaded guilty to the offences and the Crown opening made it clear that the amount demanded by C. was $100,000. In the sentencing reasons, the Judge referred to the demand having been made for the sum of $300,000 and that C. made an unwarranted demand for a very large amount of money. Upon appeal against sentence—

HELD: Appeal dismissed.

1. As the decision of the Court of Appeal in *R v Lowe* [2009] VSCA 268 makes clear, the principles of natural justice require a sentencing judge to inform the parties, and to provide the opportunity for submissions, if the judge intends to go beyond the facts contained in the Crown opening. The judge is never ultimately confined to what is set out in the Crown opening. But, given the function which a written opening conventionally performs on a plea in mitigation, it is the obligation of the judge to alert the parties if dissatisfied with any aspect of the Crown opening, or wishes to take into account some different state of facts discerned from a reading of the depositions. This is but an example of the right of every person to be alerted to any adverse matter likely to be taken into account against him or her, in order that there be an opportunity to deal with that matter before the relevant exercise of discretion takes place.

2. The references by the sentencing Judge to $300,000 were such as to breach the hearing rule. It seems clear that C. was entitled to assume that the judge would proceed on the basis that the amount demanded was $100,000. It is clear that no notice was given to the defence that the Judge would proceed on the basis that the demand was three times that.

3. Grounds 1 and 2 of the application for leave to appeal asserted that the sentencing judge erred in relying on facts and circumstances as aggravating features for sentencing purposes by having regard to matters which went beyond the facts stated in the Crown opening at the plea hearing. These Grounds are upheld but the appeal against sentence is dismissed.

MAXWELL P, BONGIORNO JA and BEACH AJA:

1. This is an application for leave to appeal against sentence. There is also an application for reinstatement of the application for leave. For reasons which follow, we have concluded that the application for reinstatement should be granted; the application for leave to appeal sentence should be granted; and the appeal should be treated as having been instituted and heard instanter and dismissed.

2. The applicant pleaded guilty to two counts; one of blackmail and the other of possession of drugs of dependence. Her Honour Judge Hampel sentenced him on the count of blackmail to two years and six months' imprisonment, of which one year and six months was suspended for one year and six months. On the count of possession, her Honour imposed a fine of $500.

3. This application for leave to appeal relates only to the sentence imposed on the blackmail count. The circumstances of the offending were as follows.

4. Mr Paskins (the victim) was a former employee of the Ymer family's fruit business, 'Fruit Ace'. When he left their employ he set up a wholesale fruit and vegetable business at Melbourne Wholesale Fruit & Vegetable Market in Footscray. The Ymer family were unhappy about the circumstances in which he had left, and wrote to Mr Paskins expressing their concerns, and stating they were $150,000 short as a result. No request for repayment was made, nor any allegation

that he owed them money. A few days later the applicant and Mantovani (one of the co-accused) approached Mr Paskins at his market stall in Footscray, stated that he owed the Ymer family money and threatened him. They eventually left when market security arrived.

Specific error: breach of natural justice

5. Grounds 1 and 2 of the application for leave to appeal assert that the sentencing judge erred in relying on facts and circumstances as aggravating features for sentencing purposes by having regard to matters which went beyond the facts stated in the Crown opening at the plea hearing.

6. In our view that ground should be upheld. We need only deal for this purpose with that part of the ground which draws attention to the statements by the judge in her reasons of the amount demanded by the applicant and his co-accused, Mantovani, of the victim, Mr Paskins. The relevant part of the Crown opening made quite clear that, so far as the case the Crown was presenting to the sentencing judge, the amount demanded was $100,000:

> The prisoner said:
> • "I hear you owe some money and we're here to talk about it."
>
> • "You owe $100,000."

The prisoner stood very close to Mr Paskins who felt intimidated and ill at ease. Mr Paskins said that he did not owe anybody any money. The prisoner said, "You owe $100,000 by Wednesday."

7. Reference was made in the course of the plea to the specific purpose of the approach to Mr Paskins as having been to get $100,000. In the oral opening, the prosecutor read from the written opening, identifying the demand as one for $100,000.

8. In the sentencing reasons her Honour refers to the demand having been for the sum of $300,000:

> ... You Campisi stood very close to Mr Paskins and said, "I hear you owe some money and we are here to talk about it. You owe $300,000. We are good friends of the Ymer family. You don't need to know; we want $100,000 by Wednesday."[1]
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> ... The amount that Mr Paskins said you demanded from him of $300,000 was double the amount referred to in the letter Mr Ymer sent or the Ymer family sent to Mr Paskins.[2]
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> ... Having rejected your explanation as to how you came to be involved, it seems to me that I must deal with you as a person who used fear, intimidation and force of numbers to make an unwarranted demand for a very large amount of money from a man you did not know; bailing him up at his workplace and being a party to Mr Mantovani's conduct of assaulting him, threatening to shoot him and threatening him by say[ing] he knew where he lived.[3]

9. Notwithstanding the submissions advanced by Mr Gyorffy, it seems clear that when her Honour referred in the above extracts to 'an unwarranted demand for a very large amount of money', she was incorporating by reference her own earlier statements that the demand was for $300,000.

10. As the decision of this Court in *R v Lowe*[4] makes clear, the principles of natural justice require a sentencing judge to inform the parties, and to provide the opportunity for submissions, if she intends to go beyond the facts contained in the Crown opening. The judge is never ultimately confined to what is set out in the Crown opening. But, given the function which a written opening conventionally performs on a plea in mitigation, it is the obligation of the judge to alert the parties if she is dissatisfied with any aspect of the Crown opening, or wishes to take into account some different state of facts discerned from a reading of the depositions. This is but an example of the right of every person to be alerted to any adverse matter likely to be taken into account against him or her, in order that there be an opportunity to deal with that matter before the relevant exercise of discretion takes place.

11. The relevant paragraphs from *Lowe*, which record how the practice on pleas in mitigation has changed since the advent of written Crown openings, are as follows:[5]

> Since that time [when *R v Halden*[6] was decided] the usual practice at a sentencing hearing has changed. Now, it is more likely for a plea hearing to be heard on the basis of an agreed statement of facts (or statement of undisputed facts as it was in the present case) rather than on facts that could be found in the depositional material. Accordingly, a sentencing judge will often be required to inform the parties and invite submissions, if he or she intends to "go beyond" those facts which have been agreed or are not disputed between the parties. That obligation will be informed by the principles of procedural fairness.
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> In sentencing, the judge is not fettered by the facts upon which the parties rely. The judge may seek further facts from either party or may indicate that he or she intends to rely upon facts additional to those which the parties have put [to] the court so long as it is done in accordance with ordinary legal principles appropriate to a criminal trial. This Court in *R v Mielicki*[7] endorsed the principles set out by Kirby P in *R v Chow*[8] where his Honour said:
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> > The judge may go behind the agreement of the parties as to the approach which they urge should be taken to the facts relevant to sentencing. But in that event, the judge must be careful to avoid the kind of procedural unfairness which is inherent in accepting a plea of guilty but then proceeding to impose a sentence upon a different factual substratum than that required by the essential ingredients of the offence and agreed between the parties when the plea was taken.

12. It was submitted by Mr Gyorffy that the references to $300,000 were not such as to breach the hearing rule. We reject that submission. It seems clear to us that the applicant was entitled to assume that the judge would proceed on the basis that the amount demanded was $100,000. It is clear that no notice was given to the defence that her Honour would proceed on the basis that the demand was three times that.

No different sentence should have been passed

13. But, as s568(4) of the *Crimes Act* 1958 (Vic) makes very clear, it is not enough for an appellant to establish error in the sentence. This Court is bound to dismiss the appeal notwithstanding the establishment of error unless satisfied that 'a different sentence should have been passed'. We are not so satisfied. In our view the sentence imposed was entirely appropriate having regard to the very serious nature of this offending. We say that mindful of all of the mitigating factors which were carefully explained to the sentencing judge and have again been drawn to our attention, in particular the applicant's prior good character and unblemished record.

14. In seeking to persuade the Court that a different sentence should have been passed, counsel for the applicant, who also appeared for him on the plea, submitted that her Honour took an unduly severe view of the seriousness of the conduct. It was said that her Honour erroneously concluded that the demand was made in order that the money (which it was expected the victim would hand over) would be received for the benefit of the applicant and his co-accused.

15. In our view, there was no such error. Her Honour was fully entitled to draw that conclusion from the facts before her. That such a finding was clearly open was underlined by the fact that defence counsel thought it necessary on the plea to seek to develop an exculpatory account of how the demand had come to be made. On instructions, counsel submitted to the sentencing judge that in truth this was no more than a misguided attempt by his client to recover money which he believed was owing by the victim to the Ymer family. This was to be seen as having been effectively the act of a commercial agent, which the applicant had qualified to become.

16. Her Honour made it very clear in the course of the plea that she found this version of events very difficult to accept. She made it quite clear that, in the absence of evidence from the applicant to verify this version, she would not regard him as having discharged the burden of proof of the mitigating facts on the balance of probabilities. In the event, the applicant did not give evidence on the point and, in our view, the implausible explanation put forward was rightly rejected.

17. It is a matter of very great seriousness, we think, to make an unwarranted demand for what on any view was a substantial amount of money – $100,000 – and to do so with the threats and menaces which accompanied this demand. The agreed statement of facts made clear, as one would expect, that the incident made the victim very fearful for himself and his family. The fact that the threats included the statement to the victim that the offenders knew where he lived heightened the seriousness of the conduct, in our view.

18. What appears to have been a mistake in the Crown opening suggested to the judge that this applicant was not a vehicle for general deterrence. We assume that what was meant was that no particular attention to specific deterrence was required. It cannot have been the Crown's view, and it is certainly not our view, that general deterrence had no part to play in this sentence. On the contrary, for serious criminal conduct of this kind general deterrence is a matter of real importance. It should not be thought by anyone that it is an easy way to make some quick money to threaten somebody or their family with death or injury. The Courts will continue to take a very serious view of such conduct.

19. Finally, counsel for the applicant pointed out that the Crown had submitted on the plea that a wholly suspended sentence would be within range. The complaint is made that her Honour did not make any reference to that submission in her reasons and, moreover, did not adopt that submission, but rather decided to impose an only partly suspended sentence.

20. In our view, it was entirely appropriate, for the reasons given *R v MacNeil-Brown*,[9] for the prosecutor to make a submission on the applicable sentencing range. (Whether a wholly suspended sentence would in truth be appropriate for a matter of this seriousness might well be debated on another occasion.) But, as the Court in *MacNeil-Brown* emphasised, no judge is bound by a Crown submission on range. Like any other submission which counsel makes in any matter, criminal or civil, a submission on range is for the assistance of the judge in arriving at the decision which the judge has to make. But there is no obligation on a judge to refer to it in her sentencing reasons and, as we have said, nothing which binds a judge to follow a submission from the Crown on range. He or she may think the submission is quite wrong or may in other circumstances think it is entirely right.

21. We would adopt what the Court said in *R v Earl*:[10]

> Since the judge expressly referred in her sentencing remarks to the nature and gravity of the offence and the range of mitigative considerations mentioned by counsel, it can hardly be doubted that her Honour took them into account. Equally, although the judge did not expressly refer to the Crown's submission as to whether it would be open to avoid an immediate sentence of imprisonment, there is no reason to suppose that her Honour would not have taken those submissions into account. Regardless, however, of whether the Crown conceded that a lesser sentence might suffice, it was for the judge to decide on the sentence to be imposed, and in the end the question for us is whether it was beyond the range of sound sentencing discretion.

22. Accordingly the appeal is dismissed.

23. The orders of the Court are as follows:

1. Application for reinstatement of the application for leave to appeal granted.

2. Application for leave to appeal against sentence granted.

3. The appeal is treated as having been instituted and heard instanter and dismissed.

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[1] *R v Latorre, Mantovani and Campisi* (Unreported, County Court of Victoria, Judge Hampel, 10 December 2009), [144].
[2] Ibid [155].
[3] Ibid [304].
[4] [2009] VSCA 268 ('*Lowe*').
[5] Ibid [15]–[16] (some citations omitted).
[6] (1983) 9 A Crim R 30.
[7] (1994) 73 A Crim R 72.
[8] (1992) 28 NSWLR 593, 607; (1992) 63 A Crim R 316.
[9] [2008] VSCA 190; (2008) 20 VR 677; (2008) 188 A Crim R 403 ('*MacNeil-Brown*').
[10] [2008] VSCA 162.
[11] Ibid [22].

APPEARANCES: For the applicant Campisi: Mr RI Gipp, counsel. Riordan Legal Pty Ltd, solicitors. For the Crown: Mr T Gyorffy, counsel. Mr C Hyland, Solicitor for Public Prosecutions.
