23/07; [2007] VSCA 60

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v BERRY

Vincent and Nettle JJ A, and Habersberger AJA

21 March 2007

CRIMINAL LAW – SENTENCING – DEFRAUDING THE COMMONWEALTH – OBTAINING PROPERTY BY DECEPTION – AMOUNTS OF $6632.45, $39,502.57 AND $10,038.78 RECEIVED WHEN NOT ENTITLED – OFFENDING OCCURRED OVER NUMBER OF YEARS – PLEAS OF GUILTY ENTERED AT EARLIEST OPPORTUNITY – GAMBLING HABIT SAID TO BE CAUSE OF OFFENDING – OFFENDING CEASED WHEN GAMBLING HABIT BROKEN – GOOD PROSPECTS OF REHABILITATION AND EMPLOYMENT – NO RELEVANT PRIOR CONVICTIONS – IMPRISONMENT SAID TO IMPOSE HARDSHIP ON ACCUSED'S ELDERLY AND UNWELL PARENTS – DELAY IN BRINGING PROSECUTION – SENTENCING STATISTICS – WHETHER A SENTENCE OF 3 YEARS' IMPRISONMENT WITH 2 YEARS' IMMEDIATE CUSTODY MANIFESTLY EXCESSIVE: *CRIMES ACT* 1914, S29D, *CRIMINAL CODE* (CTH) S134.1(1).

Having regard to the serious nature of the offences, the calculated nature of the accused's actions which required him to lodge false documents over a long period of time, the repetitive nature of the offences, the ease with which social security fraud is committed and the difficulties in detection, the prevalence of such offending and the importance of general deterrence, the appellant was properly sentenced to an actual term of imprisonment. However, the sentence was manifestly excessive given the accused's pleas of guilty, the absence of any relevant prior convictions, his good prospects of rehabilitation, particularly when he had voluntarily ceased his offending after breaking his poker machine habit, and the efforts he had made during the period of delay between detection and conviction to finding employment and continuing to abstain from gambling. In those circumstances, the sentences imposed were quashed and in lieu thereof, a total effective sentence of 2 years and 4 months' imprisonment, to be released upon a recognisance after serving 218 days of that sentence in addition to a reparation order in the sum of $56,173.80.

***Obiter*. Whilst sentencing statistics may be of limited assistance, they may be useful for parity in sentencing different offenders where a pattern of sentencing for particular offences can be established over a significant period for the same or similar conduct.**

VINCENT JA:

1. I will invite Habersberger AJA to deliver the first judgment.

HABERSBERGER AJA:

2. On 15 August 2006, the appellant pleaded guilty before the County Court at Melbourne to two counts of defrauding the Commonwealth contrary to s29D of the *Crimes Act* 1914 (Cth) ("the Act") and one count of dishonestly obtaining property belonging to Centrelink, a Commonwealth entity, by deception contrary to s134.1(1) of the *Criminal Code* (Cth). Count 1 related to the appellant defrauding the Commonwealth by receiving, between 19 July 1993 and 15 June 1995, social security benefits totalling $6,632.45 in the name of Michael Steven Berry to which he knew he was not entitled when he was, at the same time, in receipt of social security benefits in the name of Michael Steven Hill. Count 2 related to the appellant receiving, between 6 February 1996 and 23 May 2001, social security benefits totalling $39,502.57 in the name of Michael Steven Berry to which he knew he was not entitled when he was, at the same time, in receipt of social security benefits in the name of Michael Steven Hill. Count 3 related to the appellant, between 24 May and 17 July 2002, dishonestly obtaining property belonging to Centrelink, a Commonwealth entity, by deception by representing to Centrelink that he was not known by any other name and by failing to advise Centrelink that he was in receipt of payments of Newstart Allowance in the name of Michael Steven Hill, with the intention of permanently depriving Centrelink of that property. The amount involved in this count was $10,038.78 (not $10,038.57 as stated by the judge).

3. After hearing a plea in mitigation of penalty the learned judge, on 18 August 2006, sentenced the appellant as follows:

Count 1 — Convicted and sentenced to imprisonment for one year and six months;
Count 2 — Convicted and sentenced to imprisonment for three years;
Count 3 — Convicted and sentenced to imprisonment for one year and six months.

His Honour ordered that all sentences were to commence on 18 August 2006, resulting in a total effective sentence of imprisonment for three years. It was declared that the appellant had served four days in custody. In accordance with s20(1)(b) of the Act, it was further ordered that the appellant be released after serving two years of the sentence imposed on him upon him entering into his own recognisance in the sum of $1,000 to be of good behaviour for a period of twelve months. The appellant was also ordered to make reparation to the Commonwealth in the sum of $56,173.80 (the total of the three amounts referred to above).

4. The appellant was granted leave to appeal against sentence on 8 December 2006. There are two grounds of appeal. The first is that the individual sentences, the total effective sentence and the period of immediate custody are manifestly excessive. The second ground is that the learned sentencing judge erred in that he failed to give any or sufficient weight to the following matters:

(a) the comparatively modest amount of money obtained:

(b) the appellant's early pleas of guilty;

(c) the absence of any relevant prior convictions or findings of guilt;

(d) the finding that the appellant had good prospects of rehabilitation;

(e) the appellant's personal circumstances; and

(f) the delay between the offending and the charging of the appellant.

5. The appellant was born Michael Steven Hill in England on 20 May 1956. He was about three when he arrived in Australia. When the appellant was aged about six or seven his mother remarried, to a man named Berry, and the appellant's name was changed to Berry. Thereafter, he was known as either Michael Hill or Michael Berry, depending on the people he was dealing with at the time. He has had formal documentation and bank accounts in both names for a considerable number of years.

6. The appellant left school at 15 and completed an apprenticeship as a butcher. He has worked in a variety of occupations over the years. Although the appellant was a single man living, at the time of sentencing, with his parents, he had been engaged to be married for some ten years. His fiancée had children from a prior relationship and it appears that the appellant intermittently lived with and helped support that family. Indeed, for a time he was in receipt of parenting payments under the name of Hill.

7. The only prior convictions of the appellant related to a drink driving charge and associated offences in 1986. In his sentencing remarks, the learned judge said that he regarded these prior convictions "to be of limited relevance".

8. The appellant commenced to receive various social security benefits in January 1989, under the name of Hill. Apart from some breaks when the appellant gained employment or failed to attend an interview at the Department of Social Security, the appellant continued to receive these various benefits, under the name of Hill. The parenting payments were cancelled on 8 April 2000 as a result of his fiancée's children reaching the age at which they were no longer assessed as dependent children. During this period, the appellant applied for and received, under the name of Berry, various social security benefits in the periods between 22 July and 14 August 1993, between 31 August 1994 and 15 June 1995 and between 6 February 1996 and 8 April 2000, without disclosing that he was also receiving benefits under the name of Hill.

9. The payments to the appellant, under the name of Berry, continued after 8 April 2000 until they ceased on 16 December 2002 as a result of the appellant failing to enter into a program with a Job Network member. During this period, the appellant applied for and received, under the name of Hill, Newstart allowance benefits between 28 January 2001 and 17 July 2002, when they were cancelled as a result of his failure to respond to correspondence. In a sense, this is

the reverse of the earlier situation in that this time the additional benefits were obtained by the appellant under the name of Hill. Nevertheless, at the plea, the learned sentencing judge was told that "for consistency", where there were periods of "double dipping", the Crown alleged that the appellant was not entitled to the payments made to him under the name of Berry.

10. The appellant's offending came to light in July 2004 as a result of anonymous information being received by Centrelink from a member of the public.

11. Counsel for the appellant told the learned sentencing judge that the appellant had become a regular attendee at certain hotels following the introduction of poker machines into Victoria in 1993. It was said that his downfall was caused by his gambling addiction which continued until about 2002 when he nominated himself as a prohibited person at these hotels. Counsel said that the appellant had not been back since and had not gambled since. The appellant was declared bankrupt on his own petition in January 2005.

12. In June 2005, the appellant commenced working as a forklift driver with a small company earning $539 net per week. A letter from the warehouse manager of the employer was tendered at the plea. The writer described the appellant as "an invaluable employee" with "a strong work ethic". She said that he was "extremely remorseful and disappointed with himself" over the charges which he had informed her about "in depth". Counsel for the appellant tendered, without objection, a letter from the same company advising that full-time employment was still available to the appellant when he is released from prison.

13. The learned sentencing judge was also informed that the appellant's solicitors were holding $2,000 in their trust account to be paid to the Commonwealth that day by way of an initial repayment of the monies in question.

14. In his sentencing remarks, the learned judge described the offences to which the appellant had pleaded guilty as "serious". He stated that the appellant had been "double dipping" the social security benefits system on "a systematic basis over a long period of time." His Honour noted that it had often been said by superior courts that "social security fraud is easy to commit and yet difficult to detect." He said that general deterrence was "an important sentencing consideration" for crimes of this nature and where, as here, the amount of money involved was "substantial". His Honour also noted that superior courts had said "a custodial sentence is the only appropriate sentence to be imposed in respect of social security fraud save and except in very exceptional circumstances." He did not find those circumstances existed in this case. His Honour stated that the appellant had taken advantage of his situation of being known by two names to commit the offences in a "calculated" way.

15. His Honour found that the appellant had committed the offences "for greed rather than need", seemingly using the proceeds of his offending to fund a poker machine habit. He stated that "whilst gambling might offer an explanation for your offending, it serves little by way of mitigation." The learned sentencing judge specifically referred, by way of mitigation, to his finding that the appellant's incarceration would impose an additional hardship upon his elderly and unwell parents; the fact that the appellant was well regarded by his employer (a fact confirmed to this Court by the letter offering future employment with the same employer); that the appellant "may well have overcome" the gambling habit in around 2002; that there was going to be an initial repayment of $2,000 to the Commonwealth and that the appellant's prospects for rehabilitation, if he could keep away from gambling, "appeared to be good."

16. In his written outline of submissions and in his oral submissions, counsel for the appellant dealt with the two grounds of appeal together. First, he submitted that, given the amounts of money involved, the sentences on counts 1 and 3 ought to have been measured in months and the sentence on count 2 ought to have been in the order of 12 to 18 months. In the written submissions, counsel for the respondent submitted that the learned sentencing judge properly found that the offending involved a "substantial sum of money". I am satisfied that the total amount was properly regarded as "substantial", although the amounts of money involved in two of the three counts were relatively small.

17. Secondly, counsel for the appellant submitted that the appellant's pleas of guilty were

scarcely mentioned and that there was no attempt to assess them as pleas made at the earliest stage. He submitted that the sentences reflected that the guilty pleas could not have been given anything approaching sufficient weight. On the other hand, counsel for the respondent submitted that, having regard to the maximum penalty of imprisonment of 10 years for each count and the strength of the Crown case, it was evident that there was a significant discount given for the appellant's pleas of guilty.

18. Counsel for the respondent correctly pointed out that the learned sentencing judge mentioned that the appellant had pleaded guilty in the first two paragraphs of his sentencing remarks, and that his Honour had twice been told, and had noted, during the plea that the appellant had pleaded guilty at the "earliest opportunity". Further, although his Honour did not state that the guilty pleas had been taken into account, he did say that he had given "full consideration" to the matters set out in s16A and s17A of the Act, which would include taking into account the fact that the appellant had pleaded guilty to the charges (s16A(2)(g) of the Act). In any event, although his Honour should have stated in his sentencing remarks, that the pleas of guilty had been taken into account,[1] the law in Victoria is that the failure to do so does not "necessarily and in every case" constitute an error that vitiates the sentence.[2] The question for determination is whether an appropriate discount has been given.[3]

19. Thirdly, Mr Croucher drew attention to the fact that the appellant, at age 50, had no relevant prior convictions and that apart from his 20 year old drink driving incident he was a man of good character. But, as counsel for the respondent submitted, the appellant was sentenced on the basis that his prior convictions were of "limited relevance".

20. Fourthly, it was submitted on behalf of the appellant that, although the learned sentencing judge found that the appellant had good prospects of rehabilitation, that finding was not reflected in any aspect of the sentence actually imposed. Counsel for the respondent pointed out that the finding concerning rehabilitation was subject to the qualification that the appellant be able to keep away from gambling.

21. Fifthly, counsel for the appellant submitted that it was apparent that the learned sentencing judge had given little weight to the appellant's personal circumstances, including his support for his fiancée's children, his employment and the fact that his elderly and ill parents were reliant on him. In particular, Mr Croucher submitted that the fact that the offending was linked to the appellant's poker machine habit which he had overcome in 2002, when the offending ceased, was worthy of weight. In response, Ms Carlin submitted that there was no evidence that the appellant suffered from a pathological gambling addiction and that his Honour had properly held that the gambling habit was little or no mitigation for the offending. She further submitted that the other personal circumstances relied on had been referred to in detail by his Honour in passing sentence.

22. Sixthly, Mr Croucher referred to three aspects of delay in prosecution that were relevant to the judge's discretion. First, had the offending been detected earlier, the sentences on the first two counts would have been subject to the now repealed s16G of the Act. Secondly, whilst the offending was detected in July 2004, no charge was laid until December 2005. Thirdly, the appellant had done well in the four years since he overcame his gambling habit. Mr Croucher submitted that although the third aspect had been mentioned by his Honour there was no other mention of, or weight given to, the delay and its effect.

23. Ms Carlin submitted that the judge would have erred by applying s16G, given that the plea occurred after 16 January 2003. In any event, it seems to me incongruous for a person to argue that had his offences been detected earlier he might have been treated differently. It was always open to the appellant to disclose his offending conduct, but he did not.

24. In respect of the other aspects of delay, Ms Carlin correctly pointed out that the delay between detection and charging was referred to by the learned sentencing judge during the course of the plea. And, as was conceded by Mr Croucher, the judge also referred to the appellant's successful cessation of gambling in 2002. Further, Ms Carlin submitted that his Honour, having properly taken into account the appellant's employment and likely reform of his gambling habit, did not err in failing to specify that he had taken delay into account.

25. Consideration of the individual matters raised on behalf of the appellant does not enable me to identify any specific sentencing error on the part of his Honour. Nevertheless, there remains the question whether the individual sentences, the total effective sentence and the period of immediate custody were manifestly excessive. That question does not admit of much argument. The question is whether the sentence, in all of its aspects, was within the range open to the sentencing judge in the circumstances of this offending and the circumstances of the offender. In my opinion, it was not. Each aspect of the sentence was manifestly excessive. There is validity, in my view, in Mr Croucher's submission that the sentence imposed was befitting a case where much more money was obtained and there was a plea of not guilty, a refusal to repay the funds, an extensive criminal history and little or no prospects of rehabilitation.

26. This is not an appeal about whether in cases of welfare fraud there is a "rule" or "practice" that a custodial sentence should be imposed and a period of imprisonment actually served.[4] All of the policy reasons for the existence of such an approach are applicable here and the appellant was properly sentenced to an actual term of imprisonment. I consider, however, that despite the serious nature of the offences, the calculated nature of the appellant's actions which required him to lodge false documents over a long period of time, the repetitive nature of the appellant's offences, the ease with which social security fraud is committed and the difficulties in detection, the prevalence of such offending and the important of general deterrence, the sentence was manifestly excessive given the appellant's pleas of guilty, the absence of any relevant prior convictions, his good prospects of rehabilitation, particularly when he had voluntarily ceased his offending after breaking his poker machine habit,[5] and the efforts he had made during the period of delay between detection and conviction to finding employment and continuing to abstain from gambling.[6]

27. I am strengthened in this conclusion by a study of the sentencing information placed before the Court by the respondent. I accept that sentencing statistics are, as Maxwell P recently described them in *R v Abbott*,

> "generalised and shorn of the details of individual cases [where] recourse to those details is essential in order to understand why a particular sentence was imposed in a particular case." [7]

Nevertheless, I have found this information to be of assistance. Furthermore, in *R v Omer*, Winneke P stated that:

> "Parity in sentencing is not only a desirable objective in sentencing co-offenders but also, where a pattern of sentencing for particular crimes can be established over a significant period, in sentencing different offenders for the same or similar conduct."[8]

28. The "Summary of Sentences Imposed in Social Security Matters Dealt with on Indictment since 1988", maintained by the Melbourne Office of the Commonwealth Director of Public Prosecutions, lists a total of 273 different matters. From that Summary, counsel for the respondent produced four schedules. Schedule A listed 23 matters in which the head sentences imposed were equal to or greater than the three-year head sentence imposed on the appellant. Sixteen of the 23 matters involved more money than this case. Seven of the 23 matters involved receipt of multiple benefits, nine the receipt of dual benefits. Of these nine, six matters involved more money than this case and five involved offenders with prior dishonesty convictions. Schedule B listed another 12 matters where the head sentences imposed were 30 months or more but less than three years. Nine of the 12 matters involved more money than this case. Schedule C listed only six matters out of the 273 where there was an immediate custody period of two years or more. All six were from Schedule A. Five of those matters involved more money than this case, four of them considerably more. Schedule D listed another 24 matters where the immediate custody period was between 12 months and two years. Perhaps more relevantly, the Summary itself was full of matters where there was equivalent or more money involved and yet, the period of immediate custody was significantly less, including a number of cases where the offender was ordered to be released forthwith. This Summary was, surprisingly, not provided to the learned sentencing judge.

29. Whilst acknowledging that statistics and case comparisons were of limited assistance, counsel for the appellant submitted that this information demonstrated that the individual sentences, the total effective sentence and the period of immediate custody imposed in this case were outside the range of those imposed by the County Court in recent years for social security fraud involving similar amounts of money over similar periods of offending in comparable circumstances.

30. Counsel for the respondent submitted that this information supported the conclusion that the head sentence imposed on the appellant was not inconsistent with other sentences imposed on like offenders in Victoria, but very fairly conceded that the period of immediate custody set in this case was more reflective of past cases involving higher frauds, relevant prior convictions or the use of multiple false identities.

31. As I have said, I consider that the individual sentences, the total effective sentence and the period of immediate custody were all manifestly excessive. This means that the sentencing discretion is re-opened.

32. For the reasons given above, I consider that the appeal should be allowed and that the sentences imposed on the appellant should be quashed. In lieu thereof, I would impose on count 1 a sentence of nine months, on count 2 a sentence of two years and on count 3 a sentence of 12 months. I would order that there be cumulation of one month of count 1 and three months of count 3, making a total effective sentence of two years four months' imprisonment. I would direct that so much of the balance of the sentence not yet served be the subject of a recognisance release order.

VINCENT JA:
33. I agree.

NETTLE JA:
34. I agree that the appeal should be allowed and that the appellant should be re-sentenced as my brother has proposed. I wish to say, however, that I regard the proposed minimum term as being extraordinarily lenient. Although I am persuaded that such leniency is warranted in the particular circumstances of this case, it is largely because of the very considerable degree of rehabilitation achieved by the appellant up to the time of his imprisonment, and because I am persuaded that his complete rehabilitation is most likely to be achieved by his return forthwith to the position in which he was engaged before prison, and which very fortunately has been kept open for him up to this point.

VINCENT JA:
35. On advice from counsel as to the proper orders to effect the intention of the Court, the orders of the Court are:

The appeal is allowed. The sentences imposed in the court below are quashed and in lieu thereof the appellant is sentenced: On count 1 – nine months' imprisonment; On count 2 – two years' imprisonment; On count 3 - 12 months' imprisonment. It is ordered that on count 1, he is sentenced to nine months to commence today; on count 2, he is sentenced to two years to commence one month from today's date; and on count 3, he is sentenced to 12 months to commence nine months before the expiration of count 2. This creates a total effective sentence of two years and four months' imprisonment. It is declared that the appellant has already served 218 days of that total effective sentence. It is ordered that the appellant be released after serving 218 days of that sentence upon entering into a recognisance in the sum of $1,000 to be of good behaviour for a period of two years. The Court re-imposes the reparation order made in the court below pursuant to s21B of the *Crimes Act* 1914.

Mr Berry, you will be aware, as this process has been undertaken before, that you are to be released on a recognisance to serve the balance of the sentence outstanding, and that that recognisance order will be in operation for a period of two years. If you are not of good behaviour, or if you commit any offence punishable by imprisonment anywhere in the Commonwealth of Australia, you will be returned to court to be further dealt with.

---

[1] *R v Gillick* [2001] VSCA 201; (2001) 125 A Crim R 395 at [13] per Buchanan JA, at [24] per Charles JA and at [27] per Chernov JA.
[2] *R v Gillick* [2001] VSCA 201; (2001) 125 A Crim R 395 at [14] per Buchanan JA. See also at [24] per Charles JA and at [27] per Chernov JA.
[3] *R v Gillick* [2001] VSCA 201; (2001) 125 A Crim R 395 at [14] per Buchanan JA.
[4] See, for example, *R v Milne* [2001] VSCA 93 at [12]-[13] per Winneke ACJ, with whom Ormiston and Buchanan JJA agreed; and *R v Alateras* [2004] VSCA 214 at [22]-[26] per Nettle JA.
[5] See *R v Lopez* [1999] NSWCCA 245 at [17]-[18] per Adams J, with whom Spigelman CJ and Abadee J

agreed.[6] See *R v Cockerell* [2001] VSCA 239; (2001) 126 A Crim R 444 at [10] per Chernov JA, with whom Winneke P and Buchanan JA agreed; *R v Tiburcy* [2006] VSCA 244 at [2]-[3]; (2006) 166 A Crim R 291 per Maxwell P, with whom Warren CJ and Buchanan JA agreed; and *R v Merrett* [2007] VSCA 1 at [35]-[36]; (2007) 14 VR 392 per Maxwell P, with whom Chernov JA and Habersberger AJA agreed.
[7] [2007] VSCA 32; (2007) 170 A Crim R 306.
[8] Unreported, Court of Appeal, 15 February 1996 at pp3-4. Callaway JA and Hampel AJA agreed with Winneke P.

APPEARANCES: For the Crown: Ms RE Carlin, counsel. Solicitor to DPP (Cwth). For the appellant Berry: Mr MJ Croucher, counsel. Clarebrough Pica, solicitors.
