**28/07; [2007] VSCA 87**

## SUPREME COURT OF VICTORIA — COURT OF APPEAL

# *R v KOLICIC*

**Vincent and Neave JJ A, Kellam AJA**

**30 April 2007**

**SENTENCING – OBTAINING FINANCIAL ADVANTAGE BY DECEPTION – OBTAINING PROPERTY BY DECEPTION – DEFENDANT FOUND GUILTY AFTER TRIAL – REMARKS MADE BY JUDGE WHEN SENTENCING DEFENDANT – WHETHER FAILURE TO PLEAD GUILTY AND NECESSITY FOR CROSS-EXAMINATION TREATED AS AGGRAVATING FACTORS BY JUDGE – WHETHER TOTAL EFFECTIVE SENTENCE MANIFESTLY EXCESSIVE.**

K. was convicted by a jury on two counts of obtaining a financial advantage by deception and two counts of obtaining property by deception. The total amount alleged to have been obtained was $55,000. In sentencing K. to a total effective sentence of 32 months' imprisonment, the sentencing judge said:

> "[I]t is not surprising that [the complainant] claims to feel betrayed, angry and unhappy, or that these offences have impacted adversely as she says they have on her health, her emotional wellbeing and her financial security. It is also reasonable to assume that the experience of the contested trial and long cross-examination, as well as the lack of apparent contrition on your part, are matters that probably weigh heavily on her."

Upon appeal against the sentence and that the judge erred in considering K's plea of not guilty as an aggravating factor—

**HELD: Appeal dismissed.**
**1. The principle in sentencing is that defence conduct is not to be treated as an aggravating factor. It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issue to proof.**
***R v Richmond* [1920] VicLawRp 3; [1920] VLR 9; 26 ALR 47; 41 ALT 176, and**
***R v Siganto* [1998] HCA 74; (1998) 194 CLR 656; (1999) 159 ALR 94; (1998) 19 Leg Rep C 1, followed.**

**2. In the present case, the sentencing judge's remarks were made in the context of a discussion of K's lack of remorse for his crimes and his apparent lack of contrition for his victim. In this context, although her Honour said that the victim's experience of having to give evidence was likely to have weighed heavily upon her, the comments related to the effect of the offences upon the victim and the contents of the victim impact statement which her Honour was required to take into account under sub-sections 5(2)(daa) and (db) of the *Sentencing Act* 1991. There was nothing in her reasons to suggest that she treated the appellant's moral culpability as aggravated by the not guilty plea or by the cross-examination of the complainant.**

**3. The sentence was not manifestly excessive. These were heartless crimes, imposed upon a vulnerable, older woman. There was no satisfactory explanation before her Honour as to how the sums which were stolen were used by the appellant. The effect upon the victim was most significant as a result of losing her life savings. At the age of 66, and an aged pensioner, she has had to return to domestic cleaning in order to supplement her income. In all the circumstances the sentence was an appropriate one.**

**VINCENT JA:**
1. I will invite Neave JA to deliver the first judgment in this matter.

**NEAVE JA:**
2. The appellant, Mr Kolicic, aged 52, was convicted by a jury on two counts of obtaining financial advantage by deception and two counts of obtaining property by deception. Count 1 related to the transfer of $5,000 by the complainant, Mrs Jakopovic, from her bank account to the appellant's bank account and count 3 concerned a similar transfer of $30,000. Counts 4 and 5 concerned two payments of $10,000 which the complainant made to the appellant in cash. On 23 June 2006, the appellant was sentenced to a total effective sentence of 32 months, with a

non-parole period of 21 months. This is an appeal by Mr Kolicic against that sentence.

***The Facts***

3. In March 2004, the appellant was introduced by a friend to the complainant, a pensioner in her sixties. The appellant convinced Mrs Jakopovic that he was a man of means but that he needed a place to live for a short period while he was looking for a house. On 22 March 2006 the appellant moved into the complainant's home. At about the same time, the appellant told the complainant that he wanted to buy a cleaning business but that he was waiting to receive money from the proceeds of a matrimonial property settlement. The appellant asked Mrs Jakopovic to lend him the money. She agreed to do so on the basis that the appellant would repay her the money when his divorce was settled. Between 24 March and 7 April she gave the appellant the amounts totalling $55,000. On 7 April 2006 the appellant moved out of the complainant's home.

4. In his record of interview the appellant admitted to receiving the $35,000 from the complainant but denied that he said he would repay her from the amount he received from his matrimonial property division. He said that they had had an intimate sexual relationship and she had given him money in this context. In his record of interview he also said that he would receive $500,000 to $600,000 USD from the proceeds of the sale of his parents' house in Montenegro. Mrs Jakopovic denied that there had been a sexual relationship between them.

5. At trial, his evidence was that he had intended to put the money into the cleaning business but that he had subsequently lost large amounts on gambling, golf and a horse. He also said that he paid up to $17,000 for the cost of purchasing a cleaning business. The evidence given by the police informant at trial was that he thought that only approximately $1,400 was spent on a cleaning business. In any event, none of the money obtained from the complainant was repaid.

6. Following a plea hearing, the learned trial judge sentenced Mr Kolicic as follows—

> Count 1 - obtaining financial advantage by deception - 12 months' imprisonment.
> Count 3 - obtaining financial advantage by deception - 24 months' imprisonment.
> Count 4 - obtaining property by deception - 14 months' imprisonment.
> Count 5 - obtaining property by deception - 14 months' imprisonment.

7. Her Honour directed that four months of the sentences imposed on counts 4 and 5 respectively be served cumulatively on the sentence imposed on count 3 but otherwise concurrently with each other, and that the sentence on count 1 be wholly concurrent with the sentence imposed on count 3. This resulted in a total effective sentence of 32 months.

***The Appeal***

8. The appellant appealed against his sentence on the grounds that—

> 1. The sentences and the total effective sentence imposed following the orders for cumulation are manifestly excessive; and
>
> 2. The learned sentencing judge erred in that she, in fact, considered the applicant's plea of not guilty, which necessitated cross-examination of the complainant, as an aggravating factor.

9. On 27 October 2006, Redlich JA granted the appellant leave to appeal against the sentence. On 31 January 2007, as submissions had not been filed, the appeal was deemed to be dismissed for non-compliance with the *Supreme Court (Criminal Procedure) Rules* 1998. On 16 March 2007, Vincent JA granted the appellant's application for reinstatement of his leave to appeal against the sentence.

*Ground 2: Plea of not guilty, necessitating cross-examination, as an aggravating factor*

10. I deal first with ground 2. The relevant passage in her Honour's reasons appeared in the context of a discussion of the complainant's victim impact statement. It was as follows—

> "[I]t is not surprising that [the complainant] claims to feel betrayed, angry and unhappy, or that these offences have impacted adversely as she says they have on her health, her emotional wellbeing and her financial security. It is also reasonable to assume that the experience of the contested trial and long cross-examination, as well as the lack of apparent contrition on your part, are matters that probably weigh heavily on her."

11. Counsel for Mr Kolicic, Mr Carter, submitted that in making these remarks her Honour had fallen into the same error as occurred in *Siganto v R*.[1] In that case, the sentencing judge had commented—

> "You pleaded not guilty, having always denied the charge and have shown no remorse whatsoever... Your victim, a full-blood Aboriginal woman, was greatly distressed by your crime. Her distress was evident to police officers who attended the Winnellie Post Office, and other police officers who interviewed her some time after the event. Your victim's distress was aggravated by having to give evidence against you, both at the committal and trial."[2]

12. The Northern Territory Court of Criminal Appeal dismissed the appeal against sentence, relying on the decision in *R v Melville,*[3] which treated the distress experienced by a complainant in giving evidence as a factor aggravating the offender's culpability. The High Court upheld the appeal on the basis that *R v Melville* was incorrect. It approved the principle applied by the Full Court of the Supreme Court of Victoria in *R v Gray* that—

> "[i]t is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issue to proof or having presented a time-wasting or even scurrilous defence. This has long been recognised as the proper view in Victoria - see per Cussen J, *R v Richmond* [1920] VicLawRp 3; [1920] VLR 9, 12; 26 ALR 47; 41 ALT 176". [4]

13. In their joint judgment in *R v Siganto*, Gleeson CJ and Gummow, McHugh and Callinan JJ said—

> "A person charged with a criminal offence is entitled to plead not guilty, and defend him or herself, without thereby attracting a risk of the imposition of a penalty more serious than would otherwise have been imposed. On the other hand, a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial." [5]

14. In her report to this Court, her Honour reported that—

> "As to Ground 2, in sentencing I did not take into account the plea of not guilty."

15. Mr Carter sought to draw a distinction between treating the plea of not guilty as an aggravating factor and taking account of the victim's distress as a result of cross-examination as an aggravating factor. In doing so, he submitted that although her Honour had reported that she had not done the former, she did not report that she had not treated the cross-examination of the complainant as an aggravating factor. I do not accept this submission. Her Honour's report specifically referred to ground 2 which, as I set out earlier, was expressed to cover both issues.

16. Her Honour's reasons could, I think, have been expressed more plainly. However, in my view she did not fall into the error contemplated by ground 2. Her Honour's remarks were made in the context of a discussion of the appellant's lack of remorse for his crimes and his apparent lack of contrition for his victim. In this context, although her Honour said that the victim's experience of having to give evidence was likely to have weighed heavily upon her, I think that the comments related to the effect of the offences upon the victim, and the contents of the victim impact statement which her Honour was required to take into account under sub-sections 5(2)(daa) and (db) of the *Sentencing Act* 1991. There is nothing in her reasons to suggest that she treated the appellant's moral culpability as aggravated by the not guilty plea or by the cross-examination of the complainant.

17. In *R v DW*,[6] a recent decision of this Court concerning a similar but not identical ground of appeal,[7] Nettle JA made the following apposite comment:

> "as the High Court made clear in *Siganto*, they reached that view because the law in the Territory at the time had been that defence conduct could be taken into account as an aggravating circumstance, and thus it was to be assumed that the trial judge had approached the matter on that basis."[8]

18. In this state, by contrast, the principle that defence conduct is not to be treated as an aggravating factor has been established for more than 80 years.[9] In these circumstances it should not be assumed that the sentencing judge erred in the manner alleged by Ground 2. Although

her Honour's report is not determinative of the matter,[10] it fortifies my conclusion that she did not do so.

*Ground 1 – Manifest excess*

19. In relation to ground 1, Mr Carter submitted that although her Honour's sentencing remarks referred to relevant mitigating factors, including the appellant's shocking childhood and the fact that he had not previously served any period of imprisonment, she had not given proper weight to these matters.

20. In my view, her Honour gave appropriate weight to mitigating factors, including the appellant's emotional and physical deprivation during his childhood in Serbia, the violence he had suffered at the hands of his father, his ill health, his good employment record, his responsibility to care for his elderly mother and the effects of his divorce on his emotional wellbeing. I note that her Honour referred to the submission made on behalf of Mr Kolicic that he had developed difficulties with gambling and drinking following the breakdown of his marriage and that this coincided with the offences of which he was convicted. Her Honour mentioned counsel's submission that the appellant's incarceration following conviction gave him an opportunity to "dry out", and she noted that that was inconsistent with the statement made by the appellant to Mr Simmonds, who provided a psychologist's report, that he had not consumed alcohol for the last two years and had ceased significant gambling. She said that if this was the case, it would probably enhance Mr Kolicic's prospects of rehabilitation.

21. As aggravating factors, her Honour took account of the appellant's prior convictions between 1992 and 1995, including convictions for dishonesty offences. She noted the length of time between these offences and the offences for which the appellant was convicted. She also gave weight to the fact that the appellant had exploited and manipulated the victim, who was a pensioner and who was deprived of a substantial amount of her savings as a result of his deceit. She referred to the victim impact statement, which said that the complainant had had to return to cleaning houses to supplement her pension and that the offences had had an adverse effect on her health and emotional wellbeing. Her Honour was not satisfied by the offender's explanations as to what had happened to the money and expressed reservations about whether his first experience of imprisonment would prevent him from re-offending. Her Honour noted that Mr Simmonds had reported that the appellant had not had any prior convictions. While it was possible that Mr Simmonds had misunderstood what the appellant had told him, this reduced the assistance provided by Mr Simmonds's psychologist's report. Her Honour was thus unable to accept Mr Simmonds's assessment that the appellant's offending behaviour was aberrational and out of character, nor was she satisfied that it was necessarily the consequence of the distressing circumstances surrounding the failure of his marriage.

22. I have examined the sentencing statistics for the offences of obtaining property by deception[11] and obtaining a financial advantage by deception.[12] The sentences imposed for the individual counts and the total effective sentence are well within the range of sentences imposed for these offences. Although the amounts obtained by the appellant were not large, the offences involved breaches of trust against a victim who had allowed the appellant to stay in her home. The appellant's heartless conduct deprived the victim of most of her savings and her life has changed for the worse as a result. Having regard to both mitigating and aggravating factors, I do not regard the sentence imposed by her Honour as manifestly excessive.

23. Finally, even if I had found that her Honour had erred by treating the appellant's not guilty plea or the cross-examination of the complainant as an aggravating factor, I would not alter the sentence imposed by the learned sentencing judge, having regard to the factors mentioned above. I would therefore dismiss the appeal.

**KELLAM AJA:**

24. I deal first with ground 2. In the course of her sentencing remarks, the sentencing judge said, at paragraph 26—

> "In sentencing you I must also take into account the impact on your victim. The victim was an emotional and distressed witness when she gave evidence at your trial."

In this regard, she was doing no more than repeating the observations made by counsel for the

appellant, those observations appearing at page 8 of the transcript of the plea, when he said—

> "We saw the evidence of the victim during the actual trial, that obviously this caused a lot of distress to her. That's been confirmed in the victim impact statement that has been tendered."

Clearly, counsel was not suggesting that the distress demonstrated by the victim in the course of giving evidence and under cross-examination was an aggravating factor. There is no reason to assume that her Honour, in effectively repeating counsel's words, was treating the distress described by counsel as being an aggravating circumstance. Having said this, her Honour referred to the victim impact statement and, in the course of dealing with the serious effects of the deceits upon the victim, referred to the breach of trust placed in him by the victim. She referred to the feelings of betrayal and unhappiness of the victim. The judge went on to say it is "also reasonable to assume that the experience of a contested trial and long cross-examination, as well as the lack of apparent contrition", were matters which probably, she said, weighed heavily upon the victim. This was said in the context of the finding by the judge that there was no real remorse demonstrated. Whilst it no doubt would have been better for the sentencing judge to have made it plainer that she was not treating the fact that the victim was distressed by giving evidence upon the trial as an aggravating circumstance, I do not consider in all the circumstances that the judge was treating it as such.

25. Even if I am incorrect in this regard, I would not vary the sentence imposed upon the appellant. The sentence was certainly not manifestly excessive, in my view. These were heartless crimes, imposed upon a vulnerable, older woman. There was no satisfactory explanation before her Honour as to how the sums which were stolen were used by the appellant. The effect upon the victim was most significant as a result of losing her life savings. At the age of 66, and an aged pensioner, she has had to return to domestic cleaning in order to supplement her income. In all the circumstances the sentence was an appropriate one. I agree with the views of Neave JA as to the appropriate disposition of this appeal.

**VINCENT JA:**

26. For the reasons advanced by Neave JA and Kellam AJA, I also consider that this appeal should be dismissed.

27. The order of the Court is that this appeal stands dismissed.

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[1] [1998] HCA 74; (1998) 194 CLR 656; (1999) 159 ALR 94; (1998) 19 Leg Rep C 1.
[2] See [1998] HCA 74; (1998) 194 CLR 656, 663; (1999) 159 ALR 94; (1998) 19 Leg Rep C 1.
[3] [1995] NTSC 42 (unreported, Martin CJ, Thomas J and Gray AJ, 27 March 1995).
[4] [1977] VicRp 27; [1977] VR 225, 231.
[5] [1998] HCA 74; (1998) 194 CLR 656, 663-664; (1999) 159 ALR 94; (1998) 19 Leg Rep C 1.
[6] [2006] VSCA 196.
[7] In *R v DW* [2006] VSCA 196, one of the grounds of appeal was that the judge had erred by taking into account the statement by the victim that she had suffered an ordeal as the result of the need to prepare for and be cross-examined at the committal hearing prior to this plea. This court rejected the submission that the judge had treated this as a matter which aggravated the appellant's moral culpability. In doing so, the Court observed that his Honour was, of course, entitled to take account of the victims ordeal during cross examination at committal in deciding the extent to which weight should be given to a late guilty plea as an indication of the appellant's remorse. Unlike the situation in *R v DW,* the appellant did not plead guilty in this case, so that the issue raised was a different one.
[8] [2006] VSCA 196, [20].
[9] *R v Richmond* [1920] VicLawRp 3; [1920] VLR 9, 12 (Cussen J); 26 ALR 47; 41 ALT 176.
[10] See *R v JMV* [2001] VSCA 219; 124 A Crim R 432, Winneke P, Brooking and Buchanan JJA, 23 June 1997) [6] (Winneke P). In *R v Marziale* (VicCA, unreported, Winneke P, Brooking JA and Southwell AJA, 18 April 1996) [34] the Court stated "the weight to be given to a judge's report must necessarily vary according to the circumstances of each particular case". This principle applies to matters including those affecting the adequacy or inadequacy of a sentence: *DPP v Torney* [2005] VSCA 187 (unreported, Charles, Vincent and Ashley JJA, 20 July 2005) [11] (Vincent JA). For a examples of how judge's reports have been treated by this Court in the context of sentencing see *R v Groom* [1998] VSCA 146; (1998) 104 A Crim R 375; [1999] 2 VR 159, 160-161 (Tadgell JA , dissenting), 170 (Batt JA), 172 (Buchanan JA); and *R v Ahmet* (1996) 86 A Crim R 316, 322-323 (Winneke P).
[11] Sentencing Advisory Council, *Sentencing Snapshot No 19: Sentencing Trends for Obtaining Property by Deception in the Higher Courts of Victoria 2001-02 to 2005-06* (January 2007).
[12] Sentencing Advisory Council, *Sentencing Snapshot No 18: Sentencing Trends for Obtaining A Financial Advantage by Deception in the Higher Courts of Victoria 2001-02 to 2005-06* (January 2007).

**APPEARANCES:** For the Crown: Mrs CM Quin, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the applicant appellant Kolicic: Mr LC Carter, counsel. Robert Stary & Associates, solicitors.