

37/12; [2012] VSC 459

SUPREME COURT OF VICTORIA

***ACTING SECRETARY to the DEPARTMENT of JUSTICE v McKANE***

Williams J

24 November 2011; 25 June, 19 September, 2, 9 October 2012

**CRIMINAL LAW – SENTENCING – SUPERVISION ORDER – BREACH OF SUPERVISION ORDER BY TELEPHONE CONTACT CONSTITUTING OFFENCES UNDER CRIMINAL CODE ACT 1995 (CTH) – SENTENCED TO TERMS OF IMPRISONMENT BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.**

McK. was found guilty of three offences under s160 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* of breaching a condition of a supervision order. The Supervision Order required that McK. not have contact with children or young persons under the age of 18 years. The Magistrate sentenced McK. to 15 months' imprisonment on charge 1, six months' imprisonment on charge 2 and 12 months' in relation to charge 3. Upon appeal—

**HELD: Appeal allowed. Sentences varied.**

1. The sentence to be imposed should reflect the need for both general and specific deterrence in relation to breaches of supervision orders. A supervision order may only be made if a court is satisfied that an offender poses an unacceptable risk of committing a relevant offence if such an order is not made and that person is in the community. It is essential to the effectiveness of the statutory scheme that offenders subject to supervision orders be aware of the significance of their obligations under the conditions of those orders and the seriousness with which breaches will be viewed by the courts.

2. Specific deterrence was clearly required in this case. During the hearing of the application for a detention order, there was a focus upon the adequacy of measures to control the threat the appellant's behaviour posed to the community and the need to prevent him from re-offending, for its protection. The appellant must have been aware of the concern about his re-offending (especially in light of his extensive criminal record) and yet he committed the breaching offences so soon after the supervision order was made.

3. The breaches of Condition 7(p) were criminal offences, rather than more trivial contraventions. The appellant not only engaged in prohibited contact with children but that contact had also been of a sexual nature. The first breach was more serious than the other two, given the explicit and confronting nature of the request to a young person. Even though the Magistrate imposed different sentences in relation to the offences constituting the second and third breaches, it was the Court's view that they should attract the same penalty.

4. Bearing in mind the relevant sentencing considerations, the appellant was sentenced to:

- seven months' imprisonment for the first breach (charge 1); and
- six months' imprisonment for each of the second and third breaches (charges 2 and 3, respectively).

5. It was directed that one month of the sentence imposed for the second breach (charge 2) and one month of that imposed for the third breach (charge 3) be served cumulatively upon the sentence for the first breach (charge 1) making a total effective sentence of nine months' imprisonment which shall commence on 20 January 2013, which was five months before the expiration of the non-parole period in relation to the sentence the appellant was presently serving.

**WILLIAMS J:**

1. Colin George McKane, you have been found guilty of three offences under s160 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* ('the Act') of breaching a condition of a supervision order.

**Maximum penalty**

2. Whilst the maximum penalty for each of the offences under s160 is five years' imprisonment, you were found guilty after a summary hearing of charges under s172(5) of the Act, and the maximum sentence which the court can impose in those circumstances is two years' imprisonment.

**The supervision order**

3. The supervision order was made against you under the Act, on 10 December 2010. It commenced on that day and is of five years duration, with provision for biennial review. You had been due for release after having completed your most recent sentence of 10 years and six months' imprisonment for the abduction and indecent assault of a child under 16 years and an additional two month prison term for using the postal service in an offensive manner by contacting a woman known to you. The Director of Public Prosecutions had sought an order under the Act for your detention, because of your criminal history of random and opportunistic sexual offending and the troubling fact that you were unaware of any precipitating factors.

4. It was in that context that the supervision order was made subject to conditions, including Condition 7, which provides that you must:

- (a) reside each night at Corella Place at 132 Warrak Road, Ararat 3377 or where otherwise directed by the Adult Parole Board ("Residence"), and not move from this address without the prior written consent of the Adult Parole Board;
- (b) be present at the Residence between 10:00pm and 7:00am during summer daylight savings hours and between 8:00pm and 7:00am at other times, or as otherwise directed by the Adult Parole Board;
- (c) not leave and/or be absent from the Residence except in the company of a person approved by Corrections Victoria, and must remain within five metres of that person at all times unless otherwise directed by the Adult Parole Board;
- (d) not be within 500 metres of a school, kindergarten, children's playground or child care centre at any time without the prior written consent of the Adult Parole Board;
- (e) not visit public parks including beaches and rivers, except with the prior written consent of the Adult Parole Board;
- (f) not loiter in or near public toilets;
- (g) not remain unsupervised in any place where there are present young persons under the age of 18 years;
- (h) not enter the city of Warrnambool unless:
  - (i) otherwise directed by the Adult Parole Board; and/or
  - (ii) in the company of a person approved by Corrections Victoria or the Adult Parole Board;
- (i) attend for assessment and treatment as directed by Corrections Victoria Sex Offender Programs or the Adult Parole Board;
- (j) attend the Community Forensic Mental Health Service for assessment, as required, and undergo such treatment as directed by the Director, Victorian Institute of Forensic Mental Health or his or her nominee unless otherwise directed by the Adult Parole Board;
- (k) abstain from the consumption of alcohol;
- (l) submit to breath testing, urinalysis or other test procedures approved by the Secretary to the Department of Justice for detecting alcohol or drug use or as otherwise directed by the Adult Parole Board;
- (m) unless otherwise directed by the Adult Parole Board, not obtain paid or unpaid employment, or undertake voluntary work that involves him attending, contacting or entering into other people's homes;
- (n) not hold or apply for a pistol licence, a shooter's licence, authority to hunt, or firearms licence of any sort without the prior written consent of the Adult Parole Board;
- (o) not join, affiliate with, or engage in community activities in which there are or are likely to be children or young persons under the age of 18 years attending or participating except with the prior written consent of the Adult Parole Board;
- (p) not have supervised or unsupervised contact with children or young persons under the age of 18 years unless he has the prior written consent of the Adult Parole Board;
- (q) not have contact with any convicted sex offender except for the purposes of sex offender treatment programs and except for contact with other residents of Corella Place unless otherwise directed or permitted by the Adult Parole Board;
- (r) not have any contact whatsoever either directly or indirectly with the victims of his prior offences or any members of the victims' families;
- (s) comply with any form of electronic monitoring, and any other form of monitoring, as directed by the Adult Parole Board;
- (t) attend for personal examinations by a medical expert for the purpose of providing a report to the Adult Parole Board to assist in determining the need for, or form of, any direction it is permitted to give him under the order.

**Circumstances of offences**

5. Only some six months after the supervision order commenced, you breached condition 7(p), on 18 June 2011, by contacting three young people by telephone from your residence of Corella Place.

6. There was an agreed summary of the facts for the purposes of the hearing in the Geelong Magistrates' Court of charges under the *Criminal Code Act 1995* (Cth) relating to this behaviour. I am satisfied beyond reasonable doubt of those facts, which also constitute the breaches of Condition 7(p).

7. You had seen photographs of your three young victims in the Geelong Advertiser GT magazine. They had been pictured at a local theatre production and were identified by name and the suburb in which they lived.

8. At 7.45pm on 18 June 2011 you called 16 year old 'EC'. When EC's father answered the call you asked to speak to her. You said, 'This is Peter Gray, do you want my cock in your mouth?'. EC said 'No, that's disgusting'. You asked why and she told you to 'Piss off'. She gave the phone to her mother and you ended the call. EC states that she felt scared because she doesn't know what you are capable of and she felt really disgusted. You made further calls to her residence on 19 June at 2.52pm and 4.18pm and again at 6.25pm on 20 June 2011. Each call terminated when it was answered. (This conduct ('the first breach') was the subject of charges 1 and 2 in the Magistrates' Court. Charge 2 was of a stalking offence and was later withdrawn.)

9. On the same night at 9.00pm you also called the home of 10 year old 'LK'. He answered and said, 'Hello'. You said, 'Would you be interested in having phone sex with me tonight?', LK said, 'Excuse me?'. You repeated your question. LK then took the phone away from his ear, exclaiming and ended the call. He told his mother that he felt disgusted about what you had said. (This conduct ('the second breach') was the subject of Charge 7 in the Magistrates' Court.)

10. On the next day, 19 June, at approximately 11.30am you telephoned the family home of 14 year old 'DV'. Her mother answered. You identified yourself as Peter Gray and asked if DV was home. She then spoke to you, saying, 'Hello'. You said, 'Hi, is this [DV]?'. DV said, 'Yes'. You asked, 'Were you at 'Fiddler on the Roof' the other night?'. She said she had been. You said 'You are very beautiful' and she thanked you. You asked her age and she told you that she was 13 years old. You then asked her, too, 'Would you be interested in having phone sex?'. She terminated the call. She stated she had been really 'freaked out' and frightened that you would find her address and break into her house. (This conduct ('the third breach') was the subject of charge 3 and charge 4, which alleged stalking. Charge 4 was later withdrawn.)

11. You were convicted and sentenced in the Geelong Magistrates' Court to 15 months' imprisonment in relation to charge 1, six months' imprisonment in relation to charge 7, and 12 months' imprisonment in relation to charge 3.

12. In his sentencing remarks, the learned Magistrate took into account as an aggravating factor that the offences would give rise to prosecutions for breaches of the supervision order. He said this:

I clearly do not intend to sentence you for breach of any obligations under [the Act], but it appears to me that your admitting to these 10 offences while such order was in place is an aggravating circumstance because you well knew that the purpose of that order was to protect the public and that the conduct that you were about to engage in when you obtained these telephone numbers in the Geelong phonebook and the other materials that are necessary to commit these offences, you well knew that you were the subject of a supervision order and in my judgment that does amount to an aggravating circumstance.<sup>[1]</sup>

13. The Magistrate also took into account the offensive sexual nature of your calls, that your victims were children and that they and their families had suffered considerable distress as a consequence of your crimes.

14. You have been found guilty of intentionally breaching condition 7(p) of the supervision order by the conduct which constituted the offences for which you were sentenced.<sup>[2]</sup> The additional criminality of your breaches of the supervision order offences nevertheless warrants an additional penalty.<sup>[3]</sup> I must moderate your sentence so that I do not punish you twice for the *Criminal Code Act 1995* offences.<sup>[4]</sup>

15. It would seem that you do not dispute that the three breaches should attract a custodial

sentence, as counsel conceded on your behalf that some measure of cumulation of sentences is warranted.

### Personal circumstances

16. You are 54 years old. Your background and extensive criminal history are described in the reasons for making the supervision order.<sup>[5]</sup> Those reasons included a summary of your past offending<sup>[6]</sup> which I have reproduced and amended to accord with what I take to be the effect of the Victoria Police Court Outcomes Report handed up in the plea:

DATE	COURT	OFFENCE	SENTENCE
23/10/1973	Warrnambool Children's Court	Obscene exposure	52 weeks' probation.
25/03/1974	Warrnambool Children's Court	Larceny	52 weeks' probation
04/11/1974	Warrnambool Children's Court	Indecent assault	6 months' youth training centre.
26/05/1975	Warrnambool Children's Court	Indecent assault, behave in offensive manner in a public place, assault	52 weeks' probation.
21/07/1975	Warrnambool Magistrates' Court	Obscene exposure	\$100 fine in default 7 days' imprisonment.
22/09/1975	Warrnambool Magistrates' Court	Obscene exposure (x 2)	1st charge - \$100 fine in default 14 days' imprisonment; 2nd charge - released on 52 week bond.
31/10/1977	Warrnambool Magistrates' Court	Indecent assault, assault with a weapon and obscene exposure (x 2)	1st and 2nd charges - 6 months' imprisonment to be served concurrently; 3rd and 4th charges - 14 days' imprisonment on each charge.
24/04/1978	Magistrates' Court	Wilful and obscene exposure	\$200 fine in default 30 days' imprisonment.
11/02/1980	Magistrates' Court	Theft (x 5) and wilful damage (x 2)	14 days' imprisonment on each charge.
28/08/1981	Port Fairy Magistrates' Court	Wilful and obscene exposure	\$400 fine in default 40 days' imprisonment.
14/09/1982	Warrnambool County Court	Aggravated indecent assault (x 2) and assault	5 years' imprisonment on each of the 1st and 2nd counts to be served concurrently. Three months' imprisonment on the 3rd count to be served concurrently with the sentence imposed on the 1st and 2nd counts. Total Effective Sentence (TES) 5 years' imprisonment with Non-Parole Period (NPP) of 3 years' and having been brought before the Parole Board on 9/11/ 1984 for failing to observe conditions of parole was sentenced to 2 years' imprisonment.
15/10/1984	Warrnambool Magistrates' Court	Theft of a motor car	2 months' imprisonment.
13/12/1984	Warrnambool County Court	Rape (x 2), attempted rape, maliciously inflicting grievous bodily harm and kidnapping.	6 years' imprisonment on 1 <sup>st</sup> and 2 <sup>nd</sup> counts to be served concurrently; 1 year on 3 <sup>rd</sup> count to be served concurrently with 1 <sup>st</sup> and 2 <sup>nd</sup> counts; 4 years' on 4 <sup>th</sup> count; 2 years' on 5 <sup>th</sup> count to be served concurrently with 1 <sup>st</sup> , 2 <sup>nd</sup> and 3 <sup>rd</sup> counts. TES 10 years' with NPP of 8 years.
04/02/1993	Warrnambool Magistrates' Court	Indecent exposure and assault	4 months' imprisonment on each charge to be served concurrently.
26/07/1995	Geelong Magistrates' Court	Making threats to kill, using a telephone to menace and harass another (x 9)	30 months' imprisonment on 1st count, 3 months' imprisonment on 2nd to 10th counts. Sentences varied on appeal – see directly below.
18/08/1995	Geelong County Court	Sentence variation on appeal.	2 years' imprisonment on 1st count, 5 months' on 2nd to 9th counts and 8 months' on 10th count. All to be served concurrently.
05/10/1998	Melbourne County Court	Abduction of a child under sixteen years and indecent assault.	3.5 years' on 1st count. 7 years' on 2nd count. Sentences to be served cumulatively. TES 10.5 years', NPP 9 years to be served cumulatively upon any sentence undergoing.
15/01/2001	Ararat Magistrates' Court	Use postal service in an offensive manner	2 months' imprisonment to commence on the expiry of existing sentence.

17. The reasons went on to describe the events constituting your past offences.<sup>[7]</sup>

18. You started committing sexual offences against girls aged between 7 and 16 years when you

were only 15. Your victims were unknown to you and selected at random and when opportunity presented itself. You have offended in both public and more private places. I note that your prior offending included you making obscene telephone calls in 1994-95 to girls whose photographs you had seen in the newspaper. You were 37 when you offended in this manner.

19. The reasons for the supervision order also refer to expert opinions proffered as to your mental state. I note that, in his sentencing remarks, the Magistrate referred to a report from the forensic psychiatrist, Dr Danny Sullivan, who had given evidence in the detention order application. In the report before the Magistrates' Court, Dr Sullivan stated his opinion that you had a mixed personality disorder, but no psychiatric illness, cognitive impairment or drug or alcohol issues.

20. There was, however, no evidence in the plea before me as to any change in your mental state or diagnosis. Nor did counsel make any submissions specifically related to your personal circumstances.

### **Specific and general deterrence**

21. You concede that your sentence should reflect the need for both general and specific deterrence in relation to breaches of supervision orders. A supervision order may only be made if a court is satisfied that an offender poses an unacceptable risk of committing a relevant offence if such an order is not made and that person is in the community.<sup>[8]</sup> It is essential to the effectiveness of the statutory scheme that offenders subject to supervision orders be aware of the significance of their obligations under the conditions of those orders and the seriousness with which breaches will be viewed by the courts.

22. Specific deterrence is clearly required in your case. During the hearing of the application for a detention order, there was a focus upon the adequacy of measures to control the threat your behaviour posed to the community and the need to prevent you from re-offending, for its protection. You argued that your detention was not required and that a supervision order with appropriate conditions would suffice. The significant control mechanisms contemplated included the use of anti-libidinal medication (which you tried unsuccessfully). You must have been aware of the concern about your re-offending (especially in light of your extensive criminal record) and yet you have committed the breaching offences so soon after the supervision order was made.

### **Remorse**

23. You were entitled to contest the charges of breaching the supervision order. You are not, however, entitled to the benefit of the indication of remorse shown by a guilty plea.

24. The informant emphasises your failure to apologise or express any remorse for your breaches through your counsel or otherwise. I do note it and take it into account.

### **Totality**

25. You are serving a sentence of three years and four months' imprisonment with a non-parole period of two years, in relation to the *Criminal Code Act 1995* offences for which you were sentenced on 14 November 2011. You submit that this is a significant sentence and that the punishment I impose should be moderated to avoid any breach of the totality principle. I agree.

### **Current sentencing practices**

26. Senior counsel for the informant has helpfully brought a number of sentences for similar breach offences to my attention. He refers to the fact that a number of the offenders had pleaded guilty to the breaching offences. Your counsel brings to my attention that unlike some of those whose sentences are cited, you have not been convicted of any previous breach of the supervision order.

27. I also take it into account that, as your counsel points out, your offending occurred within a relatively short period of time. She argues that significant concurrency should be ordered in relation to the individual sentences, as a result.

28. The informant, on the other hand, submits that you should be sentenced to between six and nine months' imprisonment for each breach, with some cumulation to reflect flagrant nature of the breaches committed with full knowledge of the extent and coverage of the conditions relating



to any such behaviour.

### Sentence

29. Your breaches of Condition 7(p) were criminal offences, rather than more trivial contraventions. You have not only engaged in prohibited contact with children but that contact has also been of a sexual nature. I regard the first breach as more serious than the other two, given the explicit and confronting nature of the request to a young person. Even though the learned magistrate imposed different sentences in relation to the offences constituting the second and third breaches, it is my view that they should attract the same penalty.

30. You have not shown remorse. Nor have you been deterred from breaching the supervision order by the penalties attracted by your past criminal behaviour over so many years.

31. Bearing in mind the sentencing considerations to which counsel have referred and their submissions, I will sentence you to:

- seven months' imprisonment for the first breach (charge 1 before me); and
- six months' imprisonment for each of the second and third breaches (charges 2 and 3 before me, respectively).

32. I will direct that one month of the sentence imposed for the second breach (charge 2) and one month of that imposed for the third breach (charge 3) be served cumulatively upon the sentence for the first breach (charge 1). I will further direct, in accordance with s16(4) of the *Sentencing Act* 1991 (Vic) that the total effective sentence of nine months' imprisonment which I impose today shall commence on 20 January 2013, which is five months before the expiration of the non parole period in relation to the sentence you are presently serving.

---

<sup>[1]</sup> Transcript of proceedings, *DPP v CGM* (Magistrates' Court of Victoria, Magistrate Saines, 14 November 2011) 39-40.

<sup>[2]</sup> *Acting Secretary of the Department of Justice v CGM* [2012] VSC 436R.

<sup>[3]</sup> *DPP (Vic) v Lecornu* [2012] VSCA 137 [17]-[22] (Maxwell P (Hollingworth and Cavanough AJJA agreeing)).

<sup>[4]</sup> *Lecornu* [69].

<sup>[5]</sup> *DPP v CGM* [2010] VSC 509R.

<sup>[6]</sup> *Ibid* [30].

<sup>[7]</sup> *Ibid*. [31]-[45].

<sup>[8]</sup> Section 9(1) of the Act.

---

**APPEARANCES:** For the informant Acting Secretary of the Dept of Justice: Dr D Grace QC, counsel. Victorian Government Solicitor's Office. For the accused McKane: Ms H Spowart, counsel. Victoria Legal Aid.

---