44/1980

SUPREME COURT OF SOUTH AUSTRALIA (FEDERAL JURISDICTION)

TAORMINA v CAMERON

King CJ, Wells and Sangster JJ

14, 15 February, 18 March 1980 — (1980) 24 SASR 59; 29 ALR 151

SENTENCING - SOCIAL SECURITY OFFENCES - 24 OFFENCES OVER A PERIOD OF ONE YEAR - $1314.11 IMPROPERLY GAINED - OFFENDER YOUNG, UNEMPLOYED, ENGAGED IN SECONDARY STUDIES - NO PRIORS - SENTENCED TO 3 MONTHS' IMPRISONMENT WITH HARD LABOUR - WHETHER MAGISTRATE IN ERROR: *SOCIAL SERVICES ACT* 1947 (CTH), S138(1)(d).

T. pleaded guilty to 24 charges of presenting a document false in a material particular, contrary to s138(1)(d) of the *Social Services Act* 1947 (Cth.). The offences occurred over a period of 10 months, and related to the concealing of earnings from part-time employment in answering unemployment benefit forms. At the time, T. was young, married, engaged in secondary studies to qualify him for an Institute of Technology course, and felt unable to turn to his parents for help. Upon conviction, he was sentenced to three months' imprisonment and ordered to make reparation of $1314.11 within 12 months. He appealed against the sentence to the Supreme Court of South Australia. Williams AJ dismissed the appeal, but gave leave to appeal to the Full Court. Reparation was made in full prior to the hearing. T. then appealed to the Full Court, arguing that the sentence ought to have been a non-custodial order, and that to serve a period of imprisonment would seriously interfere with his studies.

HELD: Appeal allowed.
1. Per King CJ (Wells J concurring): The appellant had no previous convictions, seemed not to have embarked upon a criminal way of life, and was endeavouring to equip himself to be a useful member of society. The prevailing standard of penalties for offences in these circumstances was non-custodial and the special Magistrate erred in exercising his discretion to impose a sentence of imprisonment.

2. The court could receive evidence of circumstances subsequent to the conviction.
***Paynter v Huffa* (1977) 17 SASR 120, followed.**

3. Per Wells J: Whether a defendant had a special intent to defraud is relevant to penalty in cases of this kind. Interviews with defendants should cover state of mind and general circumstances, and be placed before the court when it is considering penalty.

4. Per Sangster J, dissenting: The appellant had shown no remorse, and could have taken stops to minimize the effects of imprisonment on his studies.

5. Per King CJ and Wells J (Sangster J dissenting): Appeal. The sentence of imprisonment replaced by a $100 good behaviour recognizance for one year.

KING CJ: The appellant, having pleaded guilty, was convicted on 15 March 1979 of 24 offences of presenting a document which was false in a material particular, contrary to s138(1)(d) of the *Social Services Act* 1947. The offences occurred between 10 August 1977 and 13th July 1978. In each instance the appellant presented an unemployment benefit form and in answer to the question 'Have you or your wife or husband any earnings or income from any other source' falsely stated "No". The learned special Magistrate imposed a sentence of imprisonment with hard labour for three months and ordered that the appellant make reparation of $1314.11, being the amount overpaid to him as a result of his false answers, to the Director of Social Security within 12 months. The appellant appealed to this court and the appeal was heard by Mr Acting Justice Williams. He dismissed the appeal, but gave leave to appeal to the Full Court.

The circumstances in which the offences were committed appear to be as follows. In the middle of 1977, the appellant, who was then 19 years of age, became unemployed. He was planning to marry a girl, whom he has since married, and this had caused trouble with his parents. For this reason he felt unable to turn to his parents for help. He obtained part-time employment. During the period of the offences he earned weekly amounts ranging from $19.64 to $111.57. The usual weekly amount was $20; being remuneration for four hours work. His wife was not working. He decided to embark upon course of studies at the Institute of Technology to qualify as a valuer. In

order to gain entry to this course it was necessary for him to pursue further matriculation studies. He did this in the year 1978. As he was engaged upon secondary studies, he was not eligible for a student's allowance. He felt that he and his new wife could not survive without a continuation of the unemployment benefits. There seems to be no reason to doubt his explanation that his offences were attributable to the predicament in which he found himself.

The offences which the appellant committed were undoubtedly serious. They involved a deliberate fraud upon the welfare system carried out over a period of 10 months. The maximum penalty for each offence is $500 fine or six months' imprisonment and the court has power under s138(5) of the *Social Services Act* to impose one penalty for all the offences. Frauds of this kind must be viewed seriously, if only because they threaten the basis of the social security system which is designed to provide financial security for those in the community who are in need. I can well appreciate why the learned special Magistrate felt that the offences called for a deterrent penalty.

The argument for the appellant on this appeal was that the learned special Magistrate ought to have dealt with the appellant by way of a non-custodial order. The decision whether to take such a course is within the discretion of the Magistrate and this court will only interfere if the exercise of the discretion has for some reason miscarried. For the proper exercise of his discretion, the learned special Magistrate was required, in my opinion, to have regard to a number of important factors in the case in addition to the seriousness of the offences. In the first place, the prevailing standard of penalties in the Adelaide Magistrates' Court for this offence at that time, as was demonstrated to Mr Acting Justice Williams, was a fine even where the offender was convicted of a number of counts. The one exception during the month of March 1979 was a person who was sentenced to three months' imprisonment, but he had a prior conviction for the same offence. This appellant had no prior convictions. He was a young offender, being aged 19 and 20 at the time of the commission of the offences, and 21 at the time of the conviction. Although the offences involved a fraudulent course of conduct, there were positive indications that the appellant had not embarked upon a criminal way of life. There was every reason to accept that he committed the offences in a misguided attempt to cope with the predicament in which he found himself as a result of his early and perhaps imprudent marriage, and his commendable desire to pursue a course of studies to equip him to be a useful and self-reliant member of society. Moreover, a sentence of imprisonment if served at the time when it was imposed would have seriously disrupted his course of studies and, bearing in mind the financial and personal pressures upon him, might well have imperilled them altogether.

The sentence imposed involved a substantial increase on the prevailing standard. Having regard to the factors which I have mentioned, I do not think that this was a case for such a departure from the prevailing standard. I think that a proper regard for all the factors which I have mentioned would have led the learned special Magistrate to make a non-custodial order. It is not possible to identify precisely the error which he has made, but I am convinced that he could not have taken into account adequately the factors which indicated a non-custodial penalty.

If this court's attention were confined to the matters before the learned special Magistrate, I would be quite satisfied to say that he had erred, but the conclusion that there should not be a sentence of imprisonment is strengthened by further material before this court. At the hearing before this court counsel for the appellant sought to tender an affidavit. It contained certain material expanding what was put before the learned special Magistrate. It also contained certain material as to events which have occurred since the hearing before the Magistrate. We received the affidavit *de bene esse* for the purpose of considering its admissibility. Counsel conceded that, in the face of objection from the respondent, he could not press for the admission of the material which could have been placed before the Magistrate. He argued, however, for the admissibility of that part of the affidavit which relates to events which have occurred since the conviction. In my opinion we are empowered to receive this evidence under s176 of the Justices Act: *Paynter v Huffa* (1977) 17 SASR 120. It seems to me that it would be highly unsatisfactory for this court to have to deal with a submission that a sentence of imprisonment would disrupt the appellant's studies without knowing his present situation. I think, therefore, that that part of the affidavit which relates to events which have occurred since the hearing before the Magistrate should be admitted. The affidavit shows that he successfully completed the year's work for 1979 and that he has been accepted for full-time second year study in 1980. I think that it would be most

unfortunate if this young man were now required to serve a sentence of imprisonment. It might put the successful completion of his course at risk. Obviously this would be disastrous for him, and it could be of no possible benefit to the society against which he has offended to damage his prospects of equipping himself to support himself and his wife.

In my opinion this appeal should be allowed for the purpose of releasing the appellant upon the appellant's entering into a recognizance in a sum of $100 to be of good behaviour and to be under the supervision of a probation officer for a period of one year. Although intensive supervision may not be needed in this case, I think that some supervision is desirable as a reminder to the appellant that the society which he defrauded has given him this opportunity to qualify himself to be a useful member of it, and that he is expected to take that opportunity.

WELLS J: I have read in draft the judgment of the learned Chief Justice; I agree with it and with the order he proposes. There is however, an unsatisfactory feature of this case that is similar to features of other cases upon which I have previously commented; I believe that I should repeat the substance of what I have said before in the continued hope that improvements will be made in practice and procedure in courts of summary jurisdiction. Although an element of *mens rea* must be shown to be present, the offence in the present case does not call for proof of a special intent, such as an intent to defraud. But whether the defendant had the special intent to defraud has a close bearing on the question of penalty. If the deception alleged is knowingly and wilfully carried out purely for the purpose of gain, the offence is obviously more heinous than if such a purpose was absent. It is, therefore, of great importance for the prosecution to present to the court such evidence in their possession as tends to show what the defendant's attitude was to presenting what he realized was a false document. With that in mind, both investigating officers and counsel for the prosecution should bear in mind that an interview with the defendant, if – as it should be – the topic of state of mind is covered, should be presented in full to the court – at all events, all those parts should be presented that relate to that topic – so that the penalty may be based upon a proper evaluation of all the relevant facts.

In this case, the court was provided with an astonishing paucity of evidence on the subject, and the learned special magistrate was placed in a very difficult position when he was called on to impose penalty. Of the interview that took place, he was apparently told no more than that the investigating officer asked the defendant why he failed to disclose his earnings from employment, to which the defendant replied: "I assumed I wouldn't get the dole if I told them about the job." Such a question and answer merely scratches the surface; much more about the defendant's state of mind and circumstances was called for. In this case, there were, no doubt, grounds for suspecting that the defendant undertook the deception alleged for unmeritorious reasons; but, equally, there were grounds for supposing that what he did was largely the product of ignorance, error, or misunderstanding. The learned special Magistrate apparently took a strongly adverse view of the defendant's conduct without, however, in my opinion, having adequate material before him to justify that view. I hope that greater efforts will be made in the future to assist Magistrates in their important task of fixing penalty. They should not be left to speculate about important facts.

SANGSTER J: The facts (including the further material submitted at the hearing of the appeal) are set out in the reasons of the Chief justice. I agree that we are empowered to receive the further material, and that in the circumstances we should receive it.

For my part I would give the recital of the facts a different emphasis, as follows: Having (as the Chief Justice has said) engaged in a deliberate fraud upon the welfare system over a period of 10 months, the appellant was summoned, on 29 November 1978 (the date of the summons – I do not know when it was served), to appear in the Magistrates' court on 11 January 1979. There he was remanded twice – at first to 15 February 1979 and then to 15 March 1979. On 15 March 1979 he pleaded guilty and was convicted and ordered to be imprisoned for three months and to repay, within 12 months, the sum of $1314.11 of which he had defrauded the Commonwealth. Neither his persistent crimes nor his three (up to that time) appearances in court, prompted him (or his parents) to make or to offer restitution. Having failed to avoid a custodial order from the magistrate, the appellant:

(a) on 19 March 1979 commenced his appeal to a judge of this court;

(b) on 20 March obtained his release on bail;
(c) on a date unspecified, but not later than 3 May 1979, paid (obviously out of moneys provided by his father) the $1314.11 to the Commonwealth.

The appellant's appeal was dismissed by Williams AJ on 13 June 1979 and by 29 June 1979 the appellant had commenced proceedings which led to this appeal to the full Court. The appellant's counsel was unable to say why the appellant did not thereupon prosecute his appeal with diligence, but I notice that the transcript was not completed until 17 December 1979. By that time the appeal was too late for the December sittings and was heard in February 1980. During the delay, June 1979 to February 1980, the appellant had passed his 1979 examinations, presumably had his 1979/80 summer vacation from his studies, and had enrolled for his 1980 studies. The options open to the appellant during that period included:

(1) Taking steps to see that his appeal to the full Court came on in October 1979, so that had he failed in his appeal he could have served his three months' imprisonment without interrupting, or at least without seriously interrupting, his studies.

(2) Abandoning his appeal and surrendering into custody immediately his studies and examinations for 1979 concluded, to minimize the risk of interruption, or serious interruption to his 1980 studies.

The emphases in the appellant's arguments may thus be seen in a different light.

Restitution: Although restitution had neither been made nor promised when the Magistrate dealt with the matter, but has now been made, I do not see what was done (not by the appellant but on his behalf) as a tangible indication of remorse but as a potential price offered in the hope of a successful appeal.

Interruption to studies: Although imprisonment for three months from the dismissal of this appeal would seriously interrupt the applicant's studies:

(a) he could have minimized that risk, as I have said:
(b) he cannot really be heard to complain of having to pay for his crimes some price that will hurt him and deter others.

In my opinion there has arisen in all our courts in recent times a pre-occupation with the hardship which imprisonment will impose upon the criminal – or "'offender" if that euphemism to preferred – and insufficient regard to the consequences to our society of his crimes, and more importantly of the well-justified fears of members of our society of falling victim to some other crime at some future time. Whilst it is true that this appellant may not offend again if he is released on a bond and observes its conditions (in which case he will suffer no punishment at all apart from a few days in custody pending this appeal) it cannot be denied that leniency to this appellant – along with leniency extended to many others – fails to deter, or even actively encourages, other persons to commit crimes in the belief that there is little risk of being caught, and, if caught, less risk of real consequences. In my opinion the appeal should dismissed.
