

22/06; [2006] VSCA 129

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

***R v HUNTER***

**Maxwell P, Buchanan & Redlich JJ A**

**6 February, 21 June 2006 — (2006) 14 VR 336**

**SENTENCING – OFFENCES COMMITTED WHILST ON PAROLE – RULE THAT OFFENCES COMMITTED ON PAROLE TO BE SERVED CUMULATIVELY UNLESS EXCEPTIONAL CIRCUMSTANCES EXIST – WHETHER SUCH CIRCUMSTANCES EXISTED – PRINCIPLE OF TOTALITY – APPLICATION OF – COURT REQUIRED TO TAKE INTO ACCOUNT PERIODS OF IMPRISONMENT CONSEQUENT UPON CANCELLED PAROLE: *SENTENCING ACT 1991*, s16(3B).**

1. Section 16(3B) of the *Sentencing Act 1991* ('Act') abrogates the general rule otherwise applying by virtue of s16(1) of the Act, that sentences are to be served concurrently. The *prima facie* rule of cumulation which s16(3B) creates is capable of being displaced should the court so direct on the ground of exceptional circumstances.

2. Where it was submitted that an accused person had proceeded to "get his life in order" when released on parole, and that he had provided clean urine screens when in custody, none of those matters constituted "exceptional circumstances" which displaced the cumulation rule provided by s16(3B) of the Act.

3. The principle of totality requires the sentencing court to take into account periods of cancelled parole being served. That is, a period of imprisonment being served at the time of the sentencing must be taken into account in the exercise of the sentencing discretion. When viewed as a whole, the aggregate of sentences imposed by reason of cumulation cannot be greater than any sentence required to fulfil the totality principle and all the appropriate aims of sentencing in the case. There must be relativity between the totality of the criminality and the totality of the sentences, not only for the offences which the person is being sentenced, but for the sentence which the person is currently serving.

4. Accordingly, where a sentencer disregarded the fact that the accused was serving the unexpired portion of his original sentence when he came to be sentenced, the sentencing discretion miscarried.

**MAXWELL P, BUCHANAN and REDLICH JJ A:**

1. On 30 March 2005 the appellant ("Hunter") pleaded guilty to each count on a presentment containing a count of theft (count 1), kidnapping (count 2), false imprisonment (count 3), causing injury intentionally (count 4) and trafficking in a drug of dependence (count 5). On 27 April 2005 Hunter was sentenced on count 1 to six months' imprisonment, on count 2 to four years' imprisonment, on count 3 to two years and six months' imprisonment, on count 4 to twelve months' imprisonment and on count 5 to six months' imprisonment.

2. The sentencing judge ordered that 18 months of the sentence imposed on count 3 and six months of the sentence imposed on count 4 be served concurrently with the sentence imposed on count 2 and that the sentences imposed on count 1 and count 5 be served cumulatively with the sentence imposed on count 2, and upon each other, making a total effective sentence of six years and six months. His Honour fixed a minimum term of four years and six months to be served before Hunter would become eligible for parole.

3. Hunter appeals, by leave, against his sentence. The grounds of appeal all relate to the alleged failure of the sentencing judge to take properly into account a sentence which Hunter was serving as a result of the cancellation of his parole.

4. The grounds are as follows:

"1. The learned sentencing judge's discretion was vitiated by proceeding from the premise that a term of imprisonment for an offence committed whilst on parole must be served cumulatively on the

parole sentence, without regard to the existence of exceptional circumstances.

2. The learned sentencing judge erred in treating the parole sentence as a potential liability contingent on what the parole board may or might not do, rather than an actual liability that was extant.

3. By ignoring the parole sentence the sentencing discretion has miscarried, offending the principle of totality."

### ***Sentencing for offences committed while on parole***

5. Each of the offences was committed while Hunter was on parole in relation to other offences. At the time of the sentencing, his parole had been cancelled by the Parole Board and he was serving the unexpired portion of his original sentence.

6. He still had approximately two years and six months to serve. (The details of his parole history are set out later in these reasons).

7. The grounds of appeal raise, not for the first time, important questions about the approach to be adopted by a sentencing court when dealing with an offender for offences committed while on parole for other offences. A related issue concerns the powers of the Parole Board when dealing with an offender for the breach of parole constituted by the commission of the later offences.

8. We deal first with the powers of the Parole Board. The key provisions are to be found in Part 8 of the *Corrections Act* 1986. In particular:

- following the expiry of the non-parole period, the Parole Board may order the release of the prisoner on parole: s74(1);
- following the prisoner's release on parole, the Board has a general power to cancel the parole at any time before the end of the parole period: s77(1);
- if a prisoner is sentenced to more than three months' imprisonment for an offence committed while on parole, the Board may cancel the prisoner's parole even though the parole period may already have elapsed: s77(5);
- if the parole is cancelled, then, unless the Board otherwise directs, the time spent on parole is not to be regarded as time served in respect of the original sentence: s77(7)(b).

9. Unless by the time of the sentencing hearing the Parole Board has already dealt with the breach of parole, the sentencing court will know only that the Board may exercise its power to cancel the parole. The sentencing judge is prohibited, by s5(2AA)(a) of the *Sentencing Act*, from taking into account any action which the Parole Board may take in the exercise of that power. In the language of the provision, the court must not have regard to –

"any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind".<sup>[1]</sup>

10. Subsection 16(3B) of the *Sentencing Act* deals with a different topic, namely, the relationship between the sentence to be imposed for the later offences and any period of imprisonment which the person may be required to serve upon cancellation of his/her parole. The requirement imposed by s16(3B) is perfectly clear. It is that the sentence for the later offences must –

"unless otherwise directed by the Court because of the existence of exceptional circumstances, be served cumulatively on any period of imprisonment which [the person] may be required to serve in custody in a prison on cancellation of the parole order."

11. As this Court explained in *R v Orphanides*,<sup>[2]</sup> s16(3B) was intended simply to abrogate, in the case of an offence committed during a period of parole, the general rule otherwise applying by virtue of s16(1), that sentences are to be served concurrently. The *prima facie* rule of cumulation which s16(3B) creates is capable of being displaced should the court so direct on the ground of exceptional circumstances.<sup>[3]</sup>

12. As the Court also explained in *Orphanides*, the prohibition on speculation which s5(2AA) imposes, and the cumulation rule which s16(3B) establishes, operate independently of each other. The phrase "may be required to serve" in s16(3B) does not permit, let alone require, the court to speculate about what the Parole Board might do. The prohibition on speculation is absolute.

13. To comply with s16(3B), the sentencing court must first consider whether exceptional circumstances exist. If such circumstances do exist, the court has power to order concurrency, in whole or part; if it does not, the court is bound to order that the parole sentence be served cumulatively on any period of imprisonment which may flow from the cancellation of the parole order.

14. In a case like the present, where the parole has already been cancelled and the offender is at the time of sentencing already serving a period of imprisonment consequent upon the cancellation, questions of totality also arise. We deal with those below.

#### ***Hunter's parole history***

15. In the course of the hearing, the Court raised questions concerning the orders made by the Parole Board. Subsequently, the Office of Public Prosecutions provided the Court with a letter from the Parole Board answering those questions and containing Hunter's latest indent report. What follows is based on that information.

16. In 1988 Hunter was sentenced to 16 years' imprisonment for murder ("the original sentence"). A non-parole period of 13 years was fixed. On 9 December 2000, Hunter was released on parole, after serving the minimum sentence of 13 years. His parole period was uneventful until 12 March 2002 when he committed the first of the offences the subject of the present appeal.

17. On 13 March 2002, his parole was cancelled by the Parole Board.<sup>[4]</sup> As noted earlier, the period during which Hunter was on parole between 2000 and 2002 is not treated as time served in respect of the original sentence.<sup>[5]</sup> On 22 May 2002, Hunter was apprehended on warrant and, on the following day, his parole was cancelled. According to his indent, the amount of the original sentence "owing" at that time was two years 11 months and 29 days. On 8 July 2002 Hunter was re-paroled by the Parole Board.

18. The charges the subject of this appeal were laid on 7 August 2003. Following Hunter's failure to appear at his committal on 13 September 2004, his parole was again cancelled by the Parole Board on 22 September 2004, Hunter having failed to comply with the conditions of his parole. The indent records Hunter as then owing the Board two years 10 months and 11 days of the original sentence. On 18 October 2004 Hunter was apprehended on a parole warrant and recommenced serving the balance of the original sentence.

19. On 3 February 2005 he was sentenced to 12 months' imprisonment for driving offences. He appealed to the County Court against that sentence. The appeal was heard on 27 April 2005, and was allowed. Hunter was sentenced to three months' imprisonment and it was ordered that the sentence be cumulative upon the sentences the subject of the present appeal, which were imposed the same day.

20. Forty-eight days of the original sentence were served between 22 May 2002 and 28 July 2002. A further 113 days were served between 14 October 2004 and 3 February 2005 (when Hunter was sentenced for his driving offences). This meant that, at the time Hunter came to be sentenced on 27 April 2005, he had served 161 days of the parole period of the original sentence and he was liable to serve a further two years, six months and 20 days of that sentence.

#### ***Ground 1***

21. In his sentencing remarks, the learned Judge noted that the offences for which Hunter was to be sentenced had been committed while he was on parole. There was no reference, however, to the fact that Hunter was in prison and serving the unexpired portion of his original sentence, with two and a half years to serve.

22. It is clear from the transcript of argument on the plea that his Honour was alive to the prohibition created by s5(2AA) against taking into account "any possibility or likelihood" of action by the Parole Board. His Honour did not, however, give any consideration to the requirements of s16(3B). As we have said, that subsection required his Honour to consider whether exceptional circumstances existed which would justify moderating the order for cumulation which would otherwise have to be made. Because of this error, the sentencing discretion is reopened and it is necessary for this Court to decide whether there were any exceptional circumstances.

23. Hunter relied upon three circumstances which were said to be exceptional. First, he relied on the delay of 15 months in charging him with these offences. Hunter had been interviewed on 22 May 2002 and had made extensive admissions in relation to these offences. It was submitted that, in the period from his re-parole on 8 July 2002 until he was charged with these offences on 7 August 2003, he had proceeded to "get his life in order". Such a submission was not made to the trial Judge and no evidence was placed before him, or before this Court, of any efforts by Hunter to rehabilitate himself during that period. Counsel for Hunter on the plea had said no more than that delay was a mitigating factor.

24. Secondly, it was submitted that Hunter's prospects of rehabilitation constituted an exceptional circumstance. It was acknowledged before this Court that, because of Hunter's amphetamine use, he was in a florid state at the time of the commission of these offences. Initially, some reliance was placed upon the fact that Hunter had provided clean urine screens when in custody, but it was acknowledged in argument that this occurred prior to his arrest on the present charges. Ultimately, counsel for Hunter accepted that there was little or no material relating to Hunter's conduct during his period on parole which threw any light upon his prospects of rehabilitation, and this argument was all but abandoned. Thirdly, counsel for Hunter referred to the principle of totality. He conceded – properly – that this could not constitute an exceptional circumstance under s16(3B), but argued that it was relevant to whether the sentencing discretion had miscarried.

25. In our view, none of these matters constitute "exceptional circumstances" which displace the cumulation rule provided by s16(3B).

### **Grounds 2 and 3**

26. It is convenient to consider grounds 2 and 3 together. Counsel for Hunter submitted that the competing imperatives of s5(2AA) and s16(3B) create a difficulty for sentencing judges in applying the totality principle. As to ground 2, it was submitted that the trial Judge had either not understood that Hunter was serving the unexpired portion of his original sentence, as a consequence of the Parole Board's cancellation of his parole, or else had misconstrued s5(2AA) of the Act as preventing him from having any regard to the sentence which Hunter was then serving as a consequence of the cancellation of his parole.

27. Under ground 3, it was contended for Hunter that the sentencing discretion miscarried because the judge ignored the fact that the balance of the original sentence was being served, and so failed to give effect to the principle of totality. It was submitted that the sentencing judge failed to have regard to the total criminality of Hunter and, in particular, had not considered the whole of the jail time which Hunter would have to serve as a result of the cumulation required by s16(3B).

28. At first senior counsel for the Crown submitted that the principle of totality did not require the sentencing judge to take account of the original sentence being served. Some days after the conclusion of oral argument, however, a written submission was filed by the Director, which acknowledged that the principle of totality *did* require the sentencing judge to take into account periods of imprisonment consequent upon cancelled parole. In the written submission senior counsel referred to the decisions in *R v Masterson*<sup>[6]</sup>; *R v Youil*<sup>[7]</sup>; *R v Cutajar*<sup>[8]</sup>; *R v Brock*<sup>[9]</sup>; *R v Gorman*<sup>[10]</sup>; *R v Ulla*<sup>[11]</sup>; and *R v Berkelaar*<sup>[12]</sup> as illustrating that the principle of totality requires the sentencing court to take into account periods of cancelled parole being served.

29. This concession – belatedly made by the Crown – is clearly correct. This Court has made clear repeatedly that a period of imprisonment being served at the time of sentencing must be taken into account in the exercise of the sentencing discretion.<sup>[13]</sup> Nothing in s5(2AA) of the *Sentencing Act* authorised, let alone required, the trial Judge to disregard the fact that Hunter was then serving the unexpired portion of his original sentence. On the contrary, the prohibition on speculation meant that the judge was bound to assume that the full term of the original sentence would be served. Any possibility that Hunter might again be released on parole had to be disregarded.

30. As already discussed, there must in the absence of exceptional circumstances be cumulation in respect of offences committed whilst on parole.<sup>[14]</sup> At the same time, viewed as a whole the aggregate of sentences imposed by reason of cumulation cannot be greater than any sentence

required to fulfil the totality principle and all the appropriate aims of sentencing in the case.<sup>[15]</sup> There must be relativity between the totality of the criminality and the totality of sentences,<sup>[16]</sup> not only for the offences for which the person is being sentenced, but for the sentence which the person is currently serving.<sup>[17]</sup>

31. Where parole is cancelled, the principle of totality must "bulk large" in the determination of the aggregate term of imprisonment imposed for the later offences.<sup>[18]</sup> In *R v Sullivan*,<sup>[19]</sup> Eames, JA (with whom Charles and Buchanan JJ A agreed), said:

"[T]he principle of totality ... requires that the sentencing court evaluate the overall criminality involved in all the offences and adjust the sentence downwards, where appropriate, to ensure there is an appropriate relativity between the totality of the criminality and the totality of the length of sentence imposed. It is a principle which requires the court to have regard both to the sentences about to be imposed and those which the prisoner is undergoing: see *Postiglione v R* [1997] HCA 26; (1997) 189 CLR 295; (1997) 145 ALR 408; (1997) 94 A Crim R 397; (1997) 71 ALJR 875; (1997) 15 Leg Rep C1. Notwithstanding section 16(3B), the principle of totality also has application in circumstances where, as here, the sentence currently being served derives from a breach of parole."<sup>[20]</sup>

32. Because of the error to which we have referred, the sentencing discretion is reopened. It is necessary, therefore, to describe in brief terms the circumstances of each of the offences for which Hunter falls to be re-sentenced.

### ***Count 1 – theft of a motor car***

33. In early 2002, Hunter rented a sports car from a car rental firm. Following the expiration of the rental period, Hunter kept the vehicle and ultimately gave it to a friend, who sold the vehicle and paid him \$2,500 from the sale proceeds. Hunter told investigating police that he committed the theft because he was desperate for money at the time. The vehicle has not been recovered.

### ***Counts 2, 3 and 4 – kidnapping, false imprisonment and causing injury intentionally***

34. In March 2002, Samantha Smith, who was a friend of Hunter's, requested that he find and capture an acquaintance, one Scott McCasker. Smith promised Hunter \$500 if he would do so. Hunter enlisted the assistance of his trans-sexual partner, Kelly Piers. On the morning of 12 March 2002, Hunter and Piers located McCasker in St Kilda and forced him into their vehicle. They then drove McCasker to Hunter's premises in Armadale, where he was taken inside. Later, they drove McCasker to Smith's address in Diggers Rest but she was not at home. Hunter then took McCasker back to Armadale, where McCasker was tied up and gagged. He was secured with tape and electric cord. His head was tied to a beam with a wire coat-hanger. Whilst McCasker was in that position, Hunter punched him to the face and ribs on a number of occasions, and he suffered injuries to the face and head. McCasker was left tied up in this way until he was able to free himself and escape from Hunter's premises.

### ***Count 5 – trafficking in a drug of dependence***

35. On 22 May 2002 Hunter was arrested in relation to the offences committed in March 2002 to which we have referred. When he was searched, police located a number of half gram bags of amphetamine on Hunter's person. He told police that he had used and sold amphetamines to pay for his board and rent. Other similar bags were located at Hunter's premises. He explained to the police how he cut the amphetamine with glucose and bagged it in preparation for sale. He informed the police that he wanted to make money and leave Victoria to avoid warrants which he believed had been issued for his apprehension. He also stated that he had purchased a quarter of an ounce per week prior to his arrest and bagged about 20 "small lots". He admitted having sold ten small bags for \$100 each before being arrested.

### ***Relevant personal matters***

36. Hunter is now aged 40. He came from an unsettled family background which was rendered stressful by his father's aggression. By the time he was 18 he had been convicted of a number of offences, including burglary and assault occasioning actual bodily harm. As already noted he was convicted on one count of murder in 1988 and sentenced to 16 years' imprisonment. Following his release on parole he worked in various hotels and restaurants. It appears that in mid-2001 he commenced using amphetamines. The reports tendered on the plea suggest that the offences the subject of this appeal were committed whilst the appellant was under the effects of substantial amphetamine abuse and in the context of a confused interest in trans-sexuals which



had developed during his period in custody. Although arrested for these offences in May 2002, he was not charged until August 2003. He cooperated with investigating officers, made significant admissions and subsequently pleaded guilty to these offences. These are all matters that must be taken into account, as they were by the sentencing Judge.

37. We propose to vary the sentences imposed by the trial Judge in the following manner. We sentence Hunter on count 2 to three years and nine months' imprisonment and on count 3 to two years and three months' imprisonment. We would not otherwise vary the terms of imprisonment imposed by the learned trial Judge. We make the same orders for concurrency and cumulation, making a total effective sentence of six years. We fix a minimum term of four years to be served before Hunter would become eligible for parole.

38. The order of the Court will be:

1. The appeal against sentence imposed on 27 April 2005 is allowed in part.
2. The sentence on count 2 is quashed and in lieu thereof the appellant is sentenced to three years and nine months' imprisonment.
3. The sentence on count 3 is quashed and in lieu thereof the appellant is sentenced to two years and three months' imprisonment.
4. The sentences imposed on counts 1, 4 and 5 are affirmed, they being respectively six months' imprisonment on count 1, 12 months' imprisonment on count 4 and six months' imprisonment on count 5, with six months of the sentence imposed on count 4 to be served concurrently with the sentence imposed on count 2, and the sentence imposed on count 5 to be served cumulatively with the sentences imposed on counts 1 and 2.
5. The orders for concurrency and cumulation are affirmed, making a new total effective sentence of six years' imprisonment.
6. A new non-parole period of four years is fixed.
7. It is declared that the period of 420 days pre-sentence detention has already been served under the sentence and it is ordered that the fact that this declaration was made and its details be noted in the records of the Court.

<sup>[1]</sup> See *R v Kuru* (1995) 78 A Crim R 447 at 451; *R v Ponton* [2001] VSCA 36; *R v Orphanides* [2002] VSCA 86; (2002) 130 A Crim R 403 at [33], [36].

<sup>[2]</sup> [2002] VSCA 86; (2002) 130 A Crim R 403.

<sup>[3]</sup> *R v Orphanides* (2002) 130 A Crim R 403 at 410 [25] per Phillips JA.

<sup>[4]</sup> *Corrections Act* s77(1).

<sup>[5]</sup> *Corrections Act* s77(7)(b).

<sup>[6]</sup> Unreported, Court of Criminal Appeal, 31 August 1982.

<sup>[7]</sup> (1995) 80 A Crim R 1.

<sup>[8]</sup> Unreported, Court of Appeal, 20 July 1995.

<sup>[9]</sup> Unreported, Court of Appeal, 22 February 1996.

<sup>[10]</sup> Unreported, Court of Appeal, 10 August 1995.

<sup>[11]</sup> [2004] VSCA 130; (2004) 148 A Crim R 356 at 366.

<sup>[12]</sup> [2001] VSCA 143.

<sup>[13]</sup> *R v Renzella* [1997] 2 VR 88 at 98; (1996) 88 A Crim R 65 per Winneke P, with whom Charles and Callaway JJ A agreed; *R v Stares* [2002] VSCA 70; (2002) 4 VR 314 at 321 [21], 324 [31] per Charles JA with whom Phillips CJ and Chernov JA agreed; *R v Smith* [2006] VSCA 23 [8] per Chernov JA with whom Warren CJ and Charles JA agreed.

<sup>[14]</sup> See s16(3B) *Sentencing Act* 1991.

<sup>[15]</sup> *R v Greenslade* [2004] VSCA 213 per Batt JA at [30]. See also *R v Hennen* [2004] VSCA 42 per Bongiorno AJA. at [31].

<sup>[16]</sup> *R v Holder* [1983] 3 NSWLR 245 at 260; (1983) 13 A Crim R 375;.

<sup>[17]</sup> *R v Bakhos* (1989) 39 A Crim R 174; *R v Harrison* (1990) 48 A Crim R 197 and *R v Gordon* (1994) 71 A Crim R 459.

<sup>[18]</sup> *R v Greenslade supra* per Batt JA at [30].

<sup>[19]</sup> [2005] VSCA 286.

<sup>[20]</sup> At [20].

**APPEARANCES:** For the appellant Hunter: Mr JP Wheelahan, counsel. Rainer Martini & Associates, solicitors. For the Crown: Mr JD McArdle QC, counsel. Mr S Carisbrooke, Acting Solicitor for Public Prosecutions.