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SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v GRABOVAC

Winneke P, Ormiston JA and Hedigan AJA

17 February, 18 April 1997 — [1998] 1 VR 664; (1997) 92 A Crim R 258

SENTENCING – MULTIPLE OFFENCES – APPROACH TO BE TAKEN BY SENTENCER – COURT NOT TO IMPOSE INADEQUATE SENTENCES TO ACCOMMODATE RULES RELATING TO CUMULATION – CONCURRENT SENTENCES SHOULD BE ORDERED WITH SOME CUMULATION FOR SEPARATE EPISODES OF OFFENDING.

The proper method to be adopted in sentencing on multiple offences is that generally a Court should avoid imposing artificially inadequate sentences in order to accommodate the rules relating to cumulation. Where practicable when applying accepted rules of sentencing as to totality and proportionality, and in order to fashion an appropriate total effective head term in relation to a series of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order for the cumulation of unnecessarily reduced individual sentences. In particular, though concurrency is to be preferred, a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a "crushing" sentence.

WINNEKE P: [1] I agree with Ormiston JA.

ORMISTON JA: *[After setting out the facts, the nature of the charges, the sentences imposed and the grounds of appeal by the Director of Public Prosecutions, His Honour continued]...***[23]** This case again raises the proper process to be adopted in sentencing persons who have pleaded guilty to or have been found guilty of multiple offences having regard to accepted principles as to totality, proportionality and the like. I concede that difficulties are posed for judges in sentencing for such offences. Those difficulties arise not so much out of the requirements, statutory and otherwise, as to concurrency (see especially s16 of the *Sentencing Act*), but, rather, in the application of principles relating to cumulation which in some cases may be exacerbated by specific statutory requirements for cumulation which fortunately do not arise in the present case. The ordinary principles as to cumulation require that the sentencing judge should as far as practicable identify separate events, "episodes" or "transactions" giving rise to specific counts or groups of counts and to recognise them by ordering at least a degree of cumulation. This is to avoid the appearance that an offender may commit a series of crimes after the first **[24]** such crime with effective impunity, if all sentences for a series of unconnected offences were to be served concurrently. Difficulty arises not so much in providing for a degree of cumulation but in having proper regard to the principle of totality and in avoiding the imposition of an inappropriately crushing sentence.

The necessity to have regard to the totality principle has been recognised for many years and is reflected in many cases but it was explicitly recognised by the High Court in the leading case of *Mill v R* [1988] HCA 70; (1988) 166 CLR 59; 83 ALR 1; (1988) 63 ALJR 117; 36 A Crim R 468. The problem lies not so much in requiring judges to stand back and review the aggregate sentence in order to see whether it is just and appropriate but in the shortcuts which may be adopted to effectuate a proper and fair result. Doubtless that influenced the learned judge in this case to decide, first, that a total effective term of 3 years was appropriate and then to impose and adjust the constituent sentences accordingly. In my opinion the latter procedure can and does frequently lead to inadequate and inappropriate consideration being given to the sentences on the separate counts, as has here occurred. These difficulties ought not to arise if sentencing judges were to apply what was stated in the joint judgment in the High Court although it may strictly be said to be an obiter dictum. At pp62-63 of the judgment the Court cited with approval a passage from Thomas' *Principles of Sentencing* (2nd ed.) at pp56-57 and then stated (at p63):'

"Where the principle [scil. of totality] falls to be applied in relation to sentences of imprisonment

> imposed by a single sentencing Court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a **[25]** number of sentences are being imposed. Where practicable, the former is to be preferred."

Although what is there stated is expressed in qualified terms, it should be realised that the use of the words "where practicable" and the reference to an alternative means, by way of "lowering the individual sentences", were expressed in very particular circumstances. The issue before the Court was the proper method of sentencing an offender for a series of three closely related crimes which were committed in different States, where two of the offences had already been dealt with in one State. It was held to be necessary to impose a lower than normal sentence in the second State in order to give effect to the principle of totality where, without statutory authority, it was "not possible for a second sentencing Court to impose a concurrent sentence" in relation to the offence last considered. As can be seen from the reasoning at p67 of the joint judgment, concurrency was not a relevant option in those circumstances and "the only course open to the second sentencing Court [was] to adopt a lower head sentence that reflect[ed] the long deferment" that had taken place since the offender had first been placed in custody. The Court there observed that it was unfortunate that the lower head sentence would "fail to reflect adequately the seriousness of the crime in respect of which it is imposed".

Consequently it can be seen that in ordinary circumstances, unlike those which occurred in *Mill's Case*, it is preferable to make sentences wholly or partially concurrent in order to achieve an appropriate result having regard to the principle of totality. What there appears indirectly and arguably only by inference is not the subject of other direct authority in the High Court, nor, so far as I am aware, was it, until recently, directly the subject of authority in this State, **[26]** although the passage has been followed in a number of other States (e.g. *Bowman* (1993) 69 A Crim R 530 (CCA, WA)) and in the Australian Capital Territory (see *McDonald* [1994] FCA 956; (1994) 48 FCR 555; (1994) 120 ALR 629; (1994) 71 A Crim R 370). To my knowledge the passage had been referred to only twice in Victorian appeals: see *R v Hynson* (Court of Appeal, 4 December 1995, [1995] VSC 218; [1995] VICSC 218) at p7, but in my recent judgment in *R v Lomax* (Court of Appeal, 26 March 1997, [1998] 1 VR 551; (1997) 91 A Crim R 270) at p20 (in which Hedigan, AJA concurred), similar issues were examined but applied in the context of an appeal arising out of individually excessive sentences on multiple counts. In order to see why the passage from *Mill* to which I have referred came to be so expressed and what should be taken to be its precise application, it is necessary to look to the sources for that statement. In *Mill*, immediately preceding the cited passage, the Court quoted what it accepted to be a correct statement of the principle of totality from *Thomas*, at pp56-57 of the second edition (1979). There followed references at p63 (of *Mill*) to the third edition of a Canadian work, *Ruby on Sentencing*, as well as to two South Australian cases and to the earlier High Court decision of *Ryan v R* [1982] HCA 30; (1982) 149 CLR 1 at pp21, 22-23; 40 ALR 651; 56 ALJR 422.

First in time is Thomas' leading work on *Principles of Sentencing*, which had reached its second edition in 1979 but which has not been since revised, though much of the material is reproduced in Thomas' subsequent three volume digest called *Current Sentencing Practice*, a loose-leaf work first published in 1982. In the second edition of his earlier work, Thomas, in the course of his discussion of the totality principle and after the passage cited in full in *Mill*, said (at p57):

> **[27]** "Where the totality of the sentences does appear to be excessive and some adjustment is necessary, it is usually preferable to make the adjustment by ordering sentences to run concurrently, rather than by reducing the length of individual sentences and allowing them to remain consecutive. The Court has stated that a series of short consecutive sentences adding up to a substantial total is generally inappropriate; 'it is better to pass ... an appropriate sentence on each count and make those sentences run concurrently.' [*Simpson* 1.2.72, 4470/B/71 ...] Where concurrent sentences are passed for offences of differing gravity, the sentences imposed for the less serious offences should not be disproportionate to the particular offences for which they are imposed, even though the length of these sentences will not affect the total period for which the offender is liable to be detained [see *R v Smith* ... [1975] Crim LR 468 ...]."

The decision referred to in the footnote, *Smith*, is the subject of the customary abbreviated report in the *Criminal Law Review*. The actual language of Scarman LJ, speaking for the Court of Appeal, appears more precisely in the summary appearing as para A5-3F01 in Thomas' *Current*

Sentencing Practice as part of the unreported judgment of 13 February 1975, as follows:

> "In such a situation as this [scil. where a large number of counts had to be dealt with], a whole series of short consecutive sentences should be avoided ... when the offences charged vary in gravity from the trivial to the comparatively serious, it is wrong as a general rule to impose concurrent sentences of equal or comparable length in respect of the offences charged."

This case is cited as authority for the following proposition in Thomas' later work at para A5-3F:

> "Where a sentencer is dealing with an offender for a series of offences, and is required to adjust the sentences in order to avoid an excessive aggregate, it is better to impose concurrent sentences which are appropriate to the offences for which they are passed, than a series of consecutive sentences each shorter than would normally be appropriate."

[28] A similar proposition appears in *Halsbury's Laws of England* (4th ed. - re-issue) Vol 11(2) para 1201, footnote 9 which contains a reference to another unreported Court of Appeal decision in *R v Dolby* (23 June 1989). What it is important to understand, in looking further at these English works (to which may be added *Ashworth* on *Sentencing and Criminal Justice* (2nd ed. 1995) Chapter 8 on "Multiple offenders"), is that there is no statutory provision or accepted principle of the common law in England which would enable orders to be made for partial concurrency or, if one prefers, partial cumulation. This restriction clearly poses a dilemma whenever a degree of cumulation is desirable, but that is not a problem in Victoria. The same problem in Canada is evidenced by Ruby's work on *Sentencing* (now in its fourth edition) in passages at pp44-47 and in Chapter 14 on "Consecutive and concurrent sentences". This doubtless explains that author's preference for consecutive sentences which is supported by a judgment of the Canadian Supreme Court in *Paul* (1982) 138 DLR (3d) 455, 67 CCC (2d) 97 at pp106-107. Notwithstanding the High Court's reference to the third edition of Ruby in *Mill*, I would, with the greatest of respect, advise caution in using any passages in that work which are dependent on the existence of such a restriction on imposing partially concurrent sentences.

Of the two South Australian judgments said to recognise the totality principle in Australia, *R v Knight* (1981) 26 SASR 573 and *R v Smith* (1983) 32 SASR 219, only the latter refers to the preference for concurrent sentences expressed by Thomas *op.cit.* p57, in the context of sentences passed for three armed robberies. Although Jacobs J (in whose judgment Matheson J agreed) referred to Thomas' **[29]** proposition (at p222), his solution was said to be "more readily ... applied to a series of offences" but was not applicable to the appeal before the Court.

The last relevant case referred to in *Mill* was *Ryan v R* [1982] HCA 30; (1982) 149 CLR 1; 40 ALR 651; 56 ALJR 422, a decision of the High Court primarily concerned with the power of an appellate court in Victoria to re-sentence on other charges under s569(1) of the *Crimes Act* where a conviction on one count is quashed. In denying that a power to increase or decrease sentences on other counts existed, the members of the High Court expressed some cautious views about sentencing on multiple counts. Probably the most that can be gained from the decision is that it is important to impose the appropriate and proportionate sentence both on each count and in respect of all counts. As the Court held that it was inappropriate to re-sentence on the remaining counts, what was said as to sentencing on multiple counts were essentially obiter dicta. Wilson J (in whose judgment Gibbs CJ concurred) said, as to the relationship between the counts, that (at CLR p21):

> "[E]ven if there were a close relationship between the counts in the indictment, I would expect that for the purpose of selecting an appropriate sentence each count in the indictment would stand separately ... Then any relationship that does exist between the counts, and also the propriety of the total sentence, would find expression in the degree of concurrency, if any, which is made to attach to the individual sentences."

Aickin J, who reached essentially the same conclusion, was even more cautious (at pp15-16):

> "It may be that it would be preferable that sentences should be imposed appropriate to each individual count as if it stood alone, the trial judge making such order as to concurrent serving of sentences as he may think appropriate. That however is a matter for the trial courts to decide for themselves."

[30] Brennan J, whose reasoning depended upon a conclusion that the joinder of the relevant count had been improper, said, after stating that a trial judge should assess an appropriate overall sentence, "having regard to the entire course of criminal conduct which constitutes the several elements of the offences", (at pp22-23):

> "In pronouncing sentence, however, the trial judge imposes separate sentences in respect of the several offences of which the accused has been convicted, effecting the appropriate overall sentence by adjusting the severity of the separate sentences and, when custodial sentences are imposed, by ordering that they be served either concurrently or cumulatively."

Stephen J did not find it necessary to address these matters. One may fairly conclude, therefore, that what was left open or uncertain by the dicta in *Ryan* as to sentencing on multiple counts was clarified in *Mill* to the extent stated in the passage set out above. In my opinion it is also useful, for the purpose of determining to what extent the High Court's stated preference in *Mill* ought to be applied in Victoria, to look at the relevant passages in *Fox and Freiberg on Sentencing: State and Federal Law in Victoria* (1985) as to the totality principle which, it would appear, have also been derived from the views of Thomas in his second edition at p57. The learned authors in para 9.413 (at p372) state:

> "Aside from whether a sentence is 'crushing', the courts will assess whether the aggregate of all the sentences is appropriate for the criminal conduct when viewed as a whole. Each of the terms ordered may well be within an appropriate range, but if the total is thought to result in too severe punishment for the incidents in question, the sentences, or through a direction as to concurrency, the manner in which they relate to each other, may have to be adjusted. This can be an upward adjustment as well **[31]** as a downward one. It is preferable that any such adjustment should try not to obliterate the concept of punishment in respect of each offence and, rather than reduce the length of properly arrived at individual sentences so as to allow them to remain consecutive, they should be permitted to stand, but made concurrent or partially concurrent."

After describing the totality principle they continue in para 9.415 (at p373):-

> "Where a sentencer is inclined to give a direction as to concurrency, it is best that he impose sentences appropriate to each individual count before attempting to achieve an acceptable total sentence by giving directions as to concurrency. This is preferable to awarding an unduly heavy sentence for the most serious offence and lesser penalties for the remaining ones in the belief that this will make no difference to the final result."

The authors then refer to the risk that the heavier sentence may be set aside by the quashing of a conviction on one count of many and to the difficulties arising in *Ryan's Case*, concluding by saying that "the remaining sentences may then fail adequately to reflect the true gravity of the charges": ibid. It is notable that these views were expressed at a time when there was a statutory presumption in favour of cumulative sentences as appeared from s123 of the *Community Welfare Services Act* 1970. The prima facie provision that sentences should be served concurrently now reflected, if only partly reflected, in s16 of the *Sentencing Act* 1991 (as amended) was first introduced by s15 of the *Penalties and Sentences Act* 1985. Of course, before 1896 the same rule was seen to be the product of a number of common law rules, the history of which may be seen in *Fox and Freiberg* at pp363-366.

It remains therefore for me to express my conclusions as to the proper method to be adopted in sentencing on multiple offences. In general a Court should avoid imposing artificially **[32]** inadequate sentences in order to accommodate the rules relating to cumulation. In other words, as the High Court said, where practicable when applying accepted rules of sentencing as to totality, proportionality and the like and in order to fashion an appropriate total effective head term in relation to a series of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order or orders for the cumulation of unnecessarily reduced individual sentences. Nevertheless, a rule of this kind can only be a precept or guideline to be applied as and when practicable. In particular, though concurrency is to be preferred, a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a "crushing" sentence.

The conclusions which I have reached were stated by me in substantially similar terms in

R v Lomax (*supra*). As the present judgment contains reasons in somewhat more extended terms, it is desirable to repeat the considerations which have compelled me to reach these conclusions. There are, as appeared at p21 of *Lomax*, three reasons, at least, for accepting what is inferred by the High Court in *Mill* and what *Thomas* and *Fox and Freiberg* both support. The first reason is an obvious desire to ensure that each sentence, though one of many sentences, will reflect appropriately the criminality of the relevant offence and of the particular offender. If a series of low sentences were to be cumulated to produce an end result which would merely have the effect of satisfying the rule as to totality and of avoiding the imposition of a crushing sentence, then the passing of each artificially low sentence would, I suggest, give rise to **[33]** a legitimate belief, among those interested in the outcome of the sentencing process, that most or some of the subject offences are not being treated seriously, especially where, as here, the statutory maximum terms exceeded by factors of 6, 12 or more the terms actually imposed for each offence. Secondly, as has been pointed out by *Fox and Freiberg*, there is the need to ensure that if one or more convictions or sentences are set aside, the remaining sentences will not be inappropriate and will allow, so far as is permitted by law, a new total effective sentence and minimum term to be calculated or imposed which also suitably reflects the criminality of all relevant offences. Again in the present case there is no question of setting aside convictions but it likewise cannot be right that different methods of sentencing, for example, by the use of cumulation, might be appropriate where there is no likelihood of an appeal as to guilt. In the third place, inadequate sentences as to the separate counts may lead (in other cases) to what would be artificial claims of disparity by co-offenders who, though charged on fewer counts, may claim to have been sentenced unjustly if not given sentences similar to those imposed on the principal offender. Such artificially inadequate sentences may also give rise to feelings of injustice among other offenders charged and sentenced for similar crimes. *[His Honour then considered the sentences imposed, allowed the appeal, set aside the sentences and resentenced the offender.]*

APPEARANCES: For the Appellant: Mr GC Flatman QC and Mr T Gyorffy, counsel. PC Wood, solicitor to DPP. For the Respondent: Mr PF Tehan, counsel. Victoria Legal Aid, solicitors.
