29/86

SUPREME COURT OF VICTORIA — FULL COURT

R v McGOWN

Crockett, McGarvie and Hampel JJ

4 December 1985

CRIMINAL LAW – SENTENCING – SOCIAL SECURITY OFFENCES – OBTAINING BENEFITS NOT PAYABLE – NATURE OF OFFENCE – GENERAL DETERRENCE OF PRIMARY IMPORTANCE – WHETHER CUSTODIAL SENTENCE APPROPRIATE – SENTENCE LESS THAN TWELVE MONTHS – WHETHER MINIMUM TERM AVAILABLE: *COMMUNITY WELFARE SERVICES ACT* 1970, S190; *COMMONWEALTH PRISONERS ACT* 1967 (CTH), S4.

Over a period in excess of 4½ years, McG. used false names and identities for the purpose of fraudulently receiving $42,144.72 sickness and unemployment benefits. He pleaded guilty to 9 counts of imposition, admitted 20 prior convictions, and was sentenced to an aggregate period of 4½ years with a minimum of 3 years before eligible for parole. On appeal against sentence as being manifestly excessive—

HELD: Appeal (in effect) dismissed.
(1) As offences of this nature are not easy to detect and are apt to be committed on a wholesale scale, general deterrence needs to be given special emphasis by the sentencing Court.

(2) Having regard to the nature of the offences, the length of time over which they were committed and the amount improperly gained, it was open to the sentencing Judge to impose the effective sentence.

(3) Observations concerning the provisions of the *Commonwealth Prisoners Act* 1967 (Cth) and the *Community Welfare Services Act* 1970 with regard to the fixing of minimum terms.

CROCKETT J: [1] In the County Court at Melbourne in April 1985 the applicant pleaded guilty to nine counts of imposition. He admitted 20 prior convictions from eight Court appearances. It is to be noted that, whilst the period of those convictions spanned from December 1963 to November 1969, nine counts of obtaining money by false pretences were included amongst them. The offences themselves commenced in January 1980 and continued until October 1984. The charges were laid under Commonwealth legislation and arose from the applicant's having employed false names and identities for the purpose of fraudulently receiving sickness and unemployment benefits from the Department of Social Services. Altogether during the period of such activities the applicant received the sum of $42,144.72 to which he was not lawfully entitled. **[2]** In respect of the offences, the learned Judge below imposed sentences which amounted in the aggregate to 4½ years' imprisonment, and in respect of those sentences he fixed minimum terms which in the aggregate amounted to three years to be served before which the applicant should be eligible for parole.

The present application is for leave to appeal against sentence. The sole ground upon which he relies in relation to the merits of his appeal is that the total sentence imposed was manifestly excessive. A number of considerations of a mitigating nature which were relied upon to support an argument that the effective sentence imposed was manifestly excessive was pointed to. The Court has had regard to all that has been said in that regard, but is of the view that, having regard to the nature of the offences, the length of time over which they were committed and the amount of money which was improperly gained as a result of their commission, it could not possibly be said that the effective sentence selected by the learned Judge was beyond the legitimate sentencing range open to him.

We think that this type of offence is one in which the component of general deterrence particularly needs to be given special emphasis by a sentencing Judge. It would seem that offences of this nature are apt to be committed on a wholesale scale. It would appear, also, that it is not particularly easy to detect individual breaches, and if they are undetected, the rewards can be great. Therefore, the need to emphasise to the community that commission of offences of this nature will

attract salutary punishment is particularly necessary. **[3]** The Court is therefore of the view that so far as the merits of the application are concerned the application must fail. However, there is a further difficulty with the matter to which it is necessary to make some reference. The learned Judge before whom the matter came for sentence expressed his indignation and frustration at having to impose sentence in relation to a considerable number of charges when those charges did not individually attract substantial penalties and which were created by Commonwealth legislation. The reason for his annoyance arose from the difficulty he felt in being required to comply with both s4 of the *Commonwealth Prisoners Act* 1967 and the provisions of s190 of the *Community Welfare Services Act* 1970, a State act.

In the appeal immediately preceding that with which we are now concerned, similar circumstances confronted the same sentencing Judge. He there gave vent to his frustration caused by the difficulties of sentencing to which those two enactments gave rise by simply refusing to have regard to their requirements. What he then did was to sentence the prisoner on the assumption that there was no Commonwealth legislation at all governing the matter. The result was that, after arriving at an effective head sentence as a result of the imposition of the individual sentences and pronouncement of concurrency orders, he simply neglected to provide for any minimum term in respect of the individual sentences and contented himself with providing the one minimum term in relation to the effective head sentence. This he could not do and, although his attention was drawn to the requirements of the legislation by Counsel for the **[4]** Director, his Honour refused to amend the sentence which he had imposed, leaving it to this Court to do what he should have done in the first place.

So far as the present case is concerned, with an awareness of the need to avoid the problem to which I have just referred, his Honour, did, in fact, purport to impose a minimum term to be served in relation to each of the individual sentences that he passed before the applicant should be eligible for parole. However, the sentences are unsustainable for two reasons. The first is that he purported to impose minimum terms in relation to head sentences which were less than 12 months' duration. This, the Judge by virtue of s190 of the *Community Welfare Services Act*, could not do. Furthermore, he failed to comply with the legislation in that he imposed minimum terms with a differential of less than six months between the head sentence and the purported minimum term. This too, he was not permitted to do because of the same statutory provision. The result is that it is necessary for this Court to re-sentence the applicant. To do so, in order to produce the same effective result as that intended by the learned sentencing Judge, a drastic re-scheduling of sentences in conformity with the relevant statutory provisions is required to be adopted.

In the circumstances the order of the Court will be: Leave to appeal is granted. The appeal is treated as instituted and heard instanter and allowed. The sentences below are set **[5]** aside and in lieu thereof the applicant is sentenced to be imprisoned for 18 months on each of counts 1, 2 and 3, with a minimum of 12 months in respect of each count. On counts 4 to 9 inclusive, the sentence is nine months' imprisonment but they are to be served concurrently with each other and with the sentence on count 1. The effective total sentence is four years six months with a minimum term of three years before the applicant shall become eligible to be released on parole.

We would wish to emphasise the sentences so passed are necessarily the product of a good deal of contrivance and, in some respects, result in quite an artificial result. It would appear impossible to avoid having to adopt such an undesirable course in order to give effect to the relevant statutory provisions and at the same time reach an effective sentence which in all of the circumstances appears to the Court to be appropriate. We emphasise that consideration for two reasons. The first is that the individual sentences which we have just announced cannot be used as a precedent for selecting what might be thought in any later case to be an appropriate sentence in respect of a similar charge of imposition.

The other reasons is that it gives rise to what we think is the need to make the following observations: We wish to draw attention to the cumbersome and ill-working provisions of the *Commonwealth Prisoners Act* 1967. That Act requires the imposition of minimum sentences when **[6]** appropriate in respect of each count and, at the same time, because of the effect of s190 of the *Community Welfare Services Act* 1970 to which regard must also be had, do so with a differential of at least six months between the head sentence and the minimum sentence. There is no provision, as there is in s190 of the *Community Welfare Services Act*, which enables the Court to fix one minimum term to be served in respect of a number of sentences imposed at the same time. The

difficulty becomes more apparent in cases such as the present where a number of short sentences is appropriate with the consequence that the Court has to engage in an artificial arithmetical exercise to achieve the desired effective head and minimum sentences. This leads inevitably to a distortion of individual sentences which then do not bear a proper relation to each other. We propose to refer our remarks to both the Commonwealth and Victorian Attorneys-General.
