13/95; [1995] VSC 58

SUPREME COURT OF VICTORIA — APPEAL DIVISION

HANSFORD v HIS HONOUR JUDGE NEESHAM and ORS

Brooking, Hampel and Smith JJ

8 March 1995 — [1995] VICSC 58; [1995] VicRp 51; [1995] 2 VR 233

CRIMINAL LAW – SENTENCING – INDICTABLE OFFENCE TRIABLE SUMMARILY – MAXIMUM PENALTY FOR OFFENCE PRESCRIBED BY STATUTE – JURISDICTIONAL LIMIT PRESCRIBED – "MAXIMUM PENALTY PRESCRIBED FOR THE OFFENCE" – MEANING OF – WHETHER COURT TO HAVE REGARD TO JURISDICTIONAL LIMIT IN SELECTING APPROPRIATE SENTENCE: *SENTENCING ACT* 119, SS5(2)(a), 113(1).

Section 5(2)(a) of the *Sentencing Act* 1991 ('Act') provides:

> "In sentencing an offender a court must have regard to—
> (a) the maximum penalty prescribed for the offence;"

Section 113(1) of the Act provides:

> "If a person is convicted by the Magistrates' Court in a summary hearing of an indictable offence...the maximum term of imprisonment to which the Court may sentence the offender is level 9."

Section 113(1) of the Act does not prescribe a maximum penalty for an offence but imposes a jurisdictional limit upon a particular sentencing court, not by reference to the nature and gravity of the offence, but by reference to the status of the sentencing court. This jurisdictional limit must be observed by the court when sentence is actually passed. There can be only one maximum penalty provided for the offence within the meaning of s5(2)(a) of the Act that is, the maximum penalty specifically provided for the particular crime. Accordingly, in the Magistrates' Court the appropriate sentence should be first determined upon by the magistrate, and then, if it exceeds two years, effect should be given to the jurisdictional limit.

BROOKING J: [1] In October 1992 the appellant, Robert Francis Hansford, was undergoing a sentence of imprisonment. He escaped from custody and while at large committed a number of offences, the most serious of them being a robbery at a bank. Counting the escape, he committed, in all, six indictable offences. He consented to the summary hearing for which s53 of the *Magistrates' Court Act* 1989 provides and pleaded guilty and in consequence was convicted of all six offences and sentenced to a total effective term of 18 months' imprisonment. Pursuant to s84 of the *Magistrates' Court Act* the Director of Public Prosecutions appealed to the County Court against the sentences. By s85 the appeal was to be conducted as a rehearing, and by s86(1) on the hearing of the appeal the County Court was empowered to make any order which it thought just and which the Magistrates' Court could have made. According to s113(1) of the *Sentencing Act* 1991:

> "If a person is convicted by the Magistrates' Court in a summary hearing of an indictable offence under s53(1) of the *Magistrates' Court Act* 1989, the maximum term of imprisonment to which the Court may sentence the offender is level 9."

The result of s86(1) of the *Magistrates' Court Act* was that s113(1) of the *Sentencing Act* limited the powers of the County Court on the hearing of the appeal. The appeal was heard by his Honour Judge Neesham, who sentenced the offender to various short terms of imprisonment on the lesser offences and to two years' imprisonment for the offence of robbery. His Honour made cumulation orders which resulted in a total effective **[2]** sentence of three years and twenty days and fixed a non-parole period of two years and three months. The principal question debated before his Honour had been that of the effect of s5(2)(a) of the *Sentencing Act* 1991 where an offender was to be sentenced for an indictable offence that had been dealt with summarily. By that provision, in sentencing an offender a court must have regard to "the maximum penalty prescribed for the offence". It was argued for the present appellant that this meant that in exercising his sentencing discretion Judge Neesham was required to treat as the maximum penalty prescribed

for the offence of robbery, not the term of imprisonment of 12½ years fixed by s75 of the *Crimes Act* 1958, but the two year maximum imposed by s113 of the *Sentencing Act* where the offender was being dealt with summarily. This had the consequence, so it was said, that two years, as the maximum sentence fixed for the crime, had, according to accepted sentencing principles, to be regarded as reserved for the worst category of case, with the result that the present appellant should be given a sentence of substantially less than two years in respect of the robbery. This argument his Honour rejected, holding that the maximum penalty prescribed for the offence within the meaning of s5(2)(a) was that fixed by the *Crimes Act* for the particular offence.

After an attempt to prosecute an application to the Full Court for leave to appeal against the sentences passed by Judge Neesham – this failed because of the terms of s91(2) of the *Magistrates' Court Act* - the appellant filed an originating motion naming as defendants his Honour **[3]** Judge Neesham and the three members of the police force who had been the informants. By this originating motion he sought under O56 relief or remedy in the nature of certiorari, the time for the commencement of this proceeding fixed by R56.02 having been enlarged. The originating motion came before Phillips, J, who on 31 August 1994 dismissed it. His Honour gave a long and, if I may say so, very carefully considered decision in which a large number of questions were dealt with. Mr Hansford has appealed against that decision. I say that he has appealed, although the document employed for the purpose was in form a notice of application for leave to appeal against sentence, not a notice of appeal against an order made on an originating motion. The respondents (by which I mean the informants) have, however, expressly declined to make any point of this, and we have with their consent proceeded to hear the appeal without requiring any amendment of the document which must be regarded as serving as the notice of appeal.

Phillips J gave lengthy consideration to the question of the availability and scope of relief in the nature of *certiorari*. Having regard to the view I have formed on what I might call the substantive questions debated before his Honour, I find it unnecessary to express any opinion on the question whether it was open to the appellant to raise, by originating motion seeking relief in the nature of *certiorari*, points of the kind sought to be raised in these proceedings or to form any view on other preliminary questions dealt with by his Honour.

[4] Error of law on the part of his Honour Judge Neesham was alleged in a number of respects. As to all but two of these, I am content to say that in my opinion Phillips, J was right in concluding that no error of law had been demonstrated. The two questions which do require more lengthy treatment are the question already mentioned - that of the effect of s5(2)(a) of the Sentencing Act - and the related question of the effect of s10 of that Act. As to the latter question, it is conceded by the appellant that, unless he is right in his contention about the effect of s5(2)(a), the point based upon s10 cannot succeed. This second point is whether the maximum penalty for the offence of robbery had been varied by the *Sentencing Act*, so as to render s10 inapplicable to the passing of sentence for that offence.

The appellant's argument here is that, two years, not 12½ years, being the maximum penalty prescribed for the offence of robbery within the meaning of s5(2)(a), and that maximum penalty not having been altered by the *Sentencing Act*, s10 was applicable. The respondents' contention is that the maximum penalty for robbery, in the sense of the penalty fixed by s75 of the *Crimes Act*, having been reduced from 20 years to 12½ years by the *Sentencing Act*, the result of *R v Boucher* ([1995] VicRp 7; [1995] 1 VR 110; (1994) 70 A Crim R 577, Full Bench, 15 February 1994) is that s10 was inapplicable.

The main question argued before Judge Neesham and Phillips J was whether, when the learned County Court judge came to sentence for the offence of robbery, "the maximum penalty prescribed for the offence" to which he was **[5]** required to have regard by s5(2)(a) of the *Sentencing Act* was the term of 12½ years fixed by s75 of the Crimes Act for the crime of robbery or the term of two years fixed by s113(1) of the *Sentencing Act* as the maximum term of imprisonment to which the Court may sentence the offender where a person is convicted by the Magistrates' Court on the summary hearing of an indictable offence under s53(1) of the *Magistrates' Court Act*. As I have said, for the appellant it was argued that the latter period was the maximum penalty prescribed for the offence within the meaning of s5(2)(a), with the result that two years' imprisonment should be regarded as reserved for the worst category of robberies. For the respondents it was argued that, notwithstanding that the appellant had been dealt with summarily, the maximum penalty within

the meaning of s5(2)(a) remained 12½ years and that that was the term to which regard should be had in considering what an appropriate sentence would be, leaving aside what the respondents described as the jurisdictional limit imposed by s113. Phillips J rejected the appellant's argument.

I entertain no doubt that the respondents' submission on this point is to be preferred. From an examination of s5 it is clear that the whole of the section is concerned with considerations which affect the discretionary determination of what is the appropriate sentence. If, notwithstanding s36(3) of the *Interpretation of Legislation Act* 1984, s36(4) and para(b)(i) of s35 of that Act permit recourse to the heading to s5 of the *Sentencing Act*, then we may notice that the section is **[6]** headed "Sentencing guidelines". This only serves to confirm what is otherwise plain, namely, that the section is concerned with what considerations are to affect the discretionary determination of what is an appropriate sentence. It is a section which provides "sentencing principles to be applied by courts in sentencing offenders" within the meaning of para (e) of s1 of the *Sentencing Act*; compare the reference to the provision of such principles in the long title to the Bill for that Act.

The maximum penalty fixed by statute for a particular crime has a twofold significance. In the first place, a sentence which goes beyond that maximum is unlawful as beyond the power of the sentencing court. In the second place, the maximum shows Parliament's view of the gravity of the offence and is a consideration to which regard must be had in determining what is an appropriate sentence, both by the operation of s5(2) and (in the absence of a statutory provision like s5(2)) as a matter of the general law relating to sentencing (*R v Oliver* (1982) 7 A CrimR 174 at p177). The distinction is important. The duty of a sentencing court not to impose a sentence which goes beyond the maximum penalty prescribed is not the result of the duty cast upon it by s5(2) to "have regard to" the maximum penalty: it is but an aspect of the duty of all courts not to exceed their jurisdiction or powers.

Where a court tries an indictable offence summarily under s53(1) of the *Magistrates' Court Act* and convicts the defendant, by s113 of the *Sentencing Act* the maximum term of imprisonment to which the Court may sentence **[7]** the offender for that offence is two years. But this does not mean that two years is "the maximum penalty prescribed for the offence", to which the Court must have regard by force of s5(2)(a). That phrase is confined to the maximum penalty selected by the legislature as that which should be prescribed for a particular crime. S5(2)(a) is in no way concerned with the limitation imposed by s113 upon the jurisdiction or powers of a sentencing magistrate whereby, whatever the nature of the offence and whatever the maximum penalty prescribed for it, the magistrate may not impose a term of imprisonment greater than two years for the offence.

Section 113 operates indifferently upon all sentences to be imposed for an indictable offence tried summarily under s53(1). It does not prescribe a maximum penalty for the offence in the sense in which those words are used in s5(2)(a) – the specification of a maximum penalty by the legislature for a particular crime. It leaves the statutory maximum penalty untouched but imposes upon a particular sentencing court a jurisdictional limit. It imposes its own maximum, not by reference to the nature of the offence and its gravity in relation to other offences, but by reference to the status of the sentencing court: the inferior court is not as a matter of policy to be empowered to pass a sentence of more than two years' imprisonment for any indictable offence, great or small. This "jurisdictional" maximum, as the respondents would describe it, is not a matter to which regard should be had in the making of the discretionary determination – that well known "instinctive synthesis" – whereby an appropriate sentence is arrived at.

[8] Rather is it a limit which must as a matter of jurisdiction or power be observed when sentence is actually passed. Just as damages may have first to be assessed without regard to a statutory limitation on the power to award them, so the appropriate sentence is first determined upon and then, if it exceeds two years, effect is given to the jurisdictional limit: in the words of s113, "the maximum sentence of imprisonment to which the court may sentence the offender is level 9". This section is cast, not in terms of providing a different maximum penalty to that fixed in respect of the particular crime, but in terms of limiting the power of the Court: it may not go beyond level 9 imprisonment, whatever level the law fixes for the offence.

Section 113 accepts, as of course it must, that all offences covered by s53(1) have a

maximum penalty fixed by the law and operates by way of limiting the power of the inferior court, by depriving it of the power which the conferring of the jurisdiction to hear and determine would otherwise give it - the power to inflict anything up to the maximum penalty – in the sense that that power is cut down to a power to pass no more than a two year sentence of imprisonment. If two years were to be treated as reserved for the worst category of case of robbery, as the appellant contends, extraordinary results would ensue.

The indictable offences which may be tried summarily under s53 of the *Magistrates' Court Act* include, for example, offences punishable by three years' imprisonment, so that on the appellant's argument these offences would have to be treated **[9]** as punishable by the same maximum sentence as robbery, 12½ years. So, on the appellant's argument, a "middle of the range" robbery might be expected to attract, other things being equal, the same sentence as a "middle of the range" threat to inflict serious injury, the offence constituting item 3 of Schedule 4 to the *Magistrates' Court Act*, for which the maximum penalty is three years (Crimes Act, s21). I think it is absurd to suggest that the statutory maximum for an offence is irrelevant to the determination by a magistrate of the appropriate sentence. The result of accepting the appellant's argument would be that all indictable offences triable summarily would have to be treated as offences of the same degree of gravity. This is, if I may say so, sentencing nonsense.

In considering the effect for present purposes of s113 of the *Sentencing Act* it would be a mistake to regard the two year maximum which it imposes on the sentence of imprisonment that may be passed as one which will in all cases be shorter than the maximum sentence fixed by law for the particular offence. More often than not, the two year maximum will be shorter than that fixed by law in respect of the offence. But in some cases the maximum sentence that may by law be passed upon an offender who has been presented will be not greater than but the same as the two year maximum fixed by s113. An example is the offence or offences of obstructing railway trains created by s233 of the *Crimes Act*. In other cases the maximum sentence fixed by law for the particular offence will be less than the two year maximum fixed by s113.

Examples are the offences of **[10]** concealing the birth of a child created by s67 of the *Crimes Act*, where the maximum penalty is six months' imprisonment, and the offence of forcible entry, created by s207 of the *Crimes Act*, where the maximum penalty is 12 months' imprisonment. These three examples are drawn from items 39, 15 and 38 respectively of Schedule 4 to the *Magistrates' Court Act*. The existence of indictable offences that may by force of s53 of the *Magistrates' Court Act* be tried summarily and which carry a maximum penalty less than the two year sentence fixed as a limit by s113 of the *Sentencing Act* is itself an insuperable obstacle to the adoption of the view that where an indictable offence is tried summarily "the maximum penalty prescribed for the offence" within the meaning of s5(2)(a) of the *Sentencing Act* is the two year maximum fixed by s113 of that Act. For if this view is correct, then in the examples just given of offences carrying a maximum penalty of six months and 12 months' imprisonment respectively, the sentencing magistrate would be required to ignore the lesser statutory maximum attached to the offence and to treat the offence as if it carried a maximum penalty of two years' imprisonment.

It seems to me that there can be only one maximum penalty prescribed for the offence within the meaning of s5(2)(a). Where an indictable offence is tried summarily, the choice lies between the maximum penalty specifically provided for the offence in question and the two year maximum imposed by s113. It being, as I have said, absurd to suggest that all indictable offences triable summarily must be treated as offences of the same degree of gravity so **[11]** far as the nature of the offence is concerned, and indictable offences triable summarily and having a maximum penalty of less than two years presenting an insuperable obstacle, I think it clear that "the maximum penalty prescribed for the offence" is the maximum penalty specifically provided for the particular crime. This is undoubtedly the meaning which the expression bears in what I might call the ordinary case of an indictable offence where the accused is tried by judge and jury, and it would be strange if the expression bore a different meaning in the case of indictable offences disposed of summarily.

I am unable to accept the view, disclaimed by both the appellant and the respondents, that there are, as regards indictable offences tried summarily, two different maximum penalties prescribed for the offence within the meaning of s5(2)(a), the first being the maximum fixed by statute for the particular offence and the second being the maximum available under s113 upon

summary conviction. When a sentencing court, exercising its discretion to arrive at the appropriate sentence, has regard to the maximum penalty prescribed for the offence, as required by s5(2)(a), it can have regard to only one maximum penalty. It cannot, in exercising its discretion, proceed upon the basis that there is for all purposes a maximum penalty, in the case of robbery, of 12½ years and that there is in addition, in the case of summary conviction, a maximum prescribed of two years. It can of course give effect to both maximum penalties, by having regard to the maximum applicable to the particular offence in considering the gravity of the crime **[12]** in the course of exercising the sentencing discretion and then by giving effect to the jurisdictional limit by ensuring that the sentence which it actually passes does not exceed that limit, but this is not to "have regard to" the s113 two year maximum within the meaning of s5(2)(a): it is to give effect to the inexorable jurisdictional limit. *[After discussing the view taken by Phillips J, His Honour continued]...***[15]** I cannot see how a sentencing magistrate could bring to account, in making his discretionary determination, two different maximum penalties – in this case, 12½ years and two years. Sentencing is done by way of instinctive synthesis, but it must remain a rational process, and I cannot see how a magistrate could rationally direct himself with regard to two different maximum penalties for the same offence in considering the light which they threw on its gravity.

Little mention need be made of the authorities. Counsel for the appellant concedes that what was said in *Freeman v Harris* [1980] VicRp 30; (1980) VR 267 by Starke, J at 272 and by Murphy, J at 281 was not necessary to the decision and was said in a case in which no distinction had been drawn in argument between the statutory maximum prescribed for a **[16]** particular offence and the jurisdictional limit. It is worth noting that the view that a jurisdictional limit should be regarded as the maximum penalty reserved for the worst type of case was rejected by Shepherdson, J in *R v Doyle* (1987) 30 A Crim R 1 at 3-4 and has been twice rejected in the Supreme Court of the Northern Territory (*Sultan v Svikart* (1989) 96 FLR 457; (1989) 42 A Crim R 15 at 18 and *Maynard v O'Brien* (1991) 78 NTR 16; (1991) 105 FLR 58; (1991) 57 A Crim R 1 at 6). In my opinion Phillips J was right in rejecting the attacks made on the sentence passed by his Honour Judge Neesham. I would accordingly dismiss this appeal.

HAMPEL J: When considering whether to assume summary jurisdiction the magistrate must, amongst other matters, consider the nature of the crime and the circumstances in which it was committed. This is to enable the magistrate to decide whether it would be appropriate to impose a sentence in respect of any one count to which the jurisdictional limit of two years applies. To undertake that task, however, is not to treat the jurisdictional limit as the penalty for the offence. I agree essentially for the reasons expressed by the learned presiding judge that the gravity of the offence must be assessed by reference to the statutory penalty provided for it. I also agree for the reasons stated the appeal should be dismissed.

SMITH J: I agree.

BROOKING J: The order of the court is that the appeal is dismissed.

Solicitors for the appellant: Balmer and Associates.
Solicitors for the respondents: PC Wood, solicitor for the Director of Public Prosecutions.
