16/86

COUNTY COURT OF VICTORIA

R v BOURKE; R v MAYES; R v MUCALOV

Judge Gorman

26 March 1986

CRIMINAL LAW – SENTENCING – SOCIAL SECURITY OFFENCES – OBTAINING BENEFITS NOT PAYABLE – PENALTY CONSIDERATIONS: *SOCIAL SECURITY ACT* 1947 (CTH) SS83, 138; *CRIMES ACT* 1914 (CTH) S29B.

(1) B. pleaded guilty to 5 charges of illegally obtaining the sum of approximately $36,446 from the Department of Social Security. B. had claimed an entitlement to a benefit as a supporting single parent whilst she was living in a de facto relationship. The magistrate convicted B. and fined her $200 on each count with $100 costs. On appeal by the Commonwealth DPP against the sentence—

HELD: Appeal allowed. Sentences quashed. Sentenced to be imprisoned for six months on each count, such sentences to be served concurrently (total six months' imprisonment). Order as to costs confirmed. The community must be aware that Social Welfare payments are for those entitled to them. Accordingly, where greed and not need is the basis of Social Security offences, and notwithstanding the repugnance of imposing a sentence of imprisonment upon mothers of children (especially young children), a penalty other than one of a custodial nature is inept and a failure to do proper justice to the community.
***Taormina v Cameron* [1980] 24 SASR 59; (1980) 29 ALR 151, applied.**

(2) Mayes was charged with 3 counts of obtaining a sum in excess of $30,000 from the Department of Social Security. Mayes had been granted a benefit in the form of a widow's pension, but continued to claim the benefit after she became reconciled with her husband and he resided with her. The claim was a calculated and continuing fraud motivated by greed. The magistrate convicted Mayes and fined her $300 on each count with $100 costs. On appeal by the Commonwealth DPP against the sentence—

HELD: Appeal allowed. Sentences as to pecuniary penalties quashed. Sentenced to be imprisoned for 6 months on each count to be served concurrently (total 6 months' imprisonment). Order as to costs confirmed.

(3) Mucalov pleaded guilty to 14 counts of receiving benefits to which she was not entitled, totalling $21,108 at least. As a result of barefaced frauds Mucalov obtained payments of a widow's pension and an invalid pension in a false name. The magistrate convicted Mucalov and fined her $200 on each count with $200 costs. On appeal by the Commonwealth DPP against the sentence—

HELD: Appeal allowed. Sentences as to pecuniary penalties quashed. On counts 1 to 7, convicted and sentenced to 3 months' imprisonment on each, to be served concurrently with each other; on counts 8 and 9, convicted and sentenced to 6 months' imprisonment on each, to be served concurrently with each other; and on counts 10 to 14, convicted and sentenced to be imprisoned to an effective term of six months, total overall of 15 months' imprisonment.

JUDGE GORMAN: R v Bourke [1] This appeal is brought by the Commonwealth Director of Public Prosecutions pursuant to the provisions of Section 74 of the *Magistrates Courts' Act* 1971. Section 74, sub-s (4) provides in substance that:

> " ... the County Court shall proceed to re-hear the case and if it thinks that a different sentence should have been passed or penalty passed or order made, quash the sentence passed ... and pass such other sentence ... warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed ..."

The basic facts of this appeal may be shortly stated: The respondent was originally charged by information by the appellant that she did on five occasions, namely, the 21st July 1978, the 2nd October 1979, the 14th October 1980, the 4th November 1983 and the 14th June 1984, impose upon the Commonwealth by an untrue representation with a view to obtain a benefit contrary to Section 29B of the *Crimes Act* 1914. Any person convicted under that section may

be imprisoned for a period of two years for each such conviction. The respondent pleaded guilty in the Magistrates' Court to the five charges and consented to be dealt with summarily. **[2]** The respondent in the year 1973 applied to the Social Security Department for, and received, fortnightly payments of benefits on the basis that she was entitled to the same as a supporting single parent. It is not disputed that the respondent was entitled to such a benefit at that time. In July 1978 a document, called an Entitlement Review was forwarded to the respondent for completion by her and return to the appropriate officer of the Department of Social Security. The form set out certain requirements to be completed asking amongst other things if the applicant was married, and it is clearly stated on the form that the word "husband" includes "de facto husband". The respondent said that she was single and was not living with a person as her spouse on a *bona fide* domestic basis, although not legally married to that person.

Section 83(AAH) of the *Social Security Act* 1947 requires that:

> "In the event of a beneficiary being a married person" – which is as I have said, includes a de facto spouse – "ceasing to live apart from his or her spouse, the beneficiary shall notify the Department accordingly within fourteen days."

The respondent here in fact began to live in a de facto relationship with one Alfred Caruana in January 1977 and thereupon became disentitled to benefits. The answer already stated was repeated in subsequent entitlement review forms, either by writing the word "single" or ticking a box beside the word "single". In the last form, dated the 14th June 1984 and signed by the respondent, it is clearly stated, and I quote: "I have not remarried, nor **[3]** have I engaged in a *bona fide* domestic relationship". In a record of interview, obtained by officers of the Department, the respondent admitted signing the various forms and that she had lived with the said Caruana since 1977. When asked why she did not notify the Department of this relationship she said, and I quote: "I was frightened in case he left me without anything". She also stated that her three children, Jason, Christopher and Lorraine were fathered by Caruana. It should be added that in the record of interview the respondent admitted that she and Caruana had purchased two houses in their joint names.

It is not disputed that the respondent was not entitled to the fortnightly payments which were paid to her since she commenced living in the de facto relationship, to which I have referred, since 1977. I am told that the total amount paid to her, to which she was not entitled, amounts to the sum of approximately $36,446, up to the time that she was interviewed by the officers of the Department, and the payments subsequently ceased. No restitution has been made of any part of this sum. The Magistrate having convicted the respondent fined her $200 on each of five counts and $100 costs. The respondent has no prior convictions. Counsel for the Director of Public Prosecutions referred me to various authorities from the Supreme Court of South Australia and the Supreme Court of the Northern Territory, stating and setting out some principles that he submitted should be used to guide my decision in relation to this appeal. **[4]** In the case of *Taormina v Cameron* [1980] 24 SASR 59; (1980) 29 ALR 151 the Chief Justice of South Australia and one of the majority of the Full Court, in referring to an appeal relating to similar offences as those now under consideration said:

> "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."

In the same case Mr Justice Wells, who agreed with the Chief Justice said:

> "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."

The record of interview in this case shows clearly that the respondent perpetrated the frauds with which she was charged and of which she was convicted knowingly and wilfully, and that such dishonesty continued over a period of several years. A further case to which I was referred of *Keith Raynor Morgan*, 9 A Crim R 289, Mr Justice Muirhead of the Northern Territory upheld a Magistrate's sentence of four months' imprisonment where the defrauder had obtained about $700 by falsely claiming unemployment benefits whilst he was in employment. The benefits were paid over a period of about ten weeks. His Honour said at p292:

"Here there were six calculated breaches. It cannot be said that there was any degree of spontaneity or sudden temptation involved." His Honour added: **[5]** "The offences were motivated by greed rather than need" – and he went on to add:

"I take the view that a fine would in the circumstances be an inept and inadequate penalty."

In his evidence, given in support of the defence for the respondent, Mr Caruana said that no money was in fact made out of the house sales, that a house had been bought in 1977 in Albert Park on vendor terms, that a deposit of $1,500 was paid, but after three years the parties, himself and the respondent, walked out and got nothing out of it. They bought another house in Turana Street, I think St. Albans – I may be wrong about that suburb – for $39,000 on $1,700 deposit and low vendor terms. He said that he built a garage at a cost of $3,000 and did other work during the three years he and the respondent lived there. The property was in their joint names but he said the respondent did not contribute anything, although it was sold, after about three years, for $45,000 but nevertheless money was lost on that property. He added that he was in fact a punter and the respondent bought the shopping and paid the bills. He said that in 1977 he earned about $250 a week as an employee of the ANZ Bank, and that he now earns $310 weekly. In his strong plea to me on behalf of the respondent Mr Forrest submitted that the respondent obtained no benefit from the two properties that she and Mr Caruana had bought, and he urged that she required, and needed the money she received to support her children and herself. He said that the respondent had been a person who had battled against overwhelming odds of life and that she **[6]** still has three young children to care for. He referred to the amnesty that is now being offered by the Commonwealth Government and said that if any charge is made to the penalties the Magistrate imposed that they should not involve a custodial sentence. The respondent herself did not give any evidence in the matter.

I refer, lest it be thought that I have not got it in mind, to the provisions of the amending section of the *Crimes Act* 1914, now contained in Section 17(A) of the *Crimes Amendment Act* - No. 67 of 1982, which in substance requires that a sentencing tribunal should regard a custodial sentence as the last resort. It is perhaps in this context not inappropriate either to refer to Sections 20(AB) of the same amending Act which does give power to a sentencing tribunal in certain circumstances to impose, if they are applicable in the State in which the matter is dealt with, such penalties as serving a term of imprisonment at an Attendance Centre or Community Service Orders. However, I have been told by counsel for the appellant that that section is not in force in the State of Victoria, that no arrangement has been made between the Governor General-in-Council of the Commonwealth and the Governor-in-Council of the State of Victoria as required by Section 3(B) of that Act.

I pause to make the observation that I am sure no member of this court, and certainly speaking for myself, I do not need legislators to tell me, that in imposing penalties that a sentence involving imprisonment would be considered as the last resort. **[7]** I would add that the additional ingredient, such as exists in this appeal, where the person under consideration is the mother of three young children, the imposition of a gaol sentence is ordinarily a very unattractive option. On the other hand it must be said that I have a duty to the community to consider, and protect the interests of the community having regard to the matters I have referred to in the reference to what was said by Chief Justice King, and the other quotations I have given, that it is important that persons who might be like minded to act as the respondent did in this case, should be deterred from pursuing a similar course by appropriate penalties.

The community must be aware that Social Welfare payments are for those who are entitled to them, and especially when one considers the fact that greed and not need is the basis of a good number of offences committed under this legislation. The present matter under review in my opinion is in that category. In my opinion the sentences imposed on the respondent by the Magistrate were manifestly inadequate and accordingly require the intervention of this court to pass the sentence which it considers appropriate.

I will deal with the question of what penalty I think is appropriate in a moment after I have referred to the bases of the other two not dissimilar appeals that were heard by me following the hearing of the current appeal, and I will refer in a moment to the penalties proposed in relation to the respondent. So far as the appeal in relation to Mrs Bourke is concerned, notwithstanding the

repugnance that one feels – **[8]** and this applies to all of the respondents – imposing a sentence of imprisonment on a mother of children, and young children, any other penalty than one of a custodial nature would in my opinion be inept and a failure on my part to do proper justice to the community, as I believe my duty to be in the circumstances. In this case the appeals are allowed, the sentences passed are quashed and I order that the respondent, Mrs Bourke, be sentenced to a term of six months' imprisonment on each of the five charges, such sentences to be served concurrently, which is a total of six months' imprisonment. Otherwise the order of the Magistrates' Court is confirmed. That refers to the costs that the Magistrate ordered.

R v Mayes. [1] I refer now to the matter of Mrs Mayes. Again this appeal is brought by the Director of Public Prosecutions for the Commonwealth alleging inadequacy of punishment by the Magistrate on the respondent Maureen Elizabeth Mayes. This appeal has many similarities to the appeal I have just referred to, but I add that it is not to say that it necessarily follows that the same result must ensue, that every case must be considered on its own merits. The informations allege against Mrs Mayes three occasions on which she imposed upon the Commonwealth. The first, that on or about the 23rd October 1978, contrary to Section 29B of the *Crimes Act* 1914, she did impose upon the Commonwealth by an untrue representation. A similar charge related to the 31st October 1979, and the third charge to the 22nd day of December 1981. The Magistrate convicted the respondent and fined her the sum of $300 on each count. However, in relation to the charges brought against the respondent it is clear that His Worship was in error in imposing that penalty as the **[2]** maximum monetary penalty that could have been imposed at that time pursuant to the provisions of Section 16 sub-s(2) of the *Crimes Act* 1914, where the matter was dealt with summarily, was in fact the sum of $200. So, in any event the penalties imposed cannot stand. The respondent was also ordered to pay $100 costs.

The respondent was married in June 1957 and separated in February 1974 when her husband left her. At the time of separation she had three children with her, a daughter born on the 28th June 1962 now twenty-three years; a son born on the 19th May 1966, now nineteen and a daughter, born on the 10th June 1970, now fifteen. She thereupon applied for benefits on the 21st June 1974, and these were granted in the form of a widow's pension. On the 19th October 1978 an Entitlement Review Form having been forwarded to the respondent was signed by her. In answer to a question she said that she was separated, and in answer to a further question: "Are you living with a person as his spouse?" she answered, "No". And to the question: "What weekly amount of maintenance do you receive for (1) yourself, (2) your children?", she answered, "We don't receive any as he let me and the children live in the house as he has gone to W.A.". The answer that the respondent was separated was false as she had become reconciled with her husband in May 1975 and was in fact residing with him at the time.

The respondent was interviewed by officers of the Social Security Department and made a statement to them admitting the various matters to which I have referred, amongst other things. She said in that statement that she **[3]** had personally completed the forms in her own handwriting and was fully aware of the nature of all the questions asked and the answers given. In further parts of the statements the respondent said: "As a result of my giving false and misleading answers as stated in this statement I continued to receive widow's pension although I knew I was no longer entitled to it." The total amount overpaid to the respondent is said to be in one sense the sum of $37,176 from the date of reconciliation with the husband, or the sum of $30,611 from the date of the first review. The respondent has no prior convictions.

The legal authorities which I referred to in relation to the previous appeal are apposite of course in relation to this matter also, but I do not re-state them. In his plea on behalf of the respondent Mr Finlay submitted that I should consider the circumstances of the respondent, that she is now forty-nine years of age, that she is a woman who has had five children and she was deserted by her husband and that caused her to suffer a nervous breakdown, whereupon she needed psychiatric treatment for over a year. He said that the respondent still has a fifteen year old daughter, that the moneys given her by her husband were only sufficient to buy food and the moneys that she obtained from the Social Security Department were spent on clothing and assisting to feed the children. He said that she is unable to earn money to refund any amounts to the Commonwealth, and her husband's earnings at the present time are only about $254 a week net.

[4] Like the previous respondent, the present respondent engaged in a calculated and continuing fraud on the Commonwealth Department of Social Security and this continued over a long period of time. It was in my opinion motivated by greed in continuing to receive the benefits that she knew she was not entitled to receive. The pecuniary penalties imposed by the Magistrate, apart from being beyond those he was empowered to impose, were manifestly inadequate in my view in the sense that pecuniary penalties were manifestly inadequate. Accordingly it requires this court to pass the sentence which it considers to be appropriate. Once again, before indicating the appropriate penalty in this matter I will deal with the third appeal brought by the Director of Public Prosecutions against Mrs Mucalov

In relation to Mrs Mayes' appeal, in my view much of what I have already said is appropriate in her case, that any sentence other than a custodial sentence would again, in my view, be a misuse of a sentencing discretion and a failure on my part to act properly and judicially. Accordingly the appeals are allowed. The sentences imposed by the Magistrate are quashed and the respondent is sentenced to six months' imprisonment on each of the three charges, such sentences to be served concurrently, that is to say a total of six months' imprisonment. Again, otherwise the order of the Magistrate is confirmed. That again deals with the costs ordered.

R v Mucalov: [1] Once again, this appeal was brought by the Commonwealth Director of Public Prosecutions in respect of sentences imposed on the respondent by the Magistrate when she pleaded guilty to fourteen counts of imposing upon the Commonwealth by an untrue representation with a view to obtaining a benefit. Again, as previously, the charges were laid under Section 29B of the Commonwealth *Crimes Act* 1914. The respondent was fined the sum of $200 on each charge and ordered to pay $200 costs and an order for refund of compensation was made by the Magistrate, and I will refer to that later.

The charges all arose out of the payment to the respondent of payments under the provisions of the *Social Security Act*. The circumstances outlined to me by the prosecutor and established by evidence at the hearing of the appeal have similarities again to the two appeals to which I have already referred. Once again, as I stated earlier, this appeal must be determined on its own merits, and it does not necessarily **[2]** follow that the same result will occur in this appeal as in those already dealt with.

The respondent is now forty-eight years of age, was married in May 1966 and arrived in Australia from Yugoslavia in December 1968. She has two children, one born on the 20th June 1968, now aged sixteen, and one born on the 10th March 1973 and now aged thirteen years. Her husband deserted her early in 1974 and she applied for and obtained a supporting mother's benefit or widow's pension in September 1975. Her husband returned to live with her in August 1976 and she lived with him until his death in September 1980. She did not notify the Department that her husband had returned but continued to receive the benefits referred to until March 1977, when she claimed and received an invalid pension. In two claim forms for the invalid pension, dated the 28th January 1977 and the 18th February 1977, the respondent stated that she was "separated" by ticking the appropriate box to answer a question as to her marital status. She also said "no" to questions as to whether she or her husband owned, or part owned the home in which she lived and she said that she paid rent to a Mr Mikovic, "the owner of the house". In fact she was then living in a house at 32 Buckingham Street, Footscray, which she had purchased in her maiden name in 1976.

She made a statement to the Department, dated the 20th April 1977, in which she said amongst other things: "I am still unaware of my husband's whereabouts. I only rent two rooms at the above address. My daughters and I are the only occupants of the two rooms that I rent at $24 a week". **[3]** In fact, as stated, the respondent was residing at the address referred to with her husband. On the 26th September 1977, she repeated the statement as to residing solely with her two children and she said: "I have not seen my husband since 2nd August 1974 and I do not know his present whereabouts". She also said: "I receive no maintenance payments for my children and receive no other income apart from my pension". At that time, of course, she was living with her husband. On an Entitlement Review Form dated the 3rd November 1978, she again said that she "was separated". In fact she was residing with her husband. On Entitlement Review Form, dated the 23rd November 1979, again she ticked the box to state that she was separated. A further Entitlement Review Form, dated the 15th January 1981 to the question as to whether she owned,

or partly owned the home in which she was living, she stated "rent". In fact she was purchasing the home. On Entitlement Review Form, dated the 19th January 1982, to the question: "Have you been employed in the last twelve months?" she answered, "No". In fact the respondent had been in 1981 employed at Bonds Weaving, Yarraville, under another name, the name Markov, on the 6th April 1981 to the 4th December 1981. She also had another job in 1981 which I will refer to shortly. To another question on the same Review Form as to whether she received income from nominated sources, one being "compensation", she said she was receiving maintenance for her two children. This was false as her husband had died on the 23rd September 1980, but in fact she was receiving worker's compensation payments of $154 a week from the 17th July 1981.

[4] The respondent claimed an invalid pension on the 5th August 1982 in the name of Dara Markov, and she received payments as a result of this claim. One question on the form asked: Have you applied for a pension, benefit or allowance before?" to which she answered, "No". At that time she was of course in receipt of an invalid pension. On the 31st August 1982, she made a statement in support of her claim for an invalid pension in the name of Markov and stated that apart from the compensation she was receiving, she said: "I have no other income". She was of course then receiving pension payments in her correct name of Mucalov, and in September 1982, she applied for and obtained child endowment for her two children in the name of Markov. On a statement dated the 6th December 1983, the respondent made a statement as Dara Markov, 222 High Street, Yarraville, in which she stated: "I have not changed my address". In fact she had then moved to 23 Wingfield Street, Footscray. She identified her claim for child endowment, when interviewed, for her two children in the name of Mucalov and also identified her claim for child endowment for the same two children in her name of Dara Markov. She did in fact, as I have stated, receive payments in that name for the two children.

In May 1984 the respondent, in the name of Markov, in a statement said that she "had no other income apart from her invalid pension and the child endowment for her two children". At that time the respondent was receiving **[5]** two invalid pensions and two sets of child endowment for the same children. It should be added that in addition to working at Bonds Weaving Company in 1981 under the name of Markov, as I have already referred to, the respondent was also employed under a different name again by Nationwide Food Services, commencing from the 20th March 1981 terminating on the 20th November 1981, although it would seem from the form tendered in evidence that there were periods during that time when she was not actually working at the Nationwide Company.

Her counsel, Mr Dean, informed me that in 1977 she had a fall whilst alighting from a bus and injured her spine and it was subsequent to that disability that she obtained the invalid pension, which took the place of the supporting mother's pension. Following an injury whilst working at Bonds, and I have already referred to the fact she was in receipt of worker's compensation benefits for that injury, she had also brought a common law claim, it would seem, against the firm for the injuries. That claim was settled, I was told, for the sum of $70,000. These moneys were used for payment of debts and towards the purchase of her present property, as her counsel informed me. She was also engaged in buying and selling property during the period under review, and counsel for the appellant informed me that it was agreed between himself and counsel for the respondent that the following property dealings were transacted by the respondent; First, No. 32 Buckingham Street, Footscray, was purchased prior to 1977 and sold in 1980. **[6]** Second, No. 22 High Street. Yarraville, was purchased in April, 1980 and sold in 1985. Third, No. 224 High Street, Yarraville, was purchased in 1981 and sold in 1983. Fourth, No. 23 Wingfield Street, Footscray was purchased in 1983 and sold in 1984. Fifth, No. 45 Whiteside Avenue, Ardeer, was purchased in 1984 and is the respondent's current address.

The respondent's counsel in his earnest plea on her behalf said that she had not been wheeling and dealing in the buying and selling of house properties, but what had originally been intended was that her husband, who was a carpenter, would renovate a house that she, or he and she, would buy and they would hopefully then sell it at a profit, having renovated it. However, as counsel informed me, the husband was an alcoholic and in reality did not contribute his skills to renovations or indeed in any realistic way to supporting the respondent. He urged upon me that the respondent had many debts to pay, that she was financially so involved that she could not make ends meet. The amount alleged to be due to the Commonwealth is said to be the sum of $21,108, at least, being the amount that has been overpaid to her, to which she was not entitled,

as indeed she well knew. This broad recital of the respondent's fraudulent actions towards the Department shows, in my opinion, a systematic course of dealing that can only be described as barefaced fraud with hardly a redeeming feature.

[7] In the circumstances I keep in mind that the respondent has no prior convictions and that she was frank when interviewed and did give a truthful account of the fraudulent activities in which she was engaged, and to that extent those matters are kept in mind in her favour. The fines of $200 imposed by the Magistrate on the respondent on their face, in my opinion, are manifestly inadequate and those fines imposed will accordingly, be quashed. I would add that if the respondent had been convicted in this court of indictable offences a substantial total term of imprisonment would have almost certainly been imposed upon her.

It was urged on me by Mr Dean that I should increase the amount of the fines in relation to the last five charges, having regard to the amendment to Section 16 of the *Crimes Act* 1982. In my opinion the circumstances of these offences require that custodial sentences be imposed upon the respondent. I will deal with the matter of the present appellant now in relation to the penalties: The appeals brought by the appellant will be allowed. The fines imposed are quashed and the respondent is sentenced to terms of imprisonment as follows: In relation to charges one, two, three, four, five, six and seven the respondent is sentenced to a term of three months' imprisonment on each of those charges, the sentences to be served concurrently, which is a total of three months. In relation to charges eight and nine the respondent is sentenced to imprisonment for a period of **[8]** six months on each charge, such sentences to be served concurrently. A total of six months for those two matters. On charges ten and eleven, the respondent is sentenced to similar terms of imprisonment for six months on each charge to be served concurrently and on charges twelve, thirteen and fourteen the respondent is sentenced to a term of six months' imprisonment on the twelfth charge, three months' imprisonment on the thirteenth and fourteenth charges, to be served concurrently, which is a total of six months, to be served concurrently with sentences imposed on charges ten and eleven making an overall total of fifteen months' imprisonment. I will order in the matter relating to Mrs Mucalov that compensation in the sum of $21,108 be paid as compensation to the Commonwealth of Australia.
