28/12; [2012] WASC 203

SUPREME COURT OF WESTERN AUSTRALIA

SCOTT v CHIEF EXECUTIVE OFFICE OF CUSTOMS

Hall J

7, 15 June 2012

SENTENCING – CRIMINAL LAW – *CUSTOMS ACT* OFFENCES – IMPORTING PROHIBITED IMPORTS – AIR GUNS – FALSE STATEMENTS MADE – SENTENCE – MAGISTRATE DECLINED TO RELEASE DEFENDANT ON A S19B BOND – FINES IMPOSED – WHETHER S19B DISMISSAL OR DISCHARGE WRONGLY REFUSED – WHETHER CIRCUMSTANCES EXTENUATING: *CRIMES ACT* 1914 (CTH), SS16A, 19B; *CUSTOMS ACT* 1901 (CTH), SS233, 234.

S. was charged with two offences of importing a prohibited import namely, soft air hand guns and two charges of intentionally making false statements in regard to those importations. At the hearing of the charges, S. pleaded guilty and submitted that he should have been dealt with under s19B of the *Crimes Act* (Cth) ('Act'). The magistrate rejected this submission and imposed monetary penalties. The grounds of the appeal were, first, that the magistrate erred in finding that there were no extenuating circumstances relevant to s19B of the Act; secondly, that the magistrate erred by failing to expressly refer to the factors in s16A(2) of the *Crimes Act* when considering the appropriate sentence.

HELD: Appeal dismissed.

1. Section s19B orders under the Act are exceptional in nature. They were so described in *Matta v ACCC* [2000] FCA 729 [3] (French J as he then was). In other cases they have been variously described as 'rare' (*R v Weller* (1988) 37 A Crim R 349; *McInnes v Global Imports Pty Ltd* [1992] FCA 590; (1993) ASC 56199); 'unusual' (*Kelton v Uren* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534); 'atypical' (*O'Brien v MR Norton-Smith* [1995] TASSC 78; (1995) 83 A Crim R 41; (1995) 31 ATR 128; *Paterson v Fenwick* [1994] ACTSC 25; (1994) 115 FLR 462); or 'special or singular' (*Uznanski v Searle* (1981) 26 SASR 388; (1981) 52 FLR 83).

2. In determining whether it is open to make a s19B order a court must first consider whether there is information that falls under any of the criteria listed in s19B(1)(b)(i), (ii) or (iii) of the Act. If there are, it is then necessary for the court to consider whether, having regard to those matters, it is inexpedient to inflict any punishment or to inflict only nominal punishment or to release the offender on probation without recording a conviction.

3. In this case the magistrate accepted that there was information before him that fell within s19B(1)(b)(i), in particular the prior good character of the appellant. However, he did not accept that the offences were committed under extenuating circumstances under s19B(1)(b)(iii).

4. Extenuating circumstances in s19B(1)(b)(iii) must be circumstances which excuse, to some appreciable degree, the commission of the offence. Such circumstances must contribute in some causative way to the offending conduct.

5. It was difficult to see how anything said in mitigation of the charges met that test. These were offences that involved some deliberate planning and forethought. They were not momentary lapses of judgment, even on the appellant's own account in his interview. The reasons given for posting the guns to Australia — that is, to blockmount one with a Tshirt and to give the others to friends — appeared to be entirely rational with no claimed connection to marital issues. No explanation for the false declarations or the false address details on the second package were provided. The marriage breakdown and the circumstances in which it occurred were unlikely to have been causative of offending having these characteristics.

6. In relation to the submission that the magistrate was obliged to make express reference to s16A of the *Crimes Act,* that section provides that a court must impose a sentence for a federal offence that is of a severity appropriate in all of the circumstances and provides a non-exclusive list of factors that must be taken into account. Section 16A does not constitute some technical checklist that judicial officers are required to mechanically recite. It is a mandatory requirement to consider the factors in s16A(2) but they do not need to be expressly referred to.

7. The appellant did not identify any factor listed in s16A(2) that was relevant here and that it is suggested that the magistrate overlooked. Indeed the evidence was to the contrary. On a careful reading of the whole of the magistrate's remarks, it is apparent that he took into account all of the relevant factors that could arise under s16A(2). In particular, his Honour referred to the nature and circumstances of the offence (s16A(2)(a)), that the appellant had pleaded guilty (s16A(2)(g)), the deterrent effect on the appellant (s16A(2)(j)), the need to ensure adequate punishment (s16A(2)(k)) and the character, antecedents, age, means and physical or mental condition of the appellant (s16A(2)(m)).

8. Accordingly, it was not possible to conclude that there was any error by the Magistrate, either express or implied. It was plain that the sentences imposed by the magistrate were open to him in the proper exercise of his discretion.

HALL J:

Introduction

1. This is an appeal against sentence.

2. On 7 June 2012 I refused leave in respect of the single ground of appeal and dismissed the appeal. I gave brief reasons and stated that more detailed reasons would be published in due course.

3. On 18 August 2011 the appellant appeared in the Magistrates' Court and was sentenced for two offences of importing a prohibited import, namely soft air hand guns, contrary to s233(1)(b) of the *Customs Act* 1901 (Cth), and two offences of intentionally making false statements in regard to those importations, contrary to s234(1)(d)(i) of the *Customs Act*. He had previously pleaded guilty to the offences and the matter had been adjourned for a verbal pre-sentence report.

4. The magistrate imposed a global fine of $1,500 for the two importation offences and a global fine of $1,000 for the two false statement offences. In doing so, his Honour expressly refused to make an order under section 19B of the *Crimes Act* 1914 (Cth), dismissing the charges or discharging the appellant without proceeding to conviction.

5. The appellant now appeals to this court against the sentence imposed. There is a single ground of appeal and it is:

> The learned magistrate erred in law when making reference to the relevant sections and subsections of section 19 and section 16 of the *Crimes Act* (Cth), upon which the exercise of discretion was based in ultimately denying the appellant's application to proceed without conviction.

6. The exact meaning of that ground is unclear. In written submissions there was reference to the ground as including the claim that the sentences imposed were manifestly excessive. However, in oral submissions counsel for the appellant abandoned any such claim and articulated two express errors that were said to have been made by the magistrate. They were, first, that the magistrate erred in finding that there were no extenuating circumstances relevant to s19B; secondly, that the magistrate erred by failing to expressly refer to the factors in s16A(2) of the *Crimes Act* when considering the appropriate sentence.

Background facts

7. The facts were not disputed. They are that between 15 October and 21 November 2010 the appellant and his wife travelled to the United States for a holiday. Whilst there he purchased three airpowered hand guns. He arranged for one of the guns to be sent to his residential address, addressed to himself. He completed the customs declaration affixed to the parcel, stating that it contained 'toys and a shirt'. The parcel only contained the gun and a Tshirt. The gun was marked with the following inscription: 'Warning: not a toy. It may cause fatal injury'.

8. The appellant also arranged for the other two guns to be posted to Australia. In this parcel were the two guns and two Tshirts. He addressed this parcel to a fictitious person and to an address of a work colleague. The customs declaration was completed by the appellant and again stated that the parcel contained 'toys and a shirt'.

9. The parcels were intercepted by customs on 7 December 2010. On 25 January 2011 the appellant was interviewed and made admissions regarding the importation of the guns. He said

that he had purchased the guns at a department store in Reno. The first gun was in a bargain bin and was not operational. This was accepted by the prosecution. The other two guns were bought from the sports section of the store and he had purchased pellets and gas cylinders for those guns and had fired them at a rest stop. He said he did not, however, send any pellets or cylinders to Australia as he thought it would be illegal if they were imported together.

10. The appellant claimed in the interview that his intention was to blockmount one of the guns with an Alcatraz Tshirt. The other guns were intended for friends. He said he thought the guns were cheap toys. He said he did not bring them back in his luggage because of anticipated difficulties with terrorist-related security checks.

11. In mitigation it was submitted that the appellant had no criminal history, was of good character and had committed the offences in extenuating circumstances. In regard to the last point, it was submitted that at the time that the air guns were purchased, the appellant was 'not thinking straight'. This was said to be because during the trip the appellant's wife left him. The details and impact of that were very briefly stated.

12. It was submitted to the magistrate that an order under s19B of the *Crimes Act* was appropriate because of the appellant's good character and mental condition and the extenuating circumstances in which the offences were said to have been committed.

Magistrate's sentencing remarks

13. The magistrate's sentencing remarks were brief. I do not criticise him for that. Brevity is a necessary virtue in the very busy Magistrates' Court. His Honour said:

> Look, you have pleaded guilty to these four charges which relate to you posting back to Australia two packages, one containing one air gun and one containing two air guns. The facts suggest that it's clear that your intention was not to import these as weapons as such but for the purpose of mounting them yourself and for your friends, and that's supported by the fact that you – although, as I understand it, the package of two handguns actually were operational, you left the pellets and carbon dioxide cartridges behind because it wasn't your intent that they be used.
>
> The charges really arise because of course having posted them, you described the goods as toys and of course they don't fall within that category and for the purposes of importation they became weapons and you have pleaded guilty to the matters. The real issue here is whether or not section 19B should be enlivened and used. That, of course, is a provision which is described as rare and unusual and sometimes exceptional. There is no doubt that you come before the court with good character and I certainly accept what has been said on your behalf, that you would certainly fall within paragraph A, and that probably of itself is sufficient.
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> Secondly, it has been submitted on your behalf that these offences were committed under extenuating circumstances, given what was happening in relation to your marriage. I don't actually accept that they constituted extenuating circumstances. They certainly give background as to what was occurring in your life but I don't think it contributed in any way to your decision with respect to these guns. They were simply decisions that you made to bring them back to Australia for the purpose of mounting them.
>
> The real issue though is whether there is something in the circumstances of an unusual nature, personal to you, that I should exercise that discretion in your favour. Normally the person with a prior good record bringing the matters in in these circumstances would expect to find, given the need to take into account both general and specific deterrence – it's of course important that weapons of any nature are not brought into the country and that the penalties reflect that both in relation to individual offenders but, more importantly, in a general sense, given the difficulty in detecting these offences.
>
> Having considered everything that has been submitted on your behalf, I'm not satisfied that there is sufficient that takes you outside the normal course, albeit that I accept what has been said on your behalf in mitigation, and I will deal with these matters by way of fine. The fines will be at the lower level to reflect the mitigating circumstances that are put on your behalf.
>
> In relation to the importation there will be a global fine of $1500; in relation to the false statements, a global fine of $1000, with costs of $3000 in each case. If you have a seat in the jury box, once you have the fine slip you will be free to go (appeal ts 7 8).

14. The magistrate was correct to describe the real issue as being whether a s19B order should be made. It had been to that issue that the plea in mitigation was entirely directed. It is clear from his Honour's reasons that he accepted that there were factors which raised for consideration whether a s19B order should be made but he was not satisfied that, taking into account all of the circumstances, he should exercise his discretion to do so in this case.

Merits of the appeal

15 Section 19B of the *Crimes Act* relevantly provides that:

> **Discharge of offenders without proceeding to conviction**
> (1) Where:
> (a) a person is charged before a court with a federal offence or federal offences; and
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> (b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:
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> (i) the character, antecedents, age, health or mental condition of the person;
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> (ii) the extent (if any) to which the offence is of a trivial nature; or
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> (iii) the extent (if any) to which the offence was committed under extenuating circumstances;
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> that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;
>
> the court may, by order:
>
> (c) dismiss the charge or charges in respect of which the court is so satisfied; or
> (d) discharge the person, without proceeding to conviction in respect of any charge referred to in paragraph (c), upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with the following conditions:
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> (i) that he or she will be of good behaviour for such period, not exceeding 3 years, as the court specifies in the order;
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> (ii) that he or she will make such reparation or restitution, or pay such compensation, in respect of the offence or offences concerned (if any), or pay such costs in respect of his or her prosecution for the offence or offences concerned (if any), as the court specifies in the order (being reparation, restitution, compensation or costs that the court is empowered to require the person to make or pay):
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> (A) on or before a date specified in the order; or
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> (B) in the case of reparation or restitution by way of money payment or in the case of the payment of compensation or an amount of costs—by specified instalments as provided in the order; and
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> (iii) that he or she will, during a period, not exceeding 2 years, that is specified in the order in accordance with subparagraph (i), comply with such other conditions (if any) as the court thinks fit to specify in the order, which conditions may include the condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed.

16. As his Honour properly recognised, s19B orders are exceptional in nature. They were so described in *Matta v ACCC* [2000] FCA 729 [3] (French J as he then was). In other cases they have been variously described as 'rare' (*R v Weller* (1988) 37 A Crim R 349; *McInnes v Global Imports Pty Ltd* [1992] FCA 590; (1993) ASC 56199); 'unusual' (*Kelton v Uren* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534); 'atypical' (*O'Brien v MR Norton-Smith* [1995] TASSC 78; (1995) 31 ATR 128; (1995) 83 A Crim R 41; *Paterson v Fenwick* [1994] ACTSC 25; (1994) 115 FLR 462); or 'special or singular' (*Uznanski v Searle* (1981) 26 SASR 388; (1981) 52 FLR 83).

17. In determining whether it is open to make a s19B order a court must first consider whether there is information that falls under any of the criteria listed in s19B(1)(b)(i), (ii) or (iii). If there are, it is then necessary for the court to consider whether, having regard to those matters, it is inexpedient to inflict any punishment or to inflict only nominal punishment or to release the

offender on probation without recording a conviction. In *Cobiac v Liddy* [1969] HCA 26; (1969) 119 CLR 257, 275 276; [1969] ALR 637; (1969) 43 ALJR 257 Windeyer J, in considering a similarly worded statutory provision, said:

> That means, I think, that the magistrate must be of opinion that the exercise of the power is expedient because of the presence and effect of one or more of the stated conditions, namely character, antecedents, age, health or mental condition. One of these by itself, or several of them taken together, must provide a sufficient ground for a reasonable man to hold that it would be expedient to extend the leniency which the statute permits. The Act speaks of the court exercising the power it confers 'having regard to' the matters it states. I read that as meaning more than merely noticing that one or more of them exists. Its, or their, existence must, it seems to me, reasonably support the exercise of the discretion the statute gives. They are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration. But they are wide words. None of the matters they connote is necessarily to be regarded in isolation from the others, or apart from the whole of the circumstances of the offender and the offence.

See also *Nelson v Quinn* [2001] WASCA 297.

18. In this case the magistrate accepted that there was information before him that fell within s19B(1)(b)(i), in particular the prior good character of the appellant. However, he did not accept that the offences were committed under extenuating circumstances under s19B(1)(b)(iii). It was not necessary for both factors to be present for the discretion to arise, though clearly it would strengthen the appellant's claim for a s19B order if extenuating circumstances were also found to exist. There is no suggestion that the magistrate failed to appreciate that. What is suggested is that his Honour was wrong to state that the circumstances of the offence were not extenuating.

19. It is submitted that there was information before the magistrate which indicated that the offending did occur in extenuating circumstances. It consists in what counsel said in the plea in mitigation. In particular, counsel said that the offences had occurred in the context of the appellant's wife having left him during the trip to the United States. Counsel said:

> [T]he issue surrounding his separation was that Mr Scott was taking anti-depressants leading up to the trip and in short, without going into too much detail, there were some problems with sexual function, your Honour. The purpose of the trip was to go away, to go off the anti-depressants and to try and have a child, because they'd been married for 11 years. Now, unfortunately what happened was Mr Scott's wife was on Facebook for a great deal of the time whilst they're on the trip and actually left him while they were on the trip, so I just wanted to shed some more light because I said that is pertinent to the second limb of enlivening 19B, which is there are extenuating circumstances. They are linked, your Honour (appeal ts 6).

20. It is necessary to note that extenuating circumstances in s19B(1)(b)(iii) must be circumstances which excuse, to some appreciable degree, the commission of the offence: *O'Sullivan v Wilkinson* [1952] SASR 213, 218 and *O'Brien v MR Norton-Smith* (131). Such circumstances must contribute in some causative way to the offending conduct.

21. It is difficult to see how anything said in mitigation could meet that test. These were offences that involved some deliberate planning and forethought. They were not momentary lapses of judgment, even on the appellant's own account in his interview. The reasons given for posting the guns to Australia, that is to blockmount one with a Tshirt and to give the others to friends, appeared to be entirely rational with no claimed connection to marital issues. No explanation for the false declarations or the false address details on the second package were provided. The marriage breakdown and the circumstances in which it occurred were unlikely to have been causative of offending having these characteristics.

22. That conclusion was supported by the verbal pre-sentence report in which the community corrections officer stated, 'He does appear essentially as a first offender and while a need for counselling has been identified, that need is not considered to be a factor in his offending behaviour'. That appears to have been a reference to the marriage breakdown and the appellant's surrounding depression.

23. In these circumstances, it was plainly open for the magistrate to conclude that the circumstances of the offending were not extenuating in the material sense. It is not reasonably

open to argue that an error in that regard occurred. That is not to say that the marital breakdown was not relevant as part of the general background, as the magistrate recognised, but it cannot be said to have explained the offending.

24. As regards the second suggested error, no authority has been provided in support of the proposition that the magistrate was obliged to make express reference to s16A of the *Crimes Act*. That section provides that a court must impose a sentence for a federal offence that is of a severity appropriate in all of the circumstances and provides a nonexclusive list of factors that must be taken into account. There is in fact clear authority that s16A does not constitute some technical checklist that judicial officers are required to mechanically recite: *R v Ferrer-Esis* (1991) 55 A Crim R 231, 237 (Hunt J with whom Gleeson CJ and Lee CJ at CL agreed). It is a mandatory requirement to consider the factors in s16A(2) but they do not need to be expressly referred to.

25. The magistrate in the penultimate paragraph of his reasons made reference to the fact that having come to the conclusion that a s19B order was not appropriate, he would deal with these matters by way of fines and referred to the level of the fines imposed being a reflection of the mitigating circumstances. That is an indication that he took into account the relevant factors under s16A(2) in determining the appropriate penalty. It is unlikely that his Honour failed to appreciate the requirement to take into account the factors listed in s16A since it was referred to in sentencing submissions.

26. The appellant did not identify any factor listed in s16A(2) that was relevant here and that it is suggested that the magistrate overlooked. Indeed the evidence is to the contrary. On a careful reading of the whole of the magistrate's remarks, it is apparent that he took into account all of the relevant factors that could arise under s16A(2). In particular, his Honour referred to the nature and circumstances of the offence (s16A(2)(a)), that the appellant had pleaded guilty (s16A(2)(g)), the deterrent effect on the appellant (s16A(2)(j)), the need to ensure adequate punishment (s16A(2)(k)) and the character, antecedents, age, means and physical or mental condition of the appellant (s16A(2)(m)).

27. I am unable to conclude that there was any error by the Chief Magistrate, either express or implied. That is sufficient to dispose of the appeal. However, I should note that sentencing is a discretionary exercise. Appeal courts recognise the importance of respecting the first instance court's discretion in this regard: *Lowndes v R* [1999] HCA 29; (1999) 195 CLR 665 [15]; (1999) 163 ALR 483; (1999) 73 ALJR 1007; (1999) 12 Leg Rep C1. An appeal against sentence is not an opportunity for resentencing unless error is established: *House v R* [1936] HCA 40; (1936) 55 CLR 499, 504 505; 9 ABC 117; (1936) 10 ALJR 202 (Dixon, Evatt and McTiernan JJ). No error has here been established. In any event, it is plain in my view that the sentences imposed by the magistrate were open to him in the proper exercise of his discretion.

28. The factors that are of importance in deciding whether an order under s19B should be made for offences of this nature were considered in *Lanham v Brake* (1983) 34 SASR 578, 585; (1984) 52 ALR 351; (1983) 74 FLR 284; (1983) 13 A Crim R 293 (Cox J). They include seriousness and prevalence of such offences, the difficulty in detection, the consequent need to impose deterrent penalties and the fact that s19B orders should be reserved for cases exhibiting exceptional features. General deterrence in this area has also been emphasised in *Hayes v Weller* (1988) 50 SASR 182; (1988) 93 FLR 64 and *Stark v Plant* [2010] WASCA 74.

29. Whilst it is true that the appellant had no relevant record and highly favourable personal references, that is a factor not necessarily unusual in offending of this type. It was a relevant matter to consider in deciding whether to make a s19B order, but it did not compel a conclusion that such an order be made. There were other factors to take into account, that I have referred to earlier, that weighed against such an order.

30. The maximum penalties for the offences committed here are indicative of their seriousness. The maximum penalty for the importation offences is a pecuniary penalty of $110,000. When dealt with summarily the maximum that can be imposed is $22,000 (s233(1)(b), s233(1AA) and s233AB(2) *Customs Act*). The maximum penalty for the false statement offences is $11,000 (s234(2)(c) *Customs Act*). Furthermore, the facts before the magistrate included reference to the air guns being dangerous items that, in the United States, had resulted in 39 deaths over ten years and an average of 21,000 injuries per year.

31. In all of these circumstances, even if some error had been established in the magistrate's reasons I am not persuaded that it would have been appropriate to make a s19B order in this case. Indeed, in my view, the penalties imposed were entirely appropriate. Accordingly, there was no miscarriage of justice in respect of the penalty and the appeal would fail in any event: s14(2) *Criminal Appeals Act* 2004.

32. For those reasons leave in respect of the single ground of appeal was refused and the appeal was dismissed.

APPEARANCES: For the appellant Scott: Mr MJ Lindsey-Temple, counsel. Alana Padmanabham, solicitors. For the respondent Chief Executive Office of Customs: Mr AC Willinge, counsel. Australian Government Solicitor.
