35/93

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v KAVANAGH

Brooking, Teague and Coldrey JJ

7 December 1993

SENTENCING – SOCIAL SECURITY FRAUD – $54000 IMPROPERLY OBTAINED OVER SIX YEARS – FALSE NAME USED – TWO SIMILAR PRIOR CONVICTIONS – THREE YEARS' IMPRISONMENT – TO SERVE 16 MONTHS – WHETHER MANIFESTLY EXCESSIVE: *CRIMES ACT* 1914, S29B.

Notwithstanding the long delay in laying charges and the age and poor health of the defendant, the imposition of a sentence of imprisonment was not manifestly excessive having regard to the need for general deterrence, the large amount improperly obtained over a long period and the previous convictions for similar offences.

BROOKING J: [1] On 15 March 1993, the applicant was charged with 35 offences of imposition contrary to s29B of the Commonwealth *Crimes Act* 1914 and three offences of defrauding the Commonwealth contrary to s29D of that Act. In due course, he was committed for trial and, at the conclusion of the committal, entered a plea of guilty to all charges. An indictment containing two counts of defrauding the Commonwealth contrary to s29D was filed in the County Court at Melbourne on 31 August 1993.

The applicant was arraigned on 10 September and pleaded guilty to both counts. He admitted previous convictions. He had been convicted in the Magistrates' Court at Ferntree Gully in 1976 on three charges of making a false statement and fined $50. That was a social security fraud. He had been convicted at the Melbourne Magistrates' Court in May 1981 on 22 charges of imposition and released on a bond. Again, those were social security frauds. The applicant was sentenced on 16 September 1993 to two years' imprisonment on Count 1 and three years' imprisonment of Count 2, both sentences to commence on 10 September 1993 and to be served concurrently. It was ordered that he be released after serving 16 months' imprisonment on entering into a recognisance to be of good behaviour for three years. He was also ordered to make reparation of some $54,000 to the Commonwealth.

The applicant, who was born on 21 July 1928, now applies for leave to appeal against sentence. The notice of application as amended contains four grounds, of which the third, relating to s10 of the *Sentencing Act* 1991, has not been argued. The remaining three grounds are that the sentence was manifestly excessive; that the learned **[2]** judge failed to take into account the list of sentences for social security frauds in Victoria placed before him; and that the judge erred by failing to take into account the evidence of Dr Janovic and Mr Bernard Healey.

As to the circumstances of the offences, the applicant commenced to receive unemployment benefits at the married rate in October 1983 and he continued to receive them until May 1990. In August 1984, he began to work under a false name, Peter Stenlake, and remained in that employment up to and, indeed, beyond May 1990. He failed to inform the Department of Social Security of his employment and receipt of income upon some 33 occasions over a period approaching six years. He completed an application, and lodged it, in which he falsely declared that he had not been in employment. He also, twice, falsely declared himself, in an entitlement review form, to be unemployed. The income he was, in fact, receiving was enough to disentitle him to unemployment benefits.

The fraud was discovered as a result of information concerning his employment being independently furnished to the department. His benefits were cancelled as from May 1990. In an interview in May 1990, he admitted employment under a false name. The total amount of unemployment benefits received by him to which he was not entitled was approximately $54,000. That amount remained outstanding at the time he was sentenced.

As regards the previous convictions, the three sustained in 1976 related again to the receipt of unemployment benefits. His wife had been in full-time employment and upon three separate occasions he signed a form stating that she had not received any income. Had **[3]** the form been truthfully filled out, he would not have been entitled to receive any benefits himself. He obtained $750 unlawfully and was fined $50 for these offences.

The 22 charges of imposition to which he pleaded guilty in May 1981 concerned his failure to declare his employment whilst receiving unemployment benefits. He had been employed under the same false name, Peter Stenlake, while receiving unemployment benefits under his own name. Indeed, when he, as Peter Stenlake, became unemployed, he began collecting unemployment benefits under that name in addition to those which he continued to collect under his own name. In all, he received over a considerable period, wrongfully about $18,000. Again, he was leniently treated, being released on a bond. On the hearing of the plea in mitigation, the learned County Court Judge received two reports from Mr Bernard Healey, the psychologist, and one report from a general medical practitioner, Dr Janovic. Mr Healey, in addition, gave oral evidence.

The applicant was aged 65 at the time of his sentence and was then in receipt of an age pension. He had for some time previously been in receipt of an invalid pension. He was a married man, with a wife of about his own age. He had been employed as a wool buyer and then began to conduct his own business as a wool broker, which business had failed. He was made bankrupt in 1970 in consequence. According to the medical report of Dr Janovic, he suffered from a moderately severe degenerative condition of the lumbar spine causing pain especially in cold **[4]** weather. He suffered moderately severe chronic airways obstructive disease evidently due or substantially contributed to by heavy smoking. He suffered from symptoms of prostatism and he had a past history of peptic ulceration – I interpolate that there was some reason to suppose that the peptic ulceration was itself very many years in the past – and he was suffering from stress. His wife was said by counsel to be in ill-health, but no medical evidence was led about the wife's condition and as no real reliance has been placed on that matter in this court by Mr Munro, who has appeared for the applicant, I say nothing about it.

The main feature of this case, in my view, overshadowing the age of the applicant and the evidence about his ill-health, is the most regrettable three-year delay in the taking of proceedings. No part of this delay was the responsibility of the applicant. If it was explained at all, it was explained only as to about one-half of the period. In the course of his quite lengthy reasons for sentence, the learned judge reminded himself of what had been said on two occasions in this Court about the importance of general deterrence with offences of this kind. His Honour referred to what had been said by Crockett J, speaking for the Court, in *R v Barry John Smith* (unreported) 22 March 1991 on the subject of the importance of general deterrence and in *R v McGown* (unreported) 4 December 1985 where His Honour said this:

> "We think that this type of offence is one in which the component of general deterrence particularly needs to be given special emphasis **[5]** 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."

His Honour also referred to what had been said by the Court of Criminal Appeal in New South Wales in *R v Price* (unreported) 2 September 1993. While Mr Munro has relied on the delay in prosecuting, he has primarily relied on two other matters: the age of the applicant and his state of health. It cannot be said, I think, in view of the reasons for sentence, that His Honour did not give attention to these matters, although it might be said that he might have dealt more fully with such evidence as there was as bore on the possible effect of incarceration of the applicant's health.

It has been submitted that the applicant should not have been required to serve any part of a custodial sentence by way of the actual service of that sentence. It has also been submitted that the sentences of imprisonment were manifestly excessive. I am not persuaded that the sentences of imprisonment and the effective sentence of imprisonment were manifestly excessive. Nor am I persuaded that to require the applicant actually to serve the period of the sentence which he was required to serve before being released on recognisance was manifestly excessive, having

regard to the approach of the Court to offences of this kind as manifested in the cases of *Smith* and *McGown*, to the circumstances of these offences, involving the receipt **[6]** of such a large sum of money over such a long period, and to the previous convictions of the applicant and, notably, to the second set of previous convictions. The convictions of 1976 for social security frauds, and especially those of 1981, which latter convictions concerned the fraudulent obtaining of $18,000 over a considerable period, made it extremely difficult to avoid requiring the applicant actually to serve a not insubstantial portion of the total prison sentence.

The matter of delay in prosecuting, the third matter on which Mr Munro relies, is a troublesome one. It was referred to only briefly by His Honour. It is in the highest degree undesirable that long and avoidable delays in the prosecution of offenders should occur. The matter was, as I say, mentioned by His Honour and I am not persuaded that the sentence passed shows that insufficient weight was given to that or the other circumstances relied upon. In the result, I am of the view that the application should be dismissed.

TEAGUE J: I agree.

COLDREY J: Whilst I agree with the reasons set out by the learned presiding judge that the imposition of a period of imprisonment was open to the sentencing judge in this case, I am also of the view that the judge erred in not giving sufficient weight to the effect of delay in determining the length of such sentence. In this regard, it was submitted by Mr Munro that the health of the applicant and that of his wife deteriorated during the three and one-third years' delay between May 1990, when the applicant admitted to these **[7]** offences, and September 1993, at which time sentence was imposed. Mr Munro drew attention to the evidence of Mr Bernard Healey, the clinical psychologist, that delay deleteriously affected the applicant's health both physically and psychologically. Certainly from the physical perspective the applicant was in receipt of an invalid pension from early 1991. Additionally, there was evidence his dependent wife was now in poor health.

In the course of his reasons for sentence, the judge referred to delay and age as mitigating factors. He specifically took into account the matter of age; but no such weight appears to me to have been accorded to the effect of delay. The considerable delay in this matter was, in my view, never satisfactorily explained by the Crown. Certainly, it was no fault of the applicant that it occurred. That delay and, more particularly, its effect upon the applicant's health and the situation which developed with regards to his wife were factors which, in my view, warranted a reduction in the length of the period of imprisonment to be served. However, since the learned presiding judge and Teague J are of the view that the sentence imposed was not manifestly excessive, it is inappropriate that I say any more.

BROOKING J: The order of the Court is that the application for leave to appeal against sentence is dismissed.

APPEARANCES: For the Crown: Mr R Maidment, counsel. JM Buckley, Solicitor for the DPP. For the applicant Kavanagh: Mr IM Munro, counsel. Legal Aid Commission of Victoria.
