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SUPREME COURT OF VICTORIA — APPEAL DIVISION

R v HIS HONOUR JUDGE HASSETT & ANOR

Brooking, Ormiston and Ashley JJ

5, 6 December 1994

CRIMINAL LAW – CAUSING INJURY INTENTIONALLY OR RECKLESSLY – WHETHER SINGLE OFFENCE: *CRIMES ACT* 1958, S18; *SENTENCING ACT* 1991.

By reason of the amendments made by the *Sentencing Act* 1991 whereby two different maximum penalties were substituted for one in s18 of the *Crimes Act* 1958 ('Act'), s18 of the Act now creates two offences, one of intentionally and the other of recklessly causing injury.

***Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531; 19 ALR 95, applied.**

***DPP v Williams* (1993) 1 VR 238, not followed.**

BROOKING J: [1] This proceeding by way of judicial review has been reserved for the consideration of the Full Court pursuant to s15(2) of the *Supreme Court Act* 1986. By the proceeding, the Director of Public Prosecutions challenges an order made by His Honour Judge Hassett on 22 March 1994 granting a permanent stay of proceedings against the second-named defendant on a presentment containing one count of intentionally or recklessly causing injury, contrary to s18 of the *Crimes Act* 1958. The date of the alleged offence is 14 November 1992.

The only question on which we have found it necessary to hear argument is whether s18 creates, and so the presentment charged, two offences or a single offence. *[After referring to provisions of the* Crimes (Amendment) Act *1985, paragraphs of the English Criminal Law Revision Committee report , and part of the Explanatory Memorandum accompanying the Victorian Bill, His Honour continued]*... **[3]** Having regard to the terms of s16 to s18 as originally enacted and to the extrinsic materials, there is really no room for doubt that, as was held by Hedigan J in *Williams*, s18 in its original terms created a single offence. The question is whether that is still its effect after the amendment made by the *Sentencing Act* 1991. Items 8 and 9 of Schedule 2 to that Act substituted for the maximum penalties fixed by s16 and s17 respectively of the *Crimes Act* maximum penalties of Level 4 and Level 5 imprisonment respectively. (This meant that the maximum penalty for causing serious injury intentionally was reduced from 15 to 12 and a half years' imprisonment and that the maximum penalty for causing serious injury recklessly remained ten years). The **[4]** amendment made to s18 by Item 11 of Schedule 2 was to replace the words:

> "Penalty: Imprisonment for seven years" with the words: "Penalty: If the injury was caused intentionally - level 6 imprisonment; If the injury was caused recklessly - level 7 imprisonment."

Level 6 imprisonment is seven and a half years and level 7 imprisonment is five years.

The real question raised by the present case is whether this amendment to s18 means that the section now creates two offences, one of intentionally and the other of recklessly causing injury. In *Williams* the view was taken that the amendment does not have this effect. (In fact, the offence there had been committed before the *Sentencing Act* came into operation, but the Act was treated as applicable, presumably on the basis that s117 made it applicable.)

That the *Sentencing Act* should have the result of creating new crimes by carving two offences out of what was hitherto a single one is, as Hedigan J observed at 247 in *Williams*, at first sight a little surprising. The expressed objects of the Act as set out in s1 might all be said to be concerned with sentencing. The amendment to s18 is made by one item in a long schedule whereby new maximum penalties are substituted for existing ones. Nevertheless, if Parliament, by its very act in creating two different maximum penalties where formerly there was one, has manifested an intention to create two offences where formerly there was one, effect must be given to that intention notwithstanding the mechanism of the amendment. Where what is done by

legislation dealing **[5]** with sentencing goes beyond the fixing of a different maximum penalty and is the creation of two distinct maximum penalties where previously there was one, the amendment may in truth be more than a sentencing amendment, so to speak, in that it alters the substantive law by which offences are constituted and defined.

I find it impossible to resist the conclusion that it was Parliament's intention that, once the *Sentencing Act* came into operation, the former offence of intentionally or recklessly causing injury should be replaced by two offences. For the old single offence, either of two mental elements would suffice. But by the amendment Parliament has distinguished between the two mental elements by attaching different maximum penalties to the intentional and the reckless causing of injury. In doing this, it has reversed its decision, embodied in the amending Act of 1985, that the distinction between the two mental elements in point of moral turpitude was not enough to warrant the creation of two separate offences as regards mere injury. It drew that distinction in the Act of 1985 as regards serious injury by creating one offence with a 15 year and another with a 10 year maximum penalty. The different maximum penalty was the way in which, for practical purposes, the two offences created by s16 and s17 were distinguished. Now Parliament has done the same, in substance, in relation to the causing of mere injury and it has done so by the expedient, not in terms of dividing up one offence into two, but of attaching different penalties to the causing of injury with the different states of mind.

It was the recommendations of the Costigan **[6]** Committee, or *Sentencing Task Force*, contained in its report of September 1989 to the Attorney-General, that in general formed the basis of the detailed provisions of the *Sentencing Act* varying the then existing maximum penalties. Mr Justice Ormiston has drawn my attention to what is said on 151 of that report:

> "S18 Causing injury intentionally or recklessly
> Current maximum: 7 years
> Effective maximum (per Starke): 4y2m
> Starke recommendation: 3y
>
> Comment: One division below s17 causing serious injury recklessly because of the lesser degree of harm inflicted. This offence should be divided into two offences, one of causing injury intentionally and one of causing injury recklessly. The distinction on the ground of mental element is recognised in s16 and s17 and we see no reason why the distinction should not be maintained where injury, rather than serious injury is caused. We would recommend that the offence of causing injury recklessly be a division 6 offence."

At 161 the following appears:

> "S18 Causing injury recklessly
> Current maximum: 7 years
> Effective maximum (per Starke): 4y2m Starke recommendation: 3y
>
> Comment: This is a proposed offence arising from the division of s18 into two parts, one of causing injury intentionally (division 5) and this offence. This distinction on the ground of the differing mental element is recognised in s16 and s17 and we see no reason why the distinction should not be maintained where injury, rather than serious injury is caused."

Divisions 5 and 6 of the divisional scale recommended in the report correspond to levels 6 and 7 on the scale laid down by the *Sentencing Act*. These extracts from the report make it plain that its author intended that two offences should be created.

So far as the principles of statutory interpretation **[7]** are concerned, of considerable interest is *Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531; 19 ALR 95, which established that a Tasmanian statute which visited with criminal consequences a person's having in his possession or control undersized flounder created only one offence. What is presently important is what was said by Griffith CJ at 535 (and concurred in by Barton J):

> "If different penalties were attached to possession and control the result would be different, but under the Statute the penalty is the same in either case."

That is a tersely expressed anticipation of the general rule of construction laid down by

Lord Diplock in *R v Courtie* (1984) AC 463 at 471, when the passage in his Lordship's speech is understood in the sense in which it was approved by Gibbs CJ, Wilson and Dawson JJ at 275-6 and by Mason J (as he then was) at 282 in *Kingswell v R* [1985] HCA 72; (1985) 159 CLR 264; 62 ALR 161; (1985) 60 ALJR 17; 19 A Crim R 65.

The present case is a straightforward one. The amended s18 is a short, simple and self-contained section which proscribes as criminal certain conduct and prescribes maximum penalties. The section defines the offence or offences by reference to alternative factual ingredients (intention and recklessness) and fixes the maximum penalty by reference to the presence of the one or the other of them: cf the discussion of *Courtie* in *Shaw v DPP* [1993] 1 All ER 918; [1993] RTR 45; (1993) 97 Cr App R 1 at 11-12.

The present case is, in principle, the same as the simple one put by Griffith CJ in *Hedberg v Woodhall*, where a section makes punishable having possession or control and attaches one penalty to possession and a different one to control. The present case is quite **[8]** different from those in which a statute, having defined the offence, goes on to create circumstances of aggravation which are not elements of the offence and which will make increased penalties applicable. Such a case was *Kingswell* and such a case was *R v Hietanen* (1989) 51 SASR 510; (1989) 45 A Crim R 26; see also *R v Meaton* [1986] HCA 27; (1986) 160 CLR 359 at 363-4; (1986) 65 ALR 65; 21 A Crim R 117; 60 ALJR 417 per Gibbs CJ and Wilson and Dawson JJ.

Unfortunately, in *Williams* Hedigan J did not have his attention drawn to *Courtie* and *Kingswell* or to the remarks of the Costigan Committee in its report which show that the Committee's recommendation was that the offence created by s18 should be divided into two offences.

It follows from what I have said that I am, with respect, of the opinion that in *Williams* it ought to have been held that the amendment to s18 had the result of carving two offences out of what had been one. S117(1) of the *Sentencing Act* does not stand in the way of this conclusion. By it, the Act applies to any sentence imposed after the commencement of s117 irrespective of when the offence was committed. See further s114, dealing with the effect of increasing or reducing the maximum penalty.

The present case concerns an attack alleged to have taken place after the *Sentencing Act* came into operation. But it might be argued, in support of the view that s18 of the *Crimes Act* as amended still creates only one offence that where the incident occurred before the *Sentencing Act* came into operation, if the amended s18 creates two new offences, s117(1) has the extraordinary result that a person is liable to be convicted of an offence that did not exist at the time of **[9]** its alleged commission.

The answer to any such argument is that if the amended s18 does create two offences (as, in my view, it does) then the case does not fall within s117(1), since the determination of the question whether given conduct constituted a criminal offence is not a matter of the imposition of a sentence. Nor is s114 applicable. In relation to acts done before the coming into operation of the *Sentencing Act*, s18 of the *Crimes Act* as originally enacted determines both the question of criminal liability and the question of penalty: there is one offence and the maximum penalty is 7 years' imprisonment. In relation to acts done after the coming into operation of the *Sentencing Act*, s18 of the *Crimes Act* as amended takes effect: there are two offences, each with its own maximum penalty. The *Sentencing Act* does not in this regard vary the maximum penalty for a pre-existing offence: it abolishes the former offence by splitting it into two offences, each carrying its own penalty....

APPEARANCES: For the DPP: Mr D Just, counsel. Mr PC Wood, Solicitor for Public Prosecutions. For the second-named defendant: Mr B Kayser and Mr G Meredith, counsel. Mr M Dicconson, Solicitor, Legal Aid Commission.
