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SUPREME COURT OF SOUTH AUSTRALIA — COURT OF CRIMINAL APPEAL

VASIN v R; SCHERF v R

King CJ, White and Millhouse JJ

22 August, 3 September 1985

(1985) 39 SASR 45; 61 ALR 701; (1985) 18 A Crim R 209

CRIMINAL LAW – SENTENCING – SOCIAL SERVICES OFFENCES – OBTAINING BENEFIT NOT PAYABLE – PRESENTING FALSE DOCUMENTS – PENALTY CONSIDERATIONS – FEDERAL OFFENCES – NEED FOR UNIFORMITY IN PENALTIES: *SOCIAL SECURITY ACT* 1947 (CTH) S138(l)(b), (1)(d); *CRIMES ACT* 1914 (CTH), SS20, 29B.

(1) V. pleaded guilty to 15 charges of obtaining an unemployment benefit which was not payable. He asked the judge to take into account 23 similar offences committed before the increase in penalties. All up, V. cheated the public purse of $5600 over 38 fortnightly pension periods. On each occasion, V. lodged an application in his own name and a fictitious person's name with the result that over a period of some 18 months he engaged in a systematic course of fraudulent conduct involving frequent conscious decisions to continue with the fraud and to fill out the false claim and forge the signature for that purpose. When apprehended, V. made no admissions and tried to escape responsibility for his actions by lies and deceit. V. was sentenced to serve 2 months' imprisonment with a minimum of 7 months. On the appeal against the severity of the sentence, it was submitted that the sentence was excessive because of V.'s good character, service to the community, plea of guilty, family hardship and the fact that the Commonwealth was in effect not defrauded of any substantial sum as V.'s grandmother – with whom V. lived – had refused to apply for a pension, and that the offences were motivated out of need.

HELD: per White and Millhouse JJ, King CJ dissenting, appeal allowed. Sentence reduced to six months' imprisonment and V. released, pursuant to s20(1)(b) of the *Crimes Act* (Cth) upon entering into a 3-year $1000 good behaviour bond and to pay restitution in the sum of $1450.

(2) S. pleaded guilty to 10 charges of presenting a false document contrary to s138(1) of the *Social Security Act* 1947 (Cth) in that he did not declare the employment and income of his wife. S. asked the judge to take into account 17 similar offences which occurred before the increase in penalties. The offending course of conduct occurred over a period of two years and approximately $9000 was paid to S. to which he was not entitled. S. was sentenced to be imprisoned for a period of 24 months with a non-parole period of 18 months. As S.'s cheating was motivated by greed, he had previously been guilty of offences involving dishonesty and there were no mitigating factors to balance the need for deterrence. On appeal—

HELD: *Per curiam.* Appeal dismissed.

WHITE J: *[After setting out briefly the facts of each case, His Honour continued]* … **[704] Vasin:** The sentencing judge ordered Vasin to serve 12 months' imprisonment with a non-parole period of seven months and Scherf to serve 24 months' imprisonment with a non-parole period of 18 months. I agree with the judge's decision to draw a sharp distinction between the criminality of the offending of each accused. However, I am of the opinion that Vasin's motive (to help his obdurate grandmother) and the small net loss to the public purse should have been recognized by a shorter prison sentence and earlier release. After all, she was entitled to the greater part of the welfare payments which he was driven to claim under a false name, benefits to which she was largely entitled because she, in her ignorance and suspicion of State authority, obdurately refused to make the correct claim in her own name. The starving household, consisting of grandmother and grandson, was unable to live on his unemployment benefits alone. The household did not benefit greatly from the subterfuge. Understood in this light, the appellant's sophisticated and admittedly reprehensible method of using a false name or names was not as serious in its criminality as appears at first sight.

Vasin is an intelligent young man with considerable linguistic talents. He used those talents for the benefit of the community, and for those disadvantaged by language difficulties, in a most generous way. He must be given credit for his good character, his voluntary service to

the community and his plea of guilty. On the other hand, he was guilty of quite a serious crime in using those same talents against the community and the public welfare system. Balancing the factors for and against him I am of the opinion that he has been more than amply punished. It should be remembered that the 23 offences to be taken into account all occurred before the maximum penalty was increased. Whilst it is true that each unlawful obtaining of a benefit was a separate offence, he is not to be punished by mindless mathematical addition of his separate offences but by having regard to the totality of his course of offending. The court is empowered by s138(5) of the *Social Security Act* to fix a cumulative sentence on one count which takes into account the gravity of his total offending, namely, offending by a connected series of transactions motivated by need of subsistence payments.

Section 17A of the *Crimes Act* enjoins the court not to imprison if other available forms of punishment will suffice. It reflects a well-established and normally-observed sentencing principle. Vasin's offending deserved some **[705]** term of imprisonment by reason of the degree of sophistication involved in inventing fictitious names and continuing the pretence, the length of time over which the offences continued and the size of the overall sum unlawfully claimed, whatever the motive. However, the length of the term must be appropriate not only to the offending but to his personal circumstances. It must reflect his general excellent character, considerable community service in interpreting for the disadvantaged, responsibility in the care of his aged grandmother (who would very easily become a burden on the State) and his plea of guilty.

All of these factors bear upon the length of the head sentence as well as upon the date of his release (total suspension of the sentence not yet being an available option under the *Crimes Act*). When his subjective motives, the relatively slight real loss to the public purse, his good character, community service and plea of guilty are balanced against the objective facts surrounding his offences, a shorter term of imprisonment than 12 months is appropriate. Most of the offending occurred before the penalties were increased and the public warning involved in the increased penalties does not apply with full force to this conduct commenced well before the increase. If he had been sentenced under the scale of penalties applicable at the time when he became locked into this fraudulent scheme, the term of imprisonment would have been much shorter: cf. *Taormina v Cameron* (1980) 24 SASR 59; (1980) 29 ALR 151; *Scott v Cameron* [1980] 26 SASR 321; (1980) 48 FLR 274.

Another factor which may be taken into account in special circumstances (and very sparingly applied) is the factor of hardship to others: cf. *R v Spiers* [1983] 34 SASR 546 and *R v Rowe* [1983] 109 LSJS 291. Vasin cares for his grandmother who came from Russia to Australia via China and Hong Kong. He is her only support. He cares for her, even bathes and dresses her. She speaks only Russian. She believes he is in Victoria looking for work. Russian friends are caring for her, but she pines for him. All criminals deserving imprisonment bring hardship on their families, but some can be spared from the household more readily than other. In this special case, the factor of family hardship can be taken into account.

In my opinion, the term of 12 months' imprisonment was manifestly excessive in this case. I would substitute a term of six months' imprisonment. He has served almost four months. Now that the term of imprisonment is less than 12 months, it is no longer necessary to fix a non-parole period: see s65 of the *Correctional Services Act* 1982 which was proclaimed on 19 August 1985 and replaces the *Prisons Act* which also continued a provision to same effect. The *Commonwealth Prisoners Act* 1967 follows the State law as to parole (see s4(1)(b)), so it is not necessary to fix a non-parole period for a term less than 12 months under either Act, although it would be permissible to do so in the case of a Commonwealth offender.

Pursuant to the provisions of s20(1)(b) of the *Crimes Act*, I would order Vasin's release forthwith upon him entering into a bond in the sum of $1000 on condition that he be of good behaviour for three years and upon the further condition that he pay to the Commonwealth the sum of $1450 by way of restitution of excess benefits received and costs of prosecution incurred, by payments of $20 to be made fortnightly, the first payment to be made within five weeks of his release.

[706] Scherf: This appellant's offending was far more serious than Vasin's for a number of reasons. He cheated the public purse of a greater amount ($9000 against a net $1000-$1500) and

his motive for cheating was greed. The explanation, but not the excuse for his greedy cheating, was his need for money due to extravagant drinking habits, spending money on women other than his wife and paying instalments on one car after the other, finally under five consumer mortgages.

Scherf's method of cheating was to represent in his claim forms that his wife was not working when she was working. This deceitful representation was made repeatedly. That is why he is charged with fortnightly offences of "present false document". An offence of making the false representation once, and thereafter blurring over the deceit in a haze of alcohol and/or forgetfulness as cheques kept coming in, would be more understandable. However, Scherf had to make a separate decision each fortnight to continue the deceit by presenting a fresh claim with a fresh false statement. And when he received the unlawful benefits, he squandered them on alcohol, cars and women. His wife eventually stabbed him for his drunken infidelity.

She also challenges his present claims that he made contributions to household expenses out of the unlawful increased pension payments. If he did contribute some money to the needs of the household, the greater part of the $9000 unlawfully obtained was squandered selfishly. The appellant does not deserve the sympathy of the court. He admitted spending up to $80 each week on liquor. Further, his prior record was not entirely blameless. He had been guilty of offences of dishonesty in the distant past: in 1962, two offences of larceny and unlawful possession (one month's imprisonment); in 1963, two offences of receiving (four months' imprisonment on each); and in 1970, unlawfully on premises ($40 fine). In his favour, it can be said that he kept out of trouble for the next 13 years until he began this offending in 1982. He is married with two sons aged 16 years and 14 years. He has not worked since 1977 when he injured his neck at work when he went off work on compensation. When that expired, he began living on sickness benefits and other relief.

It was within the judge's sentencing discretion to order a term of two years' imprisonment. Neither Scherf's personal history nor his motive for offending called for reduction of the head sentence. He offended through greed, not need. A substantial term of imprisonment was called for. I would not interfere with a term of two years' imprisonment which serves as a deterrent to him against further offending (notwithstanding his present intention to reform himself) and a deterrent to the many others who are only too ready to cheat the public purse. A strong deterrent is called for in appropriate cases. The only matter which concerns me is the fact that about half of his offending occurred before the increase in maximum penalty. In spite of that change in the law, I am not prepared to say that the sentencing judge was unaware of it nor that the sentencing discretion in fixing the head sentence of two years miscarried.

I now turn to the non-parole period and the date of release. The sentencing judge fixed a non-parole period of 18 months. That period was within the judge's discretion. It is true that Scherf did radically reform his dissolute way of life (albeit under the threat of impending court **[707]** proceedings) about six months before the date of sentencing. In September 1984, Scherf's wife could tolerate his conduct no longer. As a result, he moved out of the matrimonial home and began to live in a shack on Yorke Peninsula. The shock of separation led to a complete change in his lifestyle. He successfully overcame his alcohol problem in late 1984 and now totally abstains. He and his wife are now reconciled. He can now communicate well with her. He has good prospects of saving his marriage and continuing to abstain from liquor. The sentencing judge was aware of these matters, however. Scherf's rehabilitation will have to await the expiration of the non-parole period less remissions. I would dismiss Scherf's appeal.

I cannot part from this appeal without drawing attention to the undesirable differences in prosecuting procedures in the various States of Australia for the same or similar offences against the same Federal law. The differences in prosecuting procedures are one reason, but not the only reason, for different levels of sentencing in the various States. It should not be beyond the wit of man to devise a system whereby (i) prosecutions in each State for the same offence are brought under the same section; and (ii) the court is informed of the level of sentencing in the other States. Uniformity in standards, by treating like cases in a like manner, could thus be encouraged and ultimately achieved. There cannot be complete uniformity in that tariffs are no more than guides while the combinations and permutations of circumstances of individual cases vary almost infinitely. Nevertheless, some measure of even-handed justice for similar offenders against the same law, applicable throughout Australia, should be an achievable goal. As our Court

of Criminal Appeal said in *R v Jackson and Jennett* [1972] 4 SASR 81 at 91-2; (1972) 20 FLR 110:

> "[The sentencing judge] will, when exercising Federal jurisdiction, remember that Australia is one country and that policies (of sentencing) laid down elsewhere in Australia by superior courts, although not technically binding on him, ought to receive a very great attention by him, as it is desirable that there should be similarity of approach by sentencing authorities with respect to Federal offences."

The Full Court was there considering the desirability of uniformity of approach to sentencing narcotic importers under the *Customs Act* 1901. The same considerations apply to welfare cheats under the *Social Security Act*. We were told by prosecuting counsel and in the prosecuting officer's affidavit that, in Queensland, these offences are prosecuted under s29B of the *Crimes Act* (imposition on the Commonwealth) and not under s138 of the *Social Security Act*.

In *Scott v Cameron*, *supra*, I frowned on that practice because in 1980 the maximum penalties in the two Acts were different (two years under the *Crimes Act*, six months under the *Social Security Act*). Although the maximum penalties are now closer (two years under the *Crimes Act* and one year under the *Social Security Act*), the criticism in *Scott v Cameron* still stands in that it is undesirable to increase the maximum penalty indirectly by laying a charge under a general section prohibiting imposition on the Commonwealth when the special section under the *Social Security Act* provides the appropriate maximum for the specific offence.

In Victoria, prosecutions are never launched by indictment in the County Court so there are no comparable sentences. In New South Wales, prosecutions for multiple or dual claims over $7000 are brought on indictment in the District Court. In the Australian Capital **[708]** Territory, the New South Wales procedure is adopted. In South Australia, the New South Wales procedure is also adopted except that the cut-off figure for summary proceedings is $5000, over which figure the District Court deals with the matter. We were not informed of the procedures in Western Australia and Tasmania.

Until a uniform approach is adopted by the prosecuting officers of the Department in the various States, it will be impossible to compare the sentences in the other States or to compile meaningful statistics in aid of ultimate uniformity in sentencing standards for this offence throughout Australia.
