41/09; [2009] VSCA 296

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v FULOP

Buchanan and Nettle JJA

4, 7, 9 December 2009 — (2009) 236 FLR 376

CRIMINAL LAW – SENTENCING – CHILD PORNOGRAPHY – USING A CARRIAGE SERVICE TO ACCESS CHILD PORNOGRAPHY CONTRARY TO THE *CRIMINAL CODE* (CTH) – POSSESSION OF CHILD PORNOGRAPHY – SENTENCE OF IMPRISONMENT IMPOSED – FAILURE OF SENTENCING JUDGE TO SPECIFY A COMMENCEMENT DATE OF THE STATE SENTENCE – CUMULATION OF MINIMUM TERMS IMPERMISSIBLE – CUMULATION OF SENTENCES NOT DOUBLE PUNISHMENT – REMORSE NOT ENTAILED BY PLEAS OF GUILTY – INTENDED TOTAL EFFECTIVE SENTENCE OF FOUR YEARS' IMPRISONMENT WITH A MINIMUM TERM OF THREE YEARS' IMPRISONMENT MANIFESTLY EXCESSIVE: *CRIMINAL CODE* (CTH); *CRIMES ACT* 1958, S70.

F. pleaded guilty to one count of using a carriage service to access child pornography and one count of knowingly possessing child pornography. On F's computer a total of 451,594 pictures and video images were detected. F. said that he downloaded the material by accident and then continued through curiosity. He said he did not pay for the files he downloaded and on that account was not 'really doing any major harm'. The County Court judge sentenced F. on the first count to 3½ years' imprisonment with a minimum of 2 years and on count 2 to 2½ years with a minimum of 1 year's imprisonment. The judge ordered that 6 months of the sentence on count 2 be cumulated on the sentence on count 1 and the non-parole period on count two be served cumulatively upon the non-parole period on count 1. Upon appeal, it was submitted that the sentencing judge erred by failing to specify a commencement date of the State sentence and by ordering that the non-parole period on the State sentence be served cumulatively on the non-parole period of the Commonwealth sentence.

HELD: Appeal allowed.

1. Section 16(4) of the *Sentencing Act* 1991 provides that a court that imposes a term of imprisonment for an offence against the law of Victoria on a person already undergoing a sentence of imprisonment for an offence against the law of the Commonwealth 'must direct when the new term commences', and that must be no longer or no later than the completion of the Commonwealth sentence and the end of the non-parole period fixed in respect of it.

2. Section 16(4) of the *Sentencing Act* 1991 required the sentencing judge to turn her mind to the commencement date of the state sentence and specify it in terms. It is not permissible to work backwards from the total effective sentence which the sentencing judge intended to achieve and fix upon a starting point for the state sentence to fit that aim.

3. The sentencing judge was in error in the cumulation of minimum terms. A non-parole period is not a discrete component of a sentence. The head sentence is not a non-parole period plus an additional term but rather an appropriate term of imprisonment having regard to the circumstances of the offence and the offender. The sentencing judge could not fix a non-parole period in relation to both the state and Commonwealth sentences. The sentencing judge should have stated the commencement date of the state sentence and assigned an appropriate non-parole period to it, if she was to assign one at all.

4. The elements of the offences overlapped but they were not identical. While F. was able to obtain possession of the pornographic material through a carriage service, the service also enabled users to disseminate the material. The Commonwealth offence concentrates upon the internet whereas the state offence is not concerned with the means by which the offender gains possession of pornographic material. F. could gain access to the material without possessing it, but in this case, he took a further step by downloading the material and thereby obtained possession of it. The Commonwealth offence was concerned with the images found on the hard drive of the appellant's computer. The state offence was constituted by the CDs and DVDs made and retained by the appellant. The offences did not overlap to such an extent that it rendered inappropriate the degree of cumulation ordered by the sentencing judge.

5. A plea of guilty is usually evidence of some remorse on the part of the offender however, in F's case there were countervailing factors bearing upon remorse which the sentencing judge was entitled to take into account.

***Siganto v R* [1998] HCA 74; (1998) 194 CLR 656; 159 ALR 94; 73 ALJR 162; (1998) 19 Leg Rep C 1, applied.**

6. In relation to the submission that the sentences were manifestly excessive, F. could rely on a number of mitigating factors: the early pleas of guilty, the absence of prior convictions, the evidence of good character and a good employment record, the absence of any payment for the material to which F. gained access, and no dissemination of material by the appellant. The evil at which the provisions contravened by F. is aimed is the production of the images by subjecting children and young persons to degrading exploitation. That exploitation exists to serve the demand created by those who gain access to and collect the images. The legislation aims to deter persons such as F. and thereby remove the demand which child pornographers supply. F. was to be punished not simply for his predilection to the material but rather for his pursuit of it. In this connection, the length of time and the frequency with which F. obtained access to the images and the quantity of images which he collected, sorted and stored were the most significant aspects of his offending. The mitigating factors are to be seen in the light of those matters.

7. The sentencing judge gave the mitigating factors too little weight and sentencing statistics show that the sentence imposed on F. was substantially in excess of sentences for like offending. Total effective sentence of 3 years with a minimum period of 2 years imposed.

BUCHANAN JA:

1. The appellant was arraigned in the County Court and pleaded guilty to a presentment containing one count of using a carriage service to access child pornography, contrary to the provisions of the *Criminal Code* of the Commonwealth, and one count of knowingly possessing child pornography, contrary to the provisions of s70 of the *Crimes Act* 1958 of the State of Victoria. The maximum custodial sentence for the Commonwealth offence was ten years' imprisonment; in the case of the state offence it was five years' imprisonment.

2. After a plea, the appellant was sentenced on count 1 to be imprisoned for a term of three years and six months commencing on 20 December 2007, with a minimum term of two years' imprisonment. The appellant was sentenced on count 2 to be imprisoned for a term of two years and six months, with a minimum term of one year's imprisonment. The sentencing judge ordered that six months of the sentence on count 2 be cumulated on the sentence on count 1, and that the non-parole period of the sentence on count 2 be served cumulatively upon the non-parole period of the sentence on count 1. The appellant has been granted leave to appeal against the sentence by a single judge of this Court.

3. The Federal Bureau of Investigation in the United States of America found that child pornography was available through an internet message board. They ascertained that the appellant, amongst others, had gained access to the material. The FBI passed that information on to the Australian Federal Police, who executed a search warrant at the residence of the appellant and seized a computer. Examination of the hard drive of the computer revealed 2,061 pictures, 155 videos and 91 text files containing child pornography. The search of the premises revealed 69 compact disks and four DVDs containing 20,316 child pornography files. The material showed young children, ranging in age from babies under one year old to prepubescent children. The files showed sexual penetration of babies and children, orally, anally and vaginally; children tied up and being penetrated by one or more adults at the same time; children tied up and being penetrated by animals; children performing sexual acts on other children; children performing sexual acts on themselves; children performing sexual acts on animals; children defecating on other children and adults; infants and children performing fellatio; and images of partially naked and fully naked infants and children focussing on their genital areas. There were 451,594 pictures and video images in all.

4. In a record of interview, the appellant admitted that there were child pornography images stored on his computer. He said that he downloaded the material by accident and then continued through curiosity. He said that he gained access to the internet to view child pornography once a day, or once every couple of days. He said that he did not pay for the files he downloaded, and on that account was not 'really doing any major harm'.

5. The appellant is now 52 years old. He was born in Hungary and came to Australia in 1967. He left school in Australia after year 10, and since then has been in full-time work. The appellant was apprenticed at General Motors-Holden but did not complete his apprenticeship.

He worked for some time as a carpenter and then began renovating and building houses. In 1990 he commenced labouring for a plumber. Five years later, the appellant began installing satellite dishes and making internet connections. The appellant was married in 1995 to a Thai woman who had four children from a previous relationship. The appellant had no prior convictions.

6. The first ground of the appeal is as follows:

> The learned sentencing judge erred by failing to specify the commencement date of the state sentence in accordance with section 14(4) of the *Sentencing Act* 1991 and/or by ordering that the non-parole period on the state sentence be served cumulatively on the non-parole period of the Commonwealth sentence.

Section 16(4) of the *Sentencing Act* provides that a court that imposes a term of imprisonment for an offence against the law of Victoria on a person already undergoing a sentence of imprisonment for an offence against the law of the Commonwealth 'must direct when the new term commences', and that must be no longer or no later than the completion of the Commonwealth sentence and the end of the non-parole period fixed in respect of it.

7. In my opinion, the manner in which the sentencing judge sought to combine the state and Commonwealth offences exemplified two errors. The first was her Honour's failure to specify a commencement date for the state sentence. It was common ground that the sentencing judge intended to achieve an effective head sentence of four years' imprisonment and sought to do so by cumulating six months of the state sentence on the Commonwealth sentence. Counsel for the respondent submitted that this aim could be achieved if the state sentence commenced 18 months after the commencement of the Commonwealth sentence, and accordingly the sentencing judge was to be taken to have decided upon that commencement date.

8. In my opinion, s16(4) required the sentencing judge to turn her mind to the commencement date of the state sentence and specify it in terms. It is not permissible to work backwards from the total effective sentence which the sentencing judge intended to achieve and fix upon a starting point for the state sentence to fit that aim.

9. The second error was the cumulation of minimum terms. A non-parole period is not a discrete component of a sentence. As Callaway JA said in *Re Jackson*[1]: 'The head sentence is not a non-parole period plus an additional term.' The head sentence is an appropriate term of imprisonment having regard to the circumstances of the offence and the offender. Her Honour could not fix a non-parole period in relation to both the state and Commonwealth sentences.[2] The sentencing judge should have stated the commencement date of the state sentence and assigned an appropriate non-parole period to it, if she was to assign one at all.

10. The second ground of appeal is:

> The learned sentencing judge erred and/or the appellant has been doubly punished by reason of the order for cumulation of six months of the sentence imposed on count 2 on count 1. Alternatively, the level of cumulation is excessive.

Counsel for the appellant submitted that the Commonwealth offence reflected the means by which the state offence was committed. The appellant had obtained child pornography by using a carriage service to gain access to it. The criminality in respect of each offence, so it was said, lay in the nature of the material to which the appellant gained access and possessed. Further, it was submitted, the cumulation of six months was excessive as the possession was in substance encompassed by the act of gaining access to the material on the internet.

11. The elements of the offences overlapped but they were not identical. While the appellant was able to obtain possession of the pornographic material through a carriage service, the service also enabled users to disseminate the material. The Commonwealth offence concentrates upon the internet because, as the Parliamentary Secretary to the Minister said in his Second Reading Speech:

> Law enforcement agencies estimate that around 85% of child pornography seized in Australia is distributed via the internet. By focusing on the internet, these new Federal offences target the very heart of the abhorrent child pornography industry.

12. On the other hand, the state offence is not concerned with the means by which the offender gains possession of pornographic material. The appellant could gain access to the material without possessing it. In this case, he took a further step by downloading the material and thereby obtained possession of it. The Commonwealth offence was concerned with the images found on the hard drive of the appellant's computer. The state offence was constituted by the CDs and DVDs made and retained by the appellant. In my opinion, the offences did not overlap to such an extent that it rendered inappropriate the degree of cumulation ordered by the sentencing judge.

13. The third ground of appeal is that the sentencing judge erred by giving inadequate weight to the appellant's pleas of guilty, by failing to find that the pleas merited an additional discount because the appellant volunteered offending beyond the period able to be proved by the Crown, by failing to find that the pleas indicated a degree of remorse, and by reducing the discount for pleading guilty by reference to the strength of the Crown case.

14. Counsel for the appellant submitted that the appellant made full admissions which went beyond the charged period and pleaded guilty at the earliest opportunity. Further, he submitted, the early plea of guilty ought to have been treated as indicating a degree of remorse. Counsel for the appellant recognised that the Crown case was strong, but submitted that this did not detract from the utilitarian value of the pleas.

15. The sentencing judge recognised that the appellant made admissions to the police and that the admissions encompassed a longer period of offending than that alleged by the Crown. She did, however, note that the appellant sought to minimise his offending by maintaining that his motive was only curiosity and that he did not look at much of the material which he downloaded. Her Honour's comments were not inconsistent with due weight being given to the admissions. The strength of the Crown case was not treated by the sentencing judge as offsetting or detracting from the value of the pleas of guilty, but rather as one of a number of circumstances to which she should have regard in assessing the weight to be accorded to the pleas. As to remorse, her Honour was not bound to find that the pleas entailed remorse. As Gleeson CJ and Gummow, Hayne and Callinan JJ said in *Siganto v The Queen*[3], 'A plea of guilty is usually evidence of some remorse on the part of the offender.' In the present case, there were countervailing factors bearing upon remorse, and in my view the sentencing judge was entitled to take them into account.

16. The fourth ground of appeal is:

> The learned sentencing judge erred in her assessment of the appellant's prospects of rehabilitation by determining that she was 'unable to find anything positive in support of your rehabilitation prospects, particularly given your continuing lack of appreciation of the gravity of your offending'.

Counsel for the appellant on appeal contended that the appellant did have strong prospects of rehabilitation, relying upon his age of 52 years without any prior convictions, a strong employment record, the fact that he was married, made admissions, pleaded guilty at an early stage, and had not re-offended in a period of nine months on bail. He submitted that the sentencing judge was not entitled to rely upon the appellant's failure to tell his wife about the offences, and unfairly characterised his answers in the record of interview as revealing a lack of appreciation of the seriousness of the offending.

17. In my view, the appellant's failure to tell his wife of the offences was capable of founding an inference that he was in denial to some extent. The appellant did seek to minimise his attraction to the images which he downloaded, sorted and stored. He said:

> It actually started as harmless fun, because as far as I was concerned, I'm not doing anything to harm, to anybody wrong, because look, I'm probably wrong, but I did not financially support any of those. It's a curiosity thing that basically got out of hand, that was done with no intention of duplicating anything in life or anything like that. I felt that because I didn't really contribute to any of this stuff financially or uploading or anything like that, I don't, didn't feel I was doing any major harm for anybody.

Counsel in the course of the plea said:

> Your Honour, that his responses in the record of interview do not put before Your Honour evidence

of complete insight into the nature and gravity of the offending, they don't demonstrate particularly high levels of insight into the true gravity of his offending or remorse.

Counsel described the appellant as engaging in 'a level of denial about the true nature of these actions' and 'a level of deluded self-justification about it'.

18. In my opinion, the sentencing judge was entitled to take counsel at his word. The appellant's position was not improved by his counsel informing the sentencing judge that he was in possession of reports by a psychologist and a psychiatrist but would not tender them.

19. The final ground of appeal is that the individual sentences, the total effective sentence and the non-parole period are each manifestly excessive. Counsel for the appellant could rely on a number of mitigating factors: the early pleas of guilty, the absence of prior convictions, the evidence of good character and a good employment record, the absence of any payment for the material to which the appellant gained access, and no dissemination of material by the appellant.

20. The evil at which the provisions contravened by the appellant is aimed is the production of the images by subjecting children and young persons to degrading exploitation. That exploitation exists to serve the demand created by those who gain access to and collect the images. The legislation aims to deter persons such as the appellant and thereby remove the demand which child pornographers supply. The appellant was to be punished not simply for his predilection to the material but rather for his pursuit of it. In this connection, I regard the length of time and the frequency with which the appellant obtained access to the images and the quantity of images which he collected, sorted and stored as the most significant aspects of his offending. The mitigating factors are to be seen in the light of those matters.

21. Although the mitigating factors are to be seen in the light of those matters, I consider that the sentencing judge gave them too little weight. Sentencing statistics show that the sentence imposed upon the appellant was substantially in excess of sentences for like offending which have been imposed hitherto. The circumstances attending the appellant's offending and his personal circumstances did not warrant such an unusual punishment. I am also of the opinion that the sentence of 50% of the maximum sentence for the state offence was excessive. In addition, it is necessary to re-sentence the appellant to fix a starting date for the state sentence and to deal appropriately with the non-parole period.

22. I would re-sentence the appellant on count 1 to be imprisoned for a term of two years and six months, and I would fix a minimum term of two years' imprisonment. I would re-sentence the appellant to be imprisoned for a term of 18 months on count 2. I would cumulate six months of the sentence on count 2 on the sentence on count 1. The state sentence is to commence at the expiration of the period of six months from the commencement of the Commonwealth sentence.

NETTLE JA:

23. I agree. (Discussion ensued re orders.) (Revised order made on 9 December 2009)

BUCHANAN JA:

27. 1. The appeal is allowed.

2. The sentence passed below is set aside and in lieu thereof on count 1 the appellant is sentenced to be imprisoned for a term of two years and six months and is to be released after serving two years of the term of imprisonment upon the appellant giving security by recognisance of $1,000 to comply with the following conditions:

(a) that the appellant is to be of good behaviour for six months; and

(b) that the appellant is to comply with the following further conditions:

(i) that the defendant is to be under the supervision of the Deputy Commissioner, Community Correctional Services and Sex Offender Management or his or her nominee for six months; and

(ii) that the defendant is to attend for assessment and, if assessed as suitable, treatment for sex offender program or programs to reduce re-offending as directed by Deputy Commissioner, Community correctional Services and Sex Offender Management or his or her nominee;

(iii) that the defendant is to report to the DANDENONG Community Corrections Centre, 44 – 48 Robinson Street, Dandenong by 4 pm on Monday 21 December 2009; and

(iv) that the defendant is to report to and receive visits from a community corrections officer or officers; and

(v) that the defendant is to notify an officer at the specified community corrections centre of any change of address or employment within two clear working days after the change; and

(vi) that the defendant is not to leave Victoria except with the permission of an officer at the specified community corrections centre; and
(vii) that the defendant is to obey all lawful instructions and directions of community corrections officers.
On count 2 the appellant is sentenced to be imprisoned for a term of 18 months.
3. The sentence on count 2 is to commence six months after the commencement of the sentence on count 1.
4. The total effective sentence is two years and six months' imprisonment.
5. It is declared that the appellant must continue to comply with the reporting obligations imposed by Part 3 of the *Sex Offenders Registration Act* 2004 for a period of 15 years.
6. The forfeiture and confiscation orders made in the County Court are confirmed.
7. The Commonwealth sentence is to commence on the date upon which the applicant was sentenced in the County Court.
8. It is declared that a period of 729 days is to be reckoned as already served under the sentence and it is ordered that the fact that that declaration has been made and its contents are to be entered in the records of the Court.

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[1] [1997] 2 VR 1 at 3.
[2] See s19AJ of the *Crimes Act* 1914 (Cth).
[3] [1998] HCA 74; (1998) 194 CLR 656; 159 ALR 94; 73 ALJR 162; (1998) 19 Leg Rep C 1.

APPEARANCES: For the DPP (Cth): Mr GF Meredith, counsel. Solicitor to DPP (Cth). For the appellant Fulop: Mr LC Carter, counsel. CD Traill Lawyers.
