03/05; [2004] VSCA 214

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP (CTH) v ALATERAS

Callaway, Eames and Nettle JJ A

18, 30 November 2004

CRIMINAL LAW – SENTENCING – DEFRAUDING COMMONWEALTH DEPARTMENT OF SOCIAL SECURITY – OFFENCES COMMITTED BY OFFICER EMPLOYED BY CENTRELINK – MORE THAN $90,000 IMPROPERLY GIVEN TO 75 DIFFERENT CLIENTS ATTENDING CENTRELINK OFFICE OVER A PERIOD OF MORE THAN TWO YEARS – OFFICER CHARGED WITH OFFENCES RELATING TO DEFRAUDING THE COMMONWEALTH AND SENTENCED TO NINE MONTHS' IMPRISONMENT TO BE RELEASED IMMEDIATELY UPON ENTERING A RECOGNISANCE TO BE OF GOOD BEHAVIOUR – SENTENCING CONSIDERATIONS – WHETHER SENTENCE MANIFESTLY INADEQUATE: *CRIMES ACT* 1914 (CTH) s29C.

A. was employed by Centrelink as a Customer Services Officer between 1990 and 2000. His normal duties involved assessing benefit claims including primary claims for benefits, special benefit claims and urgent payment requests. During 1998 - 2000 A. defrauded the Commonwealth of $92,149.84 of which $85,139.84 was paid out to 75 different Centrelink beneficiaries by way of unauthorised payments to clients under financial hardship and by reducing loan balances to zero and issuing new loans. A. was subsequently charged in relation to these offences and on the plea it was said that A. wished to help private persons with budgetary problems and there was no personal benefit to A. There was a delay of more than two years between interview and the time A. was charged. The sentencing judge imprisoned A. for 9 months but ordered that he be released immediately on entering into a recognisance in the sum of $1000 to be of good behaviour for 2 years and to undergo a community-based order to perform 100 hours of unpaid community work and undergo assessment and treatment for drugs or alcohol dependency or psychological treatment. Upon appeal—

HELD: Appeal dismissed.

1. Per Callaway and Eames JJ A: On appeal, the DPP was required to show that the sentencing discretion has been shown to be manifestly erroneous. Having regard to the unusual circumstances of the case, the ground of appeal was not made out.

2. Per Nettle JA: The prosecutor submitted that there is in effect a special "rule" or "practice" of sentencing that serious frauds on the revenue will result in custodial sentences of which at least some part must be served immediately. Views may differ as to whether the "rule" or "practice" rises any higher than the application of general sentencing principles to the particular considerations which apply in cases of tax and welfare fraud. Whilst general deterrence is of particular significance in such cases, the practical result or consequence is that a custodial sentence will be necessary unless the particular circumstances are sufficiently exceptional. Whilst the sentence imposed was manifestly inadequate, having regard to the delay in laying the charges, the principle of double jeopardy and the limitations inherent in a Crown appeal, it would be inappropriate for the Court to intervene.

CALLAWAY JA:

1. I have had the advantage of reading in draft the reasons for judgment prepared by Nettle JA. I agree with his Honour that the appeal should be dismissed, but I have reached that conclusion by a more direct route.

2. In *R v Osenkowski*[1], in a passage which has often been cited, King CJ said:

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform."

In my opinion this was such a case. Leniency, very considerable leniency, was extended by an experienced judge in what were accepted by the Crown to be unusual circumstances.[2] There was accordingly no departure from principle or violation of sentencing standards.

EAMES JA:

3. I have had the benefit of reading in draft the reasons of Nettle JA and I gratefully adopt his Honour's review of the facts and competing contentions on this appeal. Whilst I agree with his Honour that the appeal should be dismissed, I have reached that conclusion on the basis that the Director has failed to establish that the sentence imposed was manifestly inadequate.

4. In my view, the cases to which we were referred in which courts have made strong statements about the need for deterrent sentences in cases involving social security fraud have only limited application to this case. As Mr Silbert conceded, the circumstances of the offending in this case were unique. The judge described it as being an exceptional case and concluded that the respondent had played the role of a "self-appointed good Samaritan". The judge concluded that the respondent had not been shown to have gained any personal financial benefit from his offences. However, given that he did not use his own money to fund his "good" work, the appropriate analogy, as Mr Silbert pointed out, would have been closer to Robin Hood.

5. Although complaint was initially made that the judge placed too much weight on the untested assessment and opinion of psychologist Mr Jeffrey Cummins, no objection was taken to its tender before the judge, and in my view he was entitled to make use of it as he did. His Honour accepted that the respondent acted as a result of feeling compassionate towards the clients who attended the Centrelink office, and in circumstances where he felt responsible for dealing with difficult and often homeless and intimidating clients. Those motives do not render these victimless crimes or crimes which do not constitute a serious breach of trust. His Honour accepted that to be so and said that general deterrence was an important sentencing consideration. They were not, however, crimes of the character which have motivated the strongest statements by the courts about social security fraud.

6. Insofar as general deterrence was required to be reflected in the sentence, the deterrent message would have been primarily directed towards other government employees who held similar positions of trust. As a result of his offending this respondent lost the job he had held for more than ten years, he had been convicted of numerous serious criminal offences, and he had been ordered to make a substantial repayment by way of reparation. Facing trial and sentence he had undergone an ordeal over a prolonged period, suffering depression as a result. I am by no means convinced that those to whom the deterrent message would have been aimed would not have been suitably deterred by those consequences alone. To suggest that only a period of actual imprisonment would have sufficed to achieve that objective seems to me to overstate the reality of the case. Sentencing judges must not ignore the principles stated in s17A(1) of the *Crimes Act* 1914 (C'th) that the court *shall not* impose a sentence of imprisonment for a federal offence unless the Court, after considering all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.[3]

7. In this case Mr Silbert conceded that the sentence of nine months imprisonment which was imposed on count 1 was within range. The sole complaint was that he was not ordered to serve an immediate custodial sentence. The respondent pleaded guilty, had no prior convictions, and was accepted to be remorseful. He was in ill health, and had experienced stress whilst subject to the considerable delay that took place while the offences were investigated. The cases justifying intervention to allow a Director's appeal will be rare and exceptional[4]. That is particularly so where the offender had been released into the community by the sentencing judge and where allowing the appeal would result in his incarceration[5]. Where the discretion that has been exercised was to wholly suspend a sentence that exercise of discretion must be shown to be manifestly erroneous[6]. I am not persuaded that the sentencing discretion has been shown to have been wrongly exercised in this case.

8. The ground of appeal has not been made out, and I would dismiss the appeal.

NETTLE JA:

9. On 30 July 2004 the respondent pleaded guilty before the County Court at Melbourne to two counts of defrauding the Commonwealth contrary to s29D of the *Crimes Act* 1914 (Cth): the first against the Department of Family & Community Services[7] between 12 July 1998 and 25 August 2000 in relation to social service payments in the sum of $85,139.84 (Count 1); and the second against the Department of Family & Community between 26 March 1999 and 27 July 2000

in relation to social security payments in the sum of $7,010.00 (Count 2). After a plea in mitigation, on 10 August 2004 the judge sentenced the respondent on Count 1 to be imprisoned for a term of nine months but ordered that he be released immediately on entering into a recognisance release order in the sum of $1,000 to be of good behaviour for two years; and, on Count 2, to a community based order for one year with conditions that he perform 100 hours of unpaid community work during a period of 12 months from the date of the order and that he undergo assessment and treatment for drugs or alcohol dependency or psychological assessment treatment.

10. The Director of Public Prosecutions now appeals against the sentence pursuant to s567A of the *Crimes Act* 1958 on the ground that it is manifestly inadequate.

11. The facts of the matter may be stated briefly. The respondent was employed by *Centrelink* as a Customer Services Officer between 22 January 1990 and 20 November 2000. During the period in which the offences were committed he was located at the *Centrelink* Customer Service Centre at 123-127 Cecil Street, South Melbourne. His normal duties involved assessing benefit claims including primary claims for benefit, special benefit claims and urgent payment requests. He was also responsible for reviewing client entitlements and he conducted new claims seminars. He was a "counter officer" and the first point of contact for the public attending the Centre for urgent payment assistance. During the period between 12 July 1998 and 25 September 2000 he defrauded the Commonwealth of $92,149.84, of which $85,139.84 was paid out to 75 different *Centrelink* beneficiaries, in part in the form of excess payments of arrears, in part by the back-dating of claims, in part by the improper excuse of *Centrelink* loans, in part by the improper adjustment of overpayment debts, and in part by payment in circumstances where there was no application for or entitlement to payment. Funds were dispersed in a number of ways, including by direct credit to beneficiary bank accounts and by the issue of electronic benefits transaction cards.

12. Police began an investigation into the respondent's activities following receipt of information that he may be making unauthorised or fraudulent payments to *Centrelink* beneficiaries. The respondent was interviewed on 23 October 2000 at which time he made generalised admissions as to making unauthorised payments to clients in financial hardship and to reducing loan balances to zero and issuing new loans. He denied, however, that he had received any personal benefit from the unauthorised payments and thereafter he made no further comment.

13. A large amount of the money has since been recovered by withholding payments from ongoing entitlements and by other debt recovery procedures. There are some cases, however, in which beneficiaries have shown that they received the funds in good faith, and in those cases recovery has been waived. At the time of sentencing, $57,227.01 had been recovered, a further $21,245.60 had been waived and the outstanding sum was $29,122.83 for which a reparation order was made.

14. The judge noted that the defalcations were multifarious and that they were well concealed and difficult to detect. The judge was also of the view that the offences were clearly dishonest and involved scant regard for the protection of the revenue. But his Honour accepted that the offences were informed by the respondent's wish to help private persons with budgetary problems and were not of personal benefit to the respondent except as to the $7,010 the subject of Count 2. His Honour was also persuaded that there were significant mitigating circumstances in the delay of more than two years between the time at which the respondent was first interviewed and the time of the respondent being charged; the respondent's admissions; the respondent's pleas of guilty; his remorse; health problems; strong employment history and lack of prior convictions; the extent of recovery and the respondent's ability to repay what remained outstanding; and the strong support provided to the respondent by his wife, brothers and parents.

The Crown's contentions

15. In the Director's written outline of argument it was contended that the sentences imposed were so manifestly inadequate as to be indicative of error of principle. As the argument was there put, each of the individual sentences was in itself inadequate and the structure of the total sentence, coupled with the judge's failure to impose an immediate custodial sentence, was evidently the result of a failure to accord sufficient weight to the respondent's culpability and the need to reflect general deterrence in the sentence, particularly in light of the judge's characterisation of

the offences as well concealed and difficult to detect. It was submitted that general deterrence requires special emphasis in cases of fraud against the social security system, and that the sentence imposed on Count 1 was so disproportionate to the seriousness of the offences as to aggrieve the public conscience. It was also said that comparison with comparative sentences for substantial social security fraud demonstrated the manifest inadequacy of the sentence. Alternatively, it was contended that even if the duration of the sentence imposed on Count 1 were not manifestly inadequate, there was no basis upon which the judge could reasonably have exercised his discretion wholly to suspend the sentence.

16. Upon the appeal coming on to be argued, Mr Silbert for the Director said that it was no longer contended that a sentence of nine months imprisonment on Count 1 was outside the available sentencing range. The argument was limited, he said, to the contention that the sentence imposed on Count 1 was manifestly inadequate because of the judge's order wholly to suspend the sentence.

17. Mr Silbert submitted that there is in effect a special "rule" or "practice" of sentencing that serious frauds on the revenue will result in custodial sentences of which at least some part must be served immediately. It is expressed, he said, in a number of authorities, including the decision of the Full Federal Court in *The Queen v Whitnall*[8] and the decision of the New South Wales Court of Criminal Appeal in *R v Purdon*[9] and the decision of this court in *DPP v Milne*[10]. Mr Silbert accepted that circumstances in some cases may be so exceptional as to warrant departure from the rule, and hence result in a wholly suspended sentence. But he submitted that the circumstances of this case were clearly not of that type. To the contrary, he said, the offences here involved fraud upon the Commonwealth in respect of the relatively large sum of $90,000; they were committed over a sustained period of two years extending from 12 July 1998 to 25 August 2000; they involved the large number of 196 transactions and 75 separate beneficiaries; they were exacerbated by concealment; and they were plainly dishonest and committed with scant regard for the protection of the revenue which it was the respondent's duty to protect. In Mr Silbert's submission, the correct application of principle necessitated a custodial sentence, of which some part should be served immediately, and the judge had plainly erred by wholly suspending the sentence without any or adequate reason for the adoption of that course.

The respondent's contentions

18. Not surprisingly, the submissions made on behalf of the respondent emphasised that Crown appeals are to be brought only in rare and exceptional cases to establish a point of principle; the need for the Crown to demonstrate specific error; and, in the absence of an identifiable error, the very high threshold over which the Crown must pass in order to show that the sentence is so manifestly inadequate as to constitute error of principle. Mr Croucher also repudiated the suggestion that there is a special rule or practice of sentencing applicable to social security frauds. Indeed, he said, the very idea of it flies in the face of sentencing principles properly understood. In the alternative, Mr Croucher emphasised the principle of double jeopardy as it applies to Crown appeals and the consequent imperative that it is only in very clear and rare cases of manifest inadequacy or error that a Crown appeal against sentence should be allowed. He called in aid the decision of this court in *Director of Public Prosecutions v Trainor and Cahir*[11] as support for his contention.

19. In *Trainor and Cahir* the offenders were the directors of a mailing house and were convicted of defrauding the Commonwealth of $750,000 over a period of 12 months. They had done so by causing bulk mail to be delivered to Australia Post for distribution without submitting any mailing statements either at the time of lodgement of the mail or at all. As the mailing house was a charge account customer, Australia Post relied on the mailing statements in order to charge the correct postage on the mail lodged. Since the returns were not submitted, nothing or less than was due was charged. Each offender was ordered to make reparation in the sum of $750,000 and sentenced to be imprisoned for a term of 18 months. But it was further ordered that each be released immediately pursuant to s20(1)(b) of the *Crimes Act* 1914 upon entering into a recognizance in the sum of $5,000 to be of good behaviour for a period of 18 months. The Director of Public Prosecutions appealed against the sentences on the ground of manifest inadequacy, but the appeal was dismissed. Batt JA, with whom Callaway JA agreed, rejected the contention that the sentences were manifestly inadequate and was persuaded that it was open to the judge to order immediate release. His Honour considered that the order for immediate release was warranted by

the facts that there had been a delay of more than two years between interviewing the offenders and charging them; that the offenders had continued to carry on their business honestly and successfully; that a large measure of reparation had been commenced; that the offending was out of character; and that each offender was said to have achieved a large degree of rehabilitation and had excellent prospects for further rehabilitation. Callaway JA added that it was in his opinion just the kind of case in which a court of criminal appeal should not intervene,[12] for he considered that the trial judge's sentencing remarks contained a careful and discriminating assessment of the relevant facts and circumstances and that, while the sentence was "undoubtedly merciful" [13], mercy did not necessarily betoken error. Tadgell JA was persuaded that the sentences were manifestly inadequate, given that the offences were constituted of deliberate deceit over a protracted period and "on a grand scale", and his Honour would have sentenced the offenders to at least half as much again. But he would not have been prepared to direct by way of re-sentence that any part of a term newly imposed should be served immediately. In his Honour's view, the delay since the commission of the offences and the fact that the offenders had avoided incarceration to that point meant that it would [not] be appropriate to inflict incarceration upon them.

20. Mr Croucher submitted that very similar considerations apply in this case. There was a long delay between the commission of the offences and the laying of charges; there has been no satisfactory explanation of that delay; the offending was aberrant; and the respondent has excellent prosects of rehabilitation and of satisfying the reparation order. What is more, whereas the offenders in *Trainor & Cahir* had profited to the extent of $750,000, the respondent here got nothing. So, he submitted, even if the sentence were manifestly inadequate, it would be inappropriate to direct by way of re-sentence that any part of the term newly to be imposed should be served immediately.

Social security fraud and custodial sentences

21. In *R v Carter*[14] Winneke P warned that ritual incantations such as "serious frauds on the revenue will result in custodial sentences" are of little practical value, because "serious" must inevitably depend upon the finding of the sentencing judge in the case under consideration. With respect that is undoubtedly true. Plainly, there are cases, particularly in the area of social security fraud, where the mitigating circumstances render the imposition of a custodial sentence both cruel and excess to needs. Such is the inevitable consequence of the nature of social security payments and the difficult personal circumstances of those who most often claim them. Hence, as it is put in Fox & Freiberg[15]:

> "Standard mitigatory factors such as the making of restitution and an early plea and co-operation with the authorities, have application to social security offences as to others, but some may carry more weight in this context than in others. Thus, social security offenders may be more likely to carry significant financial commitments or face serious financial difficulties, be more insecure in their employment and fear the consequences of loss of their allowances and benefits, suffer from ill-health and have a generally disadvantaged background. The effect of imprisonment on the beneficiary's family may be greater than is usual, if they are sole parents or are taking care of aged parents. Many of those charged with the most serious offences, particularly where the offences have been carried out over a long period of time, are considerably older than the average offender. Females represent over 40 per cent of offenders in the higher courts, a far higher proportion than that for offences generally."

22. It is nevertheless often said in the authorities, albeit often in vain[16], that those who commit serious frauds against the revenue should be punished with custodial sentences and that such sentences should include a period actually to be served.[17] Decisions of the Federal Court and of the various state courts do indeed support the existence of a "rule" or "practice" that those who commit serious frauds on the revenue should be punished with custodial sentences and that, especially in cases involving tax and welfare fraud, the sentence should include a period actually to be served.

23. So, for example, in *R v Whitnall*[18], which concerned offences of tax evasion over a four year period totalling $74,667.14, Higgins J, with whom Davies and Drummond JJ agreed, expressed the rule or practice in terms that:

> "At least, so far as the Courts are concerned, serious frauds on the revenue will result in custodial sentences. In the absence of "substantial mitigating circumstances", that sentence will include a period actually to be served."

Significantly, however, they held that the trial judge had not erred in imposing a wholly suspended sentence.

24. Similarly, in *R v Purdon*[19], which concerned fraudulent claims resulting in the over-payment of social security benefits over a period of years totalling approximately $87,000, Hunt CJ at CL expressed the proposition thus:

> "The [sentencing] judge did not refer expressly in his remarks on sentence to the strongly worded statements of this Court that make it clear beyond any doubt that, in the case of a fraud upon the social security system, a custodial sentence is to be imposed unless there exist very special circumstances justifying some lesser order. It is unnecessary to refer to the very many judgments which have re-stated and applied that proposition. It is sufficient to refer only to three: *R v Van Tung Luu* (CCA, 7 December 1984, unreported) at 3; *R v David Fernanda Medina* (CCA, 28 May 1990, unreported) at 4; *R v Mear*s (1991) 53 A Crim R 141 at 145. An attempt was made to distinguish those cases by reference to their facts, but those statements made were intended to go beyond the facts of those particular cases and to be of universal application. In my view, it is too late to challenge those statements now."

Then after referring to the particular circumstances of the case, his Honour continued:

> "There were indeed compelling subjective circumstances shown in this case. The manifest inadequacy of the sentence imposed, however, demonstrates that the judge must have acted upon some wrong principle or upon a misunderstanding or a wrong assessment of the evidence: *R v Tait* (1979) 46 FLR 386; (1979) 24 ALR 473 at 476-477. The judge has paid no regard at all to the principle of deterrence, which is of vital importance in these cases. I am unable to see how the matters specified by him could amount to `very special circumstances which would justify a non-custodial sentence'. The rationale stated for the rule that a custodial sentence is to be imposed for social security fraud except in very special circumstances is that the offence is easy to commit but difficult to detect, it is widespread, and the introduction of more checks upon applicants for social security would cause delays in the payment of benefits and therefore hardship to those whose need is urgent. It has also been said that the rule reflects a concern for the protection of the revenue, but I would prefer to express it as a concern for the additional burden upon all taxpayers who shoulder the heavy burden of providing the funds for the social security system to operate and the even heavier burden created by the widespread abuse to it by frauds such as these. The rule is *not* based upon the fact that many of the frauds are perpetrated for motives of greed rather than need. Both types of fraud are widespread. They are equally difficult to detect. If the fraud is based upon a perceived need, a custodial sentence must be expected except in very special circumstances. If the fraud is based on greed, the custodial sentence will be longer. See *R v David Fernanda Medina* (at 6); *R v Mear*s (at 145)."

25. In much the same way, in *R v Milne*[20], which involved the fraudulent receipt of social security payments over a period of more than 18 years totalling more than $170,000, this court held to be manifestly inadequate a wholly suspended sentence of nine months and increased the sentence to a total effective sentence of two years of which the first six months were to be served in prison. Winneke P analysed the relevant considerations in these terms:

> "12. In circumstances where extensive frauds on the welfare system have been perpetrated over a long period, a significant purpose of punishment must, in my view, be general deterrence. Such purpose of punishment will ordinarily be influential both in the fixing of appropriate sentences for the crimes committed and in fixing a point at which the prisoner is to be eligible for release. Although, as has been pointed out on behalf of the respondent, there were powerful factors to be taken into account on her behalf in mitigation of punishment - particularly her otherwise good character, her pleas of guilty, her physical health and the fact that she had made restitution - I am nevertheless driven to the conclusion, from the nature of the sentences imposed, that her Honour has given far too little weight to the notion that a strong message must be sent to members of the community, who are minded to engage in systematic cheating of the welfare system of the type in which the respondent has engaged, that such conduct will not be tolerated by the courts. This Court has tried to get this message across in many cases of long-running and substantial frauds on the revenue, which have frequently been misdescribed as "victimless crimes". For my own part, it seems to me that the sentences imposed by her Honour - particularly those imposed on counts 3, 4 and 5 - wholly fail to incorporate that message, and accord disproportionate weight to the matters urged in mitigation..."

Then after referring to the considerations which the trial judge had treated as being sufficiently exceptional to suspend the sentence, Winneke P continued:

> "13. ... I do not intend to suggest that in every case where a person has fraudulently obtained benefits

> for extensive periods and has done so in the absence of pressing need, that the court imposing sentence is inevitably to regard principles of deterrence as of paramount importance in the sense that actual imprisonment must be ordered. What I do suggest, however, is that ordinarily in such cases, that will be so. In speaking of sustained and deliberate social security frauds over lengthy period, King CJ said – in *R v Cameron & Anor.* – that 'the deterrent purpose of punishment must be paramount'. His Honour said (at p307) that:
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> > '... the courts have a great responsibility to protect the integrity of the social security system by imposing punishments for deliberate and sustained fraud which are likely to operate as a deterrent to others who may be tempted ... . It is necessary for the courts to send, and consistently send, a clear signal to all who might be so tempted, that sustained and deliberate fraud upon the system will mean going to gaol.'

In the subsequent case of *Kovacevic*, the South Australian Court of Criminal Appeal, sitting as a court of five judges, reviewed the remarks made by King CJ in *Cameron's* case. The majority said[21] that they could not 'fully subscribe' to 'one aspect of what King CJ had said' – namely that, in all cases of sustained and deliberate fraud, general deterrence must be paramount. Rather, so the majority said that 'in cases of sustained and deliberate fraud, deterrence must loom large in determining the appropriate sentence. But other matters, specially rehabilitation, must be considered.' The majority concluded:

> 'In our opinion the proper approach to sentencing is better reflected by saying that, in a case of the type referred to by King CJ, an order for imprisonment, with at least some of the imprisonment actually to be served is ordinarily likely to be required.'

As I have said, I agree with these remarks. An actual sentence of imprisonment is ordinarily likely to be required in cases of sustained and deliberate cheating of the social welfare system because it is unlikely that mitigating factors will be of sufficient significance to outweigh the primary purpose for imposing sentence in such cases, namely general deterrence. But that is not to say that there will not be the exceptional case where such factors exist. However, here, the factors do not seem to me to be exceptional."

26. Views may differ as to whether the "rule" or "practice" rises any higher than the application of general sentencing principles to the particular considerations which apply in cases of tax and welfare fraud. I think that that is the preferable way of looking at it. As Hunt CJ at CL said, the rationale of the "rule" is that social security fraud is easy to commit and widespread but difficult to detect, and that the introduction of more checks upon applicants for social security would cause delays in the payment of benefits and therefore hardship to those whose need is urgent, as well as the need to protect the revenue. More or less the same may be said of the observations of Higgins J about tax evasion. In terms of sentencing principle therefore, the point is that general deterrence is of particular significance in cases of tax and welfare fraud. But the practical result or consequence is that a custodial sentence will be necessary unless the particular circumstances are sufficiently exceptional.

27. I am also inclined to doubt that the "rule" is applicable to the facts of this case. This was not a case of social security fraud in the usual sense. By and large the applicant was not in it for himself. And as Eames JA observed in the course of argument, there is nothing before us which suggests that the sort of offences committed by the applicant are widespread or difficult to detect, or that audit or other appropriate safeguards against repetition of such offences would slow down the delivery of social security payments. No doubt fraud of the kind committed by the applicant is just as much a drain on the revenue as would be fraud by the recipients of the payments. Whether the fraud is organised by the recipient or a welfare officer really makes no difference to the cost. But unless offences of the kind committed by the applicant are prevalent, the effect on the revenue may not be great in relative terms. In the absence of evidence of particular prevalence,[22] it is difficult to see why fraud of the kind committed by the applicant should be approached any differently to fraud committed by any other trusted employee on any other employer. Indeed, as Mr Croucher submitted, the general principle of parity in sentencing implies that it should not be.[23]

The sentence imposed was manifestly inadequate

28. Be that as it may, I consider that the sentence imposed on Count 1 was manifestly inadequate. With all respect to the learned and very experienced sentencing judge, and despite

what was said by the majority in *Trainor and Cahir,* I am unable to accept that a wholly suspended term of imprisonment of only nine months is near to adequate penalty for a fraud by a trusted operative involving almost $90,000 perpetrated over a period of two years. Regardless of whether the "rule" applies to this case, the respondent's offences were "serious". He systematically defrauded the Commonwealth of more than $90,000 over a period of more than two years in flagrant breach of the duties of trust and loyalty which he owed to the Commonwealth as his employer.

29. It is true that he may not have profited to any great extent. But in the circumstances of this case I do not think that to be particularly significant. He was not a social security claimant pressed by the exigencies of a wretched existence to seek more than his legal entitlement. Nor was he facing serious financial difficulties or insecure in his employment or fearful of the loss of allowances or suffering from ill health or a disadvantaged background. Nor was he like the taxpayer in *Carter* who was in such straightened financial circumstances that he succumbed to the temptation of "deferring" the payment of tax in order to keep his business afloat. The respondent was employed in a secure and relatively well paid position, as a servant of the Commonwealth, whose appointed function and duty was to ensure that benefits went to claimants who were entitled to receive them and that benefits did not go to those who were not entitled to them.

30. I am also unimpressed by the contention that he acted altruistically out of a misplaced sense of wishing to help the disadvantaged. It is altogether too easy to be generous at the expense of an employer and then claim that no vice attaches; and for the respondent to procure the payment of benefits to persons whom he knew not to be entitled to receive them was to procure the very thing that he was entrusted to guard against. That means that he acted in breach of the trust that he knew that the Commonwealth placed in him, and that implies a high degree of culpability compared to the sorts of offenders that warrant merciful sentences.

31. The judge below referred to all of the matters that might be thought to bear upon the sentence to be imposed. Evidently, his Honour gave careful consideration to the factors put forward as mitigating circumstances and he referred to the relevant sentencing principles and principal relevant authorities. I acknowledge with respect that I am unable to detect any specific error apparent in his Honour's sentencing remarks. I am also acutely conscious of the principle that it is only in very clear and rare cases of manifest inadequacy or error that a Director's appeal should be allowed.[24] Obviously, it is not enough to take a different view as to the way in which the sentencing discretion might have been exercised. Nor is there warrant to intervene if the sentence which might be imposed upon re-sentencing would be limited by the principle of double jeopardy to a sentence close to the original sentence.[25]

32. In the scheme of things there may not be many cases in which it is properly open to a judge to impose a sentence of imprisonment so short that it can be suspended and yet in which the suspension of the sentence will render the sentence manifestly inadequate. Ordinarily, the propriety of so short a short sentence will imply that a suspended sentence is within the available sentencing range. This case is one of the exceptions. The point has already been made that those who commit serious frauds against the revenue should be punished with custodial sentences and such sentences should include a period actually to be served. To that may be added that the deterrent and punitive effects of the sentence should not be unduly diminished by allowing release from custody and an unduly early stage.[26] And whether or not the "rule" applies in this case, the result is much the same. Despite the factors which the learned judge took into account as mitigating circumstances, and his Honour's careful attention to ss16A and 20(1)(a) of the *Crimes Act* 1914, I consider that his Honour erred in not requiring the respondent to serve at least part of the nine months imprisonment before being released.

Double jeopardy and delay

33. That having been said, it is impossible to escape the limitations inherent in a Crown appeal and which result from the fact that there has been considerable delay on the part of the Commonwealth (for which the respondent was not responsible) in prosecuting the matter to trial. As has already been noticed, the respondent was first interviewed in October 2000 and in broad terms he admitted the offences at that time. Once the principle of double jeopardy is brought to bear upon the small difference[27] between wholly and partially suspended sentences of only nine months' imprisonment, and bearing in mind the delay, I consider that it would be inappropriate for this court to intervene.

Conclusion

34. Consequently, and despite that the sentence imposed was in my opinion manifestly inadequate, I would dismiss the appeal.

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[1] (1982) 30 SASR 212 at 212-213; (1982) 5 A Crim R 394.
[2] I enter this caveat: if it proves that Robin Hoods are widespread in the social security system, such leniency may not be available in future. It may have to give way to the requirements of general deterrence.
[3] The principle of sentencing as a last resort is also enshrined in ss5(3) and 5(4) of the *Sentencing Act* 1991. Whether s5(4) is directed to the choice between imposing a suspended and an unsuspended sentence has been doubted (see *R v Haddara* (1997) 95 A Crim R 108, at 111, per Callaway JA) but, in my view, the principle of imprisonment as a last resort is an appropriate one to adopt by sentencing judges irrespective of any statutory mandate, and would appropriately be applied when considering whether to impose a term of actual imprisonment and partial suspension, on the one hand, or total suspension of a sentence of imprisonment, on the other hand (or, in the case of a Commonwealth offence whether to release the offender immediately on a recognisance release order).
[4] See *DPP v Johnstone* [2004] VSCA 150, at [27]; (2004) 10 VR 85.
[5] See *R v Clarke* [1996] VICSC 30; [1996] VicRp 83; [1996] 2 VR 520 at 522; (1996) 85 A Crim R 114.
[6] *Johnstone*, at [28].
[7] Formerly, the Department of Social Security.
[8] [1993] FCA 271; (1993) 42 FCR 512 at 519; 120 ALR 449; 68 A Crim R 119; 25 ATR 506.
[9] NSWCCA 27 March 1997, BC 9700950.
[10] [2001] VSCA 93.
[11] [2000] VSCA 249.
[12] He referred in particular to the observations of Kirby J in *Dinsdale v R* [2000] HCA 54; (2000) 202 CLR 321 at 343 [68]-[69]; (2000) 175 ALR 315; (2000) 74 ALJR 1538; (2000) 115 A Crim R 558 and the remarks of King CJ in *R v Osenkowski* (1982) 30 SASR 212 at 212-213; (1982) 5 A Crim R 394.
[13] *Dinsdale v R* [2000] HCA 54; (2000) 202 CLR 321 at 329 [18]; (2000) 175 ALR 315; (2000) 74 ALJR 1538; (2000) 115 A Crim R 558 per Gleeson CJ and Hayne J.
[14] [1998] 1 VR 601 at 606; (1997) 91 A Crim R 222; (1997) 35 ATR 18.
[15] Fox & Frieberg, *Sentencing, State and Federal Law in Victoria*, 2nd Ed. at [12.1008].
[16] *R v Kopievsky*, Vic. CCA, 20/9/1994; BC9401297 at 6.
[17] *R v Whitnall* [1993] FCA 271; (1993) 42 FCR 512 at 519; 120 ALR 449; 68 A Crim R 119; 25 ATR 506; *R v Wright* [1994] QCA 16; (1994) 74 A Crim R 152 at 153; *DPP v Carter* [1998] 1 VR 601 at 610 and 611; (1997) 91 A Crim R 222; (1997) 35 ATR 18.
[18] [1993] FCA 271; (1993) 42 FCR 512 at 519; 120 ALR 449; 68 A Crim R 119; 25 ATR 506.
[19] NSW CCA 27 March 1997, BC 9700950.
[20] [2001] VSCA 93 at [12] and [13], citations omitted.
[21] At p138.
[22] As to the significance of which, as a matter of principle, see: *R v Downie and Dandy* [1998] 2 VR 517 at 520-522; (1997) 95 A Crim R 299; cf. *R v Lim & Ko* [1998] VSCA 54 at [34].
[23] *R v Omer* Vic CA 15/2/96, BC9600318 at 8-9.
[24] *DPP v Leach* [2003] VSCA 96; (2003) 139 A Crim R 64 at [48]; *DPP v Johnston* [2004] VSCA 150 at [26]; (2004) 10 VR 85.
[25] *R v Boxtel* [1994] VicRp 54; [1994] 2 VR 98 at 104-5; (1993) 70 A Crim R 400.
[26] *R v Nguyen and Phan* [1996] VICSC 38; [1997] 1 VR 386 at 389; (1996) 86 A Crim R 521.
[27] In absolute terms.

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