31/09; [2009] VSC 584

SUPREME COURT OF VICTORIA

DPP (CTH) v MORONEY & ORS

T Forrest J

26 November, 18 December 2009

SENTENCING – WELFARE FRAUD – EACH OFFENDER RELEASED ON A S19B BOND – WHETHER APPROPRIATELY USED IN CASES OF WELFARE FRAUD – TWO-STAGE PROCESS IN SENTENCING – NATIONAL SENTENCING PATTERNS FOR S135.2 – *CRIMINAL CODE* 1995 (CTH) – FAILURE TO PROVIDE REASONS – REFUSAL OR FAILURE TO ALLOW PROSECUTION TO MAKE SUBMISSIONS ON SENTENCE – WHETHER PROCEDURAL UNFAIRNESS – WHETHER SUPREME COURT SHOULD INTERVENE DESPITE MANIFEST INADEQUACY OF SENTENCES IMPOSED: *CRIMES ACT* 1914 (CTH), SS16A, 19B.

Four accused were charged in the Magistrates' Court with and pleaded guilty to receiving a financial advantage from the Commonwealth whilst knowing or believing they were not eligible to receive it. In each case all accused initially received the benefit legitimately but through a change of circumstances were either disqualified completely or partially from eligibility for that benefit. All accused were discharged under s19B of the *Crimes Act* 1914 (Cth) ('Act') without conviction. Details are as follows:

Moroney: Paid $29,725.09 to which she was not entitled. Repaid $2812.00. Suffered from a Major Depressive Disorder, a speech impediment and totally deaf in one ear and partially deaf in another. The prosecutor was afforded no opportunity to make submissions on penalty.

Vincent: Paid $32,050.03 to which he was not entitled. Made no restitution. Had lived an unfortunate life and suffered from ADHD, chronic depression and a significant Post-traumatic Stress Disorder. The prosecutor was precluded from being heard on the question of penalty, the Magistrate stating that it was "a minor matter".

Mahon: Paid $34,792.36 to which she was not entitled. Made full restitution and was studying for a Bachelor of Nursing degree.

Wright: Paid $33,208.80 to which she was not entitled. Repaid $750. The prosecutor was afforded no opportunity to make submissions on penalty.
During the sentencing process, no Magistrate referred to the two-stage nature of a s19B consideration. Upon appeal—

HELD: Each appeal dismissed.
1. It is beyond doubt that s19B(1) of the Act provides for a two-stage process. First is the identification of a factor or factors of the character specified in sub-paras (i) (ii) and/or (iii) of the paragraph. The second stage is the determination that, having regard to the factor or factors so identified, it 'is expedient to inflict any punishment' or to reach the other conclusions for which the paragraph provides. The factors relevant to the second stage of the process (i.e. whether it is inexpedient to inflict punishment other than nominal punishment) are the factors that ordinarily arise upon a consideration of s16A of the Act together with the aspect of general deterrence. Expressing it another way, whilst a person may qualify for s19B consideration if a court is satisfied of one or more of the s19B(1)(b) factors, the court may not proceed further to exercise that discretion in a person's favour until it considers the wider factors that ordinarily are taken into account on sentence. Only then if it appears "inexpedient" to punish or punish more than nominally would a s19B order be made.
***Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; 164 FLR 375; (2001) 192 ALR 92; (2001) 122 A Crim R 568; 48 ATR 76, applied.**

2. The test to be applied when considering a s19B disposition is that there must be something that clearly distinguishes the circumstances of the offence under consideration from the typical offence, or circumstances of an unusual nature personal to the defendant, before s19B can be properly involved in dealing with this particular offence. Further, there must be something which clearly distinguishes the particular breach of the section under consideration from what may be regarded as a typical breach of the section.
***Kelton v Uren* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534, applied.**

3. In relation to the argument that no Magistrate mentioned the two-stage process expressly or implicitly during the sentencing process, it did not automatically lead to the conclusion that that factor was ignored. Section 19B dispositions are not obscure orders exercised on the most exceptional

of occasions. They are, in fact, the only avenue that a Magistrate has to a non-conviction disposition in the Commonwealth jurisdiction and exercised frequently enough to justify their own form in Schedule 3. Magistrates consider this section frequently and an appellate court ought be slow to conclude in the absence of clear evidence to the contrary, that a fundamental process in the exercise of a s19B disposition has been overlooked.

4. In relation to the argument that the sentences were manifestly inadequate, each of the offences committed by the accused ought be considered relatively serious examples of criminal misconduct. Repeated false representations were made over an extended period of time, resulting in each case in a significant dishonest benefit to the particular recipient and an imposition on the revenue. However, none of the cases fell into a grave or particularly serious category. The amounts involved were insufficient for that to be the case and all accused at least at the outset were entitled to receive benefits. Having said that, the offences were serious enough to require that general and specific deterrence be carefully considered and not lightly set aside.

5. In relation to the cases of Moroney and Vincent, both satisfied the first stage of the two-stage process in respect of character, antecedents, age and mental condition and probably also established that their offending was committed under extenuating circumstances. When looked at more broadly (the second stage), their personal circumstances, when weighed with the nature of their offending, the need for general and specific deterrence and the other s16A factors, it may have been open to a Magistrate to use s19B. Their really substantial mitigating personal circumstances were capable of placing them in the 'atypical' category.

6. In relation to the cases of Mahon and Wright, neither were able to call upon circumstances which reasonably satisfied either the first stage of the test let alone the second. Neither accused's circumstances placed them in the unusual or atypical category and the Magistrates' decision in each case showed a manifest inadequacy so as to constitute error in principle.

7. National patterns of sentencing demonstrate with some clarity that s19B is being very widely used in Victoria in the context of welfare fraud and probably overused.

8. In relation to the argument that having regard to the failure by the Magistrates to provide reasons for their decisions, these failures were of sufficient magnitude so as to amount to an error of law.

9. It is highly desirable that Magistrates sitting in the criminal jurisdiction offer reasons for their determinations. These reasons need not be lengthy or elaborate, but they should explain in concise terms the relevant evidence relied upon, reasons for findings of fact and any application of law to those facts. In sentencing remarks this will normally amount to no more than a few sentences. In all four hearings, the Magistrates should have offered reasons for imposing s19B orders. As has been observed, a s19B disposition is an atypical disposition (if not an exceptional one). Section 19B orders are reserved for cases where it is "inexpedient "that there be punishment beyond "nominal" punishment. The offences are on any view serious enough. Where an atypically lenient disposition is being imposed for a relatively serious offence, the parties and the public are entitled to know why. Accordingly, it was highly desirable that the sentencing Magistrate in each case set out at the very least the following:

(a) A brief explanation of the two-stage test;

(b) Which factors satisfied him that he had a discretion to impose a s19B order (i.e. the first stage factors);

(c) Which factors persuaded him that he ought exercise that discretion in the defendants' favour (i.e. all the factors in the sentencing mix that led him to the conclusion that this was a case that called for no or nominal punishment).

10. Whilst these omissions to give reasons were of a significant nature, they did not constitute a miscarriage of justice such as to vitiate the proceedings.

11. In relation to the Magistrate's refusal to allow the prosecutor to be heard on the question of penalty, not only was the Magistrate wrong in characterising the matter as 'minor' he also erred in refusing to hear the prosecutor on penalty. In those circumstances there was a fundamental denial of procedural fairness.

12. When one considers all of the circumstances including the factors personal to the accused and with the aspect of double jeopardy (and triple jeopardy if the cases are remitted to the Magistrates' Court) it was appropriate for the Supreme Court not to intervene.

T FORREST J:

1. The Director of Public Prosecutions (Cth) brings four appeals by way of s92 of the *Magistrates Court Act* 1989 (Vic). In each case the respondent pleaded guilty to contraventions of s135.2 of the *Criminal Code* 1995 (Cth). Essentially each respondent received some form of Commonwealth benefit in circumstances where he or she was not entitled to same and all by their pleas admitted they received that financial advantage whilst knowing or believing they were not eligible to receive it. It seems that all respondents initially received the benefit legitimately, but through a change of circumstances were either disqualified completely or partially from eligibility for that benefit. All respondents were discharged under s19B of the *Crimes Act* 1914 (Cth) ('*Crimes Act*') without conviction.

2. Is it important to bear steadily in mind that each appeal is a separate proceeding requiring individual consideration. It would be unfair and erroneous to allow the circumstances of one appeal to infect another. Similarly there cannot be any accumulation of errors beyond each individual appeal.

Background

3. Ms Moroney was 43 when she appeared at the Magistrates' Court at Frankston on 17 March 2009. She had claimed the Newstart Allowance for a lengthy period. From 18 May 2005 to 7 March 2007 she had engaged in part-time employment. She informed Centrelink of her employment but under-declared her earnings by over $54,000. As a consequence she was paid $29,725.09 to which she was not entitled. She has repaid $2812.00 as part of a reparation program.

4. She had no prior convictions, pleaded guilty at an early stage and a psychological report was tendered during a short plea. The Magistrate accepted and acted upon its contents. Ms Moroney was totally deaf in one ear and partially deaf in another. She suffered from a speech impediment and had been sexually and physically abused by her father as a child. She had raised two children but now lived alone and suffered from a Major Depressive Disorder traceable to her childhood experiences. I regard the mitigatory material in this appeal as compelling.

5. Mr Vincent was 50 when he appeared at Frankston Magistrates' Court on 19 March 2009. Over a period of two years and five months he had claimed a Disability Support Pension whilst carrying out paid employment. As a consequence he was paid $32,050.03 to which he was not entitled. He had made no restitution. He had no prior convictions, pleaded guilty at an early stage and two unsigned psychiatrists letters[1] were tendered as part of the plea. They disclosed that Mr Vincent had lived an unfortunate and unstable life, suffered from ADHD, chronic depression and a significant Post-traumatic Stress Disorder. Mr Vincent's solicitor directed the Magistrate to a litany of misfortune that had befallen his client. This included periods of homelessness and great social isolation. Again I regard the mitigatory material in this appeal as compelling.

6. Ms Mahon was aged 40 when she appeared at the Sunshine Magistrates' Court on 7 April 2009. Over a period of two years and eight months she received Single Parents Benefits whilst living in a "marriage like relationship".[2] She had derived a benefit of $34,792.36 to which she was not entitled. She had made full restitution as a result of obtaining a bank loan and was studying for a Bachelor of Nursing degree at university. It was asserted by her counsel that a conviction may impact upon her future nursing career. She had two children aged twelve and nine. Her plea was made at an early stage.

7. Ms Wright pleaded guilty to two contraventions of s135.2(1) of the *Criminal Code* (Cth). She was 29 when she appeared at Dandenong Magistrates' Court on 26 June 2009. Over two separate periods totalling thirty eight months,[3] she received the "Parenting Payment Single" whilst employed on a full-time basis by a large retailer. She was thus disentitled to the $33,208.80 so received. She was unrepresented, presented little by way of mitigatory material but expressed contrition when invited to address the Court. She was a mother of three and received minimal maintenance from the children's father. She had entered into a repayment arrangement and had so far repaid $750.00. She remained in work.

8. All hearings were short. The transcripts do not provide any indication of actual time taken, but a reading of them shows that it is doubtful whether any of these hearings took longer than ten minutes. In my estimate the actual pleas presented on behalf of each of the three represented

respondents took in the range of one to four minutes. The plea of the unrepresented respondent (Ms Wright) was equally brief. No oral evidence was called in any matter – a reference was handed up on behalf of Ms Mahon and the previously mentioned psychiatric/psychological material was placed before the court in two of the hearings.

9. In no case did any legal representative advert to the "two stage" nature of any s19B consideration[4] and certainly no Magistrate referred to it. In two of the four hearings the prosecutor sought to be heard on penalty, although in Mr Vincent's case the prosecutor was precluded from doing so. I shall return to these aspects when considering the Appellants' grounds of appeal.

10. In each case the Magistrate was required to prepare an "Order and Recognisance Under sub-s19B(1)".[5] Various entries need to be made to the blank pro-forma document before it is ready for signature by both the Magistrate and Defendant. In particular after describing the terms of the order and the charges themselves a Magistrate is confronted with these words:

"And the court is satisfied that the charge(s) are proved, but is of the opinion, having regard to:
.....
that it is inexpedient to inflict *any punishment/*any punishment other than a nominal punishment
Dated....."

In all four cases after the words "having regard to:" each Magistrate had entered the words "THE CHARACTER, ANTECEDENTS, AGE, HEALTH, MENTAL CONDITION". No other words were entered in that particular section in any of the four completed Order and Recognisance forms.

11. The Appellant relied upon affidavits from the Principal Registrar of the Magistrates' Court of Victoria, which explained the steps a Magistrate must undertake after determining in his/her mind that a s19B order is appropriate:

> *C. "A magistrate must enter orders into the Courts electronic database in accordance with directions in the Courtlink Order Entry Manual.... The pro-forma entries which a magistrate may select from when determining the reasons for making an order pursuant to s19B of the Crimes Act 1914 (Cth) are outline CHARACTER, ANTECEDENTS, AGE, HEALTH, MENTAL CONDITION*
> E. *EXTENUATING CIRCUMSTANCES SURROUNDING THE OFFENCE*
> T. *TRIFLING NATURE OF THE OFFENCE"*[6]
> U

I understand that when drawing up an order a Magistrate would "press the C" key and all the "C" characteristics set out above would appear in the order and similarly with the E and T keys. It is unclear whether a Magistrate could exclude any of the characteristics under "C" if inappropriate.

The Director's Appeal

12. The Notices of Appeal set out seven grounds of appeal for the Respondents Moroney, Vincent and Wright. They are as follows:

> (1) The learned Magistrate failed to properly apply the two stage test required by s19B(1)(b) of the *Crimes Act* 1914 (Cth).
> (2) The learned Magistrate failed to properly exercise his discretion under s19B(1)(b) of the *Crimes Act*.
> (3). The sentence imposed was not reasonably open to the Magistrate in all the circumstances of the case.
> (4) The learned Magistrate failed to provide adequate reasons for the sentence imposed.
> (5) The sentence imposed was manifestly inadequate.
> (6) The sentence imposed was inconsistent with the sentencing pattern for like matters across the Commonwealth.
> (7) (Vincent): The learned Magistrate erred in the exercise of his discretion in failing to permit the solicitor who appeared on behalf of the informant to be heard on whether or not it was either open or appropriate, in all the circumstances of the case, to make an order under s19B of the *Crimes Act*.
> (7) (Moroney): The learned Magistrate erred in the exercise of his discretion in failing to afford the solicitor who appeared on behalf of the informant any opportunity to make any submissions concerning the appropriate sentence which might be imposed in all the circumstances of the case, and whether or not it was either open or appropriate, in all the circumstances of the case, to make an order under s19B of the *Crimes Act*.
> (7) (Wright): This ground repeats the Moroney Ground 7 in all material aspects.

Ms Mahon is the subject of the first six grounds all identical to grounds one to six in the other appeals.

13. Essentially the Appellants' arguments can be divided into three:

(a) Did the relevant Magistrate fail to apply the two stage test and so fail to properly exercise his discretion under s19B(1)(b) of the *Crimes Act* (Grounds 1 and 2);

(b) Was the relevant sentence imposed manifestly inadequate in all the circumstances (Grounds 3, 5, and 6);

(c) Was there a denial of procedural fairness in the cases by
(i) the failure to provide reasons (all appeals Ground 4)
(ii) the failure to permit or afford an opportunity for the prosecutor to be heard (Moroney, Vincent, Wright) (Ground 7 in its various forms).

Failure to apply the 'two stage process'

14. Mr Gurvich, at the commencement of a helpful submission, accepted that grounds one and two essentially were directed at the one argument – that is that *Crimes Act* s19B dispositions require that the sentencing Magistrate embark upon a two stage process of reasoning before a s19B order can be made, and in all cases this process did not occur.[7] Section 19B relevantly provides:

Discharge of offenders without proceeding to conviction

19B (1) Where:
(a) a person is charged before a court with a federal offence or federal offences; and
(b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:
(i) the character, antecedents, age, health or mental condition of the person;
(ii) the extent (if any) to which the offence is of a trivial nature; or
(iii) the extent (if any) to which the offence was committed under extenuating circumstances;
that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;
the court may, by order:
(c) dismiss the charge or charges in respect of which the court is so satisfied; or
(d) discharge the person, without proceeding to conviction in respect of any charge referred to in paragraph (c), upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with the following conditions:
(i) that he or she will be of good behaviour for such period, not exceeding 3 years, as the court specifies in the order;
(ii) that he or she will make such reparation or restitution, or pay such compensation, in respect of the offence or offences concerned (if any), or pay such costs in respect of his or her prosecution for the offence or offences concerned (if any), as the court specifies in the order (being reparation, restitution, compensation or costs that the court is empowered to require the person to make or pay):
(A) on or before a date specified in the order; or
(B) in the case of reparation or restitution by way of money payment or in the case of the payment of compensation or an amount of costs--by specified instalments as provided in the order; and
(iii) that he or she will, during a period, not exceeding 2 years, that is specified in the order in accordance with sub-paragraph (i), comply with such other conditions (if any) as the court thinks fit to specify in the order, which conditions may include the condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed.

15. It is beyond doubt that s19B(1) provides for a two stage process. Spigelman CJ described the process as follows:

> "Section 19B(1)(b) itself consists of two stages. First is the identification of a factor or factors of the character specified in sub-paras (i) (ii) and/or (iii) of the paragraph. The second stage is the determination that, having regard to the factor or factors so identified, it 'is expedient to inflict any punishment' or to reach the other conclusions for which the paragraph provides."[8]

The factors relevant to the second stage of the process (i.e. whether it is inexpedient to inflict punishment other than nominal punishment) are the factors that ordinarily arise upon a

consideration of s16A of the Act together with the aspect of general deterrence. Expressing it another way, whilst a person may qualify for s19B consideration if a court is satisfied of one or more of the s19B(1)(b) factors, the court may not proceed further to exercise that discretion in a person's favour until it considers the wider factors that ordinarily are taken into account on sentence.[9] Only then if it appears "inexpedient" to punish or punish more than nominally would a s19B order be made.

16. In substance Mr Gurvich's argument on this aspect amounted to this: – no Magistrate mentioned the two stage process expressly or implicitly; the form of the orders was no more than a "ritualistic" computer entry and the sentence imposed in each case was so lenient as to evidence the failure to observe the "two stage process".

17. I am not persuaded by this argument. If the sentence is so lenient as to evidence a failure to undertake the appropriate test then the manifest inadequacy ground will be made out in any event. I shall consider that ground in due course. Leaving the asserted leniency of the sentence to one side, the arguments on these grounds as they apply to all respondents are simply that the Magistrate did not mention the test, and the exercise in filling out the pro-forma order is ritualistic and therefore unenlightening.

18. As I have observed earlier in this judgment, it is in my view impermissible for me to reason by comparison as between appeals. I can only consider each appeal individually and certainly cannot embark upon a reasoning process that proceeds along the lines of "if four out of four Magistrates did not mention the two stage process then none of them have considered it."

19. It is well established that the failure by a court to mention a factor intrinsic to the sentencing process does not automatically or even often lead to a conclusion that that factor therefore was ignored in the sentencing exercise. In each case, considered individually, I am of the view that the Appellant has failed to demonstrate that the Magistrate did not embark upon the requisite two stage process.

20. Section 19B dispositions are not obscure orders exercised on the most exceptional of occasions. They are, in fact, the only avenue that a Magistrate has to a non-conviction disposition in the Commonwealth jurisdiction and exercised frequently enough to justify their own form in Schedule 3. Magistrates consider this section frequently and an appellate court ought be slow to conclude in the absence of clear evidence to the contrary, that a fundamental process in the exercise of a s19B disposition has been overlooked.

Grounds 3, 5 & 6

Manifest inadequacy

21. A ground alleging manifest inadequacy of penalty raises a question of law within s92(1) *Magistrates' Court Act*. In *Y v F*[10] McDonald J in accepting that proposition cited a passage from Hansen J in *Stratton v Bestabergh Pty Ltd*[11]

> "...there can be no doubt that under s92 a party to a criminal proceeding can appeal from the Magistrates' Court to the Supreme Court on a question of sentence or penalty as long as it raises a question of law and manifest inadequacy of penalty does raise such a question."[12]

On this issue I note that both McDonald J and Hansen J[13] each cited a passage from *Bakker v Stewart; Wilson v Kerr*[14] at 24 per Lush J –

> For my part, I make no secret of the fact that I think it is undesirable that this Court should be called upon to review sentence matters upon order nisi to review, and I do not think that it should review the sentences of Magistrates' Courts in the same way as the Full Court reviews sentences imposed by the County Court or by single judges of this Court. Whatever powers, if any, this court has in the matter, they should be reserved for cases which can be regarded as extreme.

22. The respondents relied on this passage and questioned the "pursuit of such a complaint in this honourable Court." I consider that the issue of manifest inadequacy in each of these appeals is squarely a question of law and as such amenable to this type of appeal. Section 92 of the *Magistrates' Court Act* 1989 was enacted nine years after Lush J spoke about the review of sentence matters upon order nisi to review. If it was intended that manifest inadequacy appeals were to be excluded from the operation of s92, the Act would state that specifically. I do accept,

however, that on a s92 appeal on a manifest inadequacy basis it would be necessary to demonstrate a very substantial inadequacy before it would be allowed.

23. Each of the offences committed by the Respondents ought be considered relatively serious examples of criminal misconduct. Repeated false representations were made over an extended period of time, resulting in each case in a significant dishonest benefit to the particular recipient and an imposition on the revenue.

24. This type of offending is commonplace, hard to detect, almost always committed over an extended period and usually requires repeated dishonest representations. The aspect of general deterrence will normally assume significance in cases of welfare fraud[15] for these reasons. The Appellant directed me to numerous cases where these principles have been applied.[16] The principles of deterrence will, however, often be tempered by the personal circumstances of the defendant.[17] Welfare fraud is commonly committed by very disadvantaged members of our community; very often by people who are initially entitled to welfare, but through a change in circumstance become either disentitled or entitled to less. For my part I see a clear distinction between an opportunist who devises and implements a scheme to defraud the revenue on the one hand, and (for instance) the single mother whose living arrangements change, or the long term unemployed who to everyone's surprise gains work.

25. I do not regard any of the cases the subject of these appeals as falling into a grave or particularly serious category. The amounts involved are insufficient for that to be the case and all respondents at least at the outset were entitled to receive benefits. They all pleaded guilty at an early stage and had no prior convictions. Having said that, the offences were serious enough to require that general and specific deterrence be carefully considered and not lightly set aside. There is little in the transcripts of any of the plea hearings to suggest that this occurred.

26. In Ms Wright's hearing the Magistrate conscientiously explained the court process to an unrepresented defendant and observed that "this is a very serious matter"[18] and that a term of imprisonment was "within the range of appropriate penalties".[19] In no other hearing was there any mention of the relative seriousness of the offences by the Magistrate and astonishingly in Mr Vincent's hearing this exchange occurred:

> DEFENCE COUNSEL: In terms of submission in relation to penalty sir, he would struggle to complete a Community Based Order given his medical conditions
> MAGISTRATE: He could not do a community based order
> MAGISTRATE: I'll just adjourn it on section 19 bond for 12 months and just pay the costs
> DEFENCE COUNSEL: Thank you sir
> PROSECUTOR: Would your Honour permit me to be heard on that?
> MAGISTRATE: Not really, no, it's a minor matter.

Quite apart from the procedural unfairness of preventing the prosecutor from making submissions on penalty, the rationale for doing so is simply misguided. On any view Mr Vincent's case was not a minor matter.

27. I have recited the bald facts and what mitigating factors existed in each appeal earlier in these reasons. It will be obvious enough that I regard the penalty imposed in each hearing as particularly lenient. The exercise of discretion under s19B has been described as available only in "exceptional" cases[20] and this approach was urged upon me by Mr Gurvich. In my opinion the correct approach is that set out by Spigelman CJ in *Baffsky*[21] with Simpson J and Einfeld AJ concurring. In that case, the Court rejected the submission by counsel for the commissioner to the effect that s19B was not available for revenue offences unless exceptional circumstances were found to exist. At para [72] the court approved a test originally formulated by Jacobs J in *Kelton v Uren.*[22]

> ...there must be something that clearly distinguishes the circumstances of the offence under consideration from the typical offence, or circumstances of an unusual nature personal to the defendant, before [s19B] can be properly involved in dealing with this particular offence.
> and
>
> There must be something which clearly distinguishes the particular breach of the section under consideration from what may be regarded as a typical breach of the section.

This approach has a general application to Commonwealth offences and there is no sensible reason why it should be confined to taxation offences.[23]

28. Whilst it ought be unusual for s19B to be used in relatively serious examples of welfare fraud such as these, each case will turn on its own peculiar facts. Ultimately the Appellant will need to demonstrate in each appeal that it was not open to the Magistrate to form the view that a s19B order was appropriate.

29. I have taken the view that the Director has failed to make out this ground insofar as Ms Moroney and Mr Vincent are concerned. They both satisfied the first stage of the two stage process in respect of character, antecedents, age and mental condition (19B(1)(b)) and probably also established that their offending was committed under extenuating circumstances. Looked at more broadly (the second stage), their personal circumstances, when weighed with the nature of their offending, the need for general and specific deterrence and the other s16A factors, may still have been sufficient for a Magistrate to use s19B. I take the view that it was open for the Magistrate to do so. Both also could call upon really substantial mitigating personal circumstances capable of placing them in the 'atypical' category.

30. After some anxious consideration, I have concluded that the Director has made out the manifest inadequacy grounds as they concern Ms Mahon and Ms Wright. Ms Mahon made full restitution and may (it was asserted) suffer some prejudice to her nursing career. Ms Wright expressed contrition and was a single mother. Neither were able to call upon circumstances which in my opinion could reasonably satisfy the first stage of the test, let alone the second. More broadly, neither respondents' circumstances placed them in the unusual or atypical category. In reaching this conclusion I am of the view that the Appellant has established a manifest inadequacy so as to constitute error in principle.[24] In my view in each of these cases the inadequacy can legitimately be characterised as "clear and egregious".[25]

31. Mr Gurvich argued ground 6 as a particular of manifest inadequacy. The broad figures which derived from the Commonwealth Sentencing Database revealed that Victorian courts are more prepared to use s19B than any other State. Of 10,219 charges under s135.2(1) dealt with nationally between January 2003 and December 2008, 12% received the benefit of s19B. In Victoria over the same period the figure was no less than 39%. The national figure would certainly be inflated by the Victorian one, making the disparity even wider. Whilst statistics such as this are persuasive in establishing divergent national patterns in sentencing, and in my view do establish this insofar as s135.2(1) *Criminal Code* offences are concerned, they have limitations when called in aid of specific appeals.[26] The utility of sentencing statistics as a guide to current sentencing practices is undoubted. However, those same statistics inevitably are of considerably less assistance when sought to be called in aid in an argument of manifest inadequacy in a specific case.

The utility of aggregate statistics is, inevitably, limited by the absence of information about individual sentencing decisions, as to whether the sentenced person had pleaded guilty or not guilty and whether there were other mitigating or aggravating features which affected the sentence.[27]

I have not taken the apparent divergent sentencing practices into account when considering the manifest inadequacy ground. I am, however, of the view that national patterns of sentencing demonstrate with some clarity that s19B is being very widely used in Victoria in the context of welfare fraud and probably overused.

Grounds 4 and 7 Denial of Procedural Fairness

32. Ground four argues that in each case the Magistrate failed to provide reasons and that these failures were of sufficient magnitude so as to amount to an error of law.

Mr Gurvich argued that the provision of reasons is fundamental to the proper administration of justice, as per Charles, Buchanan and Chernov JJA in *Fletcher Constructions Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002)[28]

> "when the decision constitutes what is in fact or substance, a final order, the case must be exceptional for a judge not to have a duty to state reasons".

The purposes underlying the judicial obligation can be summarised as follows:

> (1) A Court of Appeal must be able to ascertain whether there has been an error of law. An unsuccessful litigant usually will need to be able to point to such an error to succeed on appeal. An absence of reasons will deny him this capacity.
>
> (2) Provision of adequate reasons gives the parties and the public a basis on which to understand and accept the decision.
>
> (3) It provides a check or balance on judicial impulsiveness.
>
> (4) It can educate practitioners, legislators and the public and provide to them a guide as to how "like cases will probably be decided in the future."[29]

33. The practical sense in providing reasons for substantive decisions is obvious. To a certain extent, the impact of the above propositions is ameliorated in matters emanating, as these appeals do, from the criminal jurisdiction of the Magistrates' Courts. The Appellant in these cases had rights he elected not to exercise – appeals to the County Court pursuant to s84 of the *Magistrates' Court Act*. Such appeals would of course be heard "de novo". Any procedural unfairness in the Magistrates' Court would be cured immediately. The appellate court would not need, and indeed would have to ignore, any Magistrate's reasoning.

34. Nevertheless, in my opinion, it is highly desirable that Magistrates sitting in the criminal jurisdiction do offer reasons for their determinations. These reasons need not be lengthy or elaborate, but they should explain in concise terms the relevant evidence relied upon, reasons for findings of fact and any application of law to those facts.[30] In sentencing remarks this will normally amount to no more than a few sentences.

35. In none of the appeals have any or any satisfactory reasons been given. Mr Dann and Mr Simon in careful submissions effectively conceded this and sought to answer it in two ways. First, that it was unnecessary for the busy Magistrate in a suburban court to give reasons at all and second, even if some reasons ought to have been given the fact they were not was not fatal to the appeals as the reasons were readily apparent in any event.

36. In my opinion, in all four hearings, the Magistrates should have offered reasons for imposing s19B orders. As has been observed, a s19B disposition is an atypical disposition (if not an exceptional one). Section 19B orders are reserved for cases where it is "inexpedient" that there be punishment beyond "nominal" punishment. The offences are on any view serious enough. Where an atypically lenient disposition is being imposed for a relatively serious offence, the parties and the public are entitled to know why.

37. In my view, it was highly desirable that the sentencing Magistrate in each case set out at the very least the following:

> (a) A brief explanation of the two stage test;
>
> (b) Which factors satisfied him that he had a discretion to impose a s19B order (i.e. the first stage factors);
>
> (c) Which factors persuaded him that he ought exercise that discretion in the defendants' favour (i.e. all the factors in the sentencing mix that led him to the conclusion that this was a case that called for no or nominal punishment).

38. In each case I am of the view that these omissions are significant omissions. I do not regard their absence, however, as constituting a miscarriage of justice such as to vitiate the proceedings. The hearings were uncontested hearings with uncomplicated underlying facts and all sentences were imposed by experienced and no doubt busy Magistrates in busy suburban courts. As I have observed, the absence of reasons in each case were defects that could have been cured by a 'de novo' appeal brought by the Director under the *Magistrates' Court Act*.

Ground 7

39. The appellant complains of an actual refusal by the Magistrate to hear prosecution

submissions on penalty in Mr Vincent's hearing. In the other two appeals (Ms Moroney and Ms Wright) the complaint is simply that no opportunity was afforded to the prosecutor to make submissions on penalty. This latter complaint can be dealt with shortly. The transcripts in those matters reveal that the proceedings moved seamlessly from hearing matters in mitigation to penalty. No obvious opportunity was afforded either prosecutor at this stage nor did they seek to be heard. The Magistrates' Court is a robust jurisdiction where etiquette and courtesy are sometimes overwhelmed by the workload and the personalities of those who work under it. It was open to both prosecutors either to make submissions on penalty at the outset when they read the summaries of the offences to the court, or at an appropriate stage thereafter. The mere fact that they were not specifically invited to do so is no answer to this. Sometimes a little initiative is called for.

40. I have formed the view that Ground 7 in the Vincent appeal is made out. I have set out the impugned passage in full at para 24. Not only was the Magistrate wrong in characterising the matter as 'minor' he also erred in refusing to hear the prosecuting solicitor on penalty. "The Crown is as entitled to natural justice as any other litigant"[31]. Any impartial observer would be left uneasy by the Magistrate's conduct in this regard. This is a fundamental denial of procedural fairness.

Whether to Intervene

41. It follows from the above that I have found for the Appellant in the appeals of Ms Mahon and Ms Wright on manifest inadequacy and in the appeal of Mr Vincent on denial of procedural fairness. Mr Gurvich in his written submissions contended "....at the very least, these cases warranted a conviction based disposition. Indeed imprisonment (immediate or otherwise) is clearly within the proper range." In oral argument Mr Gurvich submitted that the most lenient disposition properly open in all cases was a Community Based Order.

42. The options available to this Court on successful appeals of this type are threefold:

(a) Remit the matters back to the Magistrates' Court for re-hearing.
(b) Re-sentence the respondents in this Court or
(c) Decline to intervene notwithstanding that the appeals have succeeded.

I have concluded that the last course is appropriate in all cases.

When sentencing an offender the appellate court must pay careful heed to the factor of double jeopardy, inherent in a Crown appeal, arising from the respondent's exposure to sentencing on a second occasion for the same crime.[32]

Crown appeals call for restraint even where manifest inadequacy may be present and the Court has "an overarching discretion not to interfere".[33] Double jeopardy is relevant not only to the discretion to allow the appeal but also to the sentence that ought be imposed where the discretion is exercised.[34] It follows that is must also be relevant to the decision as to whether or not to intervene.

43. It was accepted by Mr Gurvich that the principle of double jeopardy applied to this type of appeal.[35] All three unsuccessful respondents, Mahon Vincent and Wright have experienced the uncertainty and anxiety of two court hearings. On both occasions a term of actual imprisonment was a real potential outcome for all three. None of the unsuccessful respondents had been in trouble previously, all pleaded guilty and expressed contrition and all were legitimately entitled to welfare before their circumstances changed. Mr Vincent was able to muster compelling mitigatory material and it was through no fault of his or his counsel that the prosecutor was denied procedural fairness. Ms Mahon, although not meeting the "two stage" test or demonstrating that her case placed her in the "atypical" category, took out a loan and made full restitution.

44. I do not believe that an increase in penalty from a s19B order to a Community Based Order could be correctly characterised as "tinkering".[36] Such an increase however is, all things considered, relatively minor. When this is considered with factors personal to the respondents and with the aspect of double jeopardy (and triple jeopardy if the cases are remitted to the Magistrates' Court) then it becomes appropriate not to intervene.

[1] One was a letter reporting back to Mr Vincent's general practitioner, the other was a letter reporting to

Mr Vincent's instructing solicitors. Although the letters were unsigned, no issue about this was taken at first instance or on appeal.
[2] As described in the prosecution summary.
[3] The dates in the police summons are narrower than those alleged in the "draft prosecution summary". I have acted upon the police summons dates.
[4] *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; 164 FLR 375; (2001) 192 ALR 92; (2001) 122 A Crim R 568; 48 ATR 76 ('Baffsky').
[5] See Schedule 3, form 10 *Crimes Act* 1914 (Cth).
[6] Affidavit of Simone Shields sworn 24 November 2009.
[7] *'Baffsky'* [2001] NSWCCA 332; 164 FLR 375; (2001) 192 ALR 92; (2001) 122 A Crim R 568; 48 ATR 76.
[8] *Baffsky* [2001] NSWCCA 332; 164 FLR 375; (2001) 192 ALR 92 at 10; (2001) 122 A Crim R 568; 48 ATR 76..
[9] [2001] NSWCCA 332; 164 FLR 375; (2001) 192 ALR 92, at [21]-[29]; (2001) 122 A Crim R 568; 48 ATR 76 citing *Cobiac v Liddy* [1969] HCA 26; (1969) 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257 ('Liddy').
[10] [2002] VSC 166; 130 A Crim R 11 at 14.
[11] Unreported, Supreme Court, Vic, Hansen J, No 5331 of 1994, 9 September 1994.
[12] Ibid 3.
[13] *Stratton* [2002] VSC 166; 130 A Crim R 11, at 5-6.
[14] [1980] VicRp 2; [1980] VR 17 ('*Bakker*').
[15] *DPP (Cth) v Alateras* [2004] VSCA 214.
[16] *DPP v Milne* [2001] VSCA 93; *Moreland v Snowdon* [2007] WASC 137; *Ralph v Nawojee* [2003] WASCA 5; *Patterson v Poline & Anor* [2009] SASC 195; (2009) 104 SASR 301.
[17] See for example *Potts v Bonnici* [2009] SASC 99; 229 FLR 294; 196 A Crim R 449.
[18] Plea transcript page 4.
[19] Plea transcript page 4.
[20] *Matta v ACCC* [2000] FCA 729 at [3]; *Moreland v Snowden* [2007] WASC 137 at [46]; *R v Price* [2008] QCA 330 at [16] at paragraphs [70] to [77].
[21] [2001] NSWCCA 332; 164 FLR 375; (2001) 192 ALR 92; (2001) 122 A Crim R 568; 48 ATR 76.
[22] (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534 ('*Kelton*'). And subsequently adopted by Yeldham J in *FCT v Wormald Australia Pty Ltd* (1985) 81 FLR 330; (1985) 17 ATR 129 and by Wright J in *O'Brien v Norton Smith* (*MR) Pty Ltd* [1995] TASSC 78; (1995) 83 A Crim R 41; 31 ATR 128.
[23] In *Kelton,* Jacobs J was considering an offence under s246 of I.T.A.A. 1936 (Cth).
[24] *R v Clarke* [1996] VICSC 30; [1996] VicRp 83; [1996] 2 VR 520 at 522; (1996) 85 A Crim R 114.
[25] *DPP (Vic) v Bright* 164 A Crim R 538.
[26] *DPP v CPD* [2009] VSCA 114 at [57], [78]; (2009) 22 VR 533; (2009) 196 A Crim R 1.
[27] *DPP v CPD* at [57] per Maxwell P, Redlich JA and Robson AJA; although a statistician may argue that the sample size was sufficiently large to overcome individual variations.
[28] [2002] VSCA 189; (2002) 6 VR 1, at 99. ('Fletcher Constructions') citing McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279.
[29] *Fletcher Constructions Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* [2002] VSCA 189; (2002) 6 VR 1 at [100].
[30] *Ibid, 101; Apps v Pilet* (1997) 11 NSWLR 350.
[31] *R v Lewis* [1988] HCA 24; (1988) 165 CLR 12 at 17; 78 ALR 477; 34 A Crim R 212; 62 ALJR.
[32] *DPP (Vic) v Bright* [2006] VSCA 147; (2006) 163 A Crim R 538 at 542 per Redlich JA.
[33] *DPP (Vic) v Leach* [2003] VSCA 96; (2003) 139 A Crim R 64 at 74; *DPP v Josefski* [2005] VSCA 265; (2005) 13 VR 85; (2005) 226 ALR 174; (2005) 158 A Crim R 185; (2005) 44 MVR 288; *DPP v Bright* at [10].
[34] *DPP v Bright* at [10].
[35] See *R v Marell* [2005] VSC 430 at paras [99]-[109]; (2005) 12 VR 581 and *Flaherty v DPP* [2003] VSC 234.
[36] As explained in *Dinsdale v R* [2000] HCA 54; (2000) 202 CLR 321 at [62]; (2000) 175 ALR 315; (2000) 74 ALJR 1538; (2000) 115 A Crim R 558.

APPEARANCES: For the plaintiff DPP (Cth): Mr D Gurvich, counsel. Commonwealth DPP. For the first, second and third respondents: Mr D Dann, counsel. James Dowsley & Associates Pty Ltd, solicitors. For the fourth defendant: Mr M Simon, counsel. Jonathan Kemp & Associates, solicitors.
