08/11; [2011] VSC 88

SUPREME COURT OF VICTORIA

DPP v HILLS & ORS (Ruling No 11)

Kaye J

7, 8, 18 March 2011

CRIMINAL LAW – SENTENCING – CHILD OFFENDER – WHETHER GENERAL DETERRENCE AND DENUNCIATION APPLICABLE FACTORS: *CHILDREN YOUTH AND FAMILIES ACT* 2005, S362(1).

HELD:
1. General deterrence and denunciation are relevant when sentencing an offender who, at the relevant time, is a child for the purposes of the *Children, Youth and Families Act* 2005 ('Act').

2. A proper analysis of the sentencing provisions of the Act supports the conclusion that the factors referred to in s362(1) were not intended to be exclusive, and that in particular, they did not preclude considerations such as general deterrence and denunciation.
***H v Rowe & Ors* [2008] VSC 369, not followed.**

KAYE J:
1. In the course of his plea, made on behalf of NC, Mr Bayles raised an issue whether general deterrence and denunciation are relevant when sentencing an offender who, at the relevant time, is a child for the purposes of the *Children, Youth and Families Act* 2005 ("the Act"). In doing so, Mr Bayles referred me to some materials which, he suggested, support the view, that in determining the sentence of a child, the only factors which are relevant are those which are contained in s362(1) of the Act.

2. That subsection provides:

> "In determining which sentence to impose on a child, the court must, as far as practicable, have regard to—
> (a) the need to strengthen and preserve the relationship between the child and the child's family; and
> (b) the desirability of allowing the child to live at home; and
> (c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
> (d) the need to minimise the stigma to the child resulting from a court determination; and
> (e) the suitability of the sentence to the child; and
> (f) if appropriate the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and
> (g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child."

3. There is some authority, referred to in the materials which Mr Bayles made available to me, which supports the proposition, which he raised in the course of his sentencing submissions. In *R v S & Anor*[1], the Full Court of the Supreme Court of South Australia considered the question whether the equivalent provision in the South Australian legislation, namely s7 of the *Children's Protection and Young Offenders Act* 1979, precluded the court from taking into account general deterrence in sentencing a child. King CJ[2] and Zelling J[3] in separate judgments each reached the conclusion that the South Australian section did exclude general deterrence as a relevant factor in determining such a sentence. Matheson J[4] dissented from that view. That decision of the Full Court was followed two years later by another decision of the Full Court in *R v Wilson*[5],

4. In *H v Rowe & Ors*[6], J Forrest J, in hearing an appeal to this Court from a decision of the President of the Children's Court, expressed the view, by way of *obiter dictum*, that s362 of the Act had the effect that general deterrence is not a relevant sentencing principle.[7] In expressing that view, his Honour referred to the decision of the Court of Appeal in *R v Angelopoulos*[8]. However,

the decision of the Court of Appeal in *Angelopoulos* does not support that proposition. In that case, the Court of Appeal considered a submission that general deterrence is not relevant in sentencing an offender in the Children's Court. In doing so, the court referred to the two South Australian decisions, to which I have just referred. It also referred to an earlier decision of the Court of Appeal in *R v PP*[9], which is to contrary effect. The Court of Appeal, in *Angelopoulos*, concluded that it was not necessary for it to determine the issue raised by counsel for the appellant in the circumstances of the case before it.

5. Thus, there is no decision of appellate authority, in Victoria, which supports the proposition now advanced by Mr Bayles. On the contrary, in my view, there are a number of previous decisions of the Court of Appeal, applying to children, in which the court has clearly considered that considerations such as general deterrence and condemnation are relevant in sentencing offenders, who are children for the purposes of the Act. Furthermore, in my view, it is clear, from the text of the Act itself, that s362 was not intended to preclude those considerations from being relevant in determining the appropriate sentence to be imposed upon an offender who is a child.

6. In *R v PP*, to which I have just referred, the Court of Appeal had before it an appeal by an applicant against a sentence of 6 years' imprisonment for manslaughter. At the time of sentence, the applicant was 15 years of age. In determining the appeal, Callaway JA (with whom Winneke P and Buchanan JA agreed), stated that there is no "bright line distinction" between children offenders and others.[10] His Honour then stated:

> "13. The difficulty was that all the relevant purposes of sentencing (in respect of the applicant) could not be achieved by three years' detention in a youth training centre ... Just punishment, tempered by reference to the applicant's immaturity, was required and general deterrence was not irrelevant. There is a public interest in deterring violent fights and the use of lethal weapons ... ."

7. *Director of Public Prosecutions v SJK & GAS*[11] concerned an appeal by the Director of Public Prosecutions against sentences for manslaughter imposed on two respondents who, at the time of sentencing, were 16 and 17 years of age respectively. In allowing the appeal, the court[12] stated:

> "64 There have ... been few equally serious, but probably no more serious, examples of this offence (manslaughter) before the courts of this state for many years. It was incumbent upon the sentencing judge to reflect that level of seriousness and to express the denunciation of the community of the conduct of the respondents in the sentences handed down.
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> 65 These remarks are not intended to diminish in any way the considerable significance to be accorded to youth and rehabilitation as factors to be taken into account in the determination of the appropriate sentence to be imposed on a youthful offender. They are intended, however, to emphasise that these factors constitute only some of a number of matters that must be taken into account and that, even in the case of a young offender, there are occasions on which they must give way to the achievement of other objectives of the sentencing law.
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> 66 In this case, given the seriousness of the offence and the offending and the lack of any real remorse shown by the respondents in relation to their crimes and given that there is little evidence to show that they have reasonable prospects of rehabilitation in the near future, the principles of general and specific deterrence and the need for the court to express denunciation of the crime assume considerable significance for sentencing purposes so there is correspondingly less scope for leniency on the count of the respondents' youth ... ."

8. In *R v PDJ*[13], the applicant sought leave to appeal against a sentence for murder of imprisonment of 16 years. At the time of sentence, in 2001, he was 17 years of age. The offence was committed in September 1999. Thus, at the relevant time, the applicant was a "child" under the applicable legislation. In dismissing the application, O'Bryan AJA (with whom Chernov JA and Eames JA agreed) noted that the crime was a very brutal and callous murder calling for most severe punishment.[14] His Honour stated:

> "The youthful offender can no longer expect to trade on his or her youth in such cases for the elements of deterrence, condemnation and just punishment are significant matters."[15]

9. Finally, in *DPP v TY*[16], the Court of Appeal had before it an appeal by the Director of Public Prosecutions against a sentence imposed for murder on a respondent who, at the time of offending, was 14 years of age. In imposing sentence, the sentencing judge gave careful consideration to

the relevant principles in sentencing a child. His Honour concluded that the crime was of such objective gravity that it warranted both unequivocal denunciation by the court, and a sentence which would be sufficient to constitute a general deterrent to others.[17] The Director of Public Prosecutions appealed from that sentence. In dismissing the Director's appeal, the court observed that, in its view, the sentencing judge's sentencing remarks were "exemplary"[18].

10. The foregoing review of the authorities discloses that on at least four occasions the Court of Appeal had before it appeals, which related to offenders who were, at the relevant time, children. On each occasion, the court, either directly or (in the case of TY) by inference, regarded sentencing factors, such as general deterrence and condemnation, to be relevant to the determination of the appropriate sentence for such an offender.[19] The relevant provisions of the *Children and Young Persons Act* 1989 which were then in operation[20] were in identical form to s362 of the Act.

11. Furthermore, in my view, a proper analysis of the sentencing provisions of the Act supports the conclusion that the factors referred to in s362(1) were not intended to be exclusive, and that, in particular, they did not preclude considerations such as general deterrence and denunciation.

12. As a matter of orthodox statutory construction, s362 must be construed in the light of the general law which was then applicable. Under long standing common law principles of sentencing, general deterrence and denunciation are important factors, which often are given predominant weight, particularly in the case of mature offenders. Although it has, for many decades, been recognised that in the case of a youthful or young offender, those factors are of less weight, nevertheless the authorities make it plain that they are not irrelevant to the determination of the proper sentence of such an offender.[21] Section 362 does not, by its terms, expressly exclude those considerations as being applicable to the determination of a sentence to impose on a child. Nor is there any indication in s362, or in the Act, that it is a necessary implication of s362 that such factors are excluded from consideration in determining such a sentence.

13. In particular, it is relevant that s362(1) does not expressly refer to, or incorporate, a number of factors, which, on any sensible view, would be relevant to determining the sentence to be imposed on any offender, whether a child or an adult. Those factors would include the gravity of the offence, the remorse of the offender, whether the offender has pleaded guilty, the offender's character and antecedents, and the impact of the offence on the victim. Some of those considerations might, indirectly, come into operation by virtue of one or more of the subparagraphs of s362(1) of the Act. However, they are not, necessarily, rendered relevant by the express terms of any of the eight subparagraphs contained in that subsection. It would be extraordinary to suggest that any of those factors, to which I have just referred, would be excluded, by a process of necessary implication, from consideration in determining the sentence of a child, on the basis that they are not expressly referred to in s362(1).

14. Furthermore, it is clear from other provisions in the Act that a number of the factors, to which I have just referred, are relevant to determining such a sentence. For example, s367(1)(b) requires the court to take into account (*inter alia*) the character and antecedents of the child, when determining whether to impose a good behaviour bond. Those factors are not only relevant to determining whether such a disposition would be suitable for the child (s362(1)(e)), but they are also relevant for a number of other purposes, including whether the offender is "deserving" of such a lenient disposition. Section 362A and s367(1)(c) each, implicitly, refer to the mitigating weight of a plea of guilty by a child. That factor does not, necessarily fit within any of the eight subparagraphs contained in s362(1). Section 362(5) has effect where the court imposes a less severe sentence because of an undertaking given by the child to assist law enforcement authorities in the investigation or prosecution of an offence. Again, that factor does not, of necessity, fall within any of the subparagraphs in s362(1). Section 359 contains provisions relating to the consideration by the court of a victim impact statement. Further, there are a number of sections in the Act which have the clear implication that the gravity of the offence is relevant in determining the appropriate sentence[22]. Finally, s405(b) specifically provides that the objects of a youth attendance order are to "penalise the person", by imposing the restrictions on his or her liberty. Section 362(1) does not expressly specify the imposition of a punishment as a "just penalty".

15. Thus, there are a number of sentencing factors, either implicit in, or assumed by, other provisions of the Act, which do not necessarily fall within any of the categories described in

s362(1). That consideration strongly supports the conclusion that s362(1) was not intended to constitute an exclusive and exhaustive statement of the factors, to which the court must have regard in determining the sentence to impose on the child. Rather, it would seem clear that the purpose of s362(1) is to ensure that, in determining a sentence in accordance with established sentencing principles, the court must take into account the specified factors, each of which are particularly relevant to the personal circumstances of a young offender. Thus, s362(1) has the effect of giving emphasis to the factors specified. However, it does not do so to the exclusion of the ordinary sentencing considerations, including general and specific deterrence, rehabilitation and denunciation.

16. For those reasons, I reject the proposition, which was advanced by Mr Bayles, namely, that issues such as general deterrence and denunciation are irrelevant in determining the sentence to be imposed upon both his client, NC, and the other "child" who I must sentence, RC. Of course, in determining those sentences, I recognise that the youth of each of those two offenders is of principal importance, both in determining their level of culpability, and in placing emphasis on the need to rehabilitate both offenders.

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[1] (1982) 31 SASR 263.
[2] 266.
[3] 268.
[4] 269.
[5] (1984) 35 SASR 200, at 203 (Wells J), 205 (White J), 207 (Bollen J).
[6] [2008] VSC 369.
[7] Above, [12].
[8] [2005] VSCA 258, [52]-[56].
[9] [2003] VSCA 100.
[10] Paragraph [8].
[11] [2002] VSCA 131.
[12] Phillips CJ, Chernov and Vincent JJA.
[13] [2002] VSCA 211; (2007) 7 VR 612.
[14] p629, paragraph [80].
[15] p629, para [83].
[16] [2009] VSCA 226.
[17] [2007] VSC 489; (2007) 18 VR 241, 245 [52] (Bell J).
[18] Paragraph [88].
[19] See also *Lunt & Ors v R* [2011] VSCA 56, [34]-[35], [39]-[40] (Nettle JA).
[20] Section 139.
[21] *R v Bell* [1999] VSCA 223, [14] (Batt JA); *R v Lawrence* [2004] 10 VR 123, 132 [22]; *R v PDJ* (above); *R v Tran* [2002] VSCA 52; (2002) 4 VR 457, 462 [14]; (2002) 129 A Crim R 214; (2002) 36 MVR 248 (Callaway JA).
[22] Section 397(1)(a), s405(a), s410(1)(c).

APPEARANCES: For the Crown: Ms E Ruddle, counsel. Office of Public Prosecutions. For the Accused Karen Hills: Ms C Randazzo SC with Mr A Brand, counsel. Slades & Parsons, solicitors.
