02/06; [2005] VSCA 278

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v STEGGALL

Buchanan, Eames and Nettle, JJ A

23 November 2005 — (2005) 157 A Crim R 402

SENTENCING – SUSPENDED SENTENCE BREACHED – OFFENDER CHARGED WITH BREACH – FOUND GUILTY – COURT TO RESTORE SENTENCE UNLESS UNJUST TO DO SO IN VIEW OF ANY EXCEPTIONAL CIRCUMSTANCES WHICH HAVE ARISEN SINCE ORDER MADE – MEANING OF "EXCEPTIONAL CIRCUMSTANCES" – FINDING BY SENTENCER THAT NO EXCEPTIONAL CIRCUMSTANCES EXISTED – SENTENCE RESTORED – WHETHER SENTENCER IN ERROR: *SENTENCING ACT* 1991, S31(1), (5), (5A).

1. Prior to the amendment of s31 of the *Sentencing Act* 1991 ('Act'), it was enough to avoid restoration of a suspended sentence if it were found that there was good reason in justice and the public interest not to do so. When s31(5A) was inserted into the Act with the requirement of "exceptional circumstances" it is plain that something more than good reason is required. The something more is that if an offender breaches a suspended sentence he or she shall be compelled to serve the whole of the sentence unless the circumstances are so exceptional as to be beyond reasonable contemplation or expectation.

***Owens v Stevens*, unrep. VSC, Hedigan J, 3 May 1991, approved.**

2. Where factors such as delay, improved psychological condition, family considerations, character evidence and conduct on bail were said to amount in aggregate to exceptional circumstances, where an offender was sentenced to 25 months' imprisonment for serious offences of dishonesty and then almost immediately began again for the next two years to engage in acts of continuing criminal dishonesty, a court was not in error in fully restoring the whole of the suspended sentence notwithstanding the certain factors which were said to constitute "exceptional circumstances".

BUCHANAN JA:

1. I will ask Nettle JA to deliver the first judgment.

NETTLE JA:

2. This is an application for leave to appeal from the restoration of a sentence of imprisonment pursuant to s31(5)(a) of the *Sentencing Act* 1991. Section 31(1) of the Act provides that if at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence for which he or she may be proceeded against on a charge filed by a prescribed person or a member of a prescribed class of persons. Sections 31(5) and 31(5A) further provide:

> "(5) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a level 10 fine and in addition must—
>
> (a) restore the sentence or part sentence held in suspense and order the offender to serve it; or
>
> (b) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
>
> (c) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or
>
> (d) make no order with respect to the suspended sentence.
>
> (5A) Despite anything to the contrary in sub-section (5), if on the hearing of a charge the court finds the offender guilty of the offence it must, in addition to any fine it may impose under sub-section (5), exercise the power referred to in paragraph (a) of that sub-section unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances which have arisen since the order suspending the sentence was made."

The facts

3. The Applicant was born on 31 December 1976. On 28 September 1999 he was committed for trial on a number of charges arising from business dealings between July 1996 and December 1997. He reserved his plea. On 3 November 1999 he was presented for trial before the County

Court at Melbourne on two Presentments. Presentment No. C9901103.3 alleged five counts of Obtaining Property by Deception (counts 1, 4, 5, 6 and 9), three counts of Obtaining a Financial Advantage by Deception (counts 2, 3 and 8) and one count of Theft (count 7) and Presentment No. C9901103.4 alleged one count of Obtaining Property by Deception (count 2, six counts of Obtaining a Financial Advantage by Deception (counts 1, 3, 5, 8, 9 and 10), two counts of Attempting to Obtain Property by Deception (counts 4 and 6) and one count of Attempting to Obtain a Financial Advantage by Deception (count 7). On 4 May 2000 he entered pleas of guilty to all 19 counts. After hearing a plea in mitigation of sentence, on 12 May, 2000 the judge sentenced the applicant as follows:

> • On Presentment No. C9901103.3: to six months' imprisonment on each of Counts 1, 4, 5, 6 and 9; to three months' imprisonment on each of Counts 2, 3 and 8; and to twelve months' imprisonment on Count 7. The judge ordered that two months of the sentence imposed upon Count 1 and one month of the sentence imposed upon Count 2 be served cumulatively upon each other and upon the sentence imposed upon Count 7, making a total sentence of 15 months.
>
> • On Presentment No. C9901103.4: to three months' imprisonment on each of Counts 1, 3, 5, 8, 9 and 10; to nine months' imprisonment on Count 2; to one month imprisonment on each of Counts 4 and 6; and to one month imprisonment on Count 7. The judge ordered that one month of the sentence imposed upon Count 1 be served cumulatively upon the sentence imposed upon Count 2, making a total sentence of 10 months' imprisonment.

The judge further ordered that the total sentence of 10 months' imprisonment imposed upon Presentment C9901103.4 be served cumulatively upon the total sentence of 15 months' imprisonment imposed upon Presentment C9901103.3, thereby making for a total effective sentence of 25 months' imprisonment, and that the whole of that sentence of imprisonment be suspended for a period of three years pursuant to s27 of the *Sentencing Act* 1991.

4. By force of s206B of the *Corporations Act* 2001 (Cth), upon conviction of those offences of dishonesty the applicant was disqualified from managing a corporation for a period of five years from the date of conviction.

5. On 15 April 2004, the applicant was charged on summons that he had between 1 September 2000 and 31 January 2003 committed two offences contrary to s206A of the *Corporations Act* 2001 of managing a corporation whilst disqualified and three offences contrary to s1308(2) of that Act of making a false or misleading statement in a document submitted to the Australian Securities and Investments Commission. On 9 June 2004, he pleaded guilty before the Magistrates' Court at Melbourne to those five charges and was convicted of each charge and fined an aggregate of $5,000.

6. An offence under s206A of the *Corporations Act* carries a maximum penalty of 50 penalty units (ie. $5,000) or imprisonment for one year or both[1] and an offence under s1308(2) of the *Corporations Act* carries a maximum penalty of 200 penalty units (ie. $20,000) or imprisonment for five years or both.[2] Consequently, the applicant's commission of the offences constituted a breach of the suspended sentence of imprisonment imposed on 12 May 2000.[3]

7. On 26 August 2004, the applicant was charged with the breach of the suspended sentence, pursuant to s31(1) of the *Sentencing Act* 1991. That charge came on for hearing in the County Court at Melbourne on 6 September 2005 before the same judge as had imposed the suspended sentence of imprisonment on 12 May 2000.

8. After an extensive plea hearing in which counsel for the applicant called a number of witnesses and tendered several references, and after the judge had reserved his decision, on 12 September 2005 his Honour restored the whole of the sentence of imprisonment imposed on 12 May 2000 and ordered that the applicant serve not less than eight months of that sentence before being eligible for parole.

The judgment below

9. Counsel for the applicant argued before the sentencing judge that there were the following "exceptional circumstances" within the meaning of s31(5A) of the Act:

> (1) The considerable delay between the offending between 1 September 2000 and 31 January 2003 and the institution of the breach proceedings on 26 August 2004.

(2) Evidence of improvement in the applicant's psychological condition since the time of the original offending and the offending between 1 September 2000 and 31 January 2003.

(3) Evidence that since the offending between 1 September 2000 and 31 January 2003 the applicant had been rehabilitated in his commercial dealings.

(4) The dependence of members of the applicant's family and business associates on the applicant continuing in his current employment.

(5) What was said to be the relative lack of seriousness of the breaching offences.

(6) The considerable support which the applicant had from family and friends.

(7) The fact that the applicant had complied with his bail obligations subsequent to a bail variation.

The judge, however, was not persuaded that any of those factors constituted "exceptional circumstances", either singly or in combination.

10. His Honour considered the delay, and thought that it was regrettable, but concluded that because the period of criminality did not cease until January 2003 and that there was then a period in which investigations were carried out, the delay was hardly inordinate. His Honour also had regard to a report by Mr Joblin, the forensic psychologist, in which it was said that the applicant's personality at the time of the original offending and subsequent to the original offending was grandiose and narcissistic but that more lately the narcissism had subsided and the grandiosity had declined. Evidently, his Honour did not regard that as particularly remarkable. His Honour referred too to character evidence given on the plea and to evidence from the applicant's business associates as to the importance to them of the work on which the applicant was then engaged. But, as the judge observed, in business as in most else, no one is irreplaceable. His Honour noted as well the hardship and unhappiness that would be caused to the applicant's family if the applicant were sent to gaol. But, as his Honour said, it was hardly of an exceptional level compared to the sort of hardship suffered by many other families when an offender is imprisoned. Finally, his Honour had regard to the fact that the applicant had complied with his bail conditions while awaiting sentence, but his Honour did not think it significant.

11. Counsel for the applicant argues now that the judge in effect misconceived the nature of "exceptional circumstances" for the purposes of the section and thus or in any event gave too little weight to the factors relied on as establishing exceptional circumstances. Counsel submits that this Court should find that those factors do indeed in aggregate amount to exceptional circumstances and thus that the penalty properly to be imposed for breach of the suspended sentence should be no more than a level 10 fine, or at least should be less than restoration of the whole of the suspended sentence.

The meaning of exceptional circumstances

12. I do not accept that the sentencing judge misconceived the meaning of "exceptional circumstances" for the purposes of s31(5A). In *Owens v Stevens*[4], Hedigan J said of the expression "exceptional circumstances" in Clause 15 of Schedule 5 to the *Magistrates' Court Act* 1989[5], that:

> "The use of the phrase 'exceptional circumstances' is not unknown in the legal lexicon. Section 13 of the *Bail Act* is a well-known example. Exceptional is defined, contextually, in the *Oxford English Dictionary* (2nd Edition Volume V), the greatest dictionary, as meaning 'unusual, special, out of the ordinary course'. This does not mean any variation from the norm.
>
> The facts must be examined in the light of the Act, the legislative intention, the interests of the prosecuting authority, the defendant and the victims. It may be that the circumstances amounting to exceptional must be circumstances that rarely occur and perhaps be outside reasonable anticipation or expectation."[6]

The sentencing judge considered that those observations were equally applicable to s31(5A) and, with respect, I agree with his Honour.[7]

13. Before s31(5A) was inserted into the Act by s15(1) of the *Sentencing and Other Act (Amendment) Act* 1997 the position was governed by the former s31(7) of the Act. It provided that

the court must restore the whole of the suspended part of the sentence unless of opinion "that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence". Under that provision, this Court held in *DPP v Newman*[8] that it would not be just to restore the suspended sentence in a case where the breaching offence was significantly less serious than the offence for which the suspended sentence had been imposed. Callaway JA, with whom Winneke P agreed, reasoned that it was a matter of balancing the clear legislative policy that, in general, a breach of suspended sentence should result in the offender serving the sentence which was suspended, against the circumstances of the individual offender and the desire not to take a more severe course than is warranted by all the relevant considerations, including the public interest.[9]

14. When, however, the bill for the amending act was read a second time (interestingly on the same day that the decision in *Newman* was handed down),[10] the Attorney said in her second reading speech:

> "***Suspended sentences***
> Analysis of present sentencing practices indicated that in many cases an offender who has breached a suspended sentence by committing another offence will not be ordered to serve that period of imprisonment by the courts. This state of affairs erodes the effectiveness of this sentencing order and brings the legal system into disrepute.
>
> The suspended sentence order is intended to provide an offender with one last chance, yet in practice this has not been the case. The bill amends the provisions to provide that unless there are exceptional circumstances, an offender who has breached a suspended sentence by committing another offence will be imprisoned."

15. If therefore the language of s31(5A) were not enough in itself to demonstrate an intention to make it harder for offenders to escape the consequences of breaching a suspended sentence, the second reading speech to my mind makes plain[11] that the amendment was intended to have just that effect. Previously, it was enough to avoid restoration of a suspended sentence if, upon the sort of balancing exercise essayed in *Newman*, it were found that there was good reason in justice and the public interest not to do so. Now, with the requirement of "exceptional circumstances", it is plain that something more than good reason is required.[12]

16. Like the sentencing judge, I consider that the something more is that if an offender breaches a suspended sentence he or she shall be compelled to serve the whole of the sentence unless the circumstances are so exceptional as to be beyond reasonable contemplation or expectation.

Delay

17. Under the heading of delay, counsel for the applicant makes the point that when the applicant came to be sentenced afresh on 12 September 2005 he was effectively being sentenced for offences that occurred as long ago as 1996 and 1997. The original proceedings in May 2000 were attended by delay and the applicant was not interviewed in relation to the offending against the *Corporations Act* until March 2003, and not charged with those offences until April 2004. Counsel also points to the fact that although the applicant was sentenced for the *Corporations Act* offences in June 2004, a warrant was not issued for his arrest in relation to the breach of the suspended sentence until August 2004 and not executed until March 2005. During that period, the applicant had travelled overseas four times and was on his fifth trip when he was arrested.

18. My response to those submissions is much the same as the judge's response. It is indeed regrettable that there was a delay. Plainly, it is a long time between offending and the final imposition of sentence. But, as the judge said, the applicant has himself been responsible for a good part of that delay. The offending under the *Corporations Act* continued until January 2003 and it can hardly be said that the applicant reordered his life in the expectation that he would never be held to account for his original offending.[13] To the contrary, knowing that if he offended he stood to be imprisoned, he not only took the risk of offending but did so repeatedly over a period of more than a year and in a manner that was designed to prevent detection. In my view therefore it ill behoves him now to complain that the Crown took another year to catch up with him, or because there was then further delay of the usual and seemingly inevitable proportions in getting the matter on for hearing.

Improved psychological condition

19. As to the applicant's so-called improved psychological condition, counsel for the applicant places particular weight on the report of Mr Joblin, which was before the judge, and emphasises Mr Joblin's observations that:

> "many of the psychological factors that impinged on [the applicant] and dictated much of the offending for which he appeared in the County Court in 2000 are being resolved".

Mr Joblin opined that the applicant was no longer narcissistic, and that:

> "it did not seem that the blind grandiosity of the 1990's and perhaps early 2000's still predominates his life".

Counsel submits that the fact that Mr Joblin was able to draw those conclusions and to find that the applicant had developed a degree of humility, acknowledged his limitations and was able to learn from his mistakes, are factors which speak well of the applicant's prospects of rehabilitation.

20. That may be so, although I share with the judge the view that when Mr Joblin's report is read as a whole it is not especially favourable. Even if it were, however, I do not consider that it is exceptional for a prisoner to have good prospects of rehabilitation, or at least to have prospects of rehabilitation as good as those suggested by Mr Joblin's report. One frequently sees far more glowing projections of past and likely improvement; indeed often in reports prepared by Mr Joblin. In any event, to adopt and adapt the words of Hedigan J in *Kent v Wilson*:[14] " ... It cannot have been the legislative intention, nor is it the Act's reasonable construction, that an exceptional circumstance was one that with respect to the relevant offender amounted to no more than a change of lifestyle from abnormal to normal".

Employment

21. Under the heading of employment, counsel for the applicant emphasised evidence given on the plea by business associates of the applicant as to the importance of the role of the applicant in the affairs of an English company, Virtualplus Ltd, and its proposed backdoor listing on the Australian Stock Exchange. An English director of that company, Mr John Pitcher, gave evidence on the applicant's behalf in which Mr Pitcher extolled the virtues of the applicant and his commercial acumen and told how the applicant had informed him of his background. A number of other witnesses gave evidence to similar effect. In each instance it was said that the applicant had acted responsibly and without suggestion of seeking to act beyond his role. The judge noted in his sentencing remarks that he found that evidence impressive. Counsel for the applicant further emphasises, as it was emphasised before the sentencing judge, that the business of Virtualplus Ltd was dependent upon the applicant's expertise and that the success of the business was partially due to this expertise and the applicant's substantial contribution.

22. My reaction to all that, however, is again much the same as the judge's response. As his Honour put it:

> "... against that evidence must be balanced my knowledge of your criminal past and my grave concern that despite being given an opportunity you decided very shortly after being sentenced to commit further offences. [Your counsel] referred to the evidence from those particular executives, particularly those involved with Virtual Plus [sic] Limited, and referred to the fact that there were people dependent on your business acumen. However I think there's a saying that is relevant in all business and in all occupations and it applies here, that no-one's irreplaceable and I'm quite certain that there must be other people around who can be employed in that position. ..."

Family Considerations

23. Counsel for the applicant refers to evidence adduced on the plea that the applicant's mother was to some extent dependent on the applicant. By all accounts he assisted her in saving the matrimonial home and by negotiating a settlement of her own financial predicament brought on by her husband's bankruptcy. That in turn allowed her to keep her position as an insurance agent and to support her two younger children. The applicant also supported her financially.

24. In my view, however, all of that is largely irrelevant for present purposes. It is to be expected, or at least hoped, that someone in the applicant's position would do his best to look

after his mother in need. I find it impossible to regard the applicant's doing so as amounting to an exceptional circumstance for present purposes.

Character evidence and conduct on bail

25. Counsel for the applicant emphasises the large number of character witnesses who gave evidence at the sentencing hearing and also evidence that the applicant has strong family support. The judge regarded that evidence as impressive. But, again, it is just not the sort of thing which amounts to exceptional circumstances for the purposes of s31(5A). Previous good character, a good work record and a supportive family rarely, if ever, amount to exceptional circumstances for bail purposes.[15] In the scheme of things, in my view, it is even less likely that things of that sort should amount to exceptional circumstances for deciding whether to restore a suspended sentence of imprisonment.

26. Counsel refers as well to the applicant's conduct whilst on bail awaiting sentence, including that on two occasions he was allowed bail variations in order to travel overseas and that he complied with them to the letter. Like the judge, I think that largely to be irrelevant.

Conduct in relation to the breaching offences

27. Finally, counsel for the applicant invokes the decision of this Court in *Newman* as authority for the proposition that disproportion between the seriousness of a breaching offence and the sentence of imprisonment proposed to be activated is an important consideration in determining whether to restore the suspended sentence. He argues that while the *Corporations Act* offences carried possible terms of imprisonment, the fact that the applicant was fined only $5,000 was indicative of the relatively insignificant nature of the offences. As counsel puts it, the fines imposed indicate that the offending was at the lower end of the scale of seriousness, and he submits that the disproportion between offending of that kind and the restoration of the suspended term of imprisonment is so great as to constitute an exceptional circumstance, at least when taken in conjunction with the other factors which he mentioned.

28. I regret I do not agree. Like the judge, I consider that the magistrate was particularly lenient. The breaching offences were calculated and devious and reflected dishonesty of much the same kind[16] as led to the offences for which the suspended sentence was imposed. As appears from the prosecutor's statement of facts at the sentencing hearing, despite that the applicant was prohibited by law from acting as a director or being involved in the management of a company, and although he knew that to be the case, he acted as a director of Stegtel Trade and Equities Pty Ltd between September 2000 and February 2001; he acted in a management role at Broadband and Wireless Pty Ltd between July 2001 and 31 January 2003; and, during 2001, he lodged with the Australian Securities and Investments Commission three notification of change of office holder forms, in relation to three separate companies, appointing himself as a director of each company, using aliases and false details of birth to conceal the fact that it was he. When Callaway JA spoke in *Newman* of disparity between the offending for which the suspended sentence had been imposed and the breaching office, his Honour was dealing with a case in which the offender had been given a total effective sentence of 15 months' imprisonment, of which 10 months was suspended for two years, for offences of aggravated burglary and intentionally damaging property. The breaching offence was limited to the offender throwing a rock through the windscreen of his girlfriend's car during a domestic dispute, and that offence was provoked by the offender's girlfriend smashing the windscreen and puncturing the bonnet of the offender's car. With respect, I can well understand why his Honour regarded disparity as an important consideration in such a case, and thus how his Honour came to the conclusion that it was in the interests of justice to be lenient. But, as it seems to me, all of that is a world away from a case like this one. Here the applicant was sentenced to 25 months' imprisonment for serious offences of dishonesty, and here, having been given the "last chance" for which s27 provides, the applicant was so little appreciative of the opportunity thereby afforded to him that he almost immediately began again, and for the next two years he continued, to engage in acts of continuing criminal dishonesty. So far from the nature of the breaching offences in this case being an exceptional circumstance warranting an amelioration of the restoration of the suspended sentence, it strengthens me in the view that full restoration of the suspended sentence is just what is required.

Conclusion

29. In the result, I would dismiss the application for leave.

BUCHANAN JA:
30. I agree.

EAMES JA:
31. I also agree.

BUCHANAN JA:
32. The order of the Court will be that the application for leave to appeal against sentence is refused.

---

[1] *Corporations Act* 2001, s1311(3) and Schedule 3, Item 49.
[2] *Corporations Act* 2001, s1311(3) and Schedule 3, Item 335.
[3] *Sentencing Act* 1991, s31(1).
[4] Unreported, 3 May 1991.
[5] Which, broadly speaking, permitted the court to authorise the commencement of a committal proceeding more than three months after commencement of the commencement of the proceeding for an offence if satisfied that there were "exceptional circumstances".
[6] See also *Schwerin v Equal Opportunity Board* [1994] VicRp 60; [1994] 2 VR 279 at 287-288; [1994] EOC 92-561, per McDonald J; *R v McLachlan* [1999] VSCA 122; [1999] 2 VR 665 at 669, per Chernov JA; *Kent v Wilson* [2000] VSC 98 at [20]-[40] per Hedigan J.
[7] See also the observations of Dodds-Streeton J in *DPP v Maxwell* [2005] VSC 430 at [70]-[98]; (2005) 12 VR 581.
[8] [1998] 1 VR 715; (1997) 94 A Crim R 450.
[9] Ibid. at 715, with which Winneke P agreed.
[10] 24 April 1997.
[11] Pursuant to s35A of the *Interpretation of Legislation Act* 1984.
[12] Cf. *Irving v Carbines* [1982] VicRp 86; [1982] VR 861 at 865.
[13] See and compare, in the analogous context of the effect of delay on sentencing, *R v Nikodjevic* [2004] VSCA 222 at [20]-[24], per Ormiston JA.
[14] [2000] VSC 98 at [29].
[15] *R v Hanna El Rahi*, Unreported 18/1/96, Beach J; *Kent v Wilson* [2000] VSC 98 at [40].
[16] cf *R v Snip* [2000] VSC 205 at [7] per Hampel J.

APPEARANCES: For the Crown: Mrs CM Quin, counsel. Mr S Carisbrooke, Acting Solicitor for Public Prosecutions. For the applicant Steggall: Mr D Grace QC and Mr TF Danos, counsel. Tony Danos, solicitor.
