



SUPREME COURT OF VICTORIA
APPEAL DIVISION
COURT OF CRIMINAL APPEAL

No. 210 of 1990

THE QUEEN

v.

SATWANT SINGH

JUDGES: YOUNG, C.J., CROCKETT and SMITH, JJ.
WHERE HELD: Melbourne
DATE JUDGMENT
HANDED DOWN: 26 March 1991

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown (Commonwealth)	W. Weinberg, Q.C. with P. Coghlan	Commonwealth D.P.P.
For the Applicant	P. Dunn	Schetzer Brott & Appel
For the Crown (State)	B. Bongiorno, Q.C.	J.M. Buckley, Solicitor for D.P.P.

VICTORIAN GOVERNMENT REPORTING SERVICE
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Melbourne.

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YOUNG, C.J.: In this matter the Court is of the opinion that the application should be granted. I publish the Court's reasons.

 The order of the Court is that the application is granted, the appeal treated as instituted and heard *instanter* and allowed. The sentence is quashed. In lieu thereof the applicant is sentenced to be imprisoned for eighteen months on the first count and to be imprisoned for two years on each of counts 2, 3 and 4. The sentence on count 1 commences on 25th September 1990. The sentence on count 2 is to commence on the expiration of the sentence imposed on count 1. The sentence imposed on count 3 is to commence one year after the commencement of the sentence on count 2, and the sentence on count 4 is to commence six months after the commencement of the sentence on count 3. That order will produce an effective term of five years' imprisonment. Order that the applicant serve a non-parole period of two years' imprisonment. Direct that the Director-General of Corrections for the State of Victoria cause to be delivered to the applicant a copy of the reasons for judgment delivered by the Court this day and cause to be explained to the applicant in language likely to be readily understood by him the purpose and the consequences of fixing the said non-parole period, including an explanation of the matters referred to in the lettered paragraphs (a) to (d)

inclusive of sub-s.(1) of s.16F of the Crimes Act and report in writing to the Registrar of Criminal Appeals of this Court within fourteen days that this order has been carried out.

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No. 210/1990

THE QUEEN

v.

SATWANT SINGH

JUDGES: YOUNG, C.J. CROCKETT & SMITH JJ.

WHERE HELD: Melbourne

DATES OF HEARING: 6th March 1991

DATE OF JUDGMENT: 26th March, 1991

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown (Commonwealth)	Mr. M. Weinberg, Q.C. with Mr. P. Coghlan	Commonwealth D.P.P.
For the Applicant	Mr. P. Dunn	Schetzer Brott & Appel
For the Crown (State)	Mr. B. Bongiorno, Q.C. with Mr. N. Papas	J. M. Buckley and Solicitor for D.P.P.

YOUNG, C.J.:
CROCKETT, J.:
SMITH, J.:

The applicant Satwant Singh was charged in the County Court on 25th September 1990 with one count (Count 1) of conspiracy to prevent or defeat the execution or enforcement of a law of the Commonwealth, namely, the Migration Act 1958 contrary to section 86(1)(b) of the Crimes Act 1914 (Cth) and three counts (Counts 2, 3 and 4) of attempting to corrupt a Crown witness contrary to section 37(b) of the Crimes Act. He pleaded guilty to all four counts and after a plea for leniency had been made by counsel on his behalf he was sentenced by the learned trial judge to be imprisoned for eighteen months on the first count and for three years on each of counts 2, 3 and 4. His Honour ordered that eighteen months of each of the three year terms be served cumulatively upon each other and cumulatively upon the term imposed on the first count. Thus his Honour imposed a total effective term of six years' imprisonment. His Honour further directed that the sentence imposed on count one commence on 18th April 1990 which was the day upon which the applicant was taken into custody, that the sentence on count two commence at the expiration of the sentence on count one, that the sentence on count three commence at the expiration of the sentence on count two and that the sentence on count four commence at the expiration of the sentence on count three. His Honour further ordered that the applicant serve a non-parole period of four years.

It is against the sentences so imposed that the applicant now seeks leave to appeal to this Court upon the following grounds:

- "1. The sentence of eighteen months imprisonment on Count One is manifestly excessive.
2. The sentence of eighteen months imprisonment on Count 2 is manifestly excessive.
3. The sentence of eighteen months imprisonment on Count 3 is manifestly excessive.
4. The sentence of eighteen months imprisonment on Count 4 is manifestly excessive.
5. The learned sentencing judge failed to give sufficient weight to the matters set out in S.16A of the Commonwealth Crimes Act (1914).
6. The learned sentencing judge erred in the exercise of his sentencing discretion in that he failed to consider, or to give sufficient consideration to the matter of concurrency of sentences.
7. The total sentence on all four counts is manifestly excessive.
8. The Learned Sentencing Judge failed to give effect to the provisions of the Crimes Act 1914 as amended.
9. The Learned Sentencing Judge failed to take into account sufficiently or at all that the non-parole period fixed would not be reduced by remissions.
10. The Learned Sentencing Judge failed to give proper weight to the principal of totality.
11. The Learned Sentencing Judge imposed a sentence to achieve an effective term rather than have regard to the criminality of the offences."

The applicant is a Singaporean Citizen or National who arrived in Australia on a Tourist Visa in late 1986. The visa allowed him only temporary residence in this country. In order to obtain permanent resident status he agreed to marry an Australian woman named Blanca Marina

Orellana. She agreed to the marriage for the sum of \$7,000 to be paid as to \$3,000 on the day of the marriage, \$1,000 upon her being interviewed by the Department of Immigration and Ethnic Affairs and \$3,000 when the couple were divorced after he had obtained the right of permanent residence in Australia.

The plan was carried out and the marriage took place on 13th February 1987. The woman provided a statutory declaration that the marriage was not contrived for the purpose of the applicant's obtaining the right of permanent residence in Australia. She also provided false answers when interviewed by the Department. She was paid \$3,000 upon the marriage taking place and a further \$1,000 after the interview. The applicant was granted the right of permanent residence on 28th January 1988 and in April 1989 the couple were divorced. The woman was paid a further \$900 and was told that she would not receive the balance which was due to her.

In the course of arranging the "marriage of convenience" the applicant was introduced to a Sikh named Manjit Singh Sekhon. Sekhon was a marriage celebrant authorised to perform Sikh marriages and he in fact celebrated the marriage of the applicant and the woman Orellana.

Thereafter the applicant assisted Sekhon in arranging marriages of convenience between Indians wishing to remain in Australia and Australian citizens prepared to marry for money and to support their spouses' applications for permanent residence based on their marriages. The

applicant's role was to recruit suitable Australian women prepared to engage in these plans. He in fact assisted in the arrangement of eight of these marriages of convenience between September 1987 and September 1989 and was paid between \$4,000 and \$5,000 in all for his involvement.

The applicant was arrested on 8th March 1990 and at first denied any involvement. He maintained that his own marriage was genuine and that he believed the other ceremonies which he had attended were also genuine marriages. Later he admitted that some of them were marriages of convenience.

After his arrest the applicant was released on bail on his own undertaking and upon condition that he not contact any Crown witnesses. One of the Crown witnesses was one Barbara Ann Tannenberg who was a party to a marriage of convenience with one Karamjit Singh Gill, a brother-in-law of the applicant. The applicant contacted her directly and indirectly on three occasions in attempts to persuade her to change the evidence she had provided to the police. The applicant was anxious that she change her evidence so that he could secure the release from detention of his brother-in-law. The applicant offered Tannenberg money if she would retract her statement. Tannenberg, however, reported the applicant's approach to the police and was equipped with a listening device when she attended the meeting with the applicant. Tannenberg was vague in her response. Subsequently the applicant attempted to contact Tannenberg again through her boy friend, one McGough, and told him of further payments that he could

make to Tannenberg. He made a further offer on another occasion. His conversations with McGough were also recorded on tape. When the applicant was interviewed in connexion with these matters he maintained that he knew nothing about them, did not know McGough and denied that it was his voice on the tapes.

When the learned judge first passed sentence he first of all fixed a term of five years' before the applicant should be eligible for parole. The applicant was then removed from the Court. His Honour, however, returned to the Court a little later and counsel for the Crown informed him that "it would appear that ... the aggregate and the minimum are somewhat too close together in that the State remissions will still operate in terms of the head sentence, although they don't operate on the minimum." After some discussion with counsel his Honour then reduced the minimum term from five years to four and pronounced the sentence we have already set out.

It is now necessary to refer to the labyrinthine provisions of the Commonwealth Crimes Act dealing with sentences. It is necessary because, although the sentence imposed by his Honour was within the law, it is possible that it was not the sentence he would have passed if he had correctly understood its effect. It appears to us that he did not.

Rather than examine in detail what his Honour was told by counsel we think it better to set out the correct position.

Section 19AF(1) of the Crimes Act provides:

"Where a court is required to fix a non-parole period or make a recognizance release order in respect of a federal sentence or sentences, the court must fix a non-parole period that ends, or make a recognizance release order such that the pre-release period ends, not later than the end of the sentence, or of the last to be served of the sentences, as reduced by any remissions or reductions under section 19AA."

Section 19AA(1) provides:

"A law of a State or Territory that provides for the remission or reduction of State or Territory sentences (other than such part of the law as relates to the remission or reduction of non-parole periods of imprisonment or of periods of imprisonment equivalent to pre-release periods of imprisonment in respect of recognizance release orders) applies in the same way to the remission or reduction of a federal sentence in a prison of that State or Territory, being a sentence imposed after the commencement of this section."

In order to ascertain what remissions are allowed in Victoria it is necessary to turn to Regulation 97(3) of the Corrections Regulations 1988 (S.R.35 of 1988) which reads:

"If a minimum term has been fixed in relation to a sentence of imprisonment imposed on or determined in respect of a person after the commencement of these Regulations -

- (a) remission in respect of the minimum term is $\frac{1}{3}$ of the minimum term; and
- (b) remission in respect of the sentence of imprisonment is -
 - (i) $\frac{1}{3}$ of the portion (if any) of the sentence of imprisonment that the person is to serve between the expiry of the minimum term and the person's discharge at the end of the sentence of imprisonment, excluding any period or periods during which the person is released on parole."

Under that regulation the applicant would be entitled to remissions of sixteen months (i.e. one third of four years) off the sentence of six years. If he were

granted parole at the earliest opportunity he would serve eight months on parole. His position may be contrasted with that of an offender against State law who, if sentenced to six years' imprisonment with a minimum of four years, may be released on parole at the expiration of thirty-two months and if so released would serve two years on parole.

In sentencing an offender for an offence against the Commonwealth Crimes Act, the starting point is section 16A where in sub-section (1) the Court is directed to impose a sentence that is of a severity appropriate in all the circumstances of the offence. By sub-section (2) it is provided that "In addition to any other matters, the Court must take into account such of the following matters as are relevant and known to the Court." Then follow thirteen lettered paragraphs some of which overlap. The whole of section 16A is set out in a judgment of this Court in R. v. Carroll (C.C.A. 2nd November 1990, not yet reported), where some of the difficulties it contains are discussed.

It is also necessary not to overlook section 17A which expresses in several sub-sections the long established principle of sentencing that a court is not to pass a sentence of imprisonment unless the court is satisfied that no other sentence is appropriate.

In the present case the principal problem concerns the fixing of a minimum term, called in the legislation the "non-parole period." Section 19AB prescribes when such a period must be fixed. In the present case it is obligatory if the court imposes a

sentence of three years or more. Then, however, one turns to section 19AA which has the effect of denying to a federal offender in Victoria remissions off any non-parole period. But that is not all. Section 19AG provides:

"In calculating a non-parole period or pre-release period, in respect of a federal sentence, the court fixing that period:

- (a) must take into account the fact that, under section 19AA, any non-parole period, or pre-release period specified in a recognizance release order made, in respect of the sentence will not be subject to remission or reduction other than a remission or reduction applying under subsection 19AA(4); and
- (b) must adjust the period accordingly."

In R. v. Carroll, (supra) this Court dealt with the difficulties created by this section and we shall not repeat what was there said.

It seems at least highly probable that the learned sentencing judge did not pick his way entirely correctly through the jungle created by this legislation. But it was not on that ground that counsel for the applicant submitted that his Honour had fallen into error. The essence of the applicant's submissions was that the minimum term or non-parole period had been incorrectly arrived at and was too long. It was also submitted that the total effective sentence was excessive and that there should have been some concurrency of the sentences imposed on counts 2, 3 and 4 with the sentence imposed on count one.

We think that the learned judge fell into error in fixing the minimum term in that it seems clear that his

Honour did not comply with the requirements of section 19AG, which we have set out above, in that he did not adjust the non-parole period on account of the fact that it would not be subject to remissions. But we also think that in the circumstances the total effective sentence is excessive and that for these reasons this Court is required to set aside the sentences and sentence the applicant afresh.

The applicant is 31 years of age. He was born in Singapore where he was educated to Year 8. Thereafter he worked as a watchman until he was required to perform National Service on attaining the age of 18 years. After two years service he began working for his father in a transport business. He has been a heavy drinker and his counsel informed the Court that he had one previous conviction for drunk driving although it was not alleged by the Crown. It is of no significance for present purposes. The applicant underwent in 1982 a marriage arranged by his parents but he was divorced after about a year and underwent another arranged marriage in 1984 but he was again divorced in 1986. There are two children of that marriage. Following his divorce from Blanca Orellana in 1988, the applicant's second wife came to Australia and the parties were remarried in 1989.

When the applicant came to Australia he stayed with a close relative who is an accountant who was also alleged to be involved in the arranging of marriages of convenience but the Court was told that he was indemnified so that he might give evidence against Sekhon. It seems

clear that the applicant acted upon Sekhon's instructions and went about seeking "compliant Australian women" in a naive manner.

In spite of early denials of involvement the applicant entered a plea of guilty at the committal proceedings and thereafter indicated a willingness to assist the police in relation to other persons but in fact was not able to supply them with useful information. There is a very real prospect that he and his family will be deported at the end of his sentence.

In determining the appropriate sentence to impose we have regard to the fact that the applicant pleaded guilty at an early stage of the proceedings and we reduce the sentence which we would otherwise impose accordingly. We do not further reduce the sentence for his willingness to co-operate with the authorities, as it was ineffectual, but we bear it in mind. We do not ignore any of the matters in section 16A(2) which are relevant. Paragraph (p) of that sub-section requires the Court to take into account the probable effect that any sentence or order would have on the applicant's family. It might be thought that this requires us to consider whether he or his family is likely to be deported. We note that section 19AK provides that possible deportation does not preclude the Court from fixing a non-parole period. The question, however, is whether the possibility of deportation should be taken into account. Mr. Weinberg, the Director of Public Prosecutions, said that we should not take it into account and Mr. Dunn, counsel for the applicant, did not

suggest the contrary. This Court in R. v. Binder [1990] V.R. 563 held in effect that liability to deportation was irrelevant to the fixing of the appropriate punishment to be imposed and we accordingly disregard it. The maximum sentence which might be imposed on the first count is three years and we think that in all the circumstances it is appropriate to fix a sentence of eighteen months' imprisonment on that count. The maximum sentence for counts 2, 3 and 4 is five years' imprisonment and we fix a term of two years on each count.

We turn to the question whether there should be any concurrency of the sentences. We think that there should. The three offences of attempting to corrupt a Crown witness were committed in a continuing attempt to corrupt the same witness and might be thought therefore to justify total concurrency. On the other hand they were separate attempts and each should carry some additional punishment where that can be achieved without distorting the total effective sentence. We shall by our order produce the result that the applicant is sentenced to a total effective sentence of five years' imprisonment.

The next question is whether we should fix a non-parole period. Section 19AB requires us to do so and section 19AG requires us to take into account that no remissions will be allowed off any non-parole period so fixed: see section 19AA. We approach the task in accordance with the reasons of this Court in R. v. Carroll, supra, and will adjust the non-parole period accordingly, Taking into account all relevant matters we have arrived at

a term of two years' imprisonment. The applicant will have to serve every day of that term. Another federal offender might obtain release under the Victorian pre-release scheme (see section 19AZD) but we were informed that Regulation 5(2) of the Crimes Regulations 1990 (Cth) excludes federal offenders liable to deportation from Australia from eligibility for pre-release permits. We were further informed that since the applicant obtained permanent residency as the result of false statements made to the Department of Immigration, Local Government and Ethnic Affairs he is a person who may be liable to deportation. That conclusion has not been contested on the applicant's behalf.

We have indicated that we propose to impose an effective term of five years' imprisonment and we return to the question of the appropriate orders to achieve that result. It is dealt with in section 19 of which we shall only quote sub-section (2). It reads:

"Where:

- (a) a person is convicted of 2 or more federal offences at the same sittings; and
- (b) the person is sentenced to imprisonment for more than one of the offences;

the court must, by order, direct when each sentence commences, but so that no sentence commences later than the end of the sentences the commencement of which has already been fixed or of the last to end of those sentences."

We must also notice section 16E which applies State law to the commencement of the sentences we shall impose.

Section 14 of the Penalties and Sentences Act 1985 (Vic.) prescribes that a sentence commences, when the offender is in custody, on the day it is imposed and this Court has held that where it substitutes a sentence on appeal the sentence so substituted commences on the day upon which the original sentence commenced: see R. v. Stone [1988] V.R. 141 at pp. 150-1. The sentences we impose would accordingly under State law run from 25th September 1990. The learned judge ordered that the sentence he imposed on count one commence on 18th April 1990 but we think that his Honour fell into error. He had no power to backdate the sentence. Under section 19(2) of the Commonwealth Act we must order when each sentence is to commence. We shall accordingly order that the sentence on count 1 commences on 25th September 1990, the sentence on count 2 is to commence on the expiration of the sentence imposed on count 1, the sentence imposed on count 3 is to commence one year after the commencement of the sentence on count 2 and the sentence on count 4 is to commence six months after the commencement of the sentence on count 3. That order will give partial concurrency of the sentences on counts 2, 3 and 4 and will produce an effective five years' imprisonment. The applicant will be entitled to remissions off that term. We shall also order that the applicant serve a non-parole period of two years against which no remissions are allowed.

Finally we refer to section 16E(2) which reads:

"Where the law of a State or Territory has the effect that a sentence imposed on a person for an offence against the law of that State or

Territory or a non-parole period fixed in respect of that sentence:

- (a) may be reduced by the period that the person has been in custody for the offence; or
- (b) is to commence on the day on which the person was taken into custody for the offence;

the law applies in the same way to a federal sentence imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence."

The law of this State does provide for the sentence of an offender to be reduced by the period the offender has been in custody for the offence: see Penalties and Sentences Act 1985, section 16(1). The applicant, we were told was taken into custody on 18th April 1990 and he will therefore be entitled to have the period between that date and 25th September 1990 reckoned as a period already served under the sentences now imposed.

In order to comply with section 16F of the Crimes Act we shall make an order similar to that made in Carroll's Case requiring the Director-General of Corrections to cause the sentences now imposed to be explained to the applicant.

CERTIFICATE

I certify that this and the thirteen preceding pages are a true copy of the reasons for judgment of the Appeal Division (Young, C.J., Crockett and Smith JJ.) of the Supreme Court of Victoria delivered on 26th March 1991.

DATED this 26th day of March 1991.


Associate