Borg v R

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SARA BORG v R
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Unreported Judgments Vic · 58 Paragraphs

Supreme ***Court*** of Victoria — ***Court*** of Appeal

Priest , Beach and Niall JJA

27 July 2020

Sara Borg v R [2020] VSCA 191

Headnotes

CRIMINAL LAW — Appeal — Sentence — *Misconduct* in public office, unauthorised use of computer and making and using a false document — *Registrar* of Magistrates' *Court* fabricated an interim intervention order for use in friend's custody dispute — Sentenced to two years and one month's imprisonment with 13 months non-parole — Whether exceptional family hardship — Whether sentence manifestly excessive — Appeal allowed — Resentenced to two year community correction order.

Priest , Beach and Niall JJA.

Charges, sentences and grounds of appeal

[1] On 29 May 2020, the applicant pleaded guilty before a judge in the County ***Court*** to two charges of ***misconduct*** in public office[1] (charges 1 and 2), making a false document[2] (charge 3), using a false document[3] (charge 4), and two charges of causing an unauthorised computer function with intent to commit a serious offence.[4]

[2] Following a plea in mitigation conducted over two days, on 16 July 2020 the judge sentenced the applicant to a total effective sentence of two years and one month's imprisonment, with a non-parole period of 13 months, in accordance with the following table:

Offence	Sentence	Cumulation

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Charge			
1	***Misconduct*** in public office	2 months	1 month
2	***Misconduct*** in public office	2 years (aggregate sentence)	Base
3	Making a false document		
4	Using a false document		
5	Causing unauthorised access to computer function with intent		
6	Causing unauthorised access to computer function with intent		
	Total effective sentence	2 years and 1 month's imprisonment	
	Non-parole period	13 months	
	Section 6AAA declaration	4 years and 6 months' imprisonment with 2 years and 6 months non-parole	

[3] The applicant sought leave to appeal against the sentence on the following grounds:

1. That the sentencing judge erred in failing to take into account the exceptional family hardship caused by [the applicant's] imprisonment.
2. That in all of the circumstances of the offending and the offender, the sentence is manifestly excessive.

Particulars

a. The sentencing judge imposed a term of imprisonment in circumstances where the relevant sentencing purposes could be properly achieved by the imposition of a Community Corrections [sic.] Order.

b. The sentencing judge gave undue weight to general deterrence and denunciation.

c. The sentencing judge failed to give appropriate weight to prior good character and good prospects of rehabilitation.

d. The sentencing judge failed to give appropriate weight to the extra burden of imprisonment that will be suffered by virtue of [the applicant's] concern for [her] children.

[4] At the conclusion of oral argument in this ***Court***, we made orders granting leave to appeal; allowing the appeal; setting aside the impugned sentence; and resentencing the appellant to a conditioned community correction order of two years' duration. These are our reasons for making those orders.

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The offending

[5] The appellant's offending was a reprehensible, gross breach of trust.

[6] In September and October 2018 when the offending occurred, the appellant was aged 38 years,[5] and was studying law at university.

[7] The appellant occupied a position of some responsibility. She started work as a ***Registrar*** at the Werribee Magistrates' ***Court*** on 13 October 2008. Under the Magistrates' ***Court*** Act 1989, ***registrars*** have significant powers, including to issue any process; to administer an oath or affirmation; to extend bail; to issue certain warrants; to endorse a warrant to arrest; to issue a summons to give evidence or produce documents; to adjourn criminal proceedings; to recall and cancel a warrant; to refer civil proceedings for a pre-hearing conference; to issue certificates of order for the Supreme ***Court***; and to perform other statutory functions.[6] Self-evidently, the position of ***registrar*** is one of great trust. Scrupulous performance by ***registrars*** of their duties is essential to the proper administration of justice by the Magistrates' ***Court*** and more widely.

[8] It seems that the appellant had known Jarome Staley, her brother's friend, since childhood. Mr Staley had separated from his former partner, Tayla Hancocks, with whom he had a young daughter. On 5 September 2018, the appellant sent an email from her ***court*** email address to Ms Hancocks (who lived with her daughter in South Australia) concerning 'parenting orders' for the child. Ms Hancocks replied by email on 7 September 2018, advising that Mr Staley could have overnight access to the child on 26 October 2018. The appellant spoke to Ms Hancocks' mother the same day, identifying herself as 'Sara Mitchell', Mr Staley's lawyer, endeavouring to persuade her to convince Ms Hancocks to sign consent orders.

[9] There followed email correspondence between the appellant (using her ***court*** email address) and Ms Hancocks, including an email dated 27 September 2018 in which the appellant threatened Ms Hancocks with a Family ***Court*** costs order should Ms Hancocks 'continue to be difficult'. Using her university email address, the appellant also sent an email to Ms Hancocks on 19 October 2018, threatening to initiate proceedings in the Federal Circuit ***Court*** seeking parenting orders should Ms Hancocks continue to refuse to negotiate with Mr Staley.

[10] On or about 20 October 2018, Mr Staley notified Ms Hancocks' mother that he was driving from Victoria to Adelaide; and, on 22 October 2018, Ms Hancocks emailed Mr Staley telling him that there should be a 'parenting plan' in place before any visit.

[11] Two days later, on 24 October 2018, Ms Hancocks emailed the appellant stating that her position was that it was in the best interest of all parties if a parenting plan was arranged before any visit. That same day, the appellant sent an email to Ms Hancocks from her Magistrates' ***Court*** email address, advising her that Mr Staley had obtained an Interim Intervention Order ('IIO') that allowed him access to their daughter overnight on 26 October 2018 as previously arranged. Ms Hancocks responded, requesting a copy of the IIO. The appellant replied:

> I am not really in a position to provide you with an order that the legislation states needs to be served personally. Unfortunately, because the order makes up part of an intervention order, it is nationally recognised and criminal charges result for breaching the orders. Police can enforce them … I'm sure you don't want this to become a mess, as I don't and I am sure Jarome [Staley] would not either, so what compromise can we discuss to benefit everyone involved?'

....

[12] On 25 October 2018, the appellant was working with another ***registrar***, Simona Rosegas, in a courtroom at the Werribee Magistrates' ***Court***. At 1.00 pm, she suggested that Ms Rosegas go to lunch. The appellant remained alone in the ***court*** room and used her fellow ***registrar***'s 'Courtlink' identification to create a bogus IIO, Mr Staley being the applicant and Tayla Hancocks being the respondent (with a service address in Moonta Bay, South Australia). The appellant entered the IIO on Courtlink using the identification of a third ***registrar***, Belinda Verri. When Ms Rosegas returned to the ***court*** room just before 2.00 pm, she noticed that a Courtlink screen was open with her identification. This conduct by the appellant was the basis of charge 2, ***misconduct*** in public office; charge 3, making a false document; and charges 5 and 6, causing an unauthorised computer function with intent to commit a serious offence.

[13] The bogus IIO-bearing the presiding magistrate's judicial number as having issued it-contained a condition requiring Ms Hancocks to deliver their daughter to Mr Staley on 26 October 2018 at 1.00 pm for 24 hours, and allow Mr Staley unsupervised access to their daughter every three weeks for 24 hours until a permanent parenting plan or ***court*** orders were in place.

[14] At 3.45 pm, Senior Constable Jennifer Day of Kadina Police Station in South Australia received a telephone call from Mr Staley advising that he had been granted an IIO which needed to be served on his ex-girlfriend the next day. Mr Staley told Senior Constable Day that his lawyer was sending it. She advised him to fax the IIO and to arrange for police to attend with him the following day. Minutes later, at 3.52 pm, Senior Constable Day received a faxed copy of the sham IIO from the Werribee Magistrates' ***Court***. She believed it to be genuine. These facts are the basis of charge 4, using a false document.

[15] The following morning, 26 October 2018, the appellant flew from Melbourne to Adelaide. Together with Mr Staley-who introduced her to police as his lawyer-the appellant met Senior Constable Day and another police officer at 12.34 pm near Ms Hancocks' house. Police then attempted to serve the fake IIO, but Ms Hancocks was not home.

[16] At 3.55 pm, Ms Hancocks received a text message from Mr Staley which included a screenshot of the sham IIO. He also told her that he had been to her house with the police-he sent her screenshots of a video of police at her front door-and said he would return at 7.00 pm. If she was not home, he said, she would be charged and arrested. Mr Staley said that the appellant was with him, and he threatened her with five years' jail and a fine.

[17] Less than an hour later, at 4.40 pm, a friend of Ms Hancocks telephoned the Werribee Magistrates' ***Court*** and spoke to the Senior ***Registrar***, Nick Lachmund, telling him that police in South Australia were trying to serve an IIO on Ms Hancocks. Mr Lachmund then examined the file on Courtlink and noticed discrepancies. He saw that the matter had been initiated with Ms Rosegas' Courtlink identification, and that the IIO had been entered using Ms Verri's Courtlink identification. The Senior ***Registrar*** made enquiries with Ms Rosegas and Ms Verri, who informed him that they had no knowledge of the IIO. Data from Courtlink revealed that the supposed IIO was initiated on the system on 25 October 2018, between 1.08 pm and 1.26 pm, and that the IIO was entered between 1.45 pm and 1.52 pm, when the appellant was the only ***registrar*** in the ***court*** room.

[18] At 5.00 pm, Senior Constable Day telephoned the Werribee Magistrates' ***Court*** to enquire about the validity of the IIO and spoke to Mr Lachmund. She forwarded a scanned copy of the service request and the IIO documentation to the ***court***. The Senior ***Registrar***, the Acting Senior ***Registrar*** for the Sunshine

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Region, Kelly Richardson, and Ms Rosegas all recognised that the appellant had signed the request for service. Around this time, Mr Lachmund sent a text message to the appellant asking about an IIO made the day prior, but received no response. He also made enquiries with the magistrate, who did not recall making the IIO. Further, Mr Lachmund listened to the ***court*** recordings for the day but found no recording relating to the IIO. He discovered that the ***court*** recording stopped at 1.10 pm and resumed at 2.03 pm. Mr Lachmund was unable to locate a physical copy of the IIO. Later that evening, he told Senior Constable Day that the genuineness of the IIO could not be verified and it should not be served.

[19] The appellant resigned on 29 October 2018. Police executed a search warrant at her address on 27 March 2019, and she was arrested. She gave a 'no comment' interview.

[20] Police later analysed the appellant's mobile phone. They discovered text messages between the appellant and her sister, Melanie Mitchell, sent on 23 and 24 September 2018, relating to a male named Tim Simpson who had installed smoke alarms at Ms Mitchell's residence. Ms Mitchell expressed her fear and apprehension of Mr Simpson. At 1.51 pm on 24 September 2018, the appellant conducted a check of Mr Simpson on Courtlink. She took a photograph of the Courtlink screen, which displayed an historical Intervention Order history, and an historical Intervention Order narrative, in relation to another woman. At 2.52 pm, the appellant sent the photograph to Ms Mitchell. The Courtlink enquiry was not part of the appellant's official duties and she had no legitimate reason to carry out the check. These activities are the basis of charge 1, ***misconduct*** in public office.

The plea hearing

[21] On the plea, the prosecution submitted that, having regard to all of the circumstances and the applicable sentencing principles, a community correction order ('CCO') with conviction was open to the sentencing judge in the sound exercise of discretion. The prosecution accepted that the appellant is in a relationship of family violence, and that she had been assaulted by her husband. Very significantly, the prosecution also accepted that, due to family violence, there would be exceptional hardship flowing to the appellant's young children if she were incarcerated. As will be seen, however, the respondent resiled from these submissions in this ***Court***.

[22] Counsel for the appellant sought the imposition of a CCO. Relying on *Markovic*,[7] counsel submitted that the appellant's is a case where exceptional circumstances justify the exercise of the residual discretion of mercy.

The appellant's personal circumstances

[23] The appellant is aged 40 years. She is married and has two children, a daughter aged five years,[8] and a baby son, aged five months.[9] Presently, she is exclusively breast-feeding the baby.

[24] After secondary schooling-she apparently was an above average student-the appellant obtained a Bachelor of Science degree. She then obtained work in the public service, and commenced working for ***Court*** Services Victoria in 2008 (the same year she began her relationship with her husband).

[25] The appellant commenced studying law whilst working as a ***Registrar***, and, although she has indicated an intention to complete her degree, it seems unlikely-at least in the short term-that she will be able to practise as a lawyer.

[26] It appears that the appellant has for some time endured family violence from her husband. In

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February 2017, during an argument, her husband grabbed her by the throat and strangled her. She made a statement about the incident to police, and, on 3 March 2017, her husband pleaded guilty in the Magistrates' ***Court*** to assault. He was released on an undertaking to be of good behaviour for 12 months, and a Family Violence Final Intervention Order was made against him. The 'protected persons' under that order were both the appellant and her then two-year-old daughter.

[27] A year after separating from her husband, the appellant endeavoured to resume the relationship, but family violence persisted. Hence, on 19 November 2019, the appellant's intoxicated husband injured her by grabbing her by the arm. The appellant, who was then 25 weeks' pregnant, had to seek medical treatment for damage to her right wrist (although she persuaded those treating her not to call police). It appears that a bone in the appellant's wrist was broken, necessitating her arm being placed in a sling. The appellant's daughter had been in the next room when the violence occurred.

[28] Not long afterwards, on 28 November 2019, when the appellant told her husband about the charges pending against her, he became very angry. He also became angry the next day, 29 November 2019, when the charges were reported in the news. Her husband's anger manifested itself when, as the appellant walked away from him out the front door of the house, he grabbed her by the arm and dragged her back inside. As he pulled her through the door, the appellant's legs banged and scraped against the door frame. He shut the door and sat on her, only letting her go when she said that she could not breathe and that her arm in the cast was hurting. This incident resulted in the appellant being left with significant bruising to her knee.

[29] Following the violent episode on 29 November 2019, the appellant and her husband exchanged a number of telephone text messages. The content of the husband's messages is generally unpleasant. One message in particular, however, is striking in its ominous and threatening tenor. The appellant had written that she knew what she had done (referring to her offending), but that did not mean she deserved to be 'hurt'. She also said that police remand people in custody for doing what her husband had done to her. Her husband replied:

> You go to the cops and your [sic.] dead….to me. See what happens

[30] We pause to note that, although counsel for the respondent sought to attribute a relatively benign interpretation to this message-her husband was simply conveying to the appellant that he would have nothing further to do with her if she complained to the police about his assaults on her-we consider that the message possessed a far more menacing tone, and was intended to (and did) convey a far more sinister message.

[31] After the first day of the plea hearing the appellant separated from her husband. In the evening of 29 May 2020, following allegedly threatening behaviour by her husband, the appellant left the family home with both children, staying at a friend's home for two nights. Thereafter, she reached an agreement with her father-in-law that her husband would leave the family home so that she could return with the children.

[32] Patrick Newton, a clinical and forensic psychologist, in a report dated 16 May 2020, was of the view that the appellant

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presents with significant anxiety and depression. There are indications to suggest that she has experienced trauma in the past and she continues to manifest residual traumatic symptoms. Accordingly, the appropriate diagnosis in her case is one of **post-traumatic stress disorder, in partial remission**.

Based on [the appellant's] history, it is likely that the suicide of [a named magistrate] had rekindled trauma from her past. She experienced marked distress and difficulty after this event but did not seek treatment or engage in debriefing. Soon after, Mr Staley reportedly told both her and her brother that he was feeling suicidal in the context of his dispute with his former partner. This report not only resonated with the distress caused by the recent suicide but also rekindled distress from [the appellant's] family background which she felt paralleled his experience. As a result, [the appellant] experienced a significant resurgence of the anxiety that she had previously been suppressing. This anxiety is likely to have resulted in significant difficulties for [the appellant's] ability to exercise her usual judgment and reasoning skills. Not only would I expect her to have focused on issues related to Mr Staley's possible self-harming to the exclusion of other considerations, but I would also anticipate that she would have had difficulty reasoning about these matters with calm composure and settled reflection on account of the elevated anxiety that she was experiencing. These impairments are likely to have contributed to her serious lapse of judgment with regard to these matters.

[33] Geoffrey Burrows was the appellant's treating psychologist. In a report dated 19 May 2020, he said that the appellant had told him that

her offending was motivated by a desperate and misguided attempt to assist her friend whom she said was experiencing legal issues during this time. She told me that she had feared that he would engage in self-harming behaviour due to the stress of his legal problems and it was reportedly in this context that her acts of ***misconduct*** occurred. [The appellant] presented for treatment manifesting significant anxiety and distress in response to her current legal matters. Hence, treatment involved assisting [the appellant] to manage this distress as well as to develop insight into the underlying motivations for her offending behaviour.

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[The appellant] reported a history of repeated traumas including physical and emotional abuse from her husband and several exposures to suicide and suicide ideation from people close to her. Consistent with trauma related symptoms, [the appellant] described experiencing feelings of inadequacy, acute anxiety, and avoidance symptoms including a reluctance to acknowledge any distress or seek out assistance. Psychoeducation was provided regarding the symptoms of trauma and how these symptoms can influence behaviour. Following this phase of treatment [the appellant] was able to recognise that continued attempts to avoid the negative thoughts and emotions associated with her traumatic experiences had allowed her symptoms and subsequent distress to develop and persist. She then expressed her desire to begin addressing the impact of her traumatic experiences more directly through counselling.

[The appellant] told me that the emotional abuse in her relationship was ongoing and reported historic examples of violence in the marriage. She also described an incident of physical abuse occurring between consultations with me. Safety planning was introduced to assist [the appellant] to identify appropriate strategies to minimise the risk of harm to her and her children. …

[34] During evidence given on the plea, Mr Newton said that, as circumstances stood at that time, both he and Dr Burrows were satisfied that the appellant was sufficiently able to protect her children from the

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family violence directed at her by her husband. He said, however, that his professional obligations to notify authorities about the risk of harm to her children would be enlivened if the appellant were to be separated from them and they were placed in the care of their father. Further, on 9 July 2020, the appellant made a notification to the Department of Health and Human Services of her concerns for the safety of her daughter should she be taken into custody and her daughter left in the care of her husband.

Reasons for sentence

[35] Community Corrections staff assessed the appellant as being suitable for a CCO.

[36] Rejecting the call for a CCO, however, the judge said:[10]

> Your counsel submitted that all of the sentencing goals could be met by the imposition of a community correction order. The prosecution, which accepted that there were exceptional circumstances, also submitted that a CCO would be within range. Imprisonment is always the disposition of last resort. As difficult as it is to sentence a woman with two small children to prison, I consider, particularly in respect to Charges 2 to 6, that taking into account all the relevant facts and sentencing principles and acknowledging the punitive nature of a community correction order, nevertheless a term of imprisonment must be imposed. This would be the case even if I had accepted that there were exceptional circumstances relating to your children .

[37] The judge accepted that the appellant indicated her guilty plea 'at the earliest reasonable stage'. It had utilitarian benefit -'even more so in the current situation where the COVID-19 restrictions are in force'- and 'is an indication of remorse'. The appellant had 'not sought to put blame on anyone else', and had 'assisted the police to some degree in their investigation'.

[38] With respect to the situation of the appellant's children, the judge observed:

> I accept that a period of imprisonment will be difficult for you. You have an infant child whom you are breastfeeding. Although it appears you will be able to keep him with you if incarcerated, the process of arranging this may interrupt your care of him. You also have a 5 year old daughter from whom you would be separated in custody. Furthermore the COVID-19 restrictions will limit your ability to see your daughter in person, and being incarcerated will mean you cannot control your own exposure and risk of contracting that disease.
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> I accept that the separation from your child or children will cause you considerable distress, for your loss of that contact, and your concern for their wellbeing.

[39] The judge also observed:

> It was also submitted that your older child was at risk of violence from her father, if you were incarcerated. You pointed to the domestic violence committed against you, and the opinions of Mr Burrows and Mr Newton that if you were incarcerated they would report a risk to the child to the relevant authorities.

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> This material does not persuade me on the balance of probabilities that there is a real risk of violence being perpetrated against your children by their father. I am not satisfied that there are exceptional circumstances by reason of risk to your children which would lead me to impose a merciful sentence, and in particular one that would not involve incarceration.

[40] Having said that she accepted that the appellant had 'good prospects for rehabilitation', the judge noted the character references that had been provided on the appellant's behalf.

The submissions of the parties in this *Court*

[41] Counsel for the appellant submitted that in the circumstances of this case, the relevant hardship goes beyond the 'tragic but inevitable consequences' of an offender causing hardship to their dependants by their own criminal offending. In the instant case, the hardship arises from the protracted family violence of which the appellant has been a victim for many years. Counsel for the appellant submitted that due to the history of family violence, which previously has included involvement by child welfare authorities, the safety of the appellant's daughter was a live issue should the appellant be imprisoned. Indeed, the prosecution had adopted the stance before the sentencing judge that the appellant was the victim of family violence by her husband, and accepted that the particular circumstances of this case gave rise to exceptional family hardship.

[42] Further, counsel for the appellant submitted that the sentencing judge imposed a term of imprisonment in circumstances where all relevant sentencing purposes could properly be achieved by the imposition of a CCO. The principle of parsimony, enshrined in s 5(3) of the Sentencing Act 1991 , requires that a sentence be no more severe than is necessary to achieve the purposes of sentencing for which it is imposed. Accepting that the appellant needed to be punished, counsel submitted that a CCO is necessarily punitive in nature, but can be tailored to meet rehabilitative needs, and is available as an alternative to imprisonment for serious offences.[11] It was submitted that the judge gave undue weight to general deterrence, denunciation and just punishment, and failed to give sufficient weight to prior good character and good prospects of rehabilitation.

[43] Contrary to the position that had been taken on the plea, the respondent's counsel in this ***Court*** submitted that the sentencing judge was correct to find that exceptional hardship was not established in this case. Counsel submitted that the prosecution's submission on the plea that a CCO was open bound neither the sentencing judge nor this ***Court***.

[44] We pause once more to note that the respondent's counsel advanced no reason for abandoning the concession made to the sentencing judge. It is clear from the prosecutor's submissions on the plea that the concession represented a considered position-provided on the express instructions of a permanent Crown Prosecutor-and that it was made (at least partly) because of 'the one incident of domestic violence that occurred in the presence of her older child'. Indeed, the prosecutor said that the 'prosecution have taken into account all the factors and that's [sic.] ultimately, we say that a CCO is open'. We would observe that, although it is true that a sentencing judge is not bound by a prosecution concession-his or her duty to impose a just and appropriate sentence cannot be fettered by agreement or concession-and that the prosecution is not debarred on appeal from adopting a stance different from that taken before the sentencing ***court***, properly made and considered concessions ought not be withdrawn on appeal unless there are compelling reasons for doing so. It goes without saying, it would not be proper to abandon a considered concession on a whim or for purely tactical reasons.[12]

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[45] Returning to the submissions on family hardship, the respondent's counsel contended that there was no evidence that the appellant's husband represented any risk of harm to his five-year-old daughter, nor that he could not discharge his parental duties upon the appellant going into custody. The appellant's separation from her children could not of itself amount to exceptional circumstances. Further, family hardship amounting to exceptional circumstances justifying mercy was not established on the basis that the appellant had experienced family violence in the past. The respondent's counsel submitted that it is well established that imprisonment carries with it an inevitable degree of hardship both to the offender and his or her dependents.

[46] As to the complaint of manifest excess, the respondent's counsel submitted that the offences were serious. They were premeditated and 'calculated'. Not only had the appellant been a ***registrar*** for 10 years, but she was studying law. She therefore knew her ethical responsibilities and appreciated the effects that the fabricated IIO would have. The proper administration of justice, and indeed the confidence the public has in orders made by ***courts***, counsel submitted, depends on those entrusted with its functions acting both lawfully and ethically. General deterrence, curial denunciation and just punishment had to 'predominate' over factors personal to the appellant. Good character, it was submitted, had to be weighed against the gravity of the offending and the need for general and specific deterrence, denunciation and just punishment. Counsel submitted that the offence of ***misconduct*** in public office, unlike many others, is applicable only to those who hold public office.

Discussion

[47] As we have said, on the plea the prosecution conceded the existence of exceptional family hardship. The prosecution was correct to do so. In our view, the circumstances of the appellant's hardship are sufficiently exceptional to warrant an extension of mercy.

[48] The relevant principles were recently discussed by this ***Court*** in *Cross*:[13]

> Prior to Markovic , there was a school of thought that, notwithstanding that exceptional family hardship had not been demonstrated, there was still room for the extension of mercy in appropriate cases. Thus, in Carmody ,[14] the applicant had pleaded guilty to being knowingly concerned in the importation of heroin with her husband. Having found that the sentencing judge had erred in the way in which he dealt with the applicant's co-operation, necessitating the applicant's resentence, the ***Court*** took into account the effect of the applicant's incarceration on her four year old child. He had suffered convulsions when separated from her, but subsequently had been allowed to live with her in prison. Tadgell JA (with whom Winneke P agreed) said:[15]
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> > I cannot regard this as a case where exceptional circumstances have been shown. Nevertheless, this ***Court*** is in a position-as the learned sentencing judge necessarily was not-to learn something, with less than satisfactory material, of the actual impact that the applicant's incarceration has had on her son. We cannot act as though exceptional circumstances have been shown, for they have not been shown. We can, however, show some mercy, tempering the wind to the shorn lamb. I think this is a case in which to do it: compare *Miceli* (1997) 94 A Crim R 327 [*R v Miceli [1998] 4 VR 588*]. A similar attitude has been taken in the English cases of *Vaughan* (1982) 4 Cr App R (S) 83 and *Haleth* (1982) 4 Cr App R (S) 178 . In each of those cases an amendment of sentence was made on appeal so as to achieve the immediate release of a prisoner in order to allow a sick child or children to be cared for.

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As Markovic has since made clear, however, there is no residual discretion to exercise mercy on grounds of family hardship where the relevant circumstances are not shown to be exceptional. The ***Court*** said:[16]

> We have concluded that the established common law position should be reaffirmed. Our reasons may be summarised as follows:
>
> 1. Reliance on family hardship-that is, hardship which imprisonment creates for persons other than the offender-is itself an appeal for mercy.
> 2. Properly understood, therefore, the purpose and effect of the 'exceptional circumstances' test is to limit the availability of the ***court***'s discretion to exercise mercy on that ground.
> 3. Accordingly, there can be no 'residual discretion' to exercise mercy on grounds of family hardship where the relevant circumstances are not shown to be exceptional.
> 4. The effect *on the offender* of hardship caused to family members by his/her imprisonment raises different considerations, to which the 'exceptional circumstances' test has no application.

The ***Court*** observed that: first, it is almost inevitable that imprisoning a person will have an adverse effect on the person's dependants;[17] secondly, the primary function of the sentencing ***court*** is to impose a sentence commensurate with the gravity of the crime; thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less; and, fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would defeat the appearance of justice and be patently unjust.[18] For these reasons, it is only in the exceptional case, where the plea for mercy is seen as irresistible, that family hardship can be taken into account.[19]

[49] In our view, the fact that the appellant currently is breast-feeding her baby (albeit that her baby is now in prison with her), and the fact that her other child will be exposed to the influence of her abusive husband (albeit that there is no evidence that to this point he has harmed the children), together are sufficient to establish exceptional circumstances. The sentencing judge should have so found.

[50] The judge expressed the view that the appellant needed to persuade her 'on the balance of probabilities that there is a real risk of violence being perpetrated against [the] children by their father'.[20] Presumably, the judge did so because she regarded the risk of violence as a matter that the appellant sought to use in her favour.[21] We do not consider, however, that the risk to the child was a fact to be established on the balance of probabilities. On the judge's approach, once she could not be satisfied that harm was more likely than not, any consideration of risk was removed from the equation, and the issue was treated as having been disposed of. Once the existence of some relevantly significant risk was established (the existence, but not the extent, of that risk having to be established on the balance of probabilities) that risk, even if it was less than 50 per cent, had to be considered.

[51] A finding that exceptional circumstances exist is, however, a question of judgment, based on the available facts. It is not itself a finding of fact. The existence of a relevant risk informed the answer to that question. Hence, the real issue was the weight to be attached to the risk, rather than whether 'on the

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balance of probabilities that there is a real risk of violence being perpetrated against [her] children'. Given the husband's violence towards the appellant; his curial finding of guilt for assault; the Intervention Order which had protected both the appellant and her daughter; the absence of the mother's protection should she be imprisoned; and the assessment by both psychologists that, in order to protect the children, a notification to DHHS would be necessary-all of which were established facts-we consider that the judge was required to proceed on the basis that there was a real risk to the daughter by reason of her mother's absence that could not readily be dismissed. In our opinion, the issue could not simply be put to one side, as it appears to have been. When put into the mix, the existence of the risk when looked at in the overall context, compelled a finding-as the prosecution initially conceded-that there was exceptional family hardship.

[52] But even were we wrong about that, we regard the sentence imposed on the appellant as being manifestly excessive. Notwithstanding the seriousness of her offending on charges 2 to 5-it is no small thing to fabricate a ***court*** order and represent it to be genuine with a view to using it to advantage-we consider that the appellant should not have been imprisoned on those charges. (It is plain that the offence in charge 1, although serious, standing alone was not so serious as to warrant a sentence of imprisonment.)

[53] Albeit that she was the architect of her downfall, the appellant has suffered a spectacular fall from grace. Her good character and reputation have been indelibly tarnished by her offending, and she has suffered humiliation and embarrassment from which she will likely never recover. It is probable that her aspiration of practising law will have evaporated (at least for the foreseeable future), and her capacity to pursue a public service career irretrievably lost. Added to these things, the appellant has the care of two young children, in circumstances in which she realistically cannot rely on her husband for much in the way of support.

[54] Importantly, it does not appear that the appellant had anything to gain from her offending. There was to be no financial reward. Indeed, the offending that is the basis of charges 2 to 6 seems to have flown from sadly misguided altruism, influenced by the compromise to her judgment of which Mr Newton spoke. Further, when her ***misconduct*** was detected, she did not endeavour to defend her actions, pleading guilty at the earliest opportunity.

[55] Submitting that the prosecution's concession before the sentencing judge was not binding, senior counsel for the respondent contended that CCOs are not a 'Get Out of Jail Free' card.[22] That may be so, but it remains clear from *Boulton*[23] that 'a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment', and a ***court*** 'may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation'.[24]

[56] In our view, the factors identified above should have led the sentencing judge to conclude that there was an alternative to imprisonment in the appellant's case. We consider that imprisonment was not open to the judge in the sound exercise of discretion.

Conclusion

[57] In light of the foregoing, we were of the opinion that the sentence imposed on the appellant in the County ***Court*** had to be set aside.

....

[58] We therefore granted leave to appeal against sentence; allowed the appeal; and sentenced the appellant to a CCO of two years' duration with appropriate conditions.

Order

Orders accordingly.

Counsel for the applicant: *Mr D Hallowes QC* with *Ms S Lacy*
Solicitors for the applicant: *Lethbridges*
Counsel for the respondent: *Mr R Gibson QC*
Solicitors for the respondent: *Ms A Hogan, Solicitor for Public Prosecutions*

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1 An offence at common law. By virtue of s 320 of the Crimes Act 1958 , the maximum penalty is 10 years' imprisonment,.

2 Crimes Act 1958 , s 83A(1). The maximum penalty is 10 years' imprisonment.

3 Crimes Act 1958 , s 83A(2). The maximum penalty is 10 years' imprisonment.

4 Crimes Act 1958 , s 247B(1). The maximum penalty is the same as applies to the relevant 'serious offence'- in this case making a false document — so that the maximum penalty was 10 years' imprisonment.

5 Her date of birth is 17 March 1980.

6 For example, see, Magistrates ***Court*** Act 1989, ss 21, 43, 57, 58, 73, 107, 112 and 152.

7 *Markovic v R* (2010) 30 VR 589 ('*Markovic*').

8 Born on 4 March 2015.

9 Born on 2 March 2020.

10 Emphasis added to this and following passages.

11 *Boulton v R* (2014) 46 VR 308

....

12 See *DPP v Waack* [(2001) 3 VR 194](#) , 203–7 [22]–[31] and the authorities there cited. In that case a 'concession' that a suspended sentence of imprisonment was open had been 'dragged' from the prosecutor.

13 *Cross v R* [2019] VSCA 310 , [50]–[52] (Priest and Weinberg JJA).

14 *R v Carmody* (1998) 100 A Crim R 41

15 Ibid 45.

16 *Markovic*, 591 [5].

17 Ibid 591 [6].

18 Ibid 592 [7].

19 Ibid.

20 See [39] above.

21 See *R v Storey* [[1998] 1 VR 359](#) , 371 (Winneke P, Brooking and Hayne JJA, and Southwell AJA).

22 *Hutchinson v R* [(2015) 71 MVR 8](#) , 13 [17] (Priest JA).

23 *Boulton v R* [(2014) 46 VR 308](#) (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

24 Ibid 338 [131].

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Borg v R

[2020] VSCA 191; BC202007081

***Court*:** VSCA

Judges: Priest , Beach and Niall JJA

Judgment Date: 27/7/2020

Abstract

A ***court registrar*** who created and used false interim intervention order appealed against sentence imposed by Victorian County ***Court***. The Supreme ***Court*** of Victoria ***Court*** of Appeal allowed the appeal and subjected her to a community correction order with appropriate conditions on ground of exceptional family hardship.

Catchwords & Digest

Criminal law — Sentencing — Dishonesty offences — *Misconduct* in public office

Appeal against severity of sentence.

Finding upon exceptional circumstances that appellant's family hardship would sufficiently warrant extension of mercy.

Finding upon circumstances that imprisonment was not open to sentencing judge in sound exercise of discretion.

Finding that sentence imposed by sentencing judge was manifestly excessive.

Appeal allowed.

Criminal law — Sentencing — Dishonesty offences — *Misconduct* in public office (x2); Making false document; Using false document; Causing unauthorized access to computer function with intent; (VIC) Crimes Act 1958 ss 320, 83A(1), 83A(2), 247B(1)

Circumstances: Female; 38; Guilty plea; Offender as ***registrar*** of ***court*** used ***court*** email address to send false email to victim for parenting orders where victim replied and advised father of victim's child for overnight access; Introduced self with another name to victim's mother; Sent email and threatened victim with family ***court*** costs order if victim would not sign consent orders; Sent another email which threatened victim that proceedings in Federal Circuit ***Court*** for parenting orders should victim refuse to negotiate with father of victim's child; Used fellow ***registrar***'s courtlink identification and created bogus interim intervention order with victim as respondent; Entered interim intervention order into courtlink through third ***registrar***'s identification; Resigned from office after police attempted to serve fake interim intervention order upon victim; Married with two young children; Commenced law degree; Family violence caused by offender's husband; Post-traumatic stress disorder; Exceptional family hardship; No financial reward from offending; Early guilty plea

Held: Appeal against sentence of 2 years and 1 month imprisonment (non-parole 13 months) allowed - Sentence of two years community correction order with appropriate conditions substituted.

Litigation History

Director of Public Prosecutions (DPP) v Borg 16/7/2020 VCC

[2020] VCC 1029

Varied

Cases referring to this case

R v Deng 16/5/2023 VSC

[2023] VSC 257; *BC202304946*

Cited

Director of Public Prosecutions (DPP) v Hill (A Pseudonym) 19/4/2023 VSCA

[2023] VSCA 84; *BC202303298*

Cited

Curtis v R 21/1/2022 VSCA

[2022] VSCA 5 at *[20]* ;

*BC202200283*at *[20]*

Cited

Lam v R 1/9/2021 VSCA

[2021] VSCA 241 at *[33]* ;

*BC202108078*at *[33]*

Applied

Mendieta-Blanco v R 12/10/2020 VSCA

[2020] VSCA 265 at *[36]* ;

*BC202009875*at *[36]*

Cited

Cases considered by this case

Cross v R 18/12/2019 VSCA

[2019] VSCA 310 at [50]-[52] ;

BC201912148at [50]-[52]

Considered

Hutchinson v R

20/5/2015
VSCA

(2015) 71 MVR 8 at [17] ;

[2015] VSCA 115at [17];

BC201504093at [17]

Cited

Boulton v R; Clements v R; Fitzgerald v R

22/12/2014
VSCA

(2014) 46 VR 308 at [131] ;

(2014) 248 A Crim R 153at [131];

[2014] VSCA 342at [131];

BC201410996at [131]

Cited

Markovic v R; Pantelic v R

5/5/2010
VSCA

(2010) 30 VR 589 at [5] ;

(2010) 200 A Crim R 510at [5];

[2010] VSCA 105at [5];

BC201002732at [5]

Cited

Director of Public Prosecutions v Waack

31/7/2001
VSCA

(2001) 3 VR 194 at [22]-[31] ;

(2001) 121 A Crim R 134at [22]-[31];

[2001] VSCA 108at [22]-[31];

BC200104489at [22]-[31]

Cited

R v Carmody 18/3/1998 VSCA

(1998) 100 A Crim R 41; BC9801064

Cited

R v Miceli 23/6/1997 VSCA

[1998] 4 VR 588; (1997) 139 FLR 309; (1997) 94 A Crim R 327; BC9703736

Cited

R v Storey 6/12/1996 VSCA

[1998] 1 VR 359; (1996) 89 A Crim R 519; BC9606011

Cited

Legislation considered by this case

Legislation Name & Jurisdiction	Provisions
Crimes Act 1958 (Vic)	s 247B(1), s 320, s 83A(1), s 83A(2)
*Magistrates'' **Court** Act 1989*	2 43p, s 107, s 112, s 152, s 21, s 57, s 73
Sentencing Act 1991 (Vic)	s 5(3)

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