Summary of Judgment

Peter Brown v The Queen
[2019] VSCA 286

Director of Public Prosecutions v Jordan Drake
[2019] VSCA 293

10 December 2019

Today, the Court of Appeal (President Maxwell, Justice Priest, Justice Kaye, Justice T Forrest and Justice Emerton) dismissed the first two appeals against sentences imposed under the 'standard sentence' scheme.

The first was an offender's appeal against a sentence of 30 years' imprisonment for murder. The second was an appeal by the Director of Public Prosecutions against a sentence of 12 years and 6 months' imprisonment imposed for multiple rape offences against the same victim.

Standard sentence scheme

The standard sentence scheme was enacted by the Victorian Parliament in 2017 and commenced on 1 February 2018. The scheme prescribes standard sentences for 12 serious crimes, including murder, rape and sexual offences involving children. The 'standard sentence' for murder is 25 years, and for rape is 10 years.

The key new requirement under the scheme is that a judge when sentencing for a 'standard sentence offence' must 'take the standard sentence into account as one of the factors relevant to sentencing'.[1]

The 'standard sentence' is defined as:

> the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.[2]

The provisions then specify that those 'objective factors' are to be determined 'without reference to matters personal to a particular offender or class of offenders' and 'wholly by reference to the nature of the offending.[3]

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1 *Sentencing Act 1991* s 5B(2)(a).

2 Ibid s 5A(1)(b).

3 Ibid s 5A(3).

The question explored at the hearing of these appeals was whether the new scheme required (or permitted) the sentencing judge to assess the seriousness of the subject offence 'taking into account *only* the objective factors' as thus defined.[4]

In a unanimous judgment, the Court held that the standard sentence provisions do not alter the judge's obligation to assess the seriousness of the subject offence. That assessment remains a necessary part of the process of instinctive synthesis and it is not constrained by the legislative definition of 'objective factors'. The legislature clearly intended that the obligation to take the standard sentence into account should not otherwise affect the exercise of the sentencing discretion.

Brown v The Queen

Brown's application for leave to appeal against sentence advanced a single ground, namely, that the sentence imposed for murder — 30 years' imprisonment, with a non-parole period of 24 years — was manifestly excessive.

The Court held that the sentence was not wholly outside of the range of sentences reasonably open, when regard was had to the serious nature of the offending, the applicant's moral culpability, the aggravating circumstances, and the fact that 25 years' imprisonment is the standard sentence prescribed for an offence of murder that falls objectively within the 'middle of the range' of such an offence.

DPP v Drake

The Director's appeal contended that the individual sentences for the rape charges (6 years on each), total effective sentence (12 years and 6 months) and non-parole period (8 years) were manifestly inadequate.

The Court said that the offending was abhorrent and protracted, and had no doubt had a profound impact on the victim. The fact that the offending took place during a single episode meant, however, that the principles of proportionality and totality were engaged.

The need for general and specific deterrence, and community protection had to be balanced with a recognition of the respondent's history of childhood deprivation, violence and abuse, each of which affected the assessment of his moral culpability.

When proper regard was had to the mitigating circumstances, and the principles of proportionality and totality, the sentences were within the range properly open to the sentencing judge.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.

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[4] Ibid s 5A(1)(b) (emphasis added).