THE DIRECTOR OF PUBLIC PROSECUTIONS v CHARLIE DALGLIESH (A PSEUDONYM) (M1/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 148

Date of judgment: 29 June 2016

Special leave granted: 16 December 2016

This appeal concerns whether the legislature by enactment of section 5(2)(b) of the *Sentencing Act* 1991 (Vic) intended to alter the common law of sentencing which requires that a sentence be imposed by means of the application of a sentencing judge's instinctive synthesis. This is a process whereby all relevant sentencing matters are taken into account and synthesised to arrive at what is essentially a value judgment about the sentence.

The respondent pleaded guilty to committing four sexual acts on two sisters under the age of 16 years between 2009 and 2013. This appeal concerns the sentence imposed on Charge 1 - a charge of incest. This charge alleged that the respondent, contrary to section 44(2) of the *Crimes Act* 1958 (Vic), between 16 January 2013 and 13 March 2013 took part in an act of sexual penetration of the complainant - a person under the age of 18 years whom the respondent knew to be the child of his then de facto wife. The child was then 13 years of age and became pregnant and then had a termination of the pregnancy.

The learned sentencing judge sentenced the respondent to 3 years and 6 months' imprisonment on Charge 1 and lesser periods on the other 3 charges. The sentence imposed on charge 1 was the base charge. The remaining sentences were ordered to be served cumulatively upon the base sentence and upon each other resulting in a total effective sentence of 5 years' and 6 months' imprisonment.

The appellant ("DPP") appealed to the Court of Appeal on 2 grounds. These grounds were that the sentence imposed on Charge 1 (Ground 1) and the total effective sentence (Ground 2) were manifestly inadequate. The Deputy Registrar of the Court of Appeal subsequently wrote to the parties informing them that the Court considered the present case to be an appropriate vehicle for consideration to be given to the adequacy of "current sentencing practices" for the offence of incest.

On 18 March 2016 the Court of Appeal dismissed the DPP's appeal and published its reasons on 29 June 2016. In Part A of its reasons, the Court determined that the DPP had failed to establish that the sentence imposed on the respondent was outside the range of sentences reasonably open to the learned sentencing judge based upon the existing sentencing standards. In Part B of its reasons the Court went on to determine that current sentencing practices for the offence of incest in Victoria were inadequate. Had it not been for the '*constraints of current sentencing which…reflect the requirements of consistency, we would have had no hesitation in concluding that the sentence imposed on the respondent was manifestly inadequate*.' The Court went on to say that a sentence of '*significantly higher'* than 7

years' imprisonment on Charge 1 would have been warranted on the basis of the principles it had set out.

The DPP appealed to the High Court on essentially the same as the first of the grounds of appeal relied upon before the Court of Appeal.

The ground of appeal by the DPP is:

- That the Court of Appeal erred by failing to find that the sentence imposed on Charge 1 was manifestly inadequate and in particular, in so doing, committed an error of sentencing principle by failing to properly apply the instinctive synthesis methodology and by elevating the notion of current sentencing practices to the level of determinative sentencing criterion.