

Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41

Background

The offender, Dalgliesh (D), pleaded guilty in the County Court to charges of incest, indecent assault and sexual penetration of a child under 16 and was sentenced to five years and six months' imprisonment, with a non-parole period of three years. The charges involved offending against the two daughters of D's partner, P. The offending the subject of the incest charge resulted in V1 falling pregnant and having a subsequent termination. She was 13 at the time.

The Director of Public Prosecutions appealed to the Court of Appeal on two grounds: first, that the sentence of three years and six months imposed on the incest charge was manifestly inadequate; and second, that the cumulation orders (totalling two years on three further charges) resulted in a manifestly inadequate total effective sentence.

The Court of Appeal dismissed the Director's appeal, holding that the Director was unable to establish that the sentences imposed were outside the range reasonably open, based on existing sentencing standards. The Court of Appeal also concluded that sentences imposed for incest offences of mid-range seriousness were disproportionately low, having regard to the 25 year maximum penalty, the objective gravity of the offending and the high moral culpability of the offender. The Court of Appeal concluded that sentences for such offences should be progressively increased so as to properly reflect the objective gravity of the offence. Given this, the Court of Appeal noted that but for the constraints of current sentencing practices, it would have concluded that the sentence imposed on D was manifestly inadequate and that individual sentences of 7 years or more would have been warranted.

Appeal to the High Court

The Director appealed the decision to the High Court. The sole ground of appeal was that the Court of Appeal erred by failing to find that the sentencing judge had imposed a sentence for the incest offence that was manifestly inadequate. And in so erring, the Court of Appeal committed an error of sentencing principle in that it failed to properly apply the sentencing methodology of instinctive synthesis because it elevated the notion of current sentencing practices to the level of a determinative sentencing criterion.

The High Court unanimously allowed the appeal, concluding that the Court of Appeal had erred by treating the range established by current sentencing practices as decisive of the appeal, despite the fact that it concluded that the range demonstrated by current sentencing practices was so low that it constituted error in principle. The Court ordered the matter to be remitted to the Court of Appeal for determination of the appeal against sentence.

Reasoning

Section 5(2) of the *Sentencing Act 1991* sets out matters a court must consider when sentencing an offender. One of the matters specified, under s5(2)(b), is current sentencing practices. Other matters include the maximum penalty for the offence, the nature and gravity of the offence, the offender's culpability and degree of responsibility, the impact of the offence on any victim, and their personal

circumstances, and any aggravating or mitigating factors concerning the offender.

The principal joint judgment (Kiefel CJ, Bell and Keane JJ) noted that these considerations cannot be applied mechanically, given that they are incomparable and in many ways inconsistent (at [4]). In sentencing an offender, a court must balance each factor in order to impose a sentence that is just in all the circumstances. This is an exercise in the instinctive synthesis (at [5]). All factors must be taken into account: current sentencing practices are only one factor and are not the controlling factor (at [9]).

While the need to have regard to current sentencing practices is the statutory manifestation of the concern to ensure reasonable consistency in sentencing, it does not mean that a sentencing court must follow a range of sentences that is clearly contrary to principle (at [50]).

In this case, however, the principal judgment concluded that the Court of Appeal used current sentencing practices as the determinative factor in deciding the appeal. The Court of Appeal attached overriding importance to the need to adhere to current sentencing practices that led it to dismissing the Director's appeal, while also finding that sentencing practices for incest offences falling within the mid-level of seriousness were inadequate (at [48]).

The concurring judgment (Gageler and Gordon JJ) explained that this was to treat current sentencing practices as "fixing quantitative boundaries within which future sentences" must be passed (at [81]). The concurring judgment observed that examination of sentences in comparable cases can inform the task of sentencing, but must not be used "to fix boundaries that, as a matter of practical reality, bind the court" (at [83]).

The principal judgment observed that the Court of Appeal had assessed the range of sentences available by using decisions in two cases as sentences that were appropriate for the worst category of incest involving pregnancy and then concluding that the range of sentences available in D's case, which was of mid-level seriousness, needed to be substantially lower than the sentences imposed in those cases (at [44]).

This approach was wrong for two reasons: it constituted a mechanical or arithmetic approach to sentencing; and it misunderstood what is involved when identifying 'worst category' offences (at [45]). Given that the offence of incest carries a maximum penalty of 25 years' imprisonment, a worst category incest offence would warrant a sentence approaching that maximum. Neither of the two sentences the Court of Appeal used as examples of sentences for worst category offences were close to that maximum sentence (at [46]).

The principal judgment agreed with the Court of Appeal's conclusion that current sentencing practices for incest offences in the mid-range level of seriousness were inadequate, and did not reflect the objective gravity of the offence, thereby constituting an error of principle (at [53]). This, the principal judgment concluded, was enough to warrant the Court of Appeal intervening on the basis of manifest inadequacy (at [60]), and 'there was no good reason for the Court of Appeal not to correct the effect of the error' (at [63]).

The principal judgment agreed with the Court of Appeal that the inadequacy of sentencing practices for incest can be traced to *Kaye* (1986) 22 A Crim R 366 and that in the three decades since *Kaye*,

courts have developed “an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims” (at [57]). Despite this growing awareness, *Kaye* has continued to exert a “gravitational pull” to hold sentences at “an anomalously low level” (at [58]).

The principal judgment noted that the Court of Appeal adopted an approach to the appeal that allowed it to dismiss the appeal in order to avoid perceived unfairness to D, while also correcting, for future cases, the unjustifiably low range of sentences imposed for this type of offence. This approach, it reasoned, was based on the assumption that an offender pleads guilty, expecting to be sentenced consistently with current sentencing practices (at [66]). The desire to avoid perceived unfairness did not, however, warrant the Court of Appeal taking this approach. All an offender can expect is to have a sentence imposed that is just according to law. A sentence that is manifestly inadequate ‘is a failure of the due administration of criminal justice’ (at [65]–[66]).

What does this mean?

Current sentencing practices are only one factor, among several, that courts must take into account when sentencing offenders. Current sentencing practices inform the instinctive synthesis but are not the determinative factor. They do not set the outer limits of permissible sentencing. Where comparable cases disclose that current sentencing practices for an offence are inadequate, sentencing courts should not adhere to those practices so as to impose a sentence that is clearly contrary to legal principle. Offenders cannot expect to have a sentence imposed that is manifestly inadequate if current sentencing practices are applied without being balanced by the other sentencing considerations required to be taken into account pursuant to s5(2) of the *Sentencing Act 1991*.