SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2019 0042

VIKRAM GOPINATH — Applicant

v

THE QUEEN — Respondent

JUDGES:	EMERTON JA and LASRY AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	31 July 2019
DATE OF JUDGMENT:	2 August 2019
MEDIUM NEUTRAL CITATION:	[2019] VSCA 172
JUDGMENT APPEALED FROM:	*DPP v Gopinath* (Victorian County Court, Gucciardo J, 21 January 2019)

CRIMINAL LAW — Appeal — Sentence — Attempt to procure child for act of sexual penetration (Charge 1) — Misconduct in public office (Charge 2) — *Crimes Act 1958* s 58(3) and 321M — Guilty plea — Sentenced to 10 months' imprisonment and Community Correction Order — Sentencing judge erred as to the maximum sentence applicable on Charge 1 — Appeal allowed in part — Applicant resentenced to 190 days imprisonment.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr C. Carr	Tony Hargreaves and Partners
For the Respondent	Mr C. Boyce SC	Office of Public Prosecutions

EMERTON JA
LASRY AJA:

Introduction

1 On 3 October 2018, in the County Court of Victoria at Melbourne, the applicant was arraigned and pleaded guilty to one charge of attempting to procure a child aged 16 or 17 under his care, supervision or authority for an act of sexual penetration and one charge of misconduct in public office. On 21 January 2019 the sentencing judge sentenced the applicant as follows:

Charge on Indictment J10249542.2	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1.	Attempt to procure a child aged 16 or 17 years for an act of sexual penetration contrary to s 321M and s 58(3) of the *Crimes Act 1958* (Vic).	Level 6 imprisonment (5 years maximum) [s 321P *Crimes Act 1958* (Vic)]	10 months' imprisonment	N/A
2.	Misconduct in public office contrary to common law.	Level 5 imprisonment (10 year maximum) [s 320 *Crimes Act 1958* (Vic)]	Convicted and sentenced to a Community Correction Order for a duration of 24 months with supervision and treatment and rehabilitation conditions.	N/A

Total Effective Sentence:	10 months' imprisonment together with a Community Correction Order for 24 months with supervision and treatment and rehabilitation conditions.
Non-Parole Period:	Not Applicable
Pre-Sentence Detention:	Nil
6AAA Statement:	Not given
Ancillary orders:	• Forensic sample order; and • Sex Offender Registration for a period of 8 years.

2 The applicant sought leave to appeal against his sentence on the grounds that:

(a) the sentencing judge erred in respect of the maximum penalty on Charge 1 ('Ground 1'); and

(b) the sentencing judge erred in respect of the principle of delay ('Ground 2').

3 It was conceded by the respondent that the sentencing judge erred in respect of the maximum penalty on Charge 1. However, the respondent submitted that the sentence was nonetheless appropriate and that the error should not re-open the sentencing discretion.

4 We disagreed.

5 At the hearing of the application on 31 July 2019, we made orders that leave to appeal be granted on Ground 1, the appeal be allowed in part and the sentence imposed by the sentencing judge in respect of Charge 1 be set aside. The applicant was resentenced on Charge 1 to a term of imprisonment equivalent to time already served, which was designated as 190 days.

6 It was not contended that the imposition of the Community Correction Order on Charge 2 was the result of any error by the sentencing judge and leave to appeal on Ground 2 was refused. The Community Correction Order was affirmed.

7 These are the Court's reasons for the orders that were made.

The offending

8 The applicant was 27 years old at the time of the offending and a serving member of Victoria Police. At the relevant times, the victim was 16 years old and was in the care and custody of the Secretary to the Department of Health and Human Services. She was living in accommodation managed by the Secretary.

9 On about 12 December 2016, the victim attended Mildura Police Station, where the applicant was working, and asked for a lift home. The applicant and another police member drove her to her residence. The victim sent the applicant a Facebook message to thank him for the lift, and the applicant and the victim began to exchange messages and other material using Facebook and other social media.

10 The content of the conversations between the applicant and the victim included the victim revealing to the applicant her family problems, her mental health issues and how she wished to harm herself. The applicant reassured the victim that he was there whenever she needed. He sometimes referred to her as 'hun' and 'babe'. Over time, these messages became sexualised. On 31 December 2016, the applicant sent three photos of himself to the victim via Snapchat.

11 Between 1 December 2016 and 24 January 2017, the applicant contacted the victim on 146 separate occasions and the victim contacted the applicant on 442 separate occasions. The victim recorded 87 phone calls with the applicant the content of which was sexual, including discussing what sexual activity they would like to engage in with each other and making arrangements to meet. The phone calls included statements from the applicant that they would have to wait until the victim was 18 years old.

12 On 31 December 2016, the applicant was on patrol duty and approached the victim to make arrangements to take her home at the end of his shift. He later called the victim, who was in bed, and they had a sexualised discussion. The applicant encouraged the victim to meet with him.

13 In early January 2017, the applicant made arrangements to pick up the victim around the corner from her residence, so as not to alert her carers to his presence. They drove to the Mildura Ski Club and parked next to the river where they got out of the car and talked to one another. At one point, the applicant picked the victim up off the ground, grabbed her bottom and squeezed it. They spent approximately 45 minutes together before the applicant drove the victim to her friend's house.

14 On 13 January 2017, the applicant again arranged to meet the victim around the corner from where she lived and he drove her to Apex Park in Mildura. While they were talking, the victim asked for a hug as she was upset. The applicant leaned over, hugged the victim and kissed her on the cheek and then on the lips.

15 On 18 January 2017, following an argument between the applicant and the victim, the victim threatened to show the photos she had received from the applicant to other police members. Over the course of a number of telephone calls and text messages, the applicant told the victim that if she did what she threatened to do, it would be 'game over' for him.

16 The following day, 19 January 2017, the victim contacted Mildura Police to say that she had found an iPhone 5 in the Mildura Mall which had photos of the applicant on it. This was a fabrication. She was told to hand the phone in at the police station. The applicant was then asked by a colleague about the phone and photos and stated that he had lost his phone a couple of weeks earlier. This was also a fabrication. The applicant was told to collect the phone from the victim.

17 Between 19 and 23 January 2017, the applicant told the victim what to say about the fictitious iPhone 5, including that she had found it, and that she did not get the photos from him.

18 On 20 January 2017, the victim called the applicant and told him that her friend had put the photos of him on the Facebook 'Eye Watch' police page. The applicant told the victim that he was going to end up killing himself, that he would lose his job and go to jail and become known as a paedophile. The victim apologised and told the applicant that she would get her friend to delete the post. The applicant told the victim to stick to the story that she had found the iPhone.

19 On 24 January 2017, the victim attended Mildura Police Station and disclosed the inappropriate behaviour and messages. On 25 January 2017, police went to the applicant's home and conducted a field interview during the course of which he explained his conduct with the victim by saying, 'I've kept in communication with

her over the course of the month just because she was feeling suicidal and all that sort of stuff so it was a case of just, you know, having a chat with her. I did not do any sexual activity with her. She's 16 years old. It was never a case of that. She's fucked in the head as well'. He also stated, 'I get what you're trying to do but it's fuckin' — this is ridiculous. Stupid little fuckin' bitch. I was trying to help her for about a month and a half. She tried to blackmail me with shit and I said, "Whatever. Just water off a duck's back 'cause I don't care". I've spent time outside of the job with her, picked her up. She told me she'd cut herself so I went over there, picked her up. We went for a drive and I didn't touch her. I gave her a hug. I think that's about it. She tried to kiss me at one point but I was — sort of pushed her away and made it very clear that I wanted to be her friend, you know, help her through what she was going through'.

20 A formal interview was conducted in which the applicant made no comment.

The plea

21 On the plea, the applicant tendered a report by Ms Gina Cidoni, psychologist, dated 13 November 2018, which summarised the applicant's background, family history, education, employment and health. Ms Cidoni administered psychological tests indicating a profile of poor judgement, problems with logic and clear thinking and unpredictable behaviour. The applicant fell in the low risk category in the Sex Offender Risk Appraisal Guide. Ms Cidoni concluded that the applicant suffered a severe adjustment disorder situational in nature and opined that, were he to be gaoled, his symptoms would worsen and he would become a risk to himself. Ms Cidoni recorded that the applicant had expressed remorse and that he told her that he had lost control of himself.

22 On the plea, counsel for the applicant relied, amongst other things, on the following factors:

(a) the applicant had no prior convictions;

(b) the applicant had excellent prospects for rehabilitation and had been assessed by Ms Cidoni as a low risk of re-offending using the Sex Offender Risk Appraisal Guide and as having no paedophilic interest;

(c) the applicant had a diagnosis of adjustment disorder with severe situational distress;

(d) the applicant's pleas of guilty had facilitated the course of justice and were indicative of remorse. He had also expressed remorse to Ms Cidoni;

(e) there had been delay in bringing the matter to resolution and the applicant had been in no further trouble over the period of delay;

(f) the applicant had suffered extra curial punishment through his suspension from Victoria Police and he would lose his employment after sentencing; and

(g) the applicant would find time in custody more onerous than usual, given his previous employment and his mental state.

23 The victim made a victim impact statement in which she said that she became anxious and worried about her safety and therefore reported the applicant's conduct to the police. The matter involving the applicant and the investigation had become known in the community and, as a result, she had been abused and confronted about it by others. She had isolated herself and 'went off the rails', taking it out on everyone and becoming very angry. She was admitted to a mental health ward on several occasions towards the end of 2017, she overdosed and had attempted further self-harm.

Reasons for Sentence

24 The sentencing judge found that the offending was serious, particularly in light of the applicant's role and responsibilities as a police officer. He described the applicant's conduct as egregious and morally 'highly culpable', and found that the offending was aggravated by the vulnerability of the victim. As a result, the conduct was deserving of 'stern punishment', with general deterrence and denunciation of conduct the primary sentencing considerations.

25 The sentencing judge took into account that the applicant did not have any prior criminal history, that he continued to enjoy his partner's support, that he had incurred extra curial punishment, including financial repercussions and the loss of his career, and that he had pleaded guilty and expressed regret. The judge recognised that the plea had facilitated the course of justice and had utilitarian value. He considered the applicant's prospects of rehabilitation to be 'probably' good. The judge also recognised that the applicant's gaoling would be more onerous because of his fragile mental state and because of his status as a police officer.

26 The sentencing judge did not accept as an explanation for the offending that the applicant was extracting information about the victim's associates. He considered that this explanation revealed the applicant's limited insight into his offending and as to the impact of his offending on the victim. Nor did the sentencing judge accept that the applicant's account of anxiety contributing to a lack of clear thinking and consideration of consequences was indicative of remorse.

27 The sentencing judge took into account that there was a year long delay between the applicant's arrest and charge, recognising that it was an unfortunate and unnecessary delay that should have been avoided. He considered, however, that once the applicant was charged, the matter was delayed by the course the applicant undertook. As a result, the judge took the first period of delay into account in amelioration of the sentence but not the second, which he considered was 'not out of the ordinary' and was exacerbated by the applicant's late plea.

28 The sentencing judge held that a community correction order, standing alone, would not be a complete and appropriate sentencing disposition and determined to impose a combination sentence made up of a custodial sentence and a community correction order.

Ground 1

29 The plea indictment made it clear that Charge 1 was put on the basis of an

attempt, contrary to s 321M of the *Crimes Act 1958*, to procure an act of sexual penetration with a child aged 16 or 17 under the applicant's care, supervision and authority contrary to s 58(3) of the *Crimes Act*. While the substantive offence is punishable by a maximum penalty of ten years' imprisonment, pursuant to s 321P of the *Crimes Act*, the maximum penalty for the attempted offence is five years' imprisonment.

30 The maximum penalty is a mandatory consideration under s 5(2)(a) of the *Sentencing Act 1991*. The sentencing judge sentenced the applicant on the basis of an error as to the maximum sentence on Charge 1. So much was conceded by the respondent.

31 However, the respondent submitted that notwithstanding the error, no different sentence should be imposed. Charge 1 was aggravated by virtue of the applicant's standing as a police officer and his knowledge that the victim was in state care. He prevaricated and lied to investigating police and continued to prevaricate both to his interviewing psychologist and corrections officer. This was serious offending which, as the judge properly found, attracted general deterrence and denunciation as primary sentencing considerations. It was submitted that in view of the seriousness of the offending and the applicant's failure to come to grips with the gravity of his abuse of the position with which he was entrusted, a sentence of the order imposed by the judge was appropriate.

32 We rejected this submission. In view of the issues in play in the sentencing exercise, it could not be said that the mistake as to the maximum sentence for the offence in Charge 1 could not have materially affected the sentence that was imposed. The error is a significant error which reopens the sentencing discretion. It is necessary to re-sentence on Charge 1 having regard to the correct maximum sentence.

33 Leave to appeal must be granted and the sentence on Charge 1 set aside.

Ground 2

34 The second ground of appeal concerns the approach taken by the sentencing judge to the question of delay. The sentencing judge did not consider that the period between the applicant being charged and the disposition of the charges was unusual or that it should 'ameliorate' the sentence to be imposed. We understand the sentencing judge to have been saying, in effect, that this period did not constitute 'delay' in that it merely reflected the time commonly required to bring on charges for hearing and determination. The judge took into account only the delay in bringing the charges in the first place.

35 The principles in relation to the relevance of delay to sentencing were set out by this Court in *R v Merret, Piggott and Ferrari*.[1] The relevance of delay lies in the effect which the lapse of time has on the accused. It focuses attention on issues of rehabilitation and fairness.[2]

36 In this case, the applicant was able to use the entire period between the offending and the disposition of the charges to demonstrate the absence of any further offending, which bore on his prospects of rehabilitation. The sentencing judge noted the applicant's unblemished record but was concerned about other matters in relation to rehabilitation. We do not consider that the assessment by the sentencing judge of the applicant's prospects of rehabilitation was affected by his declining to treat the second period as a period of 'delay'. Overall, he considered them to be good.

37 In any event, the applicant stood to be re-sentenced by this Court on Charge 1. Charge 2 resulted in the imposition of the CCO, about which there was no complaint.

38 Leave to appeal on Ground 2 must be refused.

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1 (2007) 14 VR 392, 400 [34]–[36].

2 Ibid.

Disposition

39 In our view, the seriousness of the offending in Charge 1 warrants a custodial sentence. Having regard to the maximum sentence, and in circumstances of this case as outlined in the sentencing reasons above, we imposed a custodial sentence equivalent to time already served.

40 It was unnecessary to disturb the CCO imposed by the sentencing judge in relation to Charge 2. The sentencing judge obtained a pre-sentence report in December 2018 and made the CCO for 24 months with conditions involving supervision and treatment, including participation in courses that address factors relating to the offending behaviour. That regime was not anticipated to come into operation immediately. In the circumstances, we did not consider that any changes need to be made to the CCO and the sentence below was affirmed.