SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2008 0785

LAM KUOTH — Appellant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P and BUCHANAN JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	21 April 2010
DATE OF JUDGMENT:	21 April 2010
MEDIUM NEUTRAL CITATION:	[2010] VSCA 103
JUDGMENT APPEALED FROM:	*R v Kuoth* (Unreported, County Court of Victoria, Judge Lacava, 11 August 2008)

CRIMINAL LAW – Appeal – Sentence – Reckless conduct endangering persons – Appellant HIV-positive – Unprotected sexual intercourse – Victim not informed of HIV status – Guilty plea – Judge declined to reduce sentence on account of guilty plea – Crown concession of error – Resentencing – Significance of lengthy detention in isolation by health authorities – Enhanced community protection – Subsequent deterioration in appellant's health – Community-based order for two years with special conditions – *Health Act 1958* (Vic) s 121.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr S Moglia	Victoria Legal Aid
For the Respondent	Mr B Sonnet	Mr C Hyland, Solicitor for Public Prosecutions

MAXWELL P:

1 On 11 August 2008 the appellant was sentenced in the County Court by Judge Lacava on two counts of reckless conduct endangering persons. The conduct in question was engaging in unprotected sexual intercourse with a female victim whilst the appellant was aware that he was HIV-positive. (When I refer to HIV, I mean the human immuno-deficiency virus, which is a causative agent of the acquired immune deficiency syndrome (AIDS) and other related conditions. HIV is an infectious disease prescribed by regulations made under the *Health Act 1958* (Vic).)

2 The two counts related to the same victim and the same evening, but were separated in time. On count 1, the appellant received a sentence of two years' imprisonment wholly suspended for three years; and on count 2, a community-based order for two years with special conditions. As will appear, these sentences reflected the position adopted by the Crown prosecutor.[1]

3 There are two grounds of appeal. One is that the sentence on count 1 was manifestly excessive. The other is that the sentencing judge erred in declining to reduce the sentence on count 1 to take account of the guilty plea. The Crown has conceded, properly in my view, that ground 2 should be upheld and that the appeal should be allowed and the appellant re-sentenced. It is unnecessary therefore to say anything further about ground 1.

Background

4 Before proceeding to the question of re-sentencing, it is necessary to recount the circumstances of the offending, which I take from the sentencing judge's reasons:

> You were born on 2 April 1979. You are now 29 years of age, and at the time of offending you were 28 years of age. You migrated from Sudan to Australia in July 2006. Soon after you met your partners, an Australian woman. You subsequently infected her with HIV. She fell pregnant to you and you have a young child; that child is HIV negative.
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> In September 2006, whilst having treatment for tuberculosis lymphadenitis,

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1 See [10] below.

> medical testing revealed you were HIV positive. You initially denied having sexual contact with your partner. Then there was a further notification that you had been involved with a second sexual partner and had, apparently, had unprotected sexual relations with her. After failing to attend an initial appointment, you attended Geelong Hospital on 3 October 2006, where you were informed through an interpreter of the diagnosis and the risks involved. The depositions show that you were unwilling to come to terms with the diagnosis.
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> At appointments to follow up the tuberculosis treatment, on 10 December 2006 and 30 January 2007, you told staff that you had not had any sexual activity; that was not true. The risk of you having sex [was] again explained to you.. You failed to attend two subsequent appointments arranged to again explain to you the situation you were in, caused by your HIV-positive status.[2]

5 On 4 April 2007, a little over a fortnight before the offending took place, the appellant had been ordered by the Victorian Chief Health Officer to divulge his HIV positive status to any sexual partners and to use condoms during sexual intercourse. The fact that so soon afterwards he proceeded to disobey both aspects of that order is, of course, reflected in the charges which were laid. It does underline, in my view, the seriousness of the offending.

Health Department Intervention

6 Following the commission of these offences, the health authorities intervened. The following paragraphs of the sentencing judge's reasons describe the nature and effect of that intervention:

> On 27 April 2007 you were served with an isolation order made under s 121 of the *Health Act 1958*. The effect of that order was to detain you for 28 days; that order was renewed every 28 days thereafter.
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> On 12 December 2007 the Chief Health Officer determined that because you continued to deny having had sexual intercourse with the complainant, and that you lacked candour, you were a continuing health risk. A further isolation order was made. You were detained at Royal Talbot Hospital, isolated in an empty ward with one nurse and two security staff. You had no visitors. The order provided that you were not to be without direct supervision at any time. Any movement had to first be approved by the Chief Health Officer.
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> You were held at Royal Talbot Hospital until the end of March 2008, when you were moved again under an isolation order made under s 121 of the

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2 *R v Kuoth* (Unreported, County Court of Victoria, Judge Lacava, 11 August 2008) [6]–[8].

> *Health Act* into a house in a suburb of Melbourne. The house was chosen by the Department of Health and there you were under strict supervision 24 hours a day. The staff monitored your movements, assisted by video surveillance. Again, the order provided that you were not to be without direct supervision at any time. Any movement had to first be approved by the Chief Health Officer.
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> On 20 May 2008 a new isolation order was made. This was in terms similar to the previous orders except that it provided that you would be allowed five minutes per day without supervision. Your visitors had to be supervised. You could not attend for job interviews or do any study without, at least, two security staff present.
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> I received into evidence a health isolation order signed by Dr Rosemary Lester, dated 12 June 2008. The Chief Health Officer has gradually extended the period of time during which you were allowed to leave your supervised premises unsupervised. The time has extended to four hours of unsupervised release, and apart from one occasion when you returned late, your unsupervised release has worked without incident.
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> The Chief Health Officer will continue to make orders relating to you under s 121 of the *Health Act* until such time as the need for the use of such power no longer exists.[3]

7 What emerges from that chronology – as defence counsel for the appellant pointed out on the plea – is that the appellant was effectively in civil detention between 27 April 2007 and the date of sentence on 11 August 2008, a period of almost 16 months. As appears from the chronology, there were in the latter part of that period some short periods of unsupervised release. But what is important is that the isolation orders which were in force had the effect of removing the appellant's liberty. In my view, defence counsel was right to emphasise on the plea that there had 'already been very substantial restrictions on his liberty'. This was said in aid of a submission that there should not be a custodial sentence and that a community-based order would be sufficient. As already indicated, that submission did not prevail and a sentence of imprisonment was imposed on count 1, albeit that it was wholly suspended.

8 On the plea, counsel for the appellant, who also appears on this appeal, relied on the demonstrated effectiveness of the interventions which the health authorities

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3 Ibid [10]–[15].

had made. The following paragraphs of the sentencing judge's reasons describe, by reference to psychiatric reports, the progress which the appellant made under intensive counselling. Over time he came to an appreciation – which he clearly he did not have at the time of the offending – about the inappropriateness of his offending behaviour:

> It cannot be said that people in your situation, having been diagnosed HIV positive and identified as a risk to public health, will be left alone. Here the Department of Health has acted very professionally to intervene in your life to ensure that you receive appropriate counselling, information and treatment. In this regard, I have received into evidence two reports from Dr Christopher Kelly, dated 25 May 2008 and 9 June 2008. Dr Kelly has been treating you as a patient at the insistence of the Department of Health since April 2007.
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> Importantly, the report of 25 May 2008 on page 2 shows that you have acknowledged to him the mistakes in your conduct resulting in the two offences before the Court. That was the first occasion upon which you had done so in over a year of counselling. That acknowledgement represents somewhat of a breakthrough in your treatment because it reveals some insight on your part into your illness and the way you will have to conduct yourself in consequence of it. On page 3 of his first report, Dr Kelly writes:
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> > During these sessions, Mr Kuoth said that he recognised his past mistakes and that he would never made a similar mistake in the future. He stated that if he found a new girlfriend he would always use a condom.
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> Later in his report, Dr Kelly records your acknowledgement of the role played by the Department of Health in protecting the community from you as a risk to public health. That is also an important step forward by you.
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> In his second report, Dr Kelly reports:
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> > Over the past two months, Mr Kuoth has been much more open with me in discussing matters related to sexual behaviour and he acknowledged his misconduct in having sexual contact with people and not informing them of his HIV status and practising safe sex by using a condom. Therefore, in my opinion, the seriousness of other people being infected by Mr Kuoth appears to have been somewhat reduced, only due to the fact that he has, over the past two months, been more willing to be open with me in his discussions and admitting his irresponsible past behaviour. This, however, needs to be tested, and in answering your question about the extent of the restrictions that are imposed on Mr Kuoth, a gradual reduction in restrictions is occurring. This again relates to the fact that he appears to be able to take on a greater level of responsibility for past inappropriate behaviours.
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> Mr Moglia argued any disposition should provide for further unsupervised release of you, subject to conditions. I have today received into evidence a report dated 28 July 2008 from Dr W.F. Glazer, a Consultant Psychiatrist to

the Sex Offenders Program run by Corrections Victoria. That report recommends that you not be immediately imprisoned but released into the community, subject to stringent conditions. In his report Dr Glazer says:

> Mr Kuoth's hours of unsupervised community access should continue to be increased according to the relevant protocol. It should be emphasised to him that breach of the conditions of this access, for example, returning late to his accommodation, etcetera, will have consequences such as a decrease of this access and, if this is possible, also will be reported to the sentencing Court. If Mr Kuoth is given a community-based order, Health and Corrections personnel will need to work closely together to ensure an orderly and appropriate continued decrease in his supervision requirements. Provided that the process outline in (1) above goes smoothly, Mr Kuoth, as soon as possible after receiving his sentence, if this is to be a community-based order, should be assisted to find accommodation in the community which is not supervised by resident staff. Whether or not he lives with his current partner will need to be discussed in detail with both of them. Perhaps Mr Kelly could provide assistance here, although they may prefer to use the services of some other agency or professional to help them resolve the issue.[4]

9 In my opinion, defence counsel was right to submit to the judge that this matter was more appropriately regarded as a public health issue than as a criminal law issue, though it was not said then nor in this court that the breaches of the criminal law should be ignored. Rather, the point of the submission was that the objective of protecting the public had already been shown to be best served by the close supervision which the health authorities were maintaining.

10 On the plea, the Crown prosecutor told the judge that his instructions were that a wholly suspended sentence on count 1 would be appropriate and a community-based order on count 2. His Honour expressed initial hesitation, expressing the view that this seemed unduly lenient given the seriousness of the offending. Having read all the material and obtained a pre-sentence report, however, his Honour came to the conclusion that what the Crown had submitted was correct in principle. Clearly, the particular history of the matter did cast very important light on how these offences should be dealt with.

Crown concession

11 The complaint which founds ground 2 concerns the following paragraph of

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4 Ibid [19]–[23].

the reasons for sentence:

> Secondly, Mr Moglia stressed that you, having pleaded guilty at committal, are entitled to the benefit of that plea in any sentencing disposition. That is true, but in this case I have not reduced the period of imprisonment that I have imposed on Count 1 in consequence of your plea. I do take into account your plea is an indication of genuine remorse, consistent with the contents of the reports of Dr Kelly and Dr Glazer. In this case I am of the view that in sentencing you, the need to protect the community must be given greater weight over the need to discount any sentence imposed because of your pleas of guilty.[5]

12 The exercise of the sentencing discretion does not involve any arithmetical process of addition or subtraction of particular components; less still does it involve the cancellation or discounting of any relevant consideration by reason of some other matter. Of course it is for the sentencing judge to decide what weight is to be given to the relevant factors and to the applicable sentencing principles, and to determine the relativities of weight as between one consideration and another. But it was plainly wrong to conclude, as his Honour did, that the mitigating effect of the plea of guilty was negated or nullified or cancelled out because of the seriousness of the offending.

Resentencing

13 It therefore falls to this Court to re-sentence the appellant. The submissions this morning have concentrated on what view this Court should take in relation to count 1. I treat the submissions for the appellant as being in substance a plea in mitigation in relation to the re-sentencing exercise.

14 In aid of the plea, counsel for the appellant has provided us with a medical report from Southern Health dated 18 March 2010. The report is signed by a rehabilitation physician, who reports that in November last year the appellant suffered a Grade 5 subarachnoid haemorrhage, as a result of the rupture of an aneurism. According to the report, it was expected that the appellant would have some long-term cognitive impairment as a result of this brain haemorrhage, though

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5 Ibid [24].

it was difficult to predict the extent of that impairment as at the date of the report.

15 It was submitted by counsel for the appellant that this represented a very significant change in his circumstances since the time of sentencing in the County Court – specifically, a very serious deterioration in his health and the prospect of some long-term brain damage reflected in cognitive impairment. Counsel has informed the Court that the appellant is nevertheless able to communicate and, on counsel's assessment, is able and is likely to continue to be able to comply with the conditions of the community-based order which was imposed on him. The submission, however, was that in the changed circumstances there should not be a sentence of imprisonment imposed on count 1. Such a sentence would be unjust, it was said, because of the new vulnerability of the appellant.

16 Counsel for the Crown concedes that in the circumstances a more lenient disposition on count 1 would be appropriate. He maintains, nevertheless, that a sentence of imprisonment should be imposed having regard to the very serious nature of the conduct.

17 In my opinion, the appellant's submission should be upheld, and there should be a non-custodial disposition on count 1. In my view that disposition is warranted in the circumstances, without it signifying any change in the court's view as to the seriousness of the conduct which took place.

18 There are three reasons why I consider that course to be the appropriate one. First, as mentioned, the appellant has already served what amounts to a term of imprisonment for this offending. It is true that he was under civil detention and not in a gaol. But, plainly enough, the essence of imprisonment is the deprivation of liberty. That is precisely what this man suffered because of the – perfectly appropriate, it seems – imposition of successive isolation orders on him. With respect to the sentencing judge, that seems to be a matter to which insufficient attention was paid in sentencing. The lengthy containment does seem to me to have been a very significant punishment, albeit for public health purposes, in respect of

this very conduct.

19 Secondly, it is appropriate in my opinion that the Court recognise, as the sentencing judge did, the very substantial progress which the appellant made in the long period of engagement with the health authorities and, in particular, through the psychiatric treatment which he received. It seems to me to be a matter of great importance to the Victorian community that, by virtue of these non-judicial interventions, what was a very grave risk has now on all the evidence been substantially moderated, if not eliminated altogether. It also means that the need for specific deterrence is much less now that it was at the time of the sentence.

20 Thirdly, and finally, I consider that the very significant deterioration in the appellant's health warrants a merciful disposition. Compared to his position at the time of sentence, the appellant's health has been seriously compromised. That is a matter which a sentencing Court will always take into account and we are, on this occasion, the sentencing Court.

21 For those reasons I would order that:

1. The appeal be allowed.

2. The sentences imposed below be quashed and in lieu thereof it be ordered that on count 1, the appellant be convicted and discharged in the exercise of the power under s 73 of the *Sentencing Act 1991* (Vic). In relation to count 2, I would reimpose the community-based order which the sentencing judge imposed, for the same period and subject to the same conditions. This sentence is taken to have commenced on the date of the original sentence.

3. The total effective sentence therefore will be a community-based order for a period of two years. In addition to the core conditions contained in s 37 of the *Sentencing Act 1991* (Vic), the following special conditions are imposed:

First, pursuant to s 38(1)(b) that the appellant be under the supervision of a Community Corrections Officer.

Second, pursuant to s 38(1)(g) that he be available for visits from the Community Corrections Officer at any reasonable time.

Third, pursuant to s 38(1)(c) that he attend for educational or other programs as directed by the Regional Manager.

Fourth, pursuant to s 38(1)(d) that he undergo assessment and treatment for alcohol or drug addiction, or submit to medical, psychological or psychiatric assessment and treatment as directed by the Regional Manager.

Fifth, pursuant to s 38(1)(g) that he participate in assessment and intervention with the Sex Offender Program run by Corrections Victoria as directed by the Regional Manager.

Sixth, pursuant to s 38(1)(g) that he continue to comply with all terms and conditions or orders imposed upon you contained in any order imposed by the Secretary of the Department of Health Services or nominee under s 121 of the *Health Act 1958* (Vic) from time to time.

Seventh, pursuant to s 38(1)(g) that he maintain contact with his partner notification officers and comply with any lawful commands or requirements by them.

Eighth, pursuant to s 38(1)(g) that he attend Dr Christopher Kelly for counselling and treatment as may be determined by him from time to time.

Finally, pursuant to s 38(1)(g) that he abstain totally from the consumption of alcohol.

22 That disposition gives effect to all of the sentencing objectives which remain applicable at this stage. Of course should there be any future offending, it will attract its own sanctions. If it were offending of the same kind, the appellant would face the very significant sentencing consideration that it was a repeat offence, committed in spite of everything that has been done for him over this period to ensure that no such thing happens.

BUCHANAN JA:

23 I agree.

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