

41/87

SUPREME COURT OF VICTORIA — FULL COURT

R v FERNANDEZ

Young CJ, O'Bryan and Tadgell JJ

6 October 1987

CRIMINAL LAW – SENTENCING – ARMED ROBBERY – OFFENDER A HEROIN ADDICT – SINCE REHABILITATED – FIRST OFFENDER – WHETHER SENTENCE OF IMPRISONMENT APPROPRIATE – WHETHER COMMUNITY-BASED ORDER APPROPRIATE: *PENALTIES AND SENTENCES ACT 1985*, S39(1).

F., a first offender, pleaded guilty to a charge of armed robbery involving \$1100 (approx.). On the plea, it was said that F. had committed the crime whilst under the influence of heroin. However, evidence was given that at the time of the plea, F. was free of his addiction and was consistently receiving counselling and treatment for it. F. was sentenced to 4 years' imprisonment with a minimum of 3 before eligible for release on parole. Upon application by F. for leave to appeal against sentence—

HELD: Application granted. Appeal allowed. Sentence of imprisonment quashed.

(1) In imposing the sentence of imprisonment, the Judge undervalued F.'s prospects of rehabilitation.

(2) Having regard to the circumstances of the offence, F.'s antecedents and his unusual success in overcoming his drug addiction, it was more appropriate to convict F. and release him upon making a community-based order with special conditions involving the performance of unpaid community work and assessment and treatment for his drug addiction.

YOUNG CJ: (With whom O'Bryan and Tadgell JJ agreed): **[1]** The Court has before it an application for leave to appeal against sentence by Rafael Munoz Fernandez, who pleaded guilty in the County Court in August of this year to a charge of armed robbery.

The robbery was alleged to have taken place on 9th October 1986, when the shopkeeper of a record shop in the Moonee Ponds Market noticed the applicant, in company with another man, enter the shop and start looking through records. They were there for about twenty minutes before leaving. Later in the day, they returned to the shop and remained there on this occasion for about thirty minutes looking through records. The two men appeared to be somewhat nervous and kept looking towards the proprietor. At about 4.15, the proprietor and one of his employees were standing near a cash register when the two men approached them. The applicant had a folded newspaper in his hand, which he pushed **[2]** towards the employee and said, "Get down. Get down." The applicant's companion approached the proprietor brandishing a knife and said, "Open up," indicating the cash register. The proprietor opened the cash register and the man who was carrying the knife removed the money from it, the applicant shouting, "Get down. Don't get up until we shout out." Approximately eleven hundred dollars was taken from the cash register. Both men then fled from the shop.

The proprietor chased them. He reported the robbery to the Moonee Ponds Police Station and then accompanied the police in a police car. Very shortly, the proprietor was able to identify the applicant in the street and he was arrested and searched. He was found to have in his pocket a silver-coloured set of knuckle dusters, and he was conveyed to the Moonee Ponds Police Station, where a further search revealed that he had a syringe and a needle in his shirt pocket. Upon being questioned by the police, the applicant made full admissions and indicated that he had used the newspaper to make his victims believe that he had a gun inside it.

I think that is sufficient indication of the circumstances of the robbery. It is necessary to say a little about the circumstances of the applicant. The applicant is a young man of twenty-three years of age, who came to Australia from Spain about fifteen months ago. He had only been in Australia for a short time when the offence was committed. We were told that he had been addicted to heroin in Spain for some considerable time before he came to Australia, although perhaps the

addiction was not a very [3] heavy one. What was discovered in his pockets when he was arrested suggests that the addiction was continuing at the time of the offence; but the evidence given on the plea is that he has been free of his addiction since the offence was committed.

There was also evidence called that he has consistently received counselling and treatment at a church centre in Moonee Ponds to help him to overcome his drug addiction. Evidence was given before the trial Judge by an officer for the Anglican Church Drug Rehabilitation as to the progress which the applicant was making. He said that initially the applicant was physically unwell because he was withdrawing very badly from the effects of heroin. He was given no medication to assist his withdrawal and the effects of it were traumatic. The same witness gave evidence that the applicant had been free of heroin since October 1986, namely, shortly after the commission of the offence.

The applicant has no previous convictions. After listening to the evidence and hearing the plea made on the applicant's behalf, the learned trial Judge sentenced him to be imprisoned for a term of four years and fixed a minimum term of three years to be served before he should be eligible to be released on parole. There was further evidence placed before the learned trial Judge to which I should refer. It was in the form of a report from Senior Constable Carroll, an officer of the Victoria Police stationed at Moonee Ponds, who arrested and interviewed the applicant on 9th October 1986. The Constable reported that the applicant had admitted that he committed [4] the crime to pay for drugs, that he appeared to be under the influence of heroin, but that he was co-operative with the police. After he was bailed, he reported on a regular basis to the Moonee Ponds Police Station and the Senior Constable said, "It has been obvious on the various times I have met him that he is no longer on drugs. His general appearance and health improved in the first month of his reporting condition." The Constable further said that he had been informed that the applicant had been attending a rehabilitation centre with some success. "To my knowledge, he has not come to the notice of the police again."

In these circumstances, it appears to me that the learned trial Judge, in fixing the sentence which he did fix, under-valued the prospects of rehabilitation of this applicant – who was, as I have said, a first offender and who committed, with his co-accused, a somewhat amateurish offence. Moreover, his efforts to rid himself of his heroin habit have been attended by unusual success and indicate the applicant's prospects of rehabilitation. The circumstances of the offence – but, more particularly, the prospects of the applicant's rehabilitation – justify, I think, the Court in releasing the applicant, if he will agree upon a community-based order. I would propose that course to the Court.

O'BRYAN J: I agree with the course proposed by the learned presiding Judge.

TADGELL J: I also agree.

YOUNG CJ: The terms of the order which the Court will make will be as follows: The application is granted. The appeal is treated as instituted and heard *instanter* and allowed. The sentence is quashed. In lieu thereof the Court will make [5] a community-based order, if the applicant so agrees, to begin on 6th October 1987, that is today, and to last until 5th October 1989, that is for a period of two years. The order would require the applicant to attend at the Spotswood Community Corrections Centre and would provide that the Williamstown Magistrates' Court would supervise the order. In addition to the core conditions of the order, the Court would add the following special conditions: That the applicant must perform 250 hours of unpaid community work over 52 weeks; that he must attend on the Community Corrections Officer nominated by the Regional Manager of the Community Corrections Centre at the time and place the Regional Manager specifies; that he must undergo assessment and treatment for alcohol addiction, drug addiction, medical, psychological or psychiatric problems as directed by the Regional Manager of the Community Corrections Centre; that he must submit to testing for alcohol or drug use as directed by the Regional Manager of the Community Corrections Centre. (Discussion ensued.) The Court will add an extra condition, that the applicant must live with his brother-in-law, Rafael Perez, so long as he is prepared to allow him to do so, at 6 Kipling Street, Moonee Ponds. We will further order that the conviction for the offence of armed robbery is to be treated as a conviction for all purposes notwithstanding the provisions of s39(1) of the *Penalties and Sentences Act* 1985.