18/81

SUPREME COURT OF SOUTH AUSTRALIA

R v GOLDING & ANOR

Wells J

16 April, 2 May 1980 — (1980) 24 SASR 161; 3 A Crim R 26; noted 4 Crim LJ 308

SENTENCING - INFORMER - EXTENT TO WHICH PENALTY MAY BE MITIGATED WHERE USEFUL INFORMATION GIVEN TO POLICE BY AN INFORMER - SENTENCE REDUCTIONS TO THE EXTENT OF 50% MAY BE APPROPRIATE IN SOME CASES.

Consideration and discussion of the circumstances in which, and the extent to which, the fact that an accused has acted as an informer and given useful information to the police, should operate in mitigation of penalty. The relevant portion of the judgment in relation to mitigation of penalties of informers only is included herein.

WELLS J: Before considering the facts of the instant case, it is necessary, in my opinion, to draw certain distinctions and to mark out the ground that ought properly to be the subject of judicial consideration and discretion. I should distinguish between what I may term the informer proper, whether he gives evidence or not, and the agent provocateur. The predominant purpose of the former is to observe and to report without promoting or encouraging unlawful acts that would not have been perpetrated but for his work, and without attracting to himself any more attention than is absolutely necessary. In particular, he does not take part in an unlawful activity any more than he is driven to in order to avoid detection. There is a fundamental and vital distinction. I apprehend, between, on the one hand, meeting guile with guile, and reporting crimes that there were grounds for supposing would have been committed in any event, and, on the other, so conducting oneself as to encourage or incite another to commit an offence, where grounds for that supposition were absent. The agent provocateur who seduces another to commit a crime where there was no cause for believing that that other would, or was already disposed to, commit the crime, or a crime or crimes similar to it, attracts nothing but unqualified disapprobation and discouragement from British Courts.

Next, there may well be circumstances where a sentencing judge would find the prisoner's informing work so remote from the offence for which he is called on to sentence him that he will be constrained to cast it aside, and leave it to the Governor in Executive Council to make such use of as he thinks proper in the exercise of Executive clemency. Then, again, there is a world of difference between the informer who releases information, a piece at a time, when it seems to him to be in his own interests to do so, and the informer who attempts to report everything of value – *a fortiori*, if he is willing to accept an assignment to unearth information that is relevant to a current police inquiry.

Finally, there is the distinction between those cases, which, as we have seen from the authorities discussed above, occur not infrequently, where an arrested person informs on his immediate associates, and on others who have been engaged in criminal operations of which his own formed a part, and those cases where a person who has steadily, reliably, and successfully, acted as an informer in a particular area of crime, but who, after such work has been in progress for some time, is minded to commit a crime in the same area while on a frolic of his own. It is more difficult for a sentencing judge to deal with cases of the latter sort, because the suspicion must be always present that the frolic was undertaken upon the assumption that the police might be persuaded to overlook the crime because of past favours. These several distinctions, which by no means purport to be exhaustive, demonstrate that the problem of sentencing the informer may come in many forms, and its solution does not lie within the compass of a single or simple formula. It seems to me that certain propositions about sentencing informers may be formulated with a measure of confidence.

1. Nothing in the propositions following should be construed as suggesting that the ample discretion exercised by sentencing judges should be in any way curtailed or limited by inflexible rules.

2. A permissible judicial process in sentencing an alleged informant is to arrive at a sentence that would ordinarily meet the case if the prisoner were not an informer, and then to determine what, if any, allowance should be made by reason of his informing work.

3. Courts are opposed to the precept that there should be honour among thieves and, all other considerations apart, sentences and published reasons for them should be so adjusted as to further that opposition.

4. If a prisoner, who stands to be sentenced, has committed an offence in association with others, and refuses to name his associates, or refuses to disclose who was the leader or principal in the operation, or both, he thereby places himself in circumstances in which the court may the more readily conclude that he was the principal or leader of the operation.

5. Where a prisoner is shown to have been an informer (whether in the matter in which he has been convicted or some associated matter or matters, or in some matter or matters that has or have no direct relation to the offence for which he has been convicted), the court, other considerations apart, will be disposed to show leniency to mark the good he has done and in furtherance of the policy embodied in paragraph 3 above. This paragraph is subject, amongst other considerations, to what is said in par 6(d) below.

6. For the purpose of extending leniency, the sentencing court may have regard to the following considerations, amongst others.

> (a) The effectiveness of the prisoner's work as an informer should be appraised: for example, whether large quantities of stolen property or illicit drugs have been recovered; whether persons guilty of wide scale criminal operations have been brought to justice; whether crimes that would have otherwise been difficult to detect or to resolve have been effectively cleared up.
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> (b) The standards maintained by the informer when carrying out his activities should, if possible, be ascertained for example, whether the information that he gave was given in good faith, in disclosure of all unlawful conduct that could fairly be thought to be of interest to the police, or whether he acted cynically and was interested in vouchsafing information only where it appeared to him to suit his own interests, and suppressed information that could and should have been revealed.
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> (c) The extent to which he has been willing to place himself in positions of danger in order to gather useful information and to assist law enforcement authorities is relevant. Although this may conveniently be regarded as a special feature of an informer's work, it would, generally speaking, be unwise finally to weigh its effect, disengaged from other considerations. For example, some informers are willing to place themselves in situations of great peril – sometimes of constant peril – simply in order to get the money paid to them for the information they provide. Other informers may display a more selfless attitude to their work, and hence, on the whole, be more reliable.
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> (d) Where the circumstances are such that an informer is working or living in a trade, industry, business, organization, social sector, or other more or less regular group of associates, and both the information provided and the offence for which he stands to be sentenced relate to, or arise out of, the activities of the group or sector in which he works or lives, the trial judge may the more readily balance the good done with the harm caused. Where there is little or no connection between the two, the trial judge may find himself driven to the conclusion that the prisoner's work as an informer can be considered only by the Governor in the exercise of Executive clemency.

[His Honour then referred to the facts and circumstances of the case and continued] ... No one was hurt in the robberies, and no personal violence was used against the victims. The brothers seem almost to have gone out of their way to act in a relatively non-violent manner. I take into account their pleas of guilty and the personal details and submissions placed before me by counsel.

Had there not been the circumstances discussed above, more especially the brothers' work as informants, which mitigate the crimes committed by them I should have been obliged to impose very heavy sentences indeed – about twice as long as I intend to impose. Taking all mitigating circumstances into account, however, I find myself justified and empowered to reduce the sentences by terms that are of the order of 50 per cent of what would otherwise have been imposed.

Robert John Golding: I record that the suspension of the sentence imposed by Mitchell J on 2nd May 1979, was revoked on 16th April 1980 and the sentence came into force forthwith. On each of

the counts to which you have pleaded guilty, I sentence you to imprisonment with hard labour for four years and six calendar months; the sentences will be served concurrently, and will commence one year from today (that is, while serving the sentence imposed by Mitchell J)

Trevor Graham Golding: On each of the counts to which you have pleaded guilty, I sentence you to imprisonment with hard labour for three years and nine calendar months. The sentences will be served concurrently.

I invite the attention of the Parole Board and the Executive Government to the conditions under which these prisoners will of necessity exist both while in custody and after their release. I fix no non-parole periods.
