3/94

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BURNHAM

Crockett ACJ, Fullagar and Smith JJ

28 May 1993

SENTENCING – PLEA OF GUILTY – WHETHER SENTENCE MUST NECESSARILY BE REDUCED – WHETHER PLEA IS ONE OF THE FACTORS TO BE TAKEN INTO ACCOUNT WHEN FIXING SENTENCE: *SENTENCING ACT* 1991, S5(2).

The early entry of a plea does not require a court to reduce a sentence. It is no more than a factor to be considered when determining the appropriate sentence. In some cases it is possible that the plea of guilty may be cancelled out by aggravating factors.

CROCKETT ACJ: **[1]** The applicant, who is now aged 23 years, was presented in the County Court at Melbourne on a presentment which contained 7 counts. He pleaded guilty to each of the charges. They were as follows: one count of culpable driving causing death (Count 1); 4 counts of reckless conduct endangering life (Counts 2 to 5 inclusive); one count of causing serious injury recklessly (Count 6); failing to render assistance after an accident (Count 7). The applicant admitted 12 previous convictions from 5 Court appearances between 1987 and February 1991. Those convictions included: driving a motor car with a blood alcohol content exceeding 0.05 percent; driving a motor car whilst disqualified (2 counts); driving a motor car in a reckless manner; failing to surrender a licence or permit upon cancellation. The remaining 5 convictions were for theft-related offences.

Upon hearing a plea for leniency the judge imposed sentences of imprisonment on each charge. By reason of concurrency the effective sentence was three and a half years' imprisonment. His Honour fixed a non-parole period of three years. The applicant relies upon four grounds in the application which he now makes to this Court for leave to appeal against his sentence. Only two of the grounds were argued. The first is that the sentence was manifestly excessive in all the circumstances, and the other is that the learned trial Judge failed to set an appropriate minimum term.

Those involved in the offences were one Dianna Margaret Gray, who was killed as a result of the applicant's culpable driving of a motor vehicle; the **[2]** deceased's brother, Simon Gray, aged 20 years; and two nieces of the deceased, Adaline Grayling and Victoria Grayling, aged 8 and 6 years respectively. They were travelling in the car driven by the deceased. Also involved was one Bernard Roux, who was at the relevant time driving his car on Greythorn Road, and one Brett Telford, a passenger in the vehicle being driven by the applicant.

I should relate the individual offences to the victims involved in each of the respective offences, and in doing so indicate the sentence which his Honour imposed in relation to each of such individual offences. The judge introduced the topic by saying he took into account the plea of guilty and all other matters that had been raised. The judge added that he had balanced them as best he could in the sentencing process. He then said that the sentence on the first count, that is, the charge of culpable driving, would be one of imprisonment for three and a half years. On the second count, which was one of reckless conduct endangering life so far as it involved Roux, whose car narrowly avoided serious impact with the applicant's vehicle, the sentence was one of two years' imprisonment. For the like offence in the case of each of the deceased's brother and an uninjured niece, a sentence of two and a half years' imprisonment was imposed for both offences. In the case of a similar offence involving the passenger Telford, the sentence was one of 12 months' imprisonment. The offence of causing serious injury by recklessness to one of the deceased's nieces, Adaline Grayling, attracted a sentence of three years' imprisonment. Finally, on the charge of failing to render **[3]** assistance, the applicant was sentenced to imprisonment for a term of 12 months.

The offences all arose out of one episode involving the driving by the applicant of a motor vehicle, a Ford utility, along Greythorn Road in North Balwyn. The applicant's vehicle was being driving at an extremely high rate of speed. It was generally estimated by the eye witnesses as being in the vicinity of 120 kilometres per hour. The street in which it was driven was a comparatively narrow street and the driving area was limited by the presence of parked cars on either side of the roadway. The road in the area is undulating so that there were crests limiting the view of drivers. The vehicle driven by the applicant apparently was subject to some loss of control by the applicant at or about the time it came in collision with the vehicle driven by the deceased. As it crested a hill and approached the oncoming vehicle driven by the deceased, by reason of such loss of control and the very high speed at which it was driven, it "fish-tailed" onto the incorrect side of the road, striking the deceased's vehicle more or less head-on. The circumstances concerning the manner in which the vehicle was driven, and bearing in mind the degree to which the applicant obviously was adversely affected by the consumption of alcoholic liquor, led the judge before whom the matter came in the County Court to describe the circumstances as being as bad a case of culpable driving which he had encountered in his lengthy experience.

There is little doubt that the driving by the applicant can only be described as homicidal. His counsel on the hearing of this application did not resile from **[4]** that description. He conceded that it was an extremely serious instance of culpable driving. Clearly, the circumstances were such as to call for the imposition of a salutary sentence. **[5]** It was contended that despite these considerations the sentence was manifestly excessive. That contention was supported by an argument that amounted, I think, to this: if the head sentence of three and a half years' imprisonment were adapted to allow for the requirement that the fixing of that sentence be in acknowledgment that no remissions would be allowed with respect to it (see s10 of the *Sentencing Act*, 1991), the "real" sentence, as it were, is to be seen to be one of five years and three months' imprisonment. It was said that the judge must have treated that notional sentence as being one which then had to be subject to reductions to deal with other considerations.

It was said that the early indication of an intention to enter a plea of guilty should have led to a further reduction. Other aspects that were said to attract mitigation, such as youth and the prospects of rehabilitation, meant that the judge must have commenced his consideration of the matter with an appropriate notional sentence of something in the order of six years. At the relevant time the maximum statutory custodial penalty that could be imposed for the offence of culpable driving was seven years' imprisonment. It was said that the calculations to which I have referred by reason of the closeness of the notional "sentence" to the maximum makes demonstrable the proposition that the sentence which the judge passed ought not to be allowed to stand.

There is to some extent, I think, a fallacy in that reasoning. I think it is now not correct, as it once was when s4 of the *Penalties and Sentences Act* had application, to treat the early entry of a plea as requiring, in the absence of **[6]** exceptional circumstances, a reduction to be made of the sentence which the judge otherwise thought would have been appropriate to pass. I think that the fact of a plea, including, of course, very early notification of intention to plead, is no more than any other factor that might be said to attract leniency. I think that the relevant provisions of the *Sentencing Act* should be construed to that effect. See s5(2) and in particular para.(e).

That means that all matters of a mitigatory nature have to be weighed together with those that have an aggravating effect in order to enable the judge, having regard to all relevant matters to be considered, to determine an appropriate sentence to be passed, subject always to the provisions of s10 of the Act. In consequence of this, it is quite possible that the judge took the view (and, in my view, if he has done so should not be criticised for doing so) that the plea of guilty was cancelled out by the aggravating factors. In such a case there would be no justification in concluding that the judge should start with a notional sentence in excess of five years and three months. Accordingly, on such a view of the matter the argument, resting as it does upon the selection of a "starting" period close to the statutory maximum term, is without any real foundation. At all events, having regard to the circumstances of the collision and the consequences of it and the aggravating features associated with it, it is, I think, quite impossible to say the sentence which the judge ultimately concluded was appropriate to impose was beyond his sentencing discretion. I think, therefore, that that **[7]** ground has not been made out.

As to the ground that amounts to a complaint that the judge set a disproportionately high

minimum term when compared with the effective term, it must be said at once that his Honour did select a non-parole period which afforded the smallest possible term permitted by the legislation. The objects to be achieved by the setting of a minimum term were referred to in a discussion and do not require repetition. It was, however, in the circumstances open to the judge to take the view that any purpose to be served by the fixing of a minimum term to aid the applicant's rehabilitation was a factor that ought in the circumstances to be subordinated to the need for the sentence to reflect the requirements of retribution and specific and general deterrence. I think it was open to the judge to come to the conclusion that he did, particularly when one bears in mind the nature of many of the driving or like prior convictions of the applicant and the fact that they were recorded within a comparatively short span of time. The judge would have been justified in concluding from the applicant's unhappy history of past criminal activity that he had shown in the past little inclination to reform and in consequence was not likely to do so in the future, at all events, not to such an extent as to render the judge's selection of a minimum term of three years as improper to meet the case. I think, therefore, that that ground also has not been established. I would dismiss the application.

FULLAGAR J: I agree.

SMITH J: I agree.

CROCKETT ACJ: The application will be dismissed. The applicant may be removed.

APPEARANCES: For the Crown: Mr G Just, counsel. JM Buckley, Solicitor to the DPP. For the applicant Burnham: Mr J Kaufman, counsel. Legal Aid Commission of Victoria.
