

19/85

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

**R v DE LA FONTAINE****Crockett, O'Bryan and Gray JJ****7-8 March 1985****SENTENCING – PRIOR CONVICTIONS – ONE PRIOR ALLEGED WHEN NOT A PRIOR CONVICTION – EFFECT OF SENTENCE IF JUDGE TOOK IT INTO ACCOUNT WHEN ASSESSING SENTENCE.**

The defendant pleaded guilty in the County Court to one count of theft, 2 counts of obtaining property by deception, one count of receiving stolen postal articles and 4 counts of imposition. It was argued that the trial judge took into account when imposing sentence a prior conviction which had been improperly alleged.

**CROCKETT J** (with whom the other Judges agreed) said: **[3]** The learned Judge said, when commencing his reasons for sentence:

"You have nineteen prior convictions from six court appearances between the 22nd April 1968, and 9th January 1981. Eighteen of those convictions relate to the period 22nd January 1968, to 18th July 1978, and so are prior convictions in respect of the offences of receiving stolen mail and postal articles and of the theft of a motor vehicle for which you are now before the Court. A number of your convictions relate to offences of dishonesty, including two convictions in 1975 for being in possession of property suspected of being stolen."

Now the fact is, when one examines the prior convictions alleged in the State presentment, there are no convictions relating to offences of dishonesty other than the two mentioned by the learned Judge as having been recorded in April 1975, except a conviction for two counts of shop-breaking and stealing recorded on 22nd April 1968, by the Children's Court at Elsternwick which resulted in the applicant's being placed on probation for fifty-two weeks. This Court's attention was drawn to s376 of the *Crimes Act* and an unreported decision of the Full Court given in **[4]** February 1978 in the matter of *R v Castano*.

The effect of the section is that a conviction recorded in a Children's Court more than ten years before the relevant period is not to be treated as a prior conviction. This Court in *Castano's Case* took the view that if such a conviction were in fact alleged, then that would be sufficient, at all events if the matter were to be thought to have been taken into account by the sentencing Judge, to vitiate the sentencing discretion. It was argued by the prosecutor in this application that the impugned conviction could not be taken to have been one upon which weight was placed by the sentencing Judge.

The passage which I have just read from his reasons for sentence makes it clear beyond a peradventure that the Judge did take it into account, and, indeed, when faced with that passage the prosecutor – I think it is fair to say – conceded that that was so and that the inevitable consequence flowed, namely the error that had occurred vitiated the Judge's discretion in relation to the sentence. It is true that reference to the Children's Court conviction was made by the solicitor appearing for the applicant on the plea in mitigation. That in my view is not to the point. The solicitor was left with no choice but to have to deal with it, as events have shown, when it was wrongly alleged as one of the prior convictions appended to the presentment...