

18/90

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v MAY**Murphy, McGarvie and Brooking JJ****16 May 1990**

PROCEDURE – SENTENCING – MOTOR CAR THEFT – NUMEROUS PRIOR CONVICTIONS – WHETHER CUSTODIAL SENTENCE APPROPRIATE – PRE-SENTENCE IMPRISONMENT – WHETHER A RELEVANT CONSIDERATION IN RELATION TO A MINIMUM TERM: *PENALTIES AND SENTENCES ACT 1985, s17(1)*.

M. pleaded guilty to one count of theft of a motor car. M. had numerous prior convictions for various types of offences, including 5 for theft of a motor car. The trial judge sentenced M. to 18 months' imprisonment, but declined to fix a minimum term taking into account the period M. had spent in custody in relation to the offence. Upon application for leave to appeal—

HELD: Application granted; sentence varied to 18 months' imprisonment with a minimum of 12 months before eligible for release on parole.

Per Murphy and McGarvie JJ, Brooking J doubting. In deciding whether or not to fix a minimum term pursuant to s17(1) of the *Penalties and Sentences Act 1985*, it is not a relevant consideration for a court to take into account the period which the accused has spent in custody in relation to the offence.

MURPHY J: [1] The applicant Leslie Raymond May, who is now aged 36 years, approaching 37, applies for leave to appeal against a sentence of one year six months' imprisonment which was imposed upon him in the County Court on 22nd March, 1990, when he pleaded guilty to one count of theft of a motor car. He had been presented on five counts and had pleaded not guilty to the other four counts on the presentment, and after a short trial had been found not guilty by the jury.

The learned sentencing Judge heard a plea made by counsel on behalf of the applicant and sentenced the applicant on 22nd March of this year. The applicant had has a very bad prior history, amassing a total of approximately 60 prior convictions from 26 court appearances between the years 1972 and 1988. These prior convictions were for various types of offences ranging from assault to damage to property, to wilful destruction of property and various what may be, I think, generically termed street offences. But they included some five prior convictions for theft of a motor car, the latest of which, I believe, had occurred in January of 1988. On each of those prior occasions he had been sentenced to terms of imprisonment ranging from periods at the commencement of his convictions for this offence of three months ascending to two years with a minimum of eighteen months' imprisonment for later offences.

The matter comes on appeal before us on the following grounds:

- [2]** "1. His Honour erred in law in placing too much emphasis on my prior convictions.
2. His Honour did not place sufficient emphasis on (i) the circumstances of the offences; (ii) my desire to rehabilitate; (iii) my poor background and (iv) my guilty plea.
3. The sentence was manifestly excessive and a minimum term should have been set."

Mr Chadwick of Counsel who appeared for the applicant addressed the Court in the main in support of the third ground to which I have referred, and placed particular emphasis upon the failure of the learned sentencing Judge to fix a minimum term, arguing that this demonstrated error on the part of His Honour in the exercise of his sentencing discretion.

The learned sentencing Judge himself has reported to this Court and has informed the Court of his reasons for not fixing a minimum term. He stated:

"The reasons for sentence do not indicate whether or not I adverted to the question of fixing a minimum

term, although (as the transcript shows), the brief discussion with counsel, after the pronouncement of the sentence, does give some indication of this. I should now make it clear that I did have regard to the provisions of section 17(1) of the *Penalties and Sentences Act 1985*. The custodial sentence which I proposed to fix, was a period of one (1) year and six (6) months' imprisonment, in the exercise of my discretion, I decided against fixing a minimum term. I did this because of the accused's record of antisocial behaviour particularly having regard to his five (5) prior convictions for theft of a motor car. In addition, I took into account the fact that the accused had already served seven (7) months in custody for this offence, with the result that there would be a further term of imprisonment of only eleven (11) months. I disregarded (as I was bound to) any question of remissions which the accused might gain for good behaviour whilst in prison."

[3] Whilst there may be, in my view, some argument suggesting that there is ambiguity in the words of the report which I have read, in particular as to the attachment which the words prefixed by "In addition" have, it is my view that His Honour has stated to this Court that he took into account the fact that the accused had already served seven months in custody for this offence with the result there would be a further term of imprisonment of only eleven months, as a matter which was material to the exercise of his discretion whether or not to fix a minimum term. Section 17(1) of the *Penalties and Sentences Act 1985* gives the Judge a discretion whether or not to fix a minimum term where the term of imprisonment imposed is more than twelve months and less than two years.

Mr Chadwick has argued that the circumstances of this case, in particular having regard to His Honour's determination that the applicant genuinely intended to reform and genuinely intended to undergo treatment for his alcohol problem, and further that he had a reasonable employment history and that the learned sentencing Judge was hopeful that upon release the applicant would become a useful member of society, demonstrate good reasons why, in the circumstances, a minimum term should be fixed so that during a period of parole the applicant would be supervised in his endeavours to rehabilitate himself.

In my view, the learned sentencing Judge appears to have taken into account, in exercising his discretion, a fact which was not material to the exercise of that [4] discretion, and that is the fact that the applicant had already served seven months in custody for this offence with the result that there would be a further term of imprisonment of only eleven months. In my view, His Honour's discretion miscarried, and accordingly it falls to this Court to exercise its discretion in the matter having regard to the many facts that have been urged upon us by Mr Chadwick and to the material contained in the transcript of the plea and His Honour's sentencing reasons.

In my view, it is appropriate that the Court confirms the head sentence of one year six months' imprisonment and fixes a minimum term, and I would suggest that the Court should fix a minimum term of twelve months' imprisonment before which the applicant should not become eligible for parole.

McGARVIE J: I am also of the view that in the circumstances of this case it was not a relevant consideration, in exercising the discretion as to whether to fix a minimum term, to take into account the period which the applicant had spent in custody. As the learned presiding Judge has stated, it follows that an irrelevant consideration having been taken into account in the exercise of that discretion, the discretion miscarried and it is for this Court to re-exercise the discretion, and I would exercise it in the same way as has been proposed by the presiding Judge.

BROOKING J: I can imagine cases in which the period of pre-sentence detention would be relevant to the determination of the question whether a minimum term should be fixed, but [5] this is not one of them. In view of the applicant's record, especially in relation to theft and unlawful use of cars, I have some reservations about the fixing of a minimum term in this case. I am, however, not prepared to carry those doubts to the point of dissent and I agree with the order proposed.

MURPHY J: The order of the Court is the application will be allowed, the sentence below varied. The head sentence is confirmed and the Court fixes a minimum term of twelve months' imprisonment before which the applicant shall not become eligible for parole.