35/75

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v ROBINSON

Gillard, Lush and Crockett JJ

5, 7, 9, 20 May 1975 — [1975] VicRp 81; [1975] VR 816

SENTENCING – CULPABLE DRIVING – DEFENDANT UNDER THE INFLUENCE OF INTOXICATING AT THE TIME OF THE OFFENCE – SEVERAL PRIOR CONVICTIONS – DEFENDANT ASSESSED FOR SUITABILITY FOR RELEASE ON A S13 BOND – WHETHER APPROPRIATE – MATTERS TO BE CONSIDERED WHEN MAKING SUCH A BOND: *ALCOHOLICS AND DRUG-DEPENDENT PERSONS ACT* 1968, S13.

HELD: Appeal allowed. Sentence varied.
1. If the Court came to the conclusion that because of the offender's character and antecedents and of the heinous nature of the crime there was little room for clemency, then the reasonable course for it to adopt was to impose a penalty reflecting the community's sense of indignation at and condemnation of the crime and pay little attention to the reformative aspects of punishment to be found or implied in the provisions of s13.

2. Adopting such an approach to the present case it was one that not only called for the imposition of a term of imprisonment but also it was not one for release from service of such a term upon entry into a recognizance in conformity with the provisions of s13. The respondent's long record of persistent lawlessness and his constant abuse of a number of previous attempts to achieve his rehabilitation could not be ignored. The offence was a prevalent one and was currently a source of great community disquiet. It was committed in circumstances of little or no mitigation. These considerations called for the imposition of a condign punishment.

FULL COURT: This is an appeal by the Attorney-General on behalf of the Crown under s567A of the *Crimes Act* 1958 against a sentence passed by Judge Byrne in the County Court on 20 February 1975. At the conclusion of the appeal on 9 May 1975, we indicated that the appeal would be allowed and thereupon pronounced the formal orders that we considered were proper to be made upon the success of the appeal. Those orders were: "Appeal allowed and the sentence imposed by his Honour Judge Byrne on 20 February 1975, quashed and set aside, and in lieu thereof, the respondent Dennis William Joseph Robinson is sentenced to a term of imprisonment for three years, and the Court fixes a minimum term of two years before he becomes eligible for parole. The Court recommends that the respondent be given such treatment for alcoholism as may be or become available during the term of his imprisonment. The Court also directs that the respondent be disqualified for a period of five years from holding or obtaining a driving licence under the provisions of the *Motor Car Act*. The Court further orders that a warrant of commitment be issued and that the period of the term of the above sentence shall not commence, pursuant to the provisions of s122(1)(a) of the *Social Welfare Act* 1970, but pursuant to the provisions of s122(1)(b)(ii) from the date that the respondent is apprehended under the warrant of commitment."

We announced that, as the appeal had for the first time called for consideration by this Court of the novel provisions to be found in the *Alcoholics and Drug-dependent Persons Act* 1968, we would take time to formulate our reasons for the making of such orders. We now proceed to give those reasons.

The sentence impugned was passed following a plea of guilty being entered by the respondent on 3 February 1975, to a count of culpable driving a motor car at Flemington on 15 July 1972. That offence is created by s318(1) of the *Crimes Act* 1958 and is one for which a maximum penalty of imprisonment for seven years and a fine of $1000 is fixed by the section.

The circumstances of the commission of the offence may be briefly stated. At approximately 6:30 p.m. the respondent was driving a motor car, found a month later to be unroadworthy, but in circumstances that strongly suggest that the condition of unroadworthiness was present on the evening of the offence. The mechanical deficiencies included an imperfect lighting system. At

about the time of the commission of the offence the car was seen to have no headlights burning. The respondent made a right-hand turn in an intersection which he had entered on the appropriate traffic signal. In the course of that turn he struck an elderly woman who was also crossing one of the roads forming the intersection in obedience to the traffic light operating in her favour. Although it was dark and wet the collision occurred as a result of the gross negligence of the respondent. Not only did he not have headlights burning, but he was travelling at a speed that was excessive in the particular circumstances, and he failed to give way to the pedestrian as it was his obligation in law to do. The pedestrian's injuries received in the collision proved fatal.

The respondent did not stop and was in fact apprehended as a result of being stopped by the police later in the evening for other driving offences. These included driving whilst having a blood alcohol content in excess of .05 per cent. Admissions which the respondent later made in a record of interview conducted by police officers disclosed that the respondent had, during the afternoon of the day of the collision, consumed a very large quantity of alcoholic liquor and was extremely intoxicated at the time of the accident.

At the time his plea was taken the respondent admitted twenty-one prior convictions resulting from twelve Court appearances. They commenced in 1957 when the respondent was apparently about fourteen, as he was twenty-nine years of age at the time of the present offence. The first two offences were for illegally using a motor car. Three offences committed in 1961 were for having insufficient lawful means of support, larceny and conspiracy, respectively. The respondent then in the period up to 1969 amassed a number of convictions that included six offences involving dishonesty and two for street offences.

Then in 1970 he was at the one court appearance convicted of driving a motor car whilst having a blood alcohol content exceeding .05 per cent, stating a false name and address, making a false declaration, being in possession of a false licence and fraudulently using a driving licence. Finally, in 1972 he was on the same day convicted of driving a motor vehicle while under the influence of intoxicating liquor and being an unlicensed driver. For this group of motoring and allied offences the respondent had imposed on him pecuniary penalties only together with motor car driving licence disqualifications. At least four times he had breached probation on which he had been placed. On no occasion was he dealt with for such breach.

The respondent was represented by counsel when presented on the count to which he pleaded guilty before Judge Byrne. The burden of the plea for lenient treatment was that the respondent was an alcoholic and that the offence was committed by him when in a gross state of inebriation that in turn was a consequence of his disease. The respondent's criminal record subsequent to the offence was briefly and (as it now appears) incompletely referred to in order to show that for some time the respondent continued to be a victim of his condition and was responsible for the commission of further offences directly connected with his alcoholism. He was placed on probation in July 1974, by a stipendiary magistrate at Footscray Magistrates' Court. Then on 2 December 1974, an assault charge against the respondent was adjourned by the Moonee Ponds Magistrates' Court. In the meantime the respondent had voluntarily sought remedial treatment for his alcoholism.

It is unclear whether this step was taken at the insistence of his probation officer or those concerned with protecting the respondent's interests in relation to the matter with which the Moonee Ponds Court had to deal. The material suggests it was more probably the latter, but with the knowledge and approval of the probation officer. That treatment was commenced on 20 November 1974. It consisted of treatment as a day patient, out-patient and in-patient of Pleasant View Assessment Centre— an assessment centre so defined by the *Alcoholics and Drug-dependent Persons Act* 1968. This Act was only proclaimed to come into operation on 6 November 1974. A report dated 22 January 1975, from the Medical Superintendent of that centre, Dr Barlow, was put in evidence. It contained this passage:

> "It is the opinion of the clinical staff who have seen him here that he appears motivated for assistance with his alcohol problem and requires further help from this Branch. He has been referred for assessment for a long term treatment programme at Gresswell Rehabilitation Centre and will attend there tomorrow the 23rd January 1975. It is felt that if he is accepted for a longer term treatment programme we may be able to help modify his alcohol use and enable him to take the responsibility for his children which he wants so badly to achieve."

This last observation is a reference to the breakdown of the respondent's marriage—it would seem as a result of his drinking habits—that led to his six young children becoming Wards of the State and being cared for in institutions.

These facts, it was urged, justified a sentence that was in no way punitive and would allow further treatment to be administered in the confident expectation of success so that cure would in turn lead to a cessation of any further acts of lawlessness. Confinement in a correctional institutional would, it was said, frustrate this prospect so preventing the public benefit from being best served.

That this submission found favour with the learned Judge is apparent from the sentence imposed. It was that the respondent be released upon entry into a recognizance of $100 conditioned upon the respondent being of good behaviour for five years and to come up for sentence if and when called upon. There was also a disqualification for five years from obtaining a driving licence.

The considerations that inspired the learned Judge to adopt the course that he did may be derived from three sources. First, at the conclusion of the plea his Honour during discussion with counsel made certain comments. Those comments followed this statement by the respondent's counsel:

> "Your Honour, the Court has powers and has certain powers under the Act that has finally come into force now with the facilities that have been opened up, the *Alcoholics and Drug-dependent Persons Act* which was first brought into statute books in 1968...In my submission, sir, those facilities exist particularly for the situation that this man finds himself in...In my submission, the Court has power under s13 of the Act to deal with this situation and deal with the situation under the terms that the Assessment Report indicates and that all the evidence before you, sir, indicates; indeed, it is the society who—which would benefit greatly if something can be done for this man."

His Honour then observed:

> "There are certain matters that must be put before the Court may exercise its power under s13, are there not?... I draw your attention to the provisions of s13(8). It seems to me, subject to anything you may wish to say to me about it, that the document which you handed me which is dated 22 January 1975 is insufficient for the purposes of that sub-section... The prisoner will be remanded for sentence. I call for a Medical Report for the purposes of the *Alcoholics and Drug-dependent Persons Act*...I have to know the nature and type of treatment envisaged and I want to know something of the place where that treatment is to take place, and I want to know whether it is advisable that this prisoner should be treated as an in-patient as an out-patient."

Next, in the delivery of reasons for sentence, these observations appear:

> "'... in the last few months you have travelled from the state of being a helpless blubbering alcoholic to a man of self possession and dignity... I have been helped very much in a report I have received about you from Dr Milner, Inspector of the Alcoholics and Drug Dependent Persons Services... In all the circumstances of your case, despite the gravity of the offence to which you have pleaded guilty, I propose to release you on a bond if you are prepared to enter into that bond. I am doing that aware of your very bad history so far as addiction to alcohol is concerned and with in mind your extremely bad record with respect to the driving of motor cars... Is it your intention to continue to have treatment from the Alcoholics and Drug Dependent Persons Services?' "Prisoner: 'Yes.' "His Honour: 'I am not going to make that a condition of the bond. I will leave that up to you.'"

The reference to Dr Milner arises from a report of that doctor furnished pursuant to the request of the learned Judge. Finally, there are observations in the Judge's Report prepared by way of comment on the grounds set out in the Notice of Appeal. The grounds in that Notice are as follows:—

> "1. That the said sentence was inadequate and inappropriate having regard to all the circumstances of the case and a different sentence should have been passed.
>
> "2. That the learned judge failed to give due or appropriate weight to the prior convictions admitted by the respondent.
>
> "3. That the learned judge erred in that he failed to give any or any sufficient consideration to the

question whether the sentence would act as a deterrent to either the respondent or to other person minded to commit similar offences.

"4. That the learned judge erred in failing to give due and sufficient weight to the gravity of the offence committed by the respondent and to the penalty provided by the Legislature for the offence."

The Judge's comments to be found in his report set out with greater clarity and detail the factors that served to cause his Honour to take the course he did and for that reason merit quotation in full despite their length. His Honour said:—

"Ground 1: "I considered it adequate and appropriate to pass a non-custodial sentence on this respondent because exceptional circumstances applied to his case. "I was influenced in so doing by the course taken by Mr Justice Adam in *R v Raymond George Wilson* unreported August 1962 in the exceptional circumstances that applied to that case. "In the respondent's case, I thought that the circumstances were special because of the remarkable improvement in behaviour and outlook made by the respondent and the strength of his determination to maintain it.

"Ground 2: "I considered the criminal history of the respondent to be a very bad one. However I thought this history was a product of an acute and chronic alcoholism which had afflicted the respondent throughout its course and that it was to be understood and weighed in that context.

"Ground 3: "After I had heard the plea for leniency which was addressed to me on behalf of the respondent I considered that, subject to the necessary evidence being provided, the protection of the community would be best maintained should I order that the respondent be confined to a detention centre pursuant to s14 of the *Alcoholic and Drug-dependent Persons Act* 1968. "The inspector of the Alcoholic and Drug Dependent Persons Services, Dr Milner, reported to me that no such centre had yet been proclaimed under the abovementioned Act. "Furthermore, he reported on the respondent in terms confirmatory of the material that had already been put before me on the respondent's behalf. He said that with the help of his staff the respondent had moved from a condition of very determined alcoholic practice to one where he had achieved quite good control over his alcoholic problem. He recommended that after due processes of law that the respondent be enabled to continue with the help which he so obviously needed and to which he had responded and that this should happen on a voluntary rather than a compulsory basis. "I was impressed by the witness Margaret Mary Hobbs (the respondent's Probation Officer) and accepted her opinion that the treatment and rehabilitation of the respondent would be retarded by a term of imprisonment. "I thought that a prison sentence would do little to further deter him or anyone else placed in his special circumstances in view of the material before me to the effect that the respondent had demonstrated an exceptional reversal of behaviour and attitude and that he was powerfully motivated in his determination to avoid the source of his offending for the future. "Hence it seemed that the protection of society might be best achieved by a substantial declaration of trust in the respondent on the part of the Court. Although a manifest risk was involved, it appeared that the greater danger to the community lay in the taking of punitive steps by imprisoning the respondent and in all probability discourage and disturb his so far successful efforts to behave himself.

"Ground 4: "I was conscious of the gravity of the offence committed by the respondent and that it represented a repetition of similar conduct despite previous penalties. I thought that should he continue to succeed in his efforts to control his alcoholism, further offences by him might be prevented rather than postponed.

"In all the circumstances I concluded that this end might be best achieved should I release the respondent on a common law bond without any special conditions to detract from the voluntary character of his efforts."

Now, for the appellant it was contended that the sentence was unsustainable because—

(a) The sentence imposed represents such an imbalance between the hope of achieving the respondent's rehabilitation on the one hand and the need to protect the public and for a salutary punishment that would both assuage the sense of community indignation and act as a deterrent to others on the other hand as to render such sentence manifestly inadequate.

(b) The discretion exercised by the sentencing Judge had miscarried in one or more specific ways identifiable as follows:

(i) The Judge had misunderstood and so misapplied the rationale of the decision of Adam, J in *R v Wilson*. As to this complaint it is sufficient to say here and now that in our opinion it is clear that the Judge had in no way misinterpreted or misapplied that case.

(ii) That the Judge had incorrectly understood the effect of the evidence to be that the respondent had for a significant period pursued remedial attempts, whereas the period was no more than a little longer than three months which was too brief to justify any optimistic conclusion about its ultimate outcome.

(iii) That the Judge, having determined that the case was a proper one for invoking the provisions of the *Alcoholics and Drug-dependent Persons Act* 1968, and in consequence having sought the material relevant to the exercise of the powers conferred by that Act, did not in fact pass a sentence in conformity with that determination.

The principles governing the determination of appeals such as the present are now well established and require no recapitulation. See *R v Williscroft* [1975] VicRp 27; [1975] VR 292 and the cases therein referred to.

It is convenient to look first at the last ground enumerated as (b)(iii). To understand it, it is necessary to make some reference to the *Alcoholics and Drug-dependent Persons Act* 1968. The Act is designed to set up services and institutions to provide care and treatment for alcoholics and drug-dependent persons and for their rehabilitation into the community. The operative parts of the Act are to be found in s9 – 14. Sections 9 – 12 provide for the voluntary entry and compulsory committal to treatment centres via an assessment centre. This dichotomy follows in outline that to be found in and long established by the *Mental Health Act* 1958. Section 13 and s14 deal with persons convicted of an offence in respect of which (so far as relevant to the present case) drunkenness is a necessary part or contributed to the commission of the offence and the person convicted is an habitual user of intoxicating liquor to excess. Section 14 provides that a Court may, in lieu of a sentence of imprisonment, if the provisions of that section have been met, commit the person convicted to a detention centre. However, no such centres have yet been established.

Section 13, on the other hand, deals with the voluntary submission by a convicted person to treatment, the sanction being service of a suspended term of imprisonment in the event of failure, *inter alia*, to undergo the stipulated treatment. For present purposes the relevant provisions of s13 are as follows:—

"13. (1)...where a person—
(a) is convicted by a court and sentenced to a term of imprisonment for any offence in respect of which drunkenness or drug addiction is a necessary part or condition or contributed to the commission of the offence; and

(b) the court is satisfied by evidence on oath that the person convicted habitually uses intoxicating liquor or drugs of addiction to excess—
the court may order the person convicted to be released upon his entering into a recognizance in a reasonable amount, whether with or without sureties, conditioned that the person convicted do seek treatment in a treatment centre whether as in-patient or as an out-patient for such period not less than six months nor more than two years as the court thinks fit and fixes by the order and that he abstain from using alcoholic liquors or drugs of addiction unless with the authority of a legally qualified medical practitioner for such further period as the court thinks fit and fixes by the order. ...

"(8) A court shall not make an order under subs(1) without first considering a report by a medical officer of an assessment centre as to the mental and physical condition of the person convicted and his suitability for treatment in a treatment centre as an in-patient or as an out-patient or otherwise (as the case may be)."

We shall shortly refer to these provisions in a little more detail. The material to which we have referred in our opinion reveals a misunderstanding by the Judge of or a confusion as to the different procedures embraced by s13 and s14. In the context of his remarks, to which we have already referred, we should have thought that the Judge was clearly concerned to get a report that might meet the requirements of s13(8). On the other hand, evidence which was later received by this Court suggests, though it is by no means certain, that the Judge asked for a report that might assist him in relation to the provisions of s14, the Judge apparently being unaware at the time of asking for the report that there were no detention centres. Dr Milner's report provided in compliance with that request unarguably does not meet the requirements of s13(8). Even if the Judge was concerned with s14, it was in fact s13 to which his attention should have been directed, if for no other reason than that it was to the provisions of that section that the whole

plea had been directed. Accordingly the material that the Judge really required was a report that disclosed the result of the assessment to have been undertaken on 23 January 1975, at Gresswell Rehabilitation Centre. Such an assessment would be designed to ascertain the prospect of successful rehabilitation by use of a treatment centre's facilities having regard to the nature and extent of the respondent's disease, and his motivation and medical capacity for recovery. His Honour, judging from the comments in his report, certainly appears, by the time he received Dr Milner's report, to have thought that the matter was to be met by recourse to s14 and thus, when learning that no detention centres had been set up, decided to impose a sentence that completely ignored the *Alcoholics and Drug-dependent Persons Act*. This course was in contradiction to the manner in which the respondent's counsel argued his plea and the obvious state of the Judge's mind when he heard that plea.

In any event, an unconditional bond could not be justified in the light of the respondent's past history of anti-social behaviour linked with unbridled drunkenness and multiple probation breaches—especially where such a course is rested upon a self-confessed alcoholic's declared intention to redeem himself, no matter with what apparent sincerity that declaration might be made or be supported by others. Moreover, the discovery by the Judge that no detention centres existed afforded all the greater reason for his exploring the possibility of utilizing the provisions of s13—even if that had not been his original intention.

In our opinion the Judge, therefore, has plainly been shown to have been subject to confusion or to have failed to give proper weight to a relevant consideration. Believing that the respondent might well be eligible to be dealt with under the provisions of the *Alcoholics and Drug-dependent Persons Act* if the Act's conditions could be met, the Judge simply abandoned his intention when the report he got did not deal with those conditions, instead of insisting upon provision of an appropriate report in order to learn if the course he had been considering was still tenable.

This view compels the conclusion that the discretion of the Judge miscarried and makes it unnecessary to consider the remaining arguments of the appellant with which we have not already dealt. It thus falls to this Court to exercise its own discretion in place of that which miscarried. Counsel for the respondent, not unnaturally, asked that before re-sentencing the respondent we should receive the material that Judge Byrne asked for but did not get; that is to say, a report in conformity with s13(8). We agreed to do so. An attempt (with the co-operation of the Crown) to provide such a report in oral form by calling both Dr Barlow and Dr Milner during the hearing failed, as neither witness could testify to the matters which would meet the requirements of s13(8). Accordingly, at the request of the respondent's counsel, we adjourned the hearing of the appeal to allow Dr Milner further to investigate the matter and examine the respondent with a view to preparing a written report that might be put before the Court. In due course we received that report. It discloses that the respondent had not returned to the assessment centre since February. (The oral testimony had already revealed that the date of the last visit was 26 February—being the only visit made by the respondent since being sentenced.) Further, that the respondent had relapsed since that date and had not in fact been assessed at Gresswell on 23 January 1975, although this was due to a hospital employees' strike at that time.

The report continues:—

> "Mr Robinson genuinely wants to be able to give up using alcohol to save money and try to organise a home for his children—his previous record of co-operation with this Branch of the Health Department gives evidence of his good intentions, but he does need treatment and other help. He is both mentally and physically well-suited for treatment in a treatment centre as an in-patient or out-patient. It is my recommendation that he should be treated for at least two years by the Alcoholics and Drug Dependent Persons Services. At the present time I think he would best be treated as an in-patient, but this would probably be necessary for only a few weeks, after which he could most efficiently be treated as an out-patient."

There is no doubt but that this report is a sufficient compliance with the requirements of s13(8) so as to enable us to adopt the course authorized by s13(1) were we minded to do so. We do not, however, think that the case is one for the exercise of those powers. But, as during the course of argument in this matter we directed considerable attention to s13 of the *Alcoholics and Drug-dependent Persons Act* and as this Act has not yet been the subject of reported decisions it

may be desirable to record some views that we have reached in relation to its construction and operation.

A Court proposing to use the form of sentence made possible by s13 must, under s13(1)(a), sentence the accused person to a term of imprisonment. The requirements of s190 of the *Social Welfare Act* 1970 as amended by Act No. 8493 must be observed and in appropriate cases a minimum term fixed.

It is for the sentencing Judge to decide whether drunkenness or drug addiction has contributed to the commission of the offence. If this is not revealed in the trial evidence or, on a plea, in the depositions, it must be independently proved.

Drunkenness connotes a continuing pattern of behaviour or some degree of repetition of behaviour. It does not mean simply intoxication at the time of the offence. The word itself points to this interpretation, and that indication is confirmed by the use of the word "addiction" as the parallel word relating to drug taking.

There is therefore involved a finding that a succession of events constituting a course of conduct extending possibly from a time substantially before the commission of the offence contributed to the offence. In most cases evidence relevant to a decision whether the accused is guilty or not guilty will probably not extend so far. The time to which the drunkenness or addiction referred to in s13(1)(a) is to be related is the time of the commission of the offence.

The proof required by s13(1)(b) is proof by evidence on oath. Many types of material commonly used on pleas will not, therefore, be sufficient to establish the matter proof of which is required by (b). In this Court or in the County Court the requirement of proof might be satisfied by evidence in the depositions. In an appellant Court it might be satisfied by the record of evidence on oath given below. The time to which (b) relates is the time of sentencing. For the moment we leave out of consideration the question whether the position may be different at the time of appeal from the time of initial sentencing. Because of this, it is unlikely that the depositions will extend to the matters on which the finding required by (b) can be based. In most plea cases evidence on oath given on the plea will be necessary, and it seems likely that where a plea follows a trial it will at least frequently be necessary to adduce further evidence on the plea. It is to be noticed that the phrase in (b) "uses to excess" is not such as to require the finding that the accused person is an alcoholic within the meaning of the Act. The definition of an alcoholic does not refer to excess, but does refer to loss of self-control, a matter which in turn is not referred to in (b).

We have said that the time relevant to the matter proof of which is required by (b) is the time of sentencing. However, this does not confine the Court to a narrow consideration of the situation existing on one particular day. The word "habitually" implies either a continuing state of affairs or a repetition. A man can be said to use alcohol habitually when the statement concerning him is made during an interval between bouts, or at a time when what may be regarded as a normal interval is prolonged by some self-imposed restraint or by restraint imposed by an outside force or authority.

If the matters referred to in (a) and (b) are established, the Court may order the release of the prisoner on a recognizance conditioned to seek treatment at a treatment centre (which by definition is a centre for the care or rehabilitation of alcoholics and drug dependent persons, though in fact it may not be established at this stage that the convicted person is within the definition of either of these). The accused person is to "seek treatment for six months" or more, and the question may arise whether he can satisfy the terms of his bond by making one application for treatment or whether he is required to make a succession of applications. Because he is not established at this stage to be an alcoholic or drug dependent person, it is conceivable that treatment might be refused. The practical difficulties indicated by this examination of the words of s13(1) are probably minimized by the provisions of s13(8) and s13(10).

The order made by the Court laying down the conditions of the bond must fix a period of treatment and must fix a further period of abstention. The second period seems to be cumulative upon the first. The total of the two periods may be greater or less than the sentence imposed. To give the requirement as to the two conditions an effective operation, it would seem to be intended

that the abstention conditions should cover the treatment period as well as the further period. The report contemplated by s13(8) must satisfy four conditions. It must be a report by a medical officer of an assessment centre. Secondly, it must report upon the mental condition of the person convicted. It would seem that this aspect of the report is likely to deal with the question whether the convicted person's approach to treatment is likely to make him a satisfactory patient. Thirdly, it must report on his physical condition. This is no doubt directed at ascertaining whether he should be regarded as a candidate for treatment as an infirm person, see, e.g., s4(d) and s5(1)(b). Fourthly, it must say whether or not he is suitable for treatment, and it seems to be necessary that the report should say for which of the possible forms of treatment, i.e. as an in-patient or as an out-patient or otherwise, the convicted person is suitable.

The provisions of s13(10) may avoid the difficulty to which we have referred in discussing s13(1) that the convicted person may be required to seek treatment over a period when it has been decided that treatment is not required. Under s13(10) the inspector may report that the person is fit to be discharged from the treatment centre before the expiration of the period of treatment and the person is then no longer under any obligation under his bond in relation to seeking treatment. This produces the result that the only remaining condition of his bond will be the abstention condition covering the further period to which we have referred, and the result seems to be that if the treatment centre decides that the patient is not suitable for treatment or if it discharges him short of the completion of the recognizance period of treatment the effect of the Court's judgment is to suspend the sentence on a bond to abstain. This would suggest that the Court should be particularly careful to satisfy itself that the convicted person is an alcoholic or drug-dependent person within the definitions of the Act before it has recourse to this section. The recent case of *R v His Honour Judge Rapke; Ex parte Curtis* [1975] VicRp 62; [1975] VR 641, provides an example of a situation in which an institution to which a convicted person had been sent pursuant to provisions of the *Mental Health Act* declined to accept him on the ground that he was not suitable for treatment at it.

However, even though all the jurisdictional facts as required under s13 have been established, it will be seen that there is still a discretion conferred upon the Court as to whether or not it will exercise the powers conferred under the section. This discretion should be exercised only for the purpose of rehabilitating suitable accused persons who fall within the description of s13(1)(a) and s13(1)(b) and who, it may be reasonably assumed, can be reclaimed. The legislation does not take away from the Court the ordinary discretion conferred upon a court to impose the appropriate punishment on a guilty offender. The various factors which are material to punishment must still be considered but because of the provisions of s13 a new factor should be added to the existing relevant material. Where a serious crime has been committed and is of a prevalent nature calling for general deterrent penalty, then in our opinion the discretion conferred under s13 should not be lightly exercised to relieve the offender from correctional custody which deservedly should be imposed on him as a punishment for his wrongdoing. This consideration must be borne in mind in cases where the crime has become or is becoming much too common and offends against contemporary attitudes to the conduct constituting the crime.

If and when s14 is implemented, then the discretion to punish might be married to the power to treat an alcoholic or drug addict for his alcoholism or drug addiction. Until such detention centres are duly established then the provisions of s13 should not be invoked to permit an offender to avoid the appropriate punishment for a serious crime, merely because the conditions set out in s13(1)(a) and s13(1)(b) are established. Every case must be dealt with on the basis of its own particular facts. The Court should impose the appropriate punishment having regard to the various matters relevant to the exercise of the discretion. This must be done before the powers under s13 can be considered. If a term of imprisonment is required having regard to the nature of the offence, the circumstances of its commission and the antecedents of the offender and if the facts referred to in s13(1)(a) and s13(1)(b) and in s13(8) are established the Court should then consider whether it should palliate the custodial punishment in order to attempt the rehabilitation of the offender.

If the nature of the offence calls for severe punishment, then the public interest suggests that the discretion under s13 should not be exercised to relieve the offender of the punishment which it is thought community opinion would demand. On the other hand, if the demands of all the factors of punishment are nicely balanced with or are outweighed by the probable reclamation

of the offender from alcoholism or drug addiction, then the Court should be inclined to exercise its discretion under the section. This view calls for a close examination of the whole of the circumstances of the crime committed and if the Court comes to the conclusion that because of the offender's character and antecedents and of the heinous nature of the crime there is little room for clemency, then the reasonable course for it to adopt would be to impose a penalty reflecting the community's sense of indignation at and condemnation of the crime and pay little attention to the reformative aspects of punishment to be found or implied in the provisions of s13.

Adopting such an approach to the present case we are left in no doubt that it is one that not only calls for the imposition of a term of imprisonment but also it is not one for release from service of such a term upon entry into a recognizance in conformity with the provisions of s13. The respondent's long record of persistent lawlessness and his constant abuse of a number of previous attempts to achieve his rehabilitation cannot be ignored. The offence is a prevalent one and is currently a source of great community disquiet. It was committed in circumstances of little or no mitigation. In our opinion these considerations call for the imposition of a condign punishment in the terms already announced by us. We would just add this. Although having increased the sentence, we have not done so "by reason of or in consideration of any evidence that was not given at the trial," of the proviso to s574 of the *Crimes Act* 1958. Accordingly, it is unnecessary, as it was in *R v Kane* [1974] VicRp 90; [1974] VR 759 at 766, to determine whether the proviso has any application to an appeal brought by the Attorney-General. Appeal allowed; sentence varied.

Solicitor for the Crown: John Downey, Crown Solicitor.
Solicitor for the respondent: George Madden, Public Solicitor.
