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SUPREME COURT OF VICTORIA — FULL COURT

R v O'CONNOR

Young CJ, Murphy and Fullagar JJ

29-30 September, 27 October 1986

[1987] VicRp 45; [1987] VR 496; (1986) 23 A Crim R 50

SENTENCING – OBLIGATION ON COURT BEFORE CUSTODIAL SENTENCE IMPOSED – WHETHER CUSTODIAL SENTENCE APPROPRIATE IF REASONABLE SENTENCING ALTERNATIVE AVAILABLE: *PENALTIES AND SENTENCES ACT* 1985, S11.

Section 11 of the *Penalties and Sentences Act* 1985 provides:

"Subject to section 13, a court must not pass a sentence of imprisonment on a person unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case."

Before a sentence of imprisonment is imposed a Court is obliged to satisfy itself that no other sentence is appropriate. Where a reasonable sentencing alternative is available, a sentence of imprisonment should not be imposed.

THE COURT: *[After setting out the facts briefly, some comments by the trial Judge, the provisions of sections 6, 11, 12 and 13 of the* Penalties and Sentences Act *1985 and a passage from an article by Messrs Freiberg and Fox entitled* Sentencing Structures and Sanction Hierarchies *(1986) 10 Crim LJ 216 at 230-231, the Court continued]:* ... **[9]** What then is the construction to be placed upon s11? A sentencing Judge is obliged to satisfy himself that no other sentence is appropriate before he imposes a sentence of imprisonment but he is not obliged to give his reasons for rejecting non-custodial alternatives so long as it appears from all that is said that he must have satisfied himself as required. There is nothing in the section which requires the sentencing Judge to give reasons for rejecting non-custodial sentences and whilst of course a Judge always gives his reasons for passing a particular sentence we do not think that we should add an additional burden where Parliament has not done so. Moreover, s12 of the Act expressly imposes an obligation upon a Magistrates' Court to state in writing its reasons for passing a sentence of imprisonment. The omission of any such requirement in the case of the Supreme Court or the County Court is striking. **[10]** Parliament has clearly recognised the different former practices of the courts and has chosen not to enact any alteration of the practice of this Court or of the County Court.

The only other relevant conclusion that should be drawn from ss11, 12 and 13 for present purposes is that Parliament has clearly endorsed and emphasized a sentencing policy that where a reasonable sentencing alternative is available, a sentence of imprisonment should not be imposed. Applying these views to the present case it is, in our opinion, clear that the learned Judge imposed a sentence of imprisonment only because he was satisfied that no other sentence was appropriate in all the circumstances of the case. His Honour was asked to impose a non-custodial sentence but said that the substance of the crimes with which the applicant was charged called plainly for a custodial sentence. Was His Honour correct? We think that His Honour was correct in what he said, although it does not follow that the sentence actually imposed was appropriate. A view that the substance of the crimes charged did not call for a custodial sentence would set a dangerous precedent and would be tantamount to saying that an apparently respectable middle-aged man who committed the crime of obtaining money by deception should never be sent to gaol.

Mr Bourke, who appeared for the applicant in this Court, contended further that the learned Judge gave insufficient weight to the delay in bringing the applicant to trial. The offences were committed in the second half of 1982 and the applicant was not arraigned until July of **[11]** this year, nearly four years later. There was no suggestion by the Crown that the applicant in

any way contributed to the delay. We were not told when the offences came to notice but it seems probable that it was some time in 1983. There is no doubt that the delay is a relevant factor, but it was drawn to the sentencing Judge's attention and there is no reason to doubt that His Honour took it into account.

Next, it was said that the learned Judge failed to take into account the applicant's plea of guilty. Again it was clear to His Honour that the applicant had pleaded guilty; the fact was relied upon at the plea and the failure of the learned Judge to mention the fact when passing sentence does not mean that it had not been taken into account.

It remains for us to consider whether the learned judge's application of the sentencing principles was appropriate. First, we are satisfied that, having considered all other available sentences, no sentence other than imprisonment is appropriate. General deterrence, as the learned Judge said, is important in this case. A fine would be quite inappropriate as the applicant has no assets and no other form of non-custodial punishment would meet the requirement of general deterrence. The sentence of nine months on each count could hardly be described as excessive and although Mr Bourke contended that all sentences should have been made concurrent or a lesser total effective sentence reached, we are unable to say that a sentence of two years is beyond the range of permissible sentences open to the learned Judge.

[12] Mr Bourke also asked for a reduction in the minimum term. It is rare for this Court to interfere with the minimum term when no error has been revealed in the head sentence. A majority of the Court, however, has come to the conclusion in this case that the minimum term should be reduced. This is because of the long delay in bringing the matter to trial, the applicant's plea of guilty, his age, and, as the learned Judge said, "the testimony of the prisoner's doctors, that at the time he was confronted by the imminent collapse of his estate, he was distraught and drugged and thus may have succumbed to temptations which he would otherwise have rejected". The minimum term will accordingly be reduced to twelve months.

Solicitors for the applicant: Gair and Brahe.
Solicitor for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.
