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SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v LAWRENCE & ORS

Moffitt P, Nagle CJ at CL and Yeldham J

17 April 1980 — [1980] 1 NSWLR 122; 32 ALR 72; noted 5 Crim LJ 3

PRACTICE AND PROCEDURE – JOINT TRIAL – CIRCUMSTANTIAL EVIDENCE – DURESS – WHETHER TEST SUBJECTIVE OR OBJECTIVE – PRINCIPLES OF SENTENCING JOINT OFFENDERS – REMORSE.

Appeals against convictions and sentences by 6 of 14 co-accused charged with conspiracy to import a huge amount of cannabis.

HELD: There was no miscarriage of justice in the present case in having a joint trial nor did the trial judge err in the exercise of his discretion to refuse to order separate trials.

***R v Demirok* (1976) 8 ALR 462; (1976) 50 ALJR 550, referred to.**

Observations by Moffitt P on the reasons for holding joint trials.

Although it was preferable in a case based upon circumstantial evidence that juries be instructed with the statement of the law in *Peacock v R*, the direction in the present case was a proper one. The expression "reasonable inference" was meant to refer to, and would have been understood by the jury as referring to, a reasonable hypothesis or possible conclusion.

***McGreevy v DPP* (1973) 1 WLR 276; (1973) 1 All ER 503, considered.**

***Peacock v R* [1911] HCA 66; (1911) 13 CLR 619 at 630; 17 ALR 566;**

***Plomp v R* [1963] HCA 44; (1963) 110 CLR 234 at 252; [1964] ALR 267;**

***Barca v R* [1975] HCA 42; (1975) 133 CLR 82 at 104; 7 ALR 78; (1975) 50 ALJR 108;**

***Grant v R* (1976) 11 ALR 503;**

***La Fontaine v R* [1976] HCA 52; (1976) 136 CLR 62 at 71 and 80, referred to.**

The trial judge correctly directed the jury with respect to the defence of duress.

***Semble*: If the trial judge's direction as to the standard to be applied was erroneous, the case would be one, in this respect at least, for the application of the proviso to s6 of the *Criminal Appeal Act*.**

Per Nagle CJ at CL and Yeldham J:

(a) The second proposition enunciated by Smith J in *R v Hurley and Murray*, that the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did, correctly stated the test which should be applied in the case of duress. Thus, consonantly with principle and the authorities, an objective test was the one which should be applied.

***R v Hudson and Taylor* [1971] EWCA Crim 2; [1971] 2 QB 202; [1971] 2 All ER 244; 56 Cr App R 1; [1971] 2 WLR 1047; 135 JP 403;**

***R v Williamson* (1972) 2 NSWLR 281, distinguished.**

Statement in *R v Hurley and Murray* [1967] VicRp 57; (1967) VR 526 at 543, per Smith J, applied.

***DPP for Northern Ireland v Lynch* [1975] UKHL 5; [1975] AC 653; [1975] 1 All ER 913; (1975) 61 Cr App R 6; [1975] 2 WLR 641;**

***A-G v Whelan* [1933] IEHC 1; [1934] IR 518, considered,**

***R v Dawson* [1978] VicRp 51; (1978) VR 536;**

***R v Smyth* [1963] VicRp 97; (1963) VR 737;**

***R v Brown and Morley* (1968) SASR 467, referred to.**

Per Nagle CJ at CL and Yeldham J: In most cases, and indeed in the present case, having regard to the manner in which the trial was conducted, it would not be a matter of any consequence whether the test to be applied was subjective or whether it was objective.

Observations by Nagle CJ at CL and Yeldham J on judicial policy supporting the choosing of an objective test.

The sentence and "minimum sentence" imposed upon M. was eminently justified and were proportionate to those imposed upon the other conspirators. No ground could be seen for interfering with them.

It did not necessarily follow that a conspirator whose involvement was somewhat less serious than another conspirator who received the maximum sentence should, for that reason, receive less than the maximum sentence. The part played by D. may properly be described as conduct deserving of such a sentence.

***R v Tait* (1979) 46 FLR 386; (1979) 24 ALR 473 at 484-5, referred to.**

A lesser sentence could not be brought by a plea of guilty. It may result in a lesser sentence, but this was only by reason of what may be inferred in all the circumstances concerning the prisoner's subjective intention and reaction to the crime he had committed.

***R v De Haan* (1968) 2 QB 108; (1967) 3 All ER 618; [1968] 2 WLR 626, distinguished.**

***R v Nicholls and Bushby* (Court of Criminal Appeal of New South Wales, 21 September 1978, unreported), approved.**

***R v Harper* (1968) 2 QB 108; [1967] 3 All ER 618; [1968] 2 WLR 626; and**

***R v Gray* [1977] VicRp 27; (1977) VR 225 at 231-2, referred to.**

There was no rule that the maximum sentence was to be reserved for the most devilish instance of crime that judicial imagination could conceive, so that rarely, if ever, should the maximum be imposed. The primary task of the trial judge was to impose a sentence appropriate to the criminality of the prisoner's conduct, paying due regard to subjective considerations. If the criminality was so great that the maximum was warranted, it did not become a wrong sentence because differences could be pointed to by making a comparison with another prisoner whose crime also warranted the maximum sentence being imposed.

Difficulties of assessing the degree of responsibility of the various actors in a joint crime discussed.

MOFFITT P: A judge might well consider that a crime such as the present, because of the enormous quantity of drugs involved, the lengthy and sustained planning and implementation and the vast financial rewards involved and the enormous detriment to the whole community was worse than other crimes which had attracted greater penalties; cf *Bensegger v R* (1979) WAR 65 at 68; *R v Tait and Bartley* (1979) 46 FLR 386; (1979) 24 ALR 473 at 484-5.

If there were several who jointly committed such a crime he could take such a view of the crime of each, although there may have been some differences in the degree of participation of each. On this basis it would be appropriate to impose the maximum sentence on each. In any event, in a joint crime, the commission of which required the co-operation of many, there is some degree of artificiality in trying to make an assessment of the degree of responsibility of the various actors, and the more so when they stay mute as to the true part and the share of profits of each.

At best some kind of speculation is involved. To suggest that a sentence is wrong because the Crown did not go beyond the proof of guilt of the joint crime and establish the part played by a particular accused, who would say nothing of what happened is of course quite fallacious. A plea of guilty may support an inference that an accused person has remorse for his crime. In *R v Harper* (1968) 2 QB 108 at 110; [1967] 3 All ER 618; [1968] 2 WLR 626, Lord Parker CJ said:

> "It is, however, a course proper to give a man a lesser sentence if he has shown genuine remorse amongst other things by pleading guilty."

In my view Cross J in *R v Nicholls and Bushby* (Court of Criminal Appeal of New South Wales, 21 September 1978, unreported) correctly stated the principle as follows:

> "... it is trite in law that an otherwise appropriate sentence may justifiably be reduced by a plea of guilty in so far as that plea demonstrates resipiscence, saves the State the cost of a lengthy trial or avoids subjecting the victim – particularly children and women who have been the subject of sexual assaults – from the embarrassment and humiliation of giving evidence in open court."

I would regard the benefits to the State and the victims as certainly relevant where it indicates, and it will usually be inferred it does, something subjective concerning the prisoner, ie that he is repentant or motivated to cause no more harm, ie his criminality by the date of trial is less or his rehabilitation is already under way.

A plea of guilty by reason only of counsel's advice in order to get a less sentence is not by reason of any change of attitude to the crime committed. As pointed out in *R v Gray* there may be other reasons for pleading guilty, e.g. plea bargains or because defence is considered useless, which ought not attract leniency.