54/89; [1988] HCA 67

HIGH COURT OF AUSTRALIA

R v BAUMER

Mason CJ, Wilson, Deane, Dawson and Gaudron JJ

18 November, 8 December 1988

(1988) 166 CLR 51; 83 ALR 8; 8 MVR 289; (1988) 63 ALJR 113; (1988) 35 A Crim R 340

SENTENCING – PRINCIPLES – PUNISHMENT MUST FIT THE CRIME – PRIOR OFFENCES AND PROPENSITY TO COMMIT CERTAIN CRIMES – WHETHER SUCH FACTORS SHOULD INCREASE A SENTENCE – WHETHER SUCH FACTORS INHIBIT MITIGATION OR LENIENCY.

1. It is a principle of sentencing that punishment fit the crime. Apart from mitigating factors, the circumstances of an offence must determine the appropriate sentence.

2. Whilst factors such as an offender's criminal history or propensity to commit certain types of offences may reduce the opportunity for leniency or inhibit mitigation, it is wrong for a sentencing court to increase a sentence because of those factors.

THE COURT: [340] (A Crim R) In February 1987 the applicant pleaded guilty in the Supreme Court (NT) (341) to a charge that on 17 April 1986, whilst under the influence of alcohol, he did a dangerous act in that he drove a motor vehicle inbound on the outbound carriageway on the Stuart Highway and collided with another vehicle thereby causing grievous harm to a passenger in that other vehicle. The offence is commonly referred to as culpable driving causing grievous harm and is created by s154 of the *Criminal Code (NT)* (the Code). *[The Court set out the provisions of the section and continued]* ... The applicant's offence was obviously a serious one of its kind. It was aggravated by the fact that the applicant was heavily intoxicated at the time. The maximum penalty was imprisonment for 11 years and the applicant was liable to be disqualified from driving a motor vehicle for such period as the court thought fit (the Code, s390(9)). Furthermore, he had a bad criminal record, including many offences relating to motor vehicles. In sentencing the applicant, the trial judge (Asche J) noted his record, saying:

> "What increases the seriousness of this particular offence is the literally appalling record of the accused so far as prior offences in relation to driving are concerned."

His Honour also observed that people with the propensity of the applicant to continue to commit driving offences must be "kept away" for the protection of society. We will return to these observations later in these reasons. In the result, his Honour, after noting some factors in mitigation, imposed a sentence of eight years' imprisonment with a non-parole period of four years and ordered that the applicant be disqualified from obtaining or holding a driver's licence for 20 years.

The applicant applied to the Court of Criminal Appeal for leave to appeal against the sentence and the period of disqualification on the ground that both were manifestly excessive in all the circumstances of the case. Leave was granted but by majority (O'Leary CJ and Muirhead AJ, Maurice J dissenting) the appeal was dismissed. The applicant now seeks special leave to appeal to this Court. *[The Court then dealt with the proper construction of s154 and continued]* ... **[345]** In the present case, therefore, the task of the sentencing judge was to evaluate the circumstances of the offence in their entirety, including the influence of alcohol, and to determine an appropriate term of imprisonment having regard to the prescribed maximum of 11 years and to the possible range of offences to which it applied. His Honour purported to proceed in this way. However, the manner in which his Honour performed the task is open to question in two respects. We have already referred to his Honour's observation that "the literally appalling record" of the applicant increased the seriousness of the offence. If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree of

leniency then, of course, such a remark would be understandable and unobjectionable. It would clearly be wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence. Similarly, his Honour's observation that people with the propensity of the applicant to continue to commit driving offences must be "kept away" for the protection of the public is open to misunderstanding.

Propensity may inhibit mitigation but in the absence of statutory authority it cannot do more. In applying a section like s154, the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence. The question of law concerning the proper construction of s154(4) is a question of general importance which warrants the grant of special leave to appeal. Since we have expressed a different opinion to the opinions expressed in the court below, it is appropriate that we enable the Court of Criminal Appeal to impose a fresh sentence and disqualification. There should be an extension of time in which to make application for special leave to appeal. Special leave should be granted, the appeal allowed and the order of the Court of Criminal Appeal, in so far as it dismisses the appeal to that Court, set aside. The matter should be remitted to the Court of Criminal Appeal to be dealt with according to law.
