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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v DIMAANO

Crockett ACJ, Gobbo and Nathan JJ

23 June 1988

SENTENCING – PRINCIPLE OF PARITY OF – GROSSLY INADEQUATE SENTENCE IMPOSED ON CO-OFFENDER – WHETHER SENTENCING COURT MAY TOTALLY DISREGARD SUCH SENTENCE – DIFFERENCE BETWEEN SENTENCES CREATING AN INJUSTICE – WHETHER SENTENCING COURT MAY GRANT DISCOUNT ON APPROPRIATE SENTENCE.

Where a court deals with the sentencing of a co-offender, the principle of parity between sentences means that the sentencing court cannot ignore the sentence passed on the co-offender, notwithstanding it is manifestly inadequate. Where the person being sentenced and the ordinary person in the community would feel a degree of injustice having regard to the difference between the appropriate sentence and the manifestly inadequate sentence imposed on the co-offender, it is open to the sentencing court to grant some discount on what otherwise would be an appropriate sentence.

CROCKETT ACJ: [with whom Gobbo and Nathan JJ agreed] **[1]** The applicant and one Serdaris were arrested in premises in which a quantity of heroin was found together with property strongly suggestive of there having been some dealing in that substance. In the result, each was charged on a count of trafficking in a drug of dependence, namely heroin, and in the case of the applicant he was charged also with a count of possession of a drug of dependence namely cannabis L. The charges against the applicant were dealt with in the County Court at Melbourne. He pleaded guilty to each of the counts. In respect of the count of trafficking he was sentenced to a term of two years and nine months' imprisonment, and a minimum of one year nine months was fixed as that to be served before he should be eligible for parole. On the count charging the offence of possession he was fined $250. He now seeks leave to appeal against the sentence **[2]** and has confined his complaint to the sentence imposed on the count of trafficking.

The matter was dealt with after a delay of some two and half years following upon the detection of the offences. The co-offender, for some reason which does not emerge in the material before us, was dealt with in the Magistrates' Court on the charge of trafficking in a drug of dependence to which it has been assumed he also pleaded guilty. He was sentenced to one month's imprisonment on being convicted of that offence. The fact of that conviction and the sentence imposed in respect of it were drawn to the attention of the sentencing Judge who dealt with the applicant. There are some differences in the circumstances of the two co-offenders which seem to operate favourably to the applicant. He was twenty-one years of age at the time of the commission of the offences, whereas the co-offender Serdaris was twenty-three. He had no prior convictions whilst Serdaris had, we were told, one prior conviction at that time.

The applicant's counsel, at the time of the entry by the applicant of his plea of guilty, made a plea for leniency on his behalf. Naturally enough, a great deal of emphasis was placed upon the fact that the co-offender has been sentenced merely to one month's imprisonment and that that term had been imposed shortly after the detection of the offences, so that Serdaris had not been subjected to the uncertainty associated with delay in the measure that had the applicant.

Not surprisingly, the sentencing Judge took the view that the sentence imposed in the Magistrates' Court for what **[3]** to all intents and purposes was an identical offence committed in identical circumstances was grossly inadequate. However, it does appear from his reasons for selecting the sentence that he did that he considered that because of the gross inadequacy of the co-offender's sentence, he, the sentencing Judge, could on that account totally disregard it. That approach appears to be contrary to the principles dealing with the matter as they have been enunciated in this Court. A number of cases have dealt with the question, and it is, I think, for present purposes sufficient if I refer to a passage in Fox & Freiberg at p492, which represents a

synthesis of the decisions to be found in the various authorities. The authors say:

> "Considerable difficulties arise where one offender has been awarded a wholly inappropriate sentence and a co-offender appeals against his own on the ground of disparity."

That, I might interpose, is, of course, one of the grounds upon which the applicant relies in his present application for leave to appeal against his sentence. The text continues:

> "The dilemma facing the court is that the sentence imposed on the applicant may be entirely correct, but the principle of uniformity has been breached. In Victoria, the dilemma is solved in the following manner. The principle of parity between sentences does not require a court sentencing an offender to impose what, in its view, is a wholly inappropriate sentence, merely because such a sentence has been imposed on a co-offender. However, this does not mean that a manifestly inadequate sentence passed on a co-offender can be completely ignored. Where the disproportion between the sentences is manifestly, not merely arguably, excessive, the sentence, though inadequate, may be altered to avoid the feeling of injustice felt by the co-offender."

There is no question but that in the present case the disproportion between the two sentences is manifestly excessive. I think the Judge did completely ignore the **[4]** co-offender's inadequate sentence. For that reason alone his sentencing discretion must be held to have miscarried. However, if I am wrong about that, and the true view is that he did bear in mind the need to have regard to the disproportion when fixing upon a sentence to be imposed upon the applicant, he certainly does not appear to have concerned himself with the principles which would govern a determination as to whether or not some adjustment should be made to the sentence he might otherwise consider appropriate by reason of that disproportion. When there has to be a disparity as in the present case, it is for the Judge to determine whether or not the man being dealt with by him would be of the view that he had been unjustly treated or had a grievance because of what he perceived to be unjust treatment if he were given a sentence (otherwise appropriate) that represented a gross disproportion between his sentence and that of his co-offender. There would be no doubt, I think, that the answer to that query would be that this applicant would feel such a degree of injustice.

The Judge is required then to consider whether an ordinary person in the community, aware of all the relevant facts, would regard the disparity between the two sentences as unjust to the applicant. Again, having regard to the grossness of the disparity, there could be no other answer to that question but an affirmative one. If these matters had been addressed, the sentencing Judge ought to have been led to the view that it would be necessary to grant some discount on what otherwise would be a perfectly proper sentence in order to make allowance for the co-offender's grossly inadequate sentence.

[5] The failure to consider and apply those considerations appears to me to strengthen the view that the sentencing discretion miscarried. Accordingly, I am of the opinion that it is for this Court to consider what would be an appropriate sentence to be imposed in lieu of that which must now be quashed. Considering the various matters to which counsel has referred in mitigation such as the applicant's being a first offender, his being in regular employment, his having had to suffer a very lengthy delay which was not of his making before his matter was disposed of and setting against such considerations those matters which operate in aggravation, including the seriousness of the offence itself, and the fact that the amount of heroin seized had a street value of some $2,000, I am of the opinion that the appropriate sentence to be imposed, and I accordingly so propose its imposition, is one of two years' imprisonment, with a minimum term of eighteen months to be served before the applicant becomes eligible for parole.
