18/79

HIGH COURT OF AUSTRALIA

R v VEEN

Stephen, Mason, Jacobs, Murphy and Aickin JJ

28 February 1979

[1979] HCA 7; (1979) 143 CLR 458; 53 ALJR 305; 23 ALR 281 (Noted 55 ALJ 259; 3 Crim LJ 222)

CRIMINAL LAW (NSW) – MANSLAUGHTER – SENTENCE – PRINCIPLES – DIMINISHED RESPONSIBILITY – PROTECTION OF COMMUNITY – PUNISHMENT – IMPRISONMENT – PREVENTIVE DETENTION – DEFENCES OF PROVOCATION AND DIMINISHED RESPONSIBILITY – PROPORTIONALITY IN SENTENCING – RESPONSIBILITY OF JUDGE TO ASCERTAIN GROUND OF VERDICT OF GUILTY OF MANSLAUGHTER: *CRIMES ACT* 1900 (NSW), S23A(1).

The prisoner met Ward in Kings Cross, Sydney. After some conversation Ward invited the prisoner to his flat at Croydon. The prisoner accepted, and the two men spent the rest of the weekend together. Some homosexual activities took place, and for his part in them the prisoner expected Ward to pay him.

Next night, after the two men had been drinking heavily, the prisoner asked for payment, but Ward refused. According to the prisoner, Ward's refusal was in these words: 'No, you black bastards are all the same, always wanting hand-outs'. The prisoner is an aborigine, and the jury was instructed that they might, if they thought it proper to do so, treat Ward's reference to the prisoner's race in the circumstances such provocation as would reduce murder to manslaughter. What inflamed the prisoner seems to have been the refusal of payment, not the reference to his race or colour, derogatory though it was. This incident occurred in the kitchen of the flat. The prisoner then took a sharp, pointed knife from a rack, and stabbed Ward in the arm. He then ordered Ward into the living room, where he stabbed Ward three times in the arms and chest. Then the prisoner ordered Ward into the bedroom, where he stabbed him repeatedly until he collapsed and died. The prisoner covered the body, ransacked the room, stole money of the deceased, and left the flat dressed in the clothing of the deceased.

Charged with murder, the applicant was acquitted of that charge but was convicted of manslaughter, the jury indicating that it accepted the applicant's plea of diminished responsibility. Both provocation and diminished responsibility were issues at the trial. The applicant, aged twenty, had a long record of previous convictions, only one of which, however, a Children's Court conviction for malicious wounding when aged sixteen, involved violence. He was sentenced to life imprisonment.

In imposing that sentence the trial judge described the prisoner as having "a serious abnormality of mind" when he killed his victim, adding that he apparently had "a similar abnormality of mind" when he committed his previous act of violence, some four years earlier. His Honour apparently accepted the jury's finding of diminished responsibility as an acceptance by them of evidence given by a psychologist called by the defence that this abnormality arose from some brain damage, cause unknown: he then, in effect, adopted this view as his own, concluding that the applicant "if and when released, will, whilst he suffers from this brain damage, be likely sooner or later to kill or seriously injure one or more other human beings. There is no suggestion that his condition is curable, or in any way responsive to treatment".

This led his Honour to the conclusion that "punishment will not deter him" and that the ordinary principles of punishment did not apply: the prisoner had "to be imprisoned for the protection of the community from his own uncontrollable urges". Upon appeal—

HELD: Appeal allowed. Sentence of 12 years' imprisonment imposed.
1. The sentence of life imprisonment imposed by the trial judge did not conform to principles of sentencing. It was the result of almost exclusive attention being given to the notion of the protection of the community against future danger from the applicant. It sacrificed the important factor of proportionality in favour of the notion of protection.

2. The killing was undoubtedly a very grave crime; but the question was whether it was a crime which warranted not only severe punishment but the most severe punishment which could be awarded. It was not in the category of the most grave cases of unlawful killing short of murder. The applicant's history was not such that any punishment should be awarded which was not strictly proportionate to the gravity of the offence.

STEPHEN J: ... The sentence of life imprisonment passed on the applicant may indeed, for him, mean imprisonment for his lifetime if what the trial judge said in sentencing him is taken into account on the question of release. While strongly recommending full psychiatric assessment and treatment "if upon assessment such treatment appears to be warranted" and hoping that his case would be reviewed periodically, his Honour also said that his condition was not curable and that there was little doubt but that, if ever released, he would be likely to kill or seriously injure one or more other human beings, so that on release, even after many years, it remained "the probability that he will again commit a crime of serious violence". Such findings offer little encouragement for any favourable consideration of his release in the future. ...

The learned trial judge had before him a variety of evidentiary material bearing, or which might be thought to bear, upon the question whether the applicant would in the future remain a danger to the community. There was his past criminal record: a considerable number of offences, committed over some five years, some involving cars and others housebreaking and stealing. The one prior conviction involving violence, when he was sixteen, was his unprovoked stabbing of the landlady of the boarding-house where he was living; he had at the time been drinking heavily. Then there were the circumstances of the crime with which he was charged, involving as it did prolonged violent attack on the victim while at the same time possessing features which at least opened the door to a plea of provocation. There was character evidence, generally favourable to the applicant but which spoke of the social difficulties which the applicant, an aborigine, experienced in his relations with the community. There was also brief police evidence as to antecedents and evidence that he had twice attempted suicide. Finally there was the evidence of two expert witnesses, the defence's psychologist and the prosecution's psychiatrist. ...

The learned trial judge appears to have relied largely upon the evidence of the psychologist for his conclusions as to the future dangerousness of the applicant. That psychologist had seen the applicant on one occasion only, just before the trial began. He administered a variety of intelligence and other psychological tests and from their results, principally, it seems, because the applicant was shown by the tests to be of high intelligence yet had poor short-term memory and concentration powers, he concluded that something was physically wrong with the applicant's brain. From personality tests he inferred that the applicant had a sound personality structure. The effect of the inferred brain damage was, he thought, to weaken emotional control in this otherwise normal individual so that when severely provoked or drunk he might react with uncontrolled aggression. The prosecution's very experienced psychiatrist, the consultant psychiatrist to the Crown in forensic matters, denied the ability of any psychologist to make a diagnosis in this case, criticized aspects of the psychologist's test procedures and rejected the conclusion that there was any brain damage. He had seen the applicant upon a number of occasions and concluded that he had a personality defect in the form of a character disorder but that he suffered from no impairment of mental responsibility for his acts. ...

No doubt the whole question of prediction of behaviour in the future is a most difficult one. Its very difficulty is in itself a potent reason against undue weight in sentencing being given to the protection of the community from what is predicted as the likely future violence of the convicted person. Predictions as to future violence, even when based upon extensive clinical investigation by teams of experienced psychiatrists, have recently been condemned as prone to very significant degrees of error when matched against actuality. ...

This sentence of life imprisonment, imposed predominantly because of what the trial judge took to be a pressing need to protect the community from the uncontrollable urges to violence to which he regarded the applicant as likely to be subject in the future, is, then, one which for the above reasons requires reconsideration. It does not conform to those principles in sentencing to which my brother Jacobs has given expression in his judgment in this case; instead it is the result of almost exclusive attention being given to the notion of protection of the community against future danger from the applicant. It sacrifices the important factor of proportionality in favour of this notion of protection. It seems extensively to rely, for proof of likelihood of that future danger, upon expert evidence open to criticism, if for no other reason, because founded upon quite superficial psychological examination of the applicant. It dismisses from consideration all question of provocation, not because of the trial judge's own assessment of the case but in reliance upon what was inferred from the foreman's answer to the question asked of him.

The appropriate course in all the circumstances is, I think, that proposed by Jacobs J. I agree that a term of twelve years' imprisonment should be imposed, no non-parole period being fixed. I do so for the reasons appearing in his Honour's judgment.

MASON J: The protection of the community from violent crime, it has always been recognized, is a very important factor to be taken into account in sentencing. It would be surprising if it were otherwise. The court, must, in sentencing a person who has been convicted of a very serious offence involving violence, if his record and the expert evidence plainly demonstrate that there is a real likelihood of his committing that kind of offence again if he is restored to liberty ensure by the order which it makes that he will not be released whilst that likelihood continues.

JACOBS J: ... It is clear that the psychiatric services available in respect of a prisoner such as the present one are very limited indeed even if they can be said to exist at all. Any doubts which might otherwise be left about the unavailability of any extensive psychiatric treatment in New South Wales prisons are resolved by the recent report of Nagle J as Royal Commissioner appointed to enquire into New South Wales prisons.

Having stated that medical services in New South Wales prisons are not operating satisfactorily, and having referred to the fact that part-time general practitioners and medical specialists supplement full-time services of Health Commission officers, Mr Justice Nagle, *Report of Royal Commission into New South Wales Prisons* (1978), p335, said:

> "If medical treatment is not available within the prison system, then it must be acquired from outside. . . . Both logic and justice dictate that an imprisoned person should be provided with proper medical treatment. The cost of such a provision is no answer to its necessity. The Department attempted to answer it in that way. But it is wrong. If imprisonment is to be retained, society must accept the responsibility for ensuring that prisoners do not incur any physical or mental deterioration which can be cured or treated during their confinement. To achieve this objective, a suitable prison medical service must be provided."

... I now turn to the facts of the present case in order to determine whether the sentence of life imprisonment was the proper punishment appropriate to the whole of the circumstances of the case. First I shall set out the whole of the trial judge's remarks on passing sentence. They give the facts and the background and the course of reasoning which led him to impose the maximum sentence.

> "... It has been said that one of the main purposes of punishment is to protect the public from the commission of crimes of violence by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. (*R v Radich* (1954) NZLR 86; *R v Wallis,* Court of Criminal Appeal, 25th June 1975.)
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> ... These cases also stress that, on the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct, of the individual offender, and the effect of sentence on these, should also be given the most careful consideration. There is no doubt that the prisoner had a serious abnormality of mind at the time he committed this offence. He apparently had a similar abnormality of mind when at the age of sixteen he stabbed his landlady. He said that he suffers from depression and he has twice tried to commit suicide. It appears that the abnormality arises on slight provocation, particularly when the prisoner has drunk a large quantity of alcohol. The jury's finding, having regard to my directions to them, indicates that they considered that this abnormality arose from some brain damage, the cause of which is not known.
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> There can be little doubt that the prisoner, if and when released, will, whilst he suffers from this brain damage, be likely sooner or later to kill or seriously injure one or more other human beings. There is no suggestion that his condition is curable, or in any way responsive to treatment. In his case the deterrence theory of punishment expounded in *Radich's* case has no application. Punishment will not deter him, or like-minded people, for in certain circumstances they have no control over their impulses to kill. The only principle of sentencing that I can apply is that the community is entitled to be protected from violence. No matter when the prisoner is released, whether it be in a few years or many years, there is the probability that he will again commit a crime of serious violence.
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> Thus the case presents the problem that there is no basis for fixing a term of imprisonment or a non-parole period. The crime of manslaughter admits of many degrees, and the penalty ranges from nominal punishment to penal servitude for life. Normally an acquittal for murder, and a finding of guilty of manslaughter, would carry a lesser punishment than life imprisonment, even where the

> acquittal is based on diminished responsibility. In that case, the mental responsibility has been substantially impaired, and punishment would normally therefore be less than life imprisonment. But in this case I do not think the ordinary principles of punishment apply. Indeed I do not think it can be properly said, as I interpret the jury's verdict, that the prisoner should undergo punishment. He has to be imprisoned for the protection of the community from his own uncontrollable urges. There is no institution I can send him to; the only alternatives open to me are to release the prisoner or imprison him. The first alternative is of course an impossible one.
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> I strongly recommend that the prisoner be given a full psychiatric assessment, and be provided with psychiatric treatment if upon assessment such treatment appears to be warranted. I should hope that the authorities will periodically review his case to determine whether he should be released, on a proper balance of his interests and the need to protect society. The case is one of great sadness, but I believe there is only one sentence I can pass, and there will be no non-parole period. Robert Charles Vincent Veen, I sentence you to imprisonment for life."

19. There are a number of features of the case which give rise to some concern. First, the jury, having returned a verdict of manslaughter, was asked a special question. The question and answer were as follows:

> "ASSOCIATE: Is your verdict of not guilty of murder but guilty of manslaughter based on the defence of diminished responsibility? JURY FOREMAN: Yes."

The answer given by the jury to the special question does not wholly preclude the possibility that the jury found manslaughter upon the further ground upon which a verdict of manslaughter was open, namely, proof of provocation. This may not be likely, but it would have been open to the jury to find both diminished responsibility and provocation and to ask whether the verdict was based on one defence does not completely cover the field of possibilities.

20. The second feature to which I would refer is the fact that, in the light of the decision of this Court in *Johnson v R* [1976] HCA 44; (1977) 136 CLR 619; (1976) 11 ALR 23; (1976) 51 ALJR the direction to the jury on provocation was wrong in that it left to the jury as a separate element and as an "important matter" in the defence of provocation the question whether there was a reasonable proportion between the provocation and the retaliation. As the matter is before the Court, even though the appeal relates only to sentence, this error is a factor which cannot be left out of account.

21. Thirdly, the conclusion of the trial judge that the applicant, if and when released, would, whilst he suffered from brain damage be likely sooner or later to kill or seriously injure depends upon a diagnosis and prognosis by a psychologist based on an assessment by him of the results of intelligence tests conducted by him on one afternoon shortly before the trial, an assessment with which Dr Schmalzbach, a psychiatrist called on behalf of the prosecution, profoundly disagreed. The jury was asked the question which I have already quoted and answered it in the affirmative. The verdict of the jury must be accepted, but it does not follow that the presiding judge, in the task which was peculiarly his of determining the appropriate sentence, was not only bound by the jury's finding in this respect but was also bound to accept the whole of the evidence of the witness upon whose evidence the jury would appear to have relied in reaching their finding. No process of logical deduction from the legal implications of the jury's finding is a substitute for the sentencing judge being himself satisfied on the whole of the evidence that the prisoner before him had brain damage which would in the future be likely to lead him to kill or seriously injure other human beings. It appears to me that the trial judge felt himself bound to accept all the implications of the jury's verdict. I repeat what he said in this connexion.

> ". . . The jury's finding, having regard to my directions to them, indicates that they considered that this abnormality arose from some brain damage, the cause of which is not known. There can be little doubt that the prisoner, if and when released, will, whilst he suffers from this brain damage, be likely sooner or later to kill or seriously injure one or more other human beings. There is no suggestion that his condition is curable, or in any way responsible to treatment."

I do not underestimate the difficulty which arose in the present circumstances but that difficulty cannot be resolved by deductions from the jury's verdict. The present crime and the fact that three or four years previously he had committed a violent assault with a knife on his landlady showed that he was prone to violence but that can be said of many prisoners facing sentence. To base a

conclusion that he would in the future kill or seriously injure someone on the sparse evidence that he had a damaged brain as a result of the incident in Queensland would hardly be possible as the assault on his landlady occurred before the events in Queensland. It is hardly necessary to remark that there had been no neurological examination and no electro-encephalogram to support the conclusion. Whatever may have been the basis of the jury's conclusion the court itself must be satisfied that the prisoner has a mental disorder which will lead him to kill or seriously injure in the future before proceeding to sentence on that basis. It should be added that in the great majority of cases where mental disorder has been treated not as a mitigation but as a reinforcement of the need for the longest permissible sentence, the psychiatric evidence, frequently accompanied by a substantial and more or less prolonged confirmatory history, was overwhelming and most frequently unanimous that there was a present abnormal mental condition of a severe kind. These conditions were not satisfied in the present case.

22. A combination of all these features in the case, coupled with the fact that the trial judge himself, judging from the sense of his words on sentence, did not regard the case as the most grave case of manslaughter, lead me to a conclusion that the sentence of life imprisonment ought to be reviewed. I wish to make it clear that I do not say that there are not cases, many cases, of manslaughter which warrant such a sentence. In particular there are no doubt very many cases where the success of a defence of diminished responsibility will lead to a sentence of life imprisonment, even though that is the same sentence as in the case of a verdict for murder.

23. The killing was undoubtedly a very grave crime; but the question is whether it was a crime which warranted not only severe punishment but the most severe punishment which could be awarded. The applicant was aged twenty at the time of his criminal act. He had a record of comparatively minor offences not involving violence with the one exception, the conviction for malicious wounding when he was aged sixteen. This, as well as the crime for which he is now sentenced, shows that he has a propensity to violence and account must be taken of that fact. On the other hand, there was considerable provocation even if it did not amount to a defence within s23 of the *Crimes Act*. It can certainly be stated that there was no premeditated violence. He used a weapon which happened to be at hand when he wholly lost control of himself. On the other hand, the attack was prolonged from the moment of first striking and was extremely violent. It was followed by conduct designed to effect an escape from the consequences, though in all the dreadful circumstances it is doubtful whether this is of great significance. Underlying these factors is the background of the applicant. I have already stated the summary of the trial judge, but I would repeat his words:

> "These witnesses . . . left me with a strong impression that the prisoner had at one time a strong personality that gradually deteriorated as the impact of the problems of a black person in a white society was felt by him."

This crime, very grave as it was, was not in the category of the most grave cases of unlawful killing short of murder. A life sentence under New South Wales conditions, coupled with repeated judicial pronouncements that if he were released, he would probably kill again, those pronouncements being based on an inference from the jury's verdict rather than upon the cogency of the psychiatric evidence, was too severe a punishment to impose on the applicant.

One course which would now be open would be to remit the matter to the Court of Criminal Appeal for the taking of further evidence upon the question whether the applicant, if ever released, would, unless his condition had been remedied, be likely again to kill or violently injure. I have considered that course but I do not think that it would be appropriate in the light of Dr Schmalzbach's evidence and I do not think that the applicant's history is such that any punishment should be awarded which is not strictly proportionate to the gravity of the offence. In my opinion there should be a heavy sentence for a fixed term. No non-parole period should be fixed, the reason for not fixing such a period being in order that the case of the applicant can be the subject of executive review so that at a suitable time if the applicant effects a rehabilitation of himself and his personality and if his mental condition is considered stable, consideration can be given to the question of his release on licence. I would fix a term of twelve years.

MURPHY J: The evidence on which the sentence was based was meagre. This case illustrates the failure of the judicial system (at least the superior courts) to develop satisfactory principles

and procedures in sentencing. Although sentencing is often a much more difficult task than ascertaining guilt, it is neglected in legal education and in professional practice. Far more time and attention is paid to questions of determining guilt than to the also important question of what to do with the offender. In a case such as this there are significant social and economic consequences for society as well as the offender. In view of these, it is unsatisfactory that the decision to sentence to life imprisonment should be made, however compassionately (and it was in this case) on such meagre material.

Protection of the community has traditionally been regarded as an important factor in sentencing. In developing a coherent system of sentencing, it is necessary to consider sentences which have a maximum term of years and not merely those for which life imprisonment may be imposed. When sentencing for offences for which the maximum is a term of years, the legislature has entrusted the judiciary with the discretion of imposing imprisonment for less than the maximum and has made available a range of alternatives from no imprisonment being imposed to conditional sentences, probation, parole, *et cetera*, in the various States. If the sentencing judges have been empowered to impose what may be described as preventive detention, this is limited by the maximum. No matter how dangerous it may be for the offender to be released after the maximum has expired, the criminal court has no authority to order his continued detention unless he has come within the scope of a provision such as the *Habitual Criminals Act* 1957 (NSW), as amended. Suppose a person committed an offence carrying a maximum of a very lengthy period but the circumstances were such that ordinarily only a slight, if any, punishment would be imposed, and the trial judge is satisfied that the offender would at some time commit similar or other crimes if released. Is the trial judge then justified in sentencing the offender to the maximum in order to protect the community?

12. Traditionally, the courts have imposed a maximum or near-maximum sentence to protect the community, not against people who are considered to be insane or of diminished responsibility, but against those who are considered responsible for their actions but whose dispositions, aggressive or otherwise, have made them a danger to society. No doubt the supposedly sharp differences between the concepts "sick" and "dangerous", "responsible" and "irresponsible", reflect only the primitive state of our knowledge (or at least the primitive state in which it is presented to the court). It is a distortion of the criminal law to sentence people to longer terms because they are sick or have diminished responsibility. It is inconsistent with the aims of the criminal law. Also, the techniques, methods, and the information usually available to the courts do not lend themselves to a satisfactory handling of such cases. A sentence is a once-and-for-all decision, not the progressive examination, assessment and, if possible, treatment which are appropriate to preventive detention. If some definite term of imprisonment should be imposed upon an offender by way of punishment, it is a wrong administration of the criminal law for the judge to order a life sentence of preventive detention, hopefully leaving it to executive intervention to examine the applicant and do what is right. Yet it appears from the judge's careful pronouncement that this is what he had in mind. It is wrong for the courts to impose punishment or greater punishment than is merited because of the lack of non-punitive preventive detention. Whether there should or should not be such detention is a question on which I express no opinion...
