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SUPREME COURT OF VICTORIA — FULL COURT

R v CARLSTROM

Young CJ, Menhennitt and Kaye JJ

7, 8, 14 December 1976 — [1977] VicRp 44; [1977] VR 366

SENTENCING – APPLICATION FOR ADMISSION UNDER S51 *MENTAL HEALTH ACT* IN LIEU OF SENTENCE – AVAILABILITY OF PSYCHIATRIST'S REPORT TO COUNSEL FOR ACCUSED – REPORT NOT MADE AVAILABLE TO ACCUSED'S ADVISERS – WHETHER REPORT SHOULD BE MADE AVAILABLE TO THE ACCUSED'S ADVISERS: *MENTAL HEALTH ACT* S51.

On appeal against a total 7-year sentence for several offences against a small girl, two psychiatrists gave oral evidence that the accused suffered a mild mental retardation and possibly a gross sexual deviant, but was not certifiable and, as such posed a real threat to the community. The accused sought an order under s51 *Mental Health Act* admitting him to an institution. A psychiatrist's report was obtained by the trial Judge but was not shown to the accused's advisers.

HELD:

1. It is fundamental that, save in exceptional circumstances, counsel for a prisoner should have an opportunity of seeing and commenting upon any material which is provided to the trial judge, although in some cases it is necessary to obtain from counsel an undertaking not to disclose, for instance, a psychiatric report to his client. If there be a case in which the judge thinks that, for some exceptional reason, a report or some part thereof should not be made available to a prisoner's legal advisers, the trial judge should tell them that he has it and should give most explicit reasons for not allowing them to see it.

2. In relation to the question of sentence, the sentencing judge was correct in stating that the only course open to him was to sentence the accused to imprisonment.

The Full Court (YOUNG CJ, MENHENNITT and KAYE JJ), *[in delivering judgment, considered the facts and the psychiatric evidence called by the accused at the trial and continued:]* After hearing the plea, the learned Judge remanded the applicant for psychiatric report. In due course his Honour was given a report by Dr Bartholomew upon which, as appears from what he said at the time and from his report to this Court, he relied heavily in passing sentence. Unfortunately, however, his Honour did not show that report to the applicant's advisers. Indeed, they were not able to obtain a copy of it until the appeal began in this Court. The failure to make this material available to the applicant's advisers produced a very unsatisfactory state of affairs which, we trust, will never occur again. It is fundamental that, save in exceptional circumstances, counsel for a prisoner should have an opportunity of seeing and commenting upon any material which is provided to the trial judge, although in some cases it is necessary to obtain from counsel an undertaking not to disclose, for instance, a psychiatric report to his client. If there be a case in which the judge thinks that, for some exceptional reason, a report or some part thereof should not be made available to a prisoner's legal advisers, the trial judge should tell them that he has it and should give most explicit reasons for not allowing them to see it.

[The Full Court then considered matters to which the trial Judge had referred in passing sentence and part of the pre-sentence psychiatric report relied on by the trial Judge when passing sentence, and continued:]

When Mr Duckett, who appeared for the applicant in this Court, although he had not appeared for him in the Court below, saw Dr Bartholomew's report, he naturally sought to call Dr Myers (who had given evidence for the applicant on the plea) as a witness before us and, in the circumstances, we had no alternative to allowing him to do so.

Accordingly, we heard Dr Myers and we also asked that Dr Bartholomew be called. In the result there was little difference between the psychiatrists. They were essentially in agreement as to the applicant's condition. Dr Myers thought that he might be dealt with under s51(1) of the *Mental*

Health Act but Dr Bartholomew said, in effect, that he could only be dealt with under that section if the Mental Health Authority were prepared to accept him. The significance of that observation is that, although the court may under s51(1) order that a person be admitted into and detained in an institution (as defined in s3) which is specified in the order, it is a matter for the superintendent of the institution to decide how long he shall remain in it; see s51(2), s42 and *R v His Honour Judge Rapke; Ex parte Curtis* [1975] VicRp 62; [1975] VR 641, at p643.

Mr Duckett invited us to make an order under s51(1) but the conditions precedent to the making of such an order have not been satisfied. An order cannot be made unless the court is "...satisfied by the production of a certificate of a medical practitioner or by such other evidence as the court may require that such person is mentally ill or intellectually defective...". No certificate complying with the section was forthcoming and in the circumstances we are certainly not satisfied by the evidence called that the applicant is "mentally ill" or "intellectually defective" as defined in s3. But even if we were so satisfied we would not be prepared to make an order under s51.

The effect of the evidence is that, if we were to do so, the probabilities are the applicant would be detained in moderate security for a short time and then released. The fact is that there is no way by which Dr Myers' ideas for the treatment of the applicant can be ordered. Even if there were such a hostel as Dr Myers referred to, there would be no way in which the applicant could be compelled to remain in it or, indeed, in which the authorities in charge of the hostel could be compelled to have him. Moreover, it must not be forgotten that the making of an order under s51(1) is a discretionary matter. It is not a method of dealing with the applicant which the court is obliged to adopt and, although it is neither possible nor desirable to circumscribe the court's discretion, it is a power which will only be exercised where the court is satisfied in all the circumstances that the making of an order under the section is preferable to passing sentence.

In these circumstances we think that his Honour was correct in saying that in the state of affairs existing in Victoria now there was only one course open to him, namely, to sentence the applicant to imprisonment. Basically, we accept the findings stated in the portions of Dr Bartholomew's report which we have quoted and which he confirmed in evidence before us. These findings lead to the conclusion that in the interests of the community, as well as of the applicant, he should be securely detained for at least the minimum period of the sentence. Mr Duckett did not submit that the sentence was excessive; he sought only an order under s51(1), and we see no reason for interfering with the sentence imposed.

We would repeat and endorse his Honour's direction that the medical authorities at Pentridge subject the applicant to such treatment as in their discretion they think appropriate. We would also add a direction that the transcript of the plea and the transcript of the evidence given in this Court be transmitted to the Parole Board so that they may consider whether any conditions should be imposed upon the applicant if they should decide to release him on parole. Accordingly, the application is refused.

[The judges who delivered the above judgment have authorized the following addendum: The matter dealt with in this case was a psychiatric report and the Court's insistence that counsel for a prisoner should have an opportunity of seeing and commenting upon any material which is provided for a trial judge was based, as Kaye J, said in *R v Licata and Regan* (Full Court, 28 February 1977, unreported), upon the principle that it is, as a general rule, repugnant to basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings.

The above judgment, however, recognized that there may be cases where the withholding of material is justified. The judgment did not refer particularly to pre-sentence reports obtained pursuant to s507(6) of the *Crimes Act* 1958, the disclosure of which is a matter for the discretion of the trial judge: see *Social Welfare Reg* 1962, Division VI, Pt V, (a), 14 and *R v Webb* [1971] VicRp 16; [1971] VR 147, at p152, but the same principles as to the exercise of the discretion are applicable.]

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the Crown: EL Lane, Crown Solicitor.