**59/87**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v SULLIVAN*

**Young CJ, Murphy and Hampel JJ**

**19 November 1987**

**CRIMINAL LAW – SENTENCING – BURGLARY/THEFT/HANDLING STOLEN GOODS – OFFENCES CONNECTED WITH OFFENDER'S DRUG ADDICTION – DISPOSITION BY WAY OF SECTION 13 BOND REJECTED – CUSTODIAL SENTENCE IMPOSED – WHETHER ERROR IN EXERCISE OF SENTENCING JUDGE'S DISCRETION: *ALCOHOLICS AND DRUG-DEPENDENT PERSONS ACT* 1968, S13.**

S. pleaded guilty to 4 counts of burglary, 3 counts of theft and 4 counts of handling stolen goods. The value of the property involved was approximately $65,000, of which approximately $18,000-worth was recovered. The reason for the offences' being committed was to supply S's drug habit. After considering all the sentencing options, the sentencing judge declined to release S. on a recognizance pursuant to s13 of the *Alcoholics and Drug-Dependent Persons Act* 1968, and sentenced S. to a total of four years' imprisonment with a minimum of 2½ years before being eligible for parole. Upon application by S. for leave to appeal against sentence upon the ground that it was manifestly excessive—

**HELD: Application dismissed.**
**Whilst the case was one which merited consideration under s13 of the Act, no error was shown in the sentencing judge's rejecting the s13 order and imposing a custodial sentence.**

**YOUNG CJ: [1]** The Court has before it an application by Michael Patrick Sullivan for leave to appeal against a sentence imposed upon him in the County Court on 2nd September this year. He was then presented on one count of burglary, three counts of theft, three further counts of burglary, and four counts of handling stolen goods. After hearing an extensive plea on the applicant's behalf, the learned trial Judge sentenced the applicant as follows: on the first count which was a count of theft, he was sentenced to three months' imprisonment; on the second count, a count of burglary, he was sentenced to fifteen months' imprisonment; on the third count, which was another count of burglary, he was sentenced to twelve months' imprisonment; on counts 4, 5, 6, 7 and 8 –- counts 4, 5 and 6 were counts of receiving and counts 7 and 8 were counts of theft – he was sentenced in each case to three months' imprisonment; on **[2]** count 9, which was another count of burglary, he was sentenced to twelve months' imprisonment; and, on count 10, which was another count of receiving, three months' imprisonment. Then, on the second presentment, there was a count of burglary, for which he was sentenced to nine months' imprisonment. By concurrency orders, the learned Judge produced the result that the effective sentence was four years' imprisonment and His Honour fixed a minimum of two and a half years before he should be eligible to be released on parole.

The applicant seeks leave to appeal upon the ground that the sentence imposed by the learned trial Judge was manifestly excessive, and then that submission is particularised under three headings. First, that the trial Judge failed to give sufficient weight to the evidence of the consultant psychiatrist and the applicant. Secondly, that the trial Judge gave too much weight to the principle of general deterrence. Thirdly, that His Honour failed to adequately consider all alternative sentencing options including a disposition pursuant to the *Alcoholics and Drug Dependent Persons Act*.

It is unnecessary, I think, for present purposes to relate the facts in great detail, save to say that of the three counts of burglary – for which the longest terms of imprisonment were imposed – two were committed on the same day in September 1986. The first of them involved property worth $24,000-odd, of which approximately $3,800-worth was recovered. The second of them involved property worth $12,400, of which only about $1,200-worth was recovered. The third burglary was committed between 2nd and 4th January 1987, where some household goods and jewellery were stolen, **[3]** the property being valued at a little over $12,000 and only about $1,000-worth was recovered. The thefts were of amounts of property valued at amounts, in all

cases, under a thousand dollars; but I should add that there was another count of burglary on the other presentment, the second presentment, where the value of the property stolen was over $13,500, but of that property the amount recovered was a little over $12,000. Those figures, however, show a total amount of property stolen which was very substantial.

The offences were all committed between early 1986, January 1986, and February 1987. They were spread over about a year. The reason for the offences may be said to have been because the applicant had fallen in with a woman who introduced him to heroin and he took to these criminal offences in order not only to keep himself and the woman, but also to supply the drug habit which they then both indulged in. Since the applicant's arrest, he has dissociated himself from the woman with whom he had been living and has made substantial efforts at rehabilitation, although for most of this year he has been in custody, that is to say, he was in custody on remand before he was sentenced in September. That period, of course, counts against the sentence imposed.

The learned trial Judge devoted very great care to the imposition of the sentence. He recited the facts of the case very fully and he recited also the background of the applicant. He accepted that the applicant had been drug-free since 27th September of this year and he accepted Dr Bartholomew's evidence – Dr Bartholomew being called on the plea – that the applicant had recently decided to cease all association with the woman who had led him into the habit of taking heroin. **[4]** Indeed, Dr Bartholomew's evidence on the plea expressed optimism for the future of this applicant.

Upon the applicant's behalf, it was also pointed out, amongst other things, that he had attended Pleasant View voluntarily before he was apprehended, that he had suffered a number of personal problems which contributed to the commission of the crimes, that he made full confession to the police and pleaded guilty when arraigned and, I think, showed also substantial remorse. Rather unusually, the applicant was called as a witness on the plea and during his evidence, which was not criticised in any way by cross-examination, he indicated a substantial feeling of remorse, and I think that the learned Judge should be taken to have accepted that he was remorseful. In the end, however, taking into account everything that was in the applicant's favour, the learned Judge said that he felt he had no real course open but to sentence the applicant to a term of imprisonment. That is not a surprising conclusion having regard to the fact that the applicant had pleaded guilty to no less than four burglaries in which very substantial amounts of property were stolen.

In this Court, Mr Grace supported the application for leave to appeal very largely upon the basis that the learned Judge had failed to give sufficient attention or consideration to the possibility that the applicant might be released under s13 of the *Alcoholics and Drug-Dependent Persons Act*. That possibility was adverted to early in the plea when counsel for the applicant, after Dr Bartholomew had given **[5]** evidence, submitted that the learned Judge should consider a sentence such as a section 13 sentence which would allow the applicant to deal with his problems. The learned Judge's reaction at that point was brief and clear. His Honour indicated that the offences were serious and invited counsel to turn to his next submission.

Whilst that incident during the plea might be thought to found a basis for Mr Grace's argument, I think in the end it cannot be said that the learned Judge did not give sufficient attention to the possibility of a section 13 order, first of all because His Honour took time to consider his decision; secondly, because, as I indicated, his remarks when passing sentence were very carefully drawn and expressed; and thirdly, because His Honour said:

> "Considering all the sentencing options, including s13 of the *Alcohol and Drug-Dependent Persons Act*, I think nevertheless I have no real course but to sentence you to imprisonment."

In the result, the sentences which the learned Judge imposed were, in my view, lenient ones. The offences were very serious. That is not, however, to say that if the learned Judge had, in the exercise of his discretion, decided to release the applicant under s13, perhaps passing a heavier sentence than the sentence which he did in fact pass, that I would have thought that His Honour had fallen into error. I think that the case was one which merited consideration under s13 of the *Alcoholics and Drug-Dependent Persons Act*, but I do not feel able to say that it was the only disposition which was open to the learned trial Judge. The learned Judge considered that

possibility, rejected it, and imposed a lenient sentence. **[6]** His Honour did not elaborate upon his reasons for rejecting the section 13 possibility, but there was material in the plea before him which may well have induced that rejection. For instance, during the course of the plea His Honour said:

> "If I understand Dr Bartholomew, he does not think that he (that is the applicant) will benefit from future counselling and treatment and the like."

Dr Bartholomew had, as I indicated, expressed a favourable prognosis, better than many that he had met of the applicant's age. The learned Judge may well have thought that in the circumstances it was better to impose a relatively short sentence with a short minimum term than to release the applicant, after perhaps a heavier sentence, on a bond under s13. But however that may be, which is speculation on my part, I think that the learned Judge was entitled to pass the sentence which he did. It is certainly not of itself excessive, and the only matter that has troubled me in the application is whether there was a basis for saying that His Honour fell into error in the way in which he dealt with the question of a section 13 order. For the reasons that I have attempted to give, I do not think that His Honour did.

Mr Grace, in a very well presented argument, made other points, but I think the substantial thrust of his argument was to seek a section 13 order, notwithstanding that it would almost inevitably have resulted, if the Court had acceded to the suggestion, in a heavier sentence being imposed upon the present applicant. For those reasons, I would dismiss the application.

**MURPHY J: [7]** I agree. I have nothing that I wish to add.

**HAMPEL J:** I have had considerable difficulty with this application because there was, at first instance, much merit in the consideration of a section 13 order. This is so because there was ample evidence of this applicant's rehabilitation potential. By the time he was being sentenced he had probably substantially achieved rehabilitation. In my view, the sentences as such cannot be said to be manifestly excessive, and the real question for the sentencing Judge was whether a custodial sentence or a section 13 disposition was the correct sentencing option. In that respect His Honour had a discretion, and in the end I have found it impossible to say that there was error in its exercise. I think that the sentence imposed, looked at realistically, does provide for rehabilitation, and on his release he can be, and perhaps should be, placed under treatment and supervision if that is still considered necessary at the time. Because I can find no error in the exercise of the discretion by the sentencing Judge, I agree with the orders proposed by the learned Chief Justice.

**YOUNG CJ:** The Order of the Court is that the application is dismissed.

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