69/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v CHIBNALL

Young CJ, Crockett and Nathan JJ

20 November 1989

PROCEDURE – SENTENCING – WHETHER PREFERABLE TO MAKE CUMULATIVE OR CONCURRENCY ORDERS – SENTENCE TO BE DISCOUNTED WHERE GUILTY PLEA INDICATED AT AN EARLY STAGE: *PENALTIES AND SENTENCES ACT* 1985, SS4, 15.

1. Section 15 of the *Penalties and Sentences Act* 1985 ('Act') provides that unless otherwise directed by the court, sentences of imprisonment are to be served concurrently. Accordingly, in the interests of clarity, it is preferable that the order made should indicate what part of any sentence imposed is to be served cumulatively upon another sentence imposed rather than to direct that part of the sentence be served concurrently.

2. In view of the amendment to s4 of the Act, a court must take into account the stage at which an accused person has indicated an intention to plead guilty.

YOUNG CJ: [1] We have before us applications for leave to appeal against sentence by William Francis Chibnall and Dianne Chibnall who are husband and wife and who pleaded guilty in the County Court in August of this year to a presentment containing five counts. The first count was a count of trafficking in a drug of dependence, for which a sentence of six years' imprisonment was imposed. The other counts were counts of handling stolen goods, for which sentences of three years were imposed on counts 2, 4 and 5, and eighteen months on count 3. The learned trial Judge directed that two years of the sentence imposed on count 2 be served concurrently with the sentence imposed on count 1, His Honour intending thereby to produce the result that the total effective sentence should be seven years' imprisonment, and His Honour fixed a minimum term of five years to be served before eligibility for parole.

I have expressed the effect of His Honour's concurrency order in that way because it seems to me that under s15 of the *Penalties and Sentences Act* it is preferable that the order made should indicate what part of any sentence imposed is to be served cumulatively upon another sentence imposed rather than to direct that part of the sentence be served concurrently. The section provides that all sentences are concurrent unless otherwise ordered and therefore to direct that part of the **[2]** sentence be served concurrently seems to be less clear than to direct that a certain part of it be served cumulatively upon another sentence.

It is against the sentences so imposed that the applicants now seek leave to appeal. In substance the ground of appeal is that the sentences are excessive, and manifestly so. *[His Honour dealt with the facts of the case and continued]* ... **[6]** The only doubt that I entertained at all during the course of the argument was whether the learned Judge had given to the applicants sufficient credit for having indicated **[7]** at an early stage that they would plead guilty to these charges.

The amendment to s4 of the *Penalties and Sentences Act* which came into operation on 1st July and which was, therefore, applicable to these sentences was not mentioned during the course of the plea and at one time, therefore, I wondered whether His Honour had given sufficient weight to the fact that the indication of an intention to plead guilty was given early in the proceedings. On consideration, though, I am satisfied that it is not possible to say that the learned Judge did not give sufficient credit to the applicants for their early indication. During the course of His Honour's sentencing remarks he said:

> "Despite an initial reluctance to admit guilt to the investigating detectives, you have subsequently given a reasonably early indication of an intention to plead guilty, waive committal proceedings and consented to orders of forfeiture which I made previously."

His Honour having said that, it is impossible to say that His Honour did not take into account the stage at which the applicants had given an indication they would plead guilty and although, of course, he did not indicate how much discount he had permitted for those pleas – and His Honour was not bound to do so – he did say: "Had it not been for your pleas of guilty, the sentences I propose would have been longer." It seems to me, therefore, that it is impossible for the Court to conclude that there was any error in the sentencing process or that the sentences arrived at **[8]** were in any way excessive. I think, accordingly, the application should be dismissed.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicants Chibnall: Mr A Howard, counsel. Slater & Gordon, solicitors.
