13/86

SUPREME COURT OF VICTORIA — FULL COURT

R v HALL

Crockett, McGarvie and Hampel JJ

3 December 1985 — [1985] 18 A Crim R 239

CRIMINAL LAW – SENTENCING – APPEAL AGAINST SENTENCE – CO-OFFENDERS – DISPARITY OF SENTENCES – WHETHER SENTENCING COURT HAS A DISCRETION – WHERE SENTENCE ON CO-OFFENDER INADEQUATE – PRINCIPLES OF PARITY – WEIGHT TO BE GIVEN TO CO-OFFENDER'S SENTENCE.

Where it appears to a sentencing Court that a sentence imposed upon a co-offender is manifestly inadequate, the Court is not obliged to impose a sentence which it considers to be inadequate. However, in imposing the sentence, the Court must have regard to the principles of parity which require that such weight as is considered necessary in all the circumstances should be given to the fact that the co-offender has been given a sentence, albeit an inadequate one.

R v Pecora **[1980] VicRp 47; [1980] VR 499; (1979) 1 A Crim R 293, referred to.**

CROCKETT J: (with whom McGarvie and Hampel JJ agreed) **[1]** The applicant pleaded guilty to an indictment which contained twelve counts. The offences charged in those counts were a selection from a total of 854 like offences. The applicant came to be charged in these circumstances: He and a woman, Susan Cunningham, with whom he was living, were drug addicts. They needed money to satisfy their craving. They were not in employment. The applicant determined upon the pursuit of a scheme whereby he and Cunningham would steal envelopes containing Social Service cheques from letter-boxes. Having obtained the cheques, if the payee were a male, the applicant would endorse the cheque in the name of the payee in the presence of a shopkeeper to whom he had gone with a request that the shopkeeper cash the cheque. The transaction would be conducted in the context of a desire to purchase some goods for a relatively small sum so that the resulting change given the applicant could then be kept by him. If the payee of the cheque were a female, the same process would **[2]** be followed with the applicant's co-offender carrying out the act of forging and uttering. The offences charged included also charges of being "knowingly concerned" in his co-offender's forging and uttering the cheques when it was the co-offender who was the actual forger and utterer.

The applicant, having pleaded guilty, as I say, to a selection of twelve such charges, asked or agreed to have taken into account by the sentencing Judge the remaining 842 similar offences all committed as part of the same systematic pursuit of fraud and forgery which had been conducted by the two offenders over a period from January 1978 and March 1983. The result of the commission of the offences of which the applicant was guilty was the defrauding of the Commonwealth of the sum of $54,751. The sentencing judge, in addition to imposing a sentence in regard to the charges contained in the indictment to which the applicant pleaded guilty, ordered him to make reparation of the sum lost by the Commonwealth.

The applicant admitted 118 prior convictions recorded against him in sixteen court appearances. As those convictions span the period from April 1974 until August of 1984, it will be seen that in respect of the offences in regard to which sentences had to be imposed or which the Judge had to take into account when passing sentence, they were committed in circumstances where it could not be said that all of the so called prior convictions were in fact, strictly speaking, prior convictions. At all events, all of the convictions described as prior convictions were in one sense or another drug-related. They were for offences which were committed directly with the object of obtaining drugs, or alternatively with a view to **[3]** obtaining money so that drugs might be purchased. After concurrency orders were made the sentences imposed by the Judge in relation to the twelve offences aggregated six years. The minimum period required to be served before the applicant should become eligible for parole was four years. The co-offender Cunningham was also apprehended and charged with the offences in which she was implicated. She was dealt

with summarily. At the hearing she admitted what appears to have been calculated as a little in excess of 200 prior convictions. The criminal history sheet of the co-offender, when examined in conjunction with other facts which emerged in the course of the hearing with which the applicant was concerned, suggests that those prior convictions were also in one way or another for drug-related offences.

In respect of the offences to which she also pleaded guilty but which in her case included two State offences – one for failing to answer bail and the other for breach of a provision of the *Poisons Act* – she was sentenced to a total of twelve months' imprisonment. She appealed to the County Court against the supposed severity of that sentence and a Judge of that court set aside the sentence and in lieu thereof permitted her to enter into a $1,000 five-year good behaviour bond. The circumstances relating to the co-offender's commission of the offences and her ultimate sentence were, to some extent, revealed to the Judge who sentenced the applicant.

In my view it is perfectly clear, when reading the reasons for sentence, which are expressed in considerable detail, that the learned sentencing Judge was clearly of opinion that the co-offender's sentence imposed in the County Court was **[4]** manifestly inadequate. It is equally clear that the sentencing Judge considered that there were no relevant principles relating to parity of sentence that bound him to take the co-offender's sentence into account when sentencing the applicant. The applicant now seeks leave to appeal against the sentence, contending that such a construction should be placed upon the sentencing Judge's reasons for sentence. Ground 2 is the principal ground upon which the applicant relies. It is - "The sentencing Judge erred in failing to give proper weight to the question of parity of sentence with the co-offender".

In support of that ground counsel relied upon what was said by this Court in *Pecora v R* [1980] VicRp 47; [1980] VR p499 at p503; (1979) 1 A Crim R 293. It was there said in the course of a joint judgment delivered by the court:

> "In *R v Andrews* (unreported, delivered 4 February 1976, and wrongly dated 1975), it was said that if the sentence imposed upon the co-offender appears to the sentencing Judge to be manifestly inadequate he is not obliged to impose a sentence which he considers to be inadequate. In that case the Full Court considered whether the sentencing Judge had given insufficient weight to the sentences passed on the co-offenders and concluded that he had not. What was said by the Court in that case should not, however, be construed as meaning that where a sentencing Judge considers that the sentence imposed on the co-offenders is manifestly inadequate, he can disregard it entirely. The consideration which the Court gave to the sentence under review in *Andrews' Case* shows that he cannot. He must take it into account and give the principle of parity such weight as he considers in all the circumstances it deserves."

In my view the learned sentencing Judge was justified in reaching the view that the sentence ultimately passed upon the co-offender was manifestly inadequate in the circumstances. There were, however, reasons why a more lenient sentence should be imposed upon Cunningham than that which ought to be imposed upon the applicant. The applicant commenced **[5]** committing these offences some four years before Cunningham did. His offences were somewhat greater in number than were hers. He was the author of the scheme to steal the cheques, and, also, it was he who in effect forced his co-offender reluctantly to commit those offences for which she was responsible.

Nevertheless, it is plain, as I have said, that the sentencing Judge was justified in taking the view that the sentence passed upon the co-offender was manifestly inadequate. I am satisfied that he, having reached that conclusion, took the view that he could disregard entirely the sentence imposed on the co-offender. It is clear, in my opinion, that he thereupon proceeded to impose a sentence upon the applicant which he considered to be appropriate in all the circumstances, but without having regard to the principles of parity which required that he should give such weight as he, in all the circumstances, considered was necessary to be given to the fact that the co-offender had been given a sentence, albeit an inadequate one. In adopting this course the Judge departed from the appropriate sentencing principles that were required to be exercised by him and which, as I have indicated, are set out in *Pecora's Case*.

In such circumstances, I am of the view that the sentencing discretion has miscarried and, accordingly, it becomes necessary for this Court to re-sentence the applicant. In doing so, the

Court must have regard to what it thinks is the appropriate sentence in all of the circumstances in regard to each of the twelve offences to which the applicant has pleaded guilty, bearing in mind that the other 842 like offences have to be taken into account. But further, in selecting what it considers may be the appropriate sentence in **[6]** such circumstances, the Court must also take into account, and give the principle of parity such weight as it considers it deserves having regard to the admittedly manifestly inadequate sentence which was passed upon the co-offender. This requires that the Court bears in mind the various factors which, at least, justified a more lenient sentence's being passed upon the co-offender than that which it is considered ought to be passed upon the applicant.

Bearing those considerations in mind, I would propose that the applicant, if re-sentenced, should be sentenced as follows: to two years' imprisonment on counts 1 and 2 and one year on count 3. Minimum sentences to be served on counts 1 and 2 are eighteen months each, and on count 3 four months. On counts 4, 5 and 6 a sentence of one year's imprisonment on each count. On counts 7, 8, 9, 10, 11 and 12 a sentence of ten months on each count. The sentences on counts 4, 5, 6, 7, 8, 9, 10, 11 and 12 to be served concurrently with each other and with the sentence on count 1. The result is a total effective sentence of five years with a minimum of three years and four months to be served by the applicant before his becoming eligible for parole. It will be understood that in selecting such sentences it has been necessary in order to provide an appropriate effective total term and an appropriate minimum term very substantially to tailor the sentences to be imposed in respect of the different counts.
