23/88

SUPREME COURT OF SOUTH AUSTRALIA — COURT OF CRIMINAL APPEAL

R v SMITH

King CJ, Cox and O'Loughlin JJ

20 February, 19 March 1987

(1987) 44 SASR 587; (1987) 27 A Crim R 315; Noted 62 ALJ 571

CRIMINAL LAW – SENTENCING – OFFENDER SENTENCED TO IMPRISONMENT – DIAGNOSED AS HAVING AIDS VIRUS – WHETHER OFFENDER'S HEALTH A RELEVANT SENTENCING FACTOR – IMPRISONMENT LIKELY TO AGGRAVATE OFFENDER'S CONDITION – WHETHER REDUCTION IN SENTENCE APPROPRIATE.

1. The state of health of an offender is always relevant to the consideration of the appropriate sentence. Generally speaking, ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

2. Where an offender (who was diagnosed as having antibodies to the AIDS virus) was sentenced to 4 years' imprisonment with a minimum of 3, and the evidence showed that there was an undeniable risk of deterioration on the offender's health by his further imprisonment, the non-parole period was reduced to 9 months.

KING CJ: (With whom Cox and O'Loughlin, JJ agreed) **[587 SASR]** The appellant was sentenced in the Supreme Court on two charges of breaking, entering and larceny and one of arson. He had pleaded guilty to the breaking charges but had been found guilty by a jury on the charge of arson. The sentences imposed were twelve months on the first charge of breaking, entering and larceny, fifteen months on the second such charge and four years for arson, the sentences to be served concurrently. A non-parole period of three years was fixed. The appellant appeals to this Court against those sentences.

The appellant was born on 28 December 1963. The first offence was committed on 23 June 1985 when he broke and entered a model kit shop and stole five train sets and five model kits of the value of $400.00. The second **[588]** offence occurred on 19 July 1985 when he broke and entered the same shop and stole 302 model kits and a television set of the value of $2,775. On the latter occasion he was accompanied by two young men. They set fire to the shop causing damage to the extent of $50,000. The appellant was found guilty on the charge of arson on 29 October 1986 and was remanded in custody. Sentence was imposed on 3 December 1986. On 12 January 1987 he was released on bail pending the determination of this appeal. In May 1986 the appellant was diagnosed as having antibodies of the Acquired Immunity Deficiency Syndrome (AIDS) virus. Information as to his medical condition was before the learned sentencing judge.

On the hearing of the application for leave to appeal and for bail, before a single judge, evidence from Dr Ross, a medical expert on the subject of AIDS, was called. Counsel for the appellant sought to have that evidence admitted on the appeal. He also tendered a report from Dr Ross in the following terms:

> "Mr Smith was diagnosed as having antibodies to the AIDS virus on 27/5/86. He is currently well and showing no sign of progressing to a disease category, however, this situation has the potential to change if Mr Smith is subjected to any extended period of stress. He is currently attending the AIDS Programme on a regular basis for follow-up counselling and medical examinations. Please do not hesitate to contact me if I can be of any further assistance."

The task of the Court of Criminal Appeal, speaking generally, is to see whether the trial judge went wrong on the material before him: *R v Dorning* (1981) 27 SASR 481 at 488. There is power to receive fresh evidence subject to certain conditions which are summarised in *Dorning's*

case at 485. The proper purpose of fresh evidence on an appeal against sentence is to bring before the court facts which were in existence at the time of the imposition of sentence but were not known to the sentencing judge or to explain facts which were before the sentencing judge so as to put them in a new light. It is not open to the Court of Criminal Appeal to intervene upon the basis of events which have occurred since the imposition of sentence, *R v O'Shea* (1982) 31 SASR 129 and fresh evidence is therefore not receivable to establish the occurrence of such events. A clear distinction is necessary between fresh evidence as to events occurring before sentence and evidence as to events occurring after sentence.

While the evidence sought to be admitted on this appeal in a sense establishes the occurrence of events occurring after the passing of sentence, it does so for the purpose of explaining the full extent and implications of the appellant's condition of health which existed at the time of sentence. I think that the authorities show that it is permissible to have regard to events occurring after sentence for the purpose of showing the true significance of facts which were in existence at the time of sentence. In *R v Green* (1918) 13 Cr App R 200 evidence was admitted on appeal to show the true character and value of information given by the appellant to the police before sentence, as disclosed by subsequent events.

In *R v Ferrua* (1919) 14 Cr App R 39 the evidence admitted on the appeal revealed how serious the **[589]** appellant's state of health had been when he was sentenced. I think that the events occurring since sentence are admissible to show the extent and implications of the condition of health which the appellant was in when he was sentenced. The evidence which proves the occurrence of those events and which bears generally upon the extent and implications of the AIDS condition from which the appellant was suffering at the time of sentence, meets the tests referred to above for the admission of fresh evidence on appeal. We therefore admitted the evidence.

It becomes necessary, therefore, to reconsider the sentence imposed in the light of all the circumstances of the case, including the fresh knowledge as to the appellant's condition and the impact of incarceration upon it. The crimes were serious in themselves. There is, moreover, the additional factor that there were two incidents separated by a period of about a month. Notwithstanding that the only prior conviction was treated by the judge as irrelevant, I think that on the information before the judge, the sentences are fully warranted.

How far should the new information about the appellant's health affect the matter? The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

The conclusion which I would draw from the evidence in the present case is that there is a substantial risk that the stress associated with a further period of imprisonment will cause some deterioration in the condition which afflicts him. The evidence shows that there are three recognised stages of AIDS sufferers. The stage C sufferer has AIDS antibodies but no symptoms. He may or may not progress to stage B in which there are symptoms but no danger to life. Stage B sufferers may or may not progress to stage A in which the disease is terminal. While in prison the appellant went from C to B. After his release he reverted to C. It cannot be assumed, of course that further imprisonment will have the same effect. The initial stress may subside with consequent amelioration of the adverse effects of prison. But there is an undeniable risk of deterioration.

Counsel for the appellant made a strong plea for suspension of the sentence. I have found the gravity of the crimes an insurmountable obstacle to acceding to that submission. I am conscious, however, that the stress of worry about his potentially fatal condition may well cause imprisonment to bear more heavily upon the appellant than upon a healthy person. In the interests of the appellant's future, moreover, I am strongly moved to attempt to minimise the risk of deterioration in his health. He had no relevant convictions prior to the subject offending and

ought to be a good candidate for parole. **[590]** I would not feel justified in suspending or reducing the head sentence, but I think the above factors would justify this Court in reducing the non-parole period to one which would be an unusually low proportion of the head sentence. I would allow the appeal for the purpose of reducing the non-parole period to nine calendar months.

COX J: I agree with the order proposed by the Chief Justice for the reasons that he has given.

O'LOUGHLIN J: I have had the benefit of reading in draft the reasons for judgment of the Chief Justice. I agree with what he has had to say; there is nothing further that I wish to add.
