04/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v PECORA

Young CJ, Lush and Southwell JJ

26 September 1979 — [1980] VicRp 47; [1980] VR 499; (1979) 1 A Crim R 293

SENTENCING – INDECENT ASSAULT – PRIOR CONVICTIONS (PROBATION) – REPORT BY PROBATION OFFICER – CO-OFFENDER SENTENCED TO 6 MONTHS YTC – ACCUSED SENTENCED TO 15 MONTHS YTC – PARITY WITH SENTENCE OF CO–OFFENDER – SENTENCE REDUCED TO 6 MONTHS YTC.

P., aged 18 yrs appeared before the County Court on a charge of indecently assaulting a girl aged 15 years. He had held the girl's legs whilst a much more aggressive and insistent co-offender endeavoured to have intercourse with her. Although Counsel for the Crown originally gave misleading information to the Judge as to the extent of the co-offender's (allegedly "lengthy") prior convictions, his criminal history sheet was subsequently produced, it showing that he had less Court appearances than the applicant P., but of a similar nature (dishonesty). Both had been previously dealt with by the Children's Court and had been placed on probation (without conviction). The co-offender, aged 16 yrs received 6 months' Youth Training Centre in the Children's Court. P. was sentenced to 15 months' Youth Training Centre by the County Court Judge. Upon appeal—

HELD: Appeal allowed. Sentence reduced to 6 months' detention in a Youth Training Centre.
1. Disparity between sentences imposed on co-offenders for the same offence may produce a feeling of dissatisfaction in detached observers and of injustice in the offender or offenders receiving the heavier sentences. Common sense and criminological writings indicate that such offenders may and do have a sense of grievance. Those considerations may not be of compelling importance, but they should always be borne in mind by sentencing judges.

2. 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. However, this does not mean that where a sentencing judge considers that the sentence imposed on the co-offender is manifestly inadequate he can disregard it entirely. He must take it into account and give the principle of parity such weight as he considers in all the circumstances it deserves.

YOUNG CJ, LUSH and SOUTHWELL JJ: 1. Previous history: Counsel informed his Honour that the applicant was on 52 weeks' probation for theft of a motor car. He had been placed on probation on 17th August 1978, by the Children's Court and had not been convicted of the offence: see *Children's Court Act* 1973, s26(1)(c). Accordingly no reference to this probation order appeared on the presentment although as the learned trial Judge said counsel was obliged to disclose to the Court that the applicant was on probation at the time of the plea. A reference from the applicant's employer, Rheem Australia Limited, where he had been employed since 2nd March 1979, was presented. The applicant's probation officer was called to give evidence. He expressed the opinion that the applicant had shown marked improvement during this year. He also said that the applicant had been continuously on probation since 1975 and presented a report which was evidently intended for submission to the Court, for it recommended that the applicant be given a bond or a fine. It listed the following:

"PRIOR COURT APPEARANCES:

10. 7.75 Melbourne Children's Court – Protection Application – 52 weeks Probation
23.12.77 Dimboola Children's Court – Theft of m/car; Unlicensed driving; Giving false name and address; Unlawful possession – 52 weeks Probation
1. 2.78 Melbourne Children's Court – Theft – 52 weeks Probation
22. 3.78 Benalla Children's Court – Burglary; theft – 52 weeks Probation.
17. 8.78 Melbourne Children's Court – Unlawfully on premises; Theft of motor car – 52 weeks Probation."

It is somewhat disturbing that such a document should be put before the Court for the statement quoted cannot be reconciled with the prior convictions on the presentment. When it

was presented to the Court the Crown should have drawn attention to this fact and ensured that the trial Judge was provided with the correct details of the applicant's antecedents.

2. Probation orders (Children's Court):

During the plea the learned Judge raised the question of whether he was entitled to take to various probation orders into account for the purpose of s476A of the *Crimes Act*. That section authorises a Court, instead of sentencing an offender under the age of twenty-one years to imprisonment, to direct that he be detained in a Youth Training Centre where the Court thinks that course appropriate having regard the nature of the offence and the age, character and antecedents of the offender. Reference was made to *R v Poulton* [1974] VicRp 85; (1974) VR 716 in which it was held that whilst on the authority of *R v Wilson* [1956] VicLawRp 31; (1956) VLR 199; [1956] ALR 503, as to which doubt was expressed (see p199) convictions subsequent to the offence charged could not be taken into account for the purpose of sentencing the offender, they might be taken into account as part of the antecedents of the offender for the purpose of fixing a minimum term under what is now s190 of the *Community Welfare Services Act* 1970. In our opinion. His Honour was entitled to take into account the probation orders for the purposes of s476. They were clearly part of the antecedents of the applicant

So far as the probation orders are concerned, His Honour made it clear that he did not regard them as indicating prior convictions, but he said that he took them into account as forming part of the applicant's antecedents. His Honour was entirely justified in doing so. As to the probation officer's evidence, His Honour said that he was not satisfied that the applicant was making progress to the extent suggested. Such a conclusion was clearly open to His Honour and the contrary was not suggested.

3. Degree of guilt:

His Honour passed sentence on 3rd August. When doing so he said that he had decided to deal with the applicant as a principal in the second degree. It was suggested that this was a slip, for the applicant had not been charged with felony. Although participation as principal in the first degree, or principal in the second degree is a concept equally applicable to misdemeanors as to felonies, the terms are not commonly used in connection with misdemeanours, for a person who aids abets counsels or procures the commission of a misdemeanour may be presented and punished as a principal offender: *Crimes Act* 1958, s333. That statement revealed no error on His Honour's part.

4. Parity of sentence:

When the learned Judge came to deal with question of parity, he said:

> "I am unaware of what special factors, if any, might have been present in Peterson's case, but having regard to his antecedents and to the part he played in this present offence, I consider the sentence passed upon him was manifestly too lenient, and therefore inappropriate. Accordingly, while I have regard to it, I do not think it appropriate to treat it as the sentences on co-offenders are commonly treated."

The sole ground of appeal argued before us was in effect that whilst His Honour was not obliged to sentence the applicant to exactly the same sentence as was imposed on Peterson, the disparity between them was so great that, particularly having regard to the fact that the applicant was an aider or abettor, it ought not to be allowed to stand.

It is convenient to take the opportunity of re-stating the significance of the concept of parity of sentences. Disparity between sentences imposed on co-offenders for the same offence may produce a feeling of dissatisfaction in detached observers and of injustice in the offender or offenders receiving the heavier sentences. Common sense and criminological writings indicate that such offenders may and do have a sense grievance. Those considerations may not be of compelling importance, but they should always be borne in mind by sentencing judges.

In *R v Andrews* (unreported, delivered 4th 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-offender is manifestly inadequate he can disregard it entirely. The consideration which the Court gave to the sentence under review in *Andrews' Cas*e 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.

So in *R v Mitchell* [1974] VicRp 75; (1974) VR 625, which was an Attorney-General's appeal under s567A of the *Crimes Act*, the Full Court said, in a case in which a question of parity had been raised:

> "Although we regard the sentence we are about to impose as inadequate, having regard to these other sentences, the respondent will be sentenced to ..."

(We add emphasis in that sentence to the words "having regard to these other sentences".) It is clear that by "inadequate" in that context the Court meant a lesser sentence than would have been imposed but for the other sentences which had to be regarded, or in other words a sentence less than it would have imposed if it had been exercising an unfettered discretion. Finally in *R v McDonald* (unreported, 4.11.77), the Full Court did not impose the same sentence on the applicant as had been imposed on his co-offender but it substantially reduced the total effective sentence imposed solely because it regarded the disparity between the two as too great to be allowed to stand.

We have come to the conclusion that the difference between the sentences imposed on Peterson and on the applicant is manifestly excessive and that for that reason the applicant's sentence should be quashed. The fact that the applicant is older than Peterson would justify the sentencing Court in distinguishing between them as would their respective antecedents, although it is not clear that the applicant's antecedents are worse than Peterson's. But the imposition on the applicant who was only aiding and abetting an indecent assault of a sentence two and a half times the sentence passed on the co-offender cannot in our opinion be justified.

5. Offence "charged":

During argument a question was raised whether in passing sentence the Court was entitled to take into account the stated intention of Peterson to have intercourse with the girl without her consent. It was said to be unreal to ignore the circumstances of the offence. Whilst the circumstances of the offence must be regarded, care must also be exercised not to sentence an offender upon the basis that he has committed an offence with which he has not been charged. (Cf. *R v Hill* [1979] VicRp 33; (1979) VR 311). The applicant in the present case was committed for trial on two charges: assault with intent to rape, and indecent assault. However, he was presented only upon the count of indecent assault. The Court has not been informed of any considerations which led to the dropping of the more serious charge. Thus the applicant is to be sentenced for an offence which carries a maximum sentence of five years but upon the basis that no intent to rape was involved.

[The appeal was allowed to the extent that the sentence was reduced to 6 months' detention in a Youth Training Centre.]
