26/87

SUPREME COURT OF VICTORIA — FULL COURT

R v KEHAGIAS

Kaye, Gray and Nathan JJ

12 June 1987

CRIMINAL LAW – SENTENCING – PLEA OF GUILTY ON ARRAIGNMENT – PLEA MADE OUT OF SELF-INTEREST – SIGNIFICANCE OF SUCH PLEAS – WHETHER COURT REQUIRED TO GRANT ALLOWANCE: *PENALTIES AND SENTENCES ACT* 1985, S4.

Section 4 of the *Penalties and Sentences Act* 1985 is intended to encourage persons to plead guilty for whatever reason they deem fit. The plea of guilty is a mitigating factor and the court should allow a discount for it, notwithstanding that it is motivated by self-interest or made only upon arraignment.
***R v Morton* [1986] VicRp 82; [1986] VR 863; (1986) 23 A Crim R 433, applied.**

KAYE J: *[After setting out the sentence, the facts and the grounds of appeal, His Honour continued]*: … **[3]** The applicant in fact had pleaded guilty when arraigned before His Honour, although when the case was first called it would appear that the applicant's intention was to plead not guilty to the charge. His counsel was provided with notices of the evidence which it was intended to call from John Peter Grech and Rona Grech, both dated 10th November, 1986. It would appear that counsel was also provided with a statement of each of those witnesses. The learned Judge in his reasons for sentence adverted to the fact that the applicant had a number of prior convictions, and announced that he would not take those convictions into account because they were totally unrelated to the offence to which he had pleaded guilty and they had occurred some time previously. His Honour then said:

> "It is said that I should put into effect the provisions of s4 of the *Penalties and Sentences Act* and take into account, in fixing the sentence, that you have pleaded guilty. That is not a submission to which I intend to accede. You pleaded guilty this morning, after this case had been to court on previous occasions and you did so, I am told, only after seeing and realising the strength of the Crown case as contained in the statements made by Mr and Mrs Grech. That does not appeal to me as being a circumstance which militates in your favour."

His Honour then proceeded to advert to matters which were personal to the applicant, namely his family of young children, one of whom was very young and very sick, the gravity of the offence of trafficking in heroin, and the anti-social effect which drug-related offences have upon the community.

Mr Weinberg QC, who with Mr Dunn appeared for the applicant, has in a very careful submission advanced **[4]** arguments in support of all three grounds of appeal. In my opinion, it is necessary to deal first with the second ground, namely that His Honour erred in declining to give any weight to the plea of guilty and refusing to do so having regard to the effects of s4 of the *Penalties and Sentences Act*. As I have already observed, His Honour took the view that the plea of guilty was made only on that morning because the applicant became aware of the strength of the case which it was intended to be made against him through the witnesses Mr and Mrs Grech. For these reasons alone, he took the view that the plea of guilty did not constitute a mitigating circumstance. It is necessary, however, to bear in mind that s4 of the *Penalties and Sentences Act* 1985 is expressed in this way:

> "(1) A court in passing sentence for an offence on a person who pleaded guilty to the offence may take into account in fixing the sentence the fact that the person pleaded guilty."
>
> By sub-section (2) it is provided:
> "If under sub-section (1) a court reduces the sentence that it would otherwise have passed on a person the court must state that fact when passing sentence."
>
> Sub-section (3) provides:

> "The failure of a court to comply with sub-section (2) does not invalidate any sentence imposed by it."

The effect of s4 of the *Penalties and Sentences Act* was considered by this Court in *R v Morton* [1986] VicRp 82; [1986] VR 863; (1986) 23 A Crim R 433. After referring to the provisions of the section, the Court said at p867:

> **[5]** "The result of this consideration of the section is that a court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest and even though it is a plea to lesser offences than those originally charged or intended to be charged. Doubtless, however, a plea of guilty which is indicative of remorse or of some other mitigating quality will ordinarily carry more weight than a plea dictated solely by self-interest. Nevertheless, Parliament having indicated, by the requirement that a court state the fact that it has reduced the sentence that it would otherwise have passed on account of a plea of guilty, that encouragement is to be given to pleas of guilty, such a plea should ordinarily be taken into account in the accused's favour. But nothing in this judgment should be taken as indicating a requirement that a court should pass a sentence that in all the circumstances it considers to be inappropriate."

It follows, therefore, that the mere circumstance that the plea of guilty was made by the applicant out of self-interest was not sufficient reason for His Honour, in the exercise of his discretion, to deny the applicant any allowance for his plea of guilty. Moreover, the circumstance that the plea was made only when the applicant was arraigned is a circumstance which ought not to have been taken into account. In my view, the operation of the section is intended to encourage persons to plead guilty for whatever reason they consider fit. What was expressed by the Court in *Morton's case* states in clear terms what was intended by the section. In my view, there was nothing about the plea made in the circumstances in which the applicant made it which would have justified the learned Judge in not using it as a mitigating circumstance when exercising his sentencing discretion. The expressions used by the learned Judge in my view indicate that he fell into error and for that reason, **[6]** the sentence ought to be set aside.

Mr Weinberg advanced arguments in support of the other grounds; however, it is not necessary to consider further the remaining grounds or the arguments addressed by Mr Weinberg. Nevertheless, there were matters which Mr Weinberg brought to the Court's attention which are relevant for the purposes of sentence. I would, therefore, accede to the application, set aside the sentence and take into account the various matters to which Mr Weinberg referred. In particular, in my view, it would be proper to disregard the applicant's previous criminal record. As I have indicated the plea of guilty is a mitigating factor. It is not necessary to consider whether that was a form of remorse or contrition. It was just a plea of guilty and it was made in time to have avoided the necessity of calling witnesses. It avoided inconvenience to those witnesses and the loss of revenue to the community resulting from the conduct of a trial. No doubt if there had been an element of remorse or contrition which could be discerned in the plea, a greater allowance by way of discount would be warranted.

Secondly, there was a long delay between the time of the commission of the offence, namely, in December 1983, and when the applicant was arraigned. In that period, the applicant has shown, by reason of the fact that he has not indulged in other criminal behaviour, a capacity for rehabilitation. I would take into account also the circumstance that the quantity of heroin which was the subject of the **[7]** trafficking was merely .89 of a gram. This quantity was relatively small, and having regard to the quantity, the sentence which it should attract should be lower than if the quantity had been a substantially larger one.

It is correct, as Mr Weinberg pointed out, that in other cases of trafficking which have attracted sentences of long terms of imprisonment, the quantities have been many times greater than in the present case. For those reasons, I would sentence the applicant to a term of three years' imprisonment and fix two years as the minimum period before which he will become eligible for parole.

GRAY J: I agree. **NATHAN J:** I agree. **KAYE J:** The orders of the Court are as follows:
The application for leave to appeal against sentence be allowed; the appeal be heard instanter; the sentence imposed by the Court below be set aside; the applicant be sentenced to a term of three years' imprisonment and the minimum period before which he will become eligible for parole is two years.