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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v CUMMINS

Crockett, McGarvie and Beach JJ

23 March 1990 — [1991] VicRp 4; [1991] 1 VR 44

CRIMINAL LAW – SENTENCING – AGGRAVATED BURGLARY/ARMED ROBBERY/FALSE IMPRISONMENT – OFFENDER SUFFERING FROM A MENTAL ILLNESS – HOSPITAL ORDER – WHETHER OFFENDER ELIGIBLE FOR SUCH AN ORDER – WHETHER SUCH AN ORDER APPROPRIATE WHERE SERIOUS OFFENCES COMMITTED: *MENTAL HEALTH ACT* 1986, S16.

C., who has been a long-term sufferer from a mental illness, submitted to the Court that in lieu of the imposition of a sentence for offences of aggravated burglary armed robbery and false imprisonment (to which C. pleaded guilty) a hospital order pursuant to s15 of the *Mental Health Act* 1986 ('Act') should be made. C. was assessed for his suitability for a hospital order, however, the court declined to make such an order and sentenced C. to a total of 5 years' imprisonment with a minimum of 4 years before eligible for release on parole. Upon application for leave to appeal—

HELD: Application dismissed.
Even though the jurisdictional facts required under s15 of the Act may be established, a court is obliged to impose what it considers to be an appropriate penalty and has a discretion whether to make a hospital order or not. Where a serious offence has been committed which calls for severe punishment, a court should exercise great care in deciding whether or not to make a hospital order. In the present case, having regard to the gravity of the crimes committed and the seriousness of the circumstances attending their commission, the appropriate penalty was a sentence of imprisonment rather than a hospital order.

***R v Robinson* [1975] VicRp 81; (1975) VR 816, applied.**

THE COURT: [*After setting out the nature of the charges and s15 of the Act, the Court continued*] ... **[3]** Before dealing with the question as to the applicant's possible eligibility for the making of [a hospital] order, it is necessary to say something as to the facts relating to the commission of the offences In stating those facts we are indebted to the sentencing Judge for their collation in the course of his pronouncing reasons for sentence. He there said:

> "All these offences arise out of an episode that occurred at premises occupied by Mr Frank Kastanck and Miss Zlata Pjajcak, at Narbethong on the night of the 9th and 10th July, 1985. On that evening [the applicant] was one of four persons who entered the home occupied by this couple. They had lived there for many years and apparently had accumulated a large number of valuable paintings and artefacts. Somehow a man by the name of Robinson became aware of this valuable collection. He recruited another man **[4]** by the name of Loughnan, who in turn recruited [the applicant] and a young girl by the name of Susan Robinson to assist. The offence was well planned. The area had been inspected and a truck hired in an assumed name had been obtained.
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> Before entering the premises Robinson decided that the four offenders should be designated by numbers rather than by names so as to reduce the likelihood of their being traced by the use of names. All four were equipped with balaclavas and the three male offenders had firearms. [The applicant] was equipped with a swan-off shotgun. Whilst he was at the premises he terrified and tied up firstly Mrs Pjajcak, and then, when he arrived home, her husband. Throughout the evening the premises were emptied of paintings, artefacts and anything else that was thought to be of value. Apart from that, there were moments when both victims were gratuitously frightened into believing that one or both of them were about to be killed. Prior to leaving early the following morning, [the applicant] cut all the telephone lines and bound the two victims. Although they were able to untie themselves fairly quickly, they were both so frightened by the threats that had been made that they did not contact police until about midday."

The Judge pointed out that both victims had been profoundly affected by the experience. He observed that, given that an armed group of four persons had invaded their home and held them prisoner for an extensive period, that was hardly surprising. The Judge took the view that

the applicant's role was a lesser one than that of both Robinson and Loughnan, and indeed the sentence he imposed was one which was not inconsiderably less than that that had been imposed on each of those offenders. Nevertheless, despite the lesser role which the applicant played, the sentence selected by the Judge as being the appropriate sentence to pass could not, in our opinion, be criticised. Indeed, if anything, it erred on the side of the merciful.

[5] The applicant, however, pointed out that the evidence disclosed that he had been a long-standing sufferer from schizophrenia, and in respect of that illness he had from time to time suffered exacerbation and remissions and received institutional care when it had on occasions been called for. This matter was adverted to during the plea for leniency (when the applicant was legally represented) and the Judge made reference to it in the course of his reasons for sentence. He said:

> "The second point emphasised in the plea was your mental state. I have been assisted by assessment from Dr Lester Walton, a consultant psychiatrist: Dr Brian Hutchinson of Forensic Psychiatry Services and now Dr Peter O'Keefe of Dax House in Geelong, at which I was told you had been treated for some time, although the report does not confirm that. It is clear, however, that you have a long history of psychiatric problems. Apparently this commenced at a very early age. Both as an adolescent and throughout adulthood there have been numerous occasions on which you have been admitted for the purpose of psychiatric treatment. Your adolescence was marked by long periods of institutionalisation."

Although no specific application appears to have been made in the course of the plea for a hospital order pursuant to s15 of the *Mental Health Act*, the applicant has pointed out to us that there is material which he contends would establish his eligibility for such an order. He relies upon this passage in the report of Dr Walton:

> "Were the Court inclined to dispose of Mr Cummins under the auspices of a Section 15 Hospital Order, *Mental Health Act* 1986, then he would qualify for such placement as he meets the necessary criteria specified in the Act and the appropriate receiving hospital would be Dax House. The Authorised Psychiatrist of that institution would be required to give his consent to the admission."

After hearing the plea for leniency on 27th October 1989 the Judge remanded the applicant in **[6]** custody for sentence. He was sentenced on 19th December 1989. Whilst he was on remand the applicant's then advisers (presumably with the possibility of the making of a Section 15 hospital order in mind) procured a report dated 26th November 1989 from Dr O'Keefe, the Psychiatric Registrar at EC Dax House. That is the name of the Department of Psychiatry of the Geelong Hospital. That report is addressed to Dr Tofler the Director of Clinical Services at Dax House. It is a lengthy report but it is necessary to refer only to the concluding opinion which is in these terms:

> "It is our opinion that this rather unfortunate individual should be given the opportunity of continuing his attempts at rehabilitation outside of the prison environment. We are impressed by the commitment that he made to treatment prior to his returning to prison, however, we are concerned that he seemed to be having considerable difficulties coping in independent living at that time and would suggest that involvement in further rehabilitation might be more appropriate in an inpatient setting. Although we do not have any objections to him being transferred to the care of Dax House, we feel that Brierly Hospital, Warrnambool might be a more appropriate setting for Mr Cummins to work on his daily living skills, with the eventual return of him to a Group Home or a flat in the Geelong region."

By a letter dated 8th December 1989 addressed to the applicant's legal adviser, Dr Tofler forwarded a copy of Dr O'Keefe's report and advised that he had arranged with Brierly Hospital for that institution to carry out an assessment of the applicant on 13th December 1989. Apparently with the co-operation of the Corrections Department this was duly carried out notwithstanding the applicant's then confinement on remand. The report produced as a result of the assessment is dated 14th December 1989. The report refers to a panel **[7]** consisting of Dr Ong, a psychiatrist, a Charge Nurse, and a Senior Clinical Psychologist. The document goes on to state:

> "Following your request for assessment of Mr Thomas Cummins, an inmate of Pentridge Prison, as to his potential for rehabilitation in a psychiatric facility, he has an identified pre-existing psychiatric disorder. On assessment the team found that he fulfilled some of the criteria for the Loch Ard Rehabilitation Programme. We acknowledge that it would be in his best interest in achieving parole status with the Department of Correctional Services to be admitted as a voluntary patient.
> To ensure his commitment to our programme the terms of the parole should include the re-entry to Pentridge should he fail to comply with the Programme requirements."

That document does not on its face appear to be a consent in the terms to which Dr Walton referred, nor would it appear to be an approval of a kind which complies strictly with the provisions of s15. However, it is unnecessary further to examine the document as, if the Court were minded to grant the application on the ground upon which it relies, we have no doubt that suitable adjournments would permit any defect in the evidentiary material to be the subject of remedy. All these documents brought into existence after the hearing of the plea had concluded seem to have been forwarded to the Judge for his consideration prior to passing sentence. Although it does not otherwise appear that they were so submitted with that object, the internal evidence of the reports themselves strongly suggests that their communication to the Judge could only have been for the purpose of persuading him to consider a disposition by way of a s15 hospital order. However that may be, the Judge did not advert to the matter in his reasons for **[8]** sentence. Apart from the passage already extracted from those reasons the only significant reference to the applicant's mental illness by the Judge was to indicate that he thought it appropriate to take it into account in the manner dealt with in *R v Anderson* [1981] VicRp 17; [1981] VR 155; (1980) 2 A Crim R 379.

In these circumstances we do not think that the Judge's apparent failure to consider s15 amounted to a miscarriage of his sentencing discretion. However, in all the circumstances we have thought it expedient that we should for ourselves determine whether the making of a hospital order might be thought to be appropriate. It is to be noted that the section does not appear to allow the Court to retain control of a prisoner once such an order is made and it may regain it only in the limited circumstances to which the section refers. Nor does there appear to be power to impose any particular time limit for the operation of the order, and the length of its life would appear to depend entirely upon the determination of the psychiatrist in charge of the prisoner's programme. In these circumstances, the Court would require to exercise the very greatest care before determining that the appropriate manner with which to deal with a prisoner was the grant of his release pursuant to a hospital order into a psychiatric in-patient service facility. This is so even though the prisoner is to be an involuntary patient.

There is, however, we think another and most important consideration to be borne in mind. That is that the power conferred by the section on the court is clearly a discretionary power. In relation to a like power granted a sentencing Judge pursuant to s13 of the **[9]** *Alcoholics and Drug-Dependent Persons Act* (which section is in many respects a provision analogous to s15 of the *Mental Health Act*, at least with regard to the policy underlying each of the provisions) it is we think pertinent to refer to what was said by this Court in *R v Robinson* [1975] VicRp 81; [1975] VR 816 at pp828-9. The passage is as follows:

> "However, even though all the jurisdictional facts as required under s13 have been established, it will be seen that there is still a discretion conferred upon the Court as to whether or not it will exercise the powers conferred under the section. This discretion should be exercised only for the purpose of rehabilitating suitable accused persons who fall within the description of s13(1)(a) and (b) and who, it may be reasonably assumed, can be reclaimed. The legislation does not take away from the Court the ordinary discretion conferred upon a court to impose the appropriate punishment on a guilty offender. The various factors which are material to punishment must still be considered but because of the provisions of s13 a new factor should be added to the existing relevant material. Where a serious crime has been committed and is of a prevalent nature calling for general deterrent penalty, then in our opinion the discretion conferred under s13 should not be lightly exercised to relieve the offender from correctional custody which deservedly should be imposed on him as a punishment for his wrongdoing. This consideration must be borne in mind in cases where the crime has become or is becoming much too common and offends against contemporary attitudes to the conduct constituting the crime."

The whole of that passage, in our opinion, applies equally to a consideration of the application now made for an order that the applicant be treated pursuant to a hospital order made under s15 of the *Mental Health Act*. If that is correct, then it is clear beyond peradventure that the gravity of the crimes committed and the seriousness of the circumstances attending their commission were such that it would be quite inappropriate not to pass upon the applicant a sentence of imprisonment pursuant to **[10]** the Court's obligation to impose what it considers in such a serious case to be an appropriate penalty. That consideration of itself is sufficient, we think, to dispose of the application. That is to say, it is clear that the case is one in which the Hospital Order sought ought not to be granted. We would for those reasons dismiss the application. The application will be dismissed.