

52/1980

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v HILL

Lush, Murphy and O'Bryan JJ

5 February 1980

CRIMINAL LAW - SENTENCE - DRUGS - SELLING HEROIN SYSTEMATICALLY AND FOR PROFIT - SENTENCED TO 7 YEARS IMPRISONMENT WITH A MINIMUM OF 5 YEARS BEFORE RELEASE ON PAROLE - NEED FOR DETERRENCE BOTH PERSONAL AND GENERAL - SENTENCE NOT MANIFESTLY EXCESSIVE.

1. Deterrence, both personal and general, remains a part of the process of sentencing and it is a matter that has particular relevance in drug cases. The clearest single reason for the importance of the deterrence aspect in drug cases, is that men like the present applicant, coming before the Court on drug charges, have around them groups of people interested in the distribution or consumption of drugs who are faced with the temptation to become involved in activities relating to drugs, which the law classes as criminal. When a man in the applicant's position is arrested and charged, the particular group around him will know of the fact; they will know in all probability of the ultimate consequences of the arrest and charge. It can be said that in drug cases the deterrence aspect has a greater possibility of being significant than in other cases, that because of this factor people who can be described as "relevant people" will know and be warned by what happens.

2. Having regard to the offence charged and the count to which the applicant pleaded guilty, the prevalence of the offence and the seriousness of the offence of distribution and sale of heroin in the community, it cannot be said that the sentence of seven years with a minimum term of five years was excessive. Accordingly, the application must be dismissed.

LUSH J: (With whom Murphy and O'Bryan JJ agreed) The present applicant was presented in the County Court at Melbourne on 16th November 1979 upon two counts under the *Poisons Act* – the first count being the count of trafficking in a drug of addiction and the second the count of selling such a drug. The applicant pleaded not guilty to the first count and guilty to the second count and in that situation the Crown led no evidence on the first count and a verdict of not guilty was entered accordingly. The matter then proceeded to plea in relation to the second count, the applicant admitting nine prior convictions for stealing from four court appearances, the last in 1975 when he would have been 15 or 16 years old. The sentence imposed by the learned Judge was a sentence of imprisonment for seven years with a direction that a minimum term of five years should be served.

The charge embodied in the count to which the applicant pleaded guilty arose from observations by a police officer of the passing in and out of the applicant's flat of large numbers of people in the evening hours. These movements having been watched for some time, a search of the flat was made early one morning and the applicant was there found in possession of capsules containing heroin.

The general picture emerging from the evidence, including the quite detailed record of interview, was that the applicant was obtaining heroin, already encapsulated, from a man at a hotel in Mount Alexander Road and he was reselling the capsules so obtained to people who came to his flat to buy it – buying each capsule for \$40 and selling for \$50. The applicant had some degree of addiction to heroin himself and he and his de facto wife were using some of the heroin purchased. He also had a child by her.

The quantities of heroin referred to in the material, combined with the profit involved, make it possible that the applicant was making a comfortable weekly income from his transactions. At its peak, he seems to have been acquiring some twenty capsules at a time every second day. He had a household of three and rent to pay and nothing but social welfare money coming in.

The fact that the sales that were made without the use of any active salesmanship or advertisement of any description was pointed to, and in particular it was said, that the method of selling it did not involve the encouragement of others to become heroin users; it was a method producing the result simply that those who were interested in obtaining the heroin got to know that it was obtainable at the applicant's flat.

It was also said, for what it was worth, that the applicant was simply the final retailer in the end of the whole distribution chain, and it was contended, I think without much force, certainly without much force as far as I am concerned, that this in some way meant that in the whole distribution operation the applicant was not important and I would not have any difficulty in accepting the idea that if the services of the applicant had not been obtained, the services of somebody else would have been: but the fact is it was from the applicant's hands that the customers finally received the heroin.

There could be no doubt that the applicant was selling heroin systematically, and of course for profit. The statement that it was committed as part of a commercial enterprise was correct in either one of two senses. One sense is that it was part of the total system of distribution of the heroin; the other is that it was the enterprise by which at that time the plaintiff made his living.

Deterrence, both personal and general, remains a part of the process of sentencing. Recent considerations of drug cases in this Court indicate it is a matter that has particular relevance in drug cases and that statement will be found supported by *dicta* in *McKenzie's case*, a judgment which was given on 18th December 1977, and in *Piscitelli's case*, judgment given on 7th August, 1979.

Perhaps the clearest single reason for the importance of the deterrence aspect in drug cases, without putting this statement which I am about to make forward as an exhaustive reason why it is that deterrence is significant in these cases, is that men like the present applicant, coming before the Court on drug charges, have around them groups of people interested in the distribution or consumption of drugs who are faced with the temptation to become involved in activities relating to drugs, which the law classes as criminal.

When a man in the applicant's position is arrested and charged, the particular group around him will know of the fact; they will know in all probability of the ultimate consequences of the arrest and charge. It can be said that in drug cases the deterrence aspect has a greater possibility of being significant than in other cases, that because of this factor people who can be described as "relevant people" will know and be warned by what happens.

Counsel's argument was that when it was seen that the sentence was just under half the maximum sentence available for the offence, the conclusion must be that all personal factors and factors surrounding the sale have either been ignored or given insufficient weight. It was said, I think, in *Piscitelli's Case*, that whether a sentence was manifestly excessive was largely a question of the subjective judgment of each judge constituting an appellate court, and by that observation I am bound and with it I respectfully agree.

It must be understood that the function of this Court is not to offer individual opinions about what sentence might have been imposed by any one of the three Judges constituting this Court and comparing this with what was done by the trial Judge.

The function of this Court is to say whether or not it considers that what the trial Judge decided was wrong, either because some error can be demonstrated in the process of decision or because the result can be said to be clearly inappropriate to the offence and the personal surrounding circumstances.

Having regard to the offence charged and the count to which the applicant pleaded guilty, the prevalence of the offence and the seriousness of the offence of distribution and sale of heroin in the community, I am unable to say that the sentence of seven years with a minimum term of five years was excessive. Accordingly, in my opinion, the application must be dismissed.