16/73

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v MORAN

Winneke CJ, Little and McInerney JJ

5 June 1973

CRIMINAL LAW – SENTENCING – CHARGES OF ILLEGAL USE OF A VAN AND THEFT OF ITS CONTENTS – THREE OFFENDERS TWO OF WHICH WERE SENTENCED TO TERMS OF IMPRISONMENT – THE APPELLANT RELEASED ON PROBATION – SUBSEQUENTLY APPELLANT FOUND GUILTY OF BREACH OF PROBATION AND SENTENCED TO THE SAME TERMS AS THE CO-OFFENDERS – ON APPEAL, GIVEN THE DIFFERENCES IN THE OFFENDERS, APPELLANT SENTENCED TO A LESSER TERM OF IMPRISONMENT.

1. There were two bases of distinction between the applicant on the one hand and the two co-accused on the other, the first being the criminal record and the second lying in the fact that in the sentencing judge's view the applicant had come in on the criminal episode in question at a late stage of its development.

2. Having regard to the material before the Court, the sentencing Judge made a proper distinction in what he then said but in the result the distinction was not carried into effect when the sentence ultimately imposed upon the applicant was precisely the same as that imposed upon the other two accused.

3. In the circumstances, the applicant was sentenced to a total effective sentence of twelve months' imprisonment with a minimum term of four months.

WINNEKE CJ: The applicant, Desmond Herbert Moran, aged 25 years, was presented, in company with two other men, one named Mileto and the other Connellan in the County Court at Ballarat before His Honor Judge Byrne on the 10 October 1972, on one count of illegally using a motor car and a second count of larceny. After a trial that extended over several days, the three men presented were convicted on both counts on the presentment. The applicant admitted two prior convictions, one in August 1964, for using indecent language, and the other in December 1968 for assault occasioning actual bodily harm. On the 18 October the learned judge released the applicant on probation for a period of three years. He sentenced the co-accused Mileto, who had admitted twelve prior convictions including a number for offences of dishonesty and who was aged 21 years, to a term of 18 months' imprisonment with a minimum term of six months. The learned judge also sentenced the other co-accused, Connellan, who admitted 43 prior convictions, including many convictions for dishonesty and who was aged 30 years, to eighteen months with a minimum term of six months.

On the 30 November 1972, the applicant was convicted in the County Court at Melbourne before His Honor Judge Shillito of an offence of contempt of court consisting of attempting to influence a witness in a trial that was then proceeding before that learned judge, and he was sentenced to a term of three months' imprisonment. On the 15 December 1972, in the Supreme Court at Melbourne, the applicant was further convicted of the offence of contempt of court, consisting on this occasion of assaulting a person who had already given evidence at the trial, and was again sentenced to three months' imprisonment to be served concurrently with the other sentence of three months imposed upon him. Both offences of contempt of court occurred on the same evening and, as we have said, occurred whilst a trial was in progress in Melbourne. Both persons concerned were witnesses in that trial, and on the occasion in question both had gone to the applicant's home, and it was there that the events took place which led to the two convictions for contempt of court.

Those convictions meant, of course, that the applicant was in breach of the probation which had been granted to him by Judge Byrne at Ballarat; and accordingly on the 11 April 1973, he was brought up before Judge Byrne for those breaches of probation. On that occasion he

admitted the two convictions for contempt which constituted the breaches. After hearing a plea made on his behalf, the learned judge then sentenced him for the offence in respect of which he is now before this court to a like term to those imposed on the two co-accused, namely eighteen months with a minimum term of six months. It is from that sentence that the applicant has now applied for leave to appeal.

The offence in question was a serious offence. It occurred on the 17 December 1971 at Gordon, near Ballarat. On that occasion it was established that the applicant, together with Mileto and Connellan, had taken a van which was the property of a company which dealt in cigarettes. It contained a large quantity of cigarettes. They took the van and cigarettes away. Not long afterwards, they were apprehended by police and the van containing the cigarettes was discovered hidden in thick bush somewhere in the locality of the township of Gordon.

When the three accused persons were convicted, pleas were made on behalf of Mileto and Connellan, but the learned judge decided to release the present applicant on probation without waiting for a plea to be made on his behalf. In deciding to take that course, His Honor said that he had made the distinction in the case of the applicant Moran first because of the difference in his criminal history as compared with the other two accused, and secondly because His Honor thought that the applicant had been brought into the criminal enterprise at a late stage of its development. At the time of releasing the applicant on probation, the learned judge told the applicant that if he breached it he would be sentenced to the same term as had been awarded to Mileto and Connellan and said: "That is a promise I will keep."

When the applicant was brought before the learned judge for breach of the probation, His Honor reminded him of the promise that he had made; and then having reviewed the circumstances, having, as he said, taken into account what counsel had said on behalf of the applicant, His Honor went on to say that he was not concerned with the offences that constituted the breach of probation, but must act on the basis that those offences had been committed. He then went on: "However, I feel compelled to honour the promise I made to you on the occasion on which I released you on probation." Resulting from that, His Honor then imposed the sentence that is the subject of this application.

In his report to this court His Honor said, amongst other things;

> "I was surprised, however, to read at page 6 of the transcript, that Mr Vernon had then stated that the applicant's father was willing to give evidence on behalf of his son. I was distracted at the time he said that and did not hear counsel's statement to that effect. I would have welcomed the opportunity to hear the applicant's father, for I regarded the question as to whether or not I should continue the applicant's probation in the circumstances as a difficult one to determine and one which caused me some anxiety."

On the present application, Mr Dunn appeared for the applicant, and he submitted that the discretion of the learned judge had erred by reason of what he said when sentencing the applicant. Mr Dunn's argument was that His Honor's remarks should be construed as meaning that in determining whether he would continue the probation he should not take into account the circumstances in which the offences constituting the breaches of probation occurred. Alternatively, said Mr Dunn, His Honor had unduly inhibited his course of action by his promise to the applicant at the time he released him on probation that if he breached it he would be sentenced to this term of 18 months with a minimum of six months.

Mr Dunn also submitted that the sentences imposed on the applicant were unduly severe when compared with the sentences imposed upon the two co-accused, Mileto and Connellan. The argument was that having regard firstly to the age of Connellan and, secondly, and more importantly, to the criminal records of those two men as compared with those of the applicant, that some differentiation in sentence was called for.

Having regard to the report made by the learned Judge we permitted Mr Dunn to call the applicant's father on his behalf and we heard his evidence.

In our view the circumstances of this case do call for some differentiation between the applicant on the one hand and Mileto and Connellan on the other. We assume for the present

purpose that the sentences imposed by the learned Judge on the two co-accused were reasonable sentences in the circumstances. There is no doubt that there is a big difference in the criminal record of the applicant and the criminal records of the other two men. It seems to us that when the learned Judge released the applicant on probation he considered at the time that some differentiation should be made. We have already referred to His Honor's remarks on that occasion.

It could be said that there were two bases of distinction between the applicant on the one hand and the two co-accused on the other, the first being the criminal record and the second lying in the fact that in His Honor's view the applicant had come in on the criminal episode in question at a late stage of its development.

We think on the material before us that the learned Judge was making a proper distinction in what he then said but in the result the distinction was not carried into effect when the sentence ultimately imposed upon the applicant was precisely the same as that imposed upon the other two accused.

For the reasons we have given we think that some distinction should be made. Accordingly, the application will be granted. The appeal will be allowed. The sentence imposed upon the applicant will be quashed and in lieu the applicant will be sentenced to a term of twelve months' imprisonment in respect of each offence of which he was convicted and the court fixes a minimum term of four months before he will be eligible for release. The two sentences of twelve months will be served concurrently with each other making an effective sentence of twelve months with a minimum term of four months.
