**08/74**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v POULTON*

**Gowans, Nelson and Anderson JJ**

**6, 7 May 1974 — [1974] VicRp 85; [1974] VR 716**

**SENTENCING – OFFENDER PRESENTED ON A CHARGE OF ASSAULT WITH INTENT TO RAPE AND INDECENT ASSAULT – PLEA OF GUILTY ENTERED – PRIOR TO SENTENCING OFFENDER CONVICTED AND SENTENCED IN THE MAGISTRATES' COURT FOR A CHARGE OF OBSCENE EXPOSURE COMMITTED AFTER THE OTHER CHARGES – WHETHER SUBSEQUENT CONDUCT SHOULD BE PLACED BEFORE THE SENTENCING COURT – WHETHER SUCH CONDUCT MAY BE DECISIVE IN DETERMINING WHETHER THE OFFENDER WAS A SUITABLE PERSON FOR RELEASE ON PAROLE.**

**HELD: Appeal allowed. Sentences imposed varied by making the terms of imprisonment concurrent with the sentence imposed by the Magistrates' Court in respect of the subsequent offence.**

**1. Matter showing subsequent conduct, and indeed subsequent offences, may properly be placed before the court in pre-sentence reports for use for a proper end by the court. This material could not be used for the purpose of increasing the length of the maximum sentence which would otherwise be imposed, but it could be used for the purpose of determining such things as the concurrency of the sentences. It is apparent that the court has to exercise a discretion in deciding how much of the term imposed when the offender is sentenced to be imprisoned is to be the subject of release on parole at the discretion of the Parole Board and how much is not.**

***R v Webb* [1971] VicRp 16; [1971] VR 147, and**

***R v Prendergast* (VSC, unreported, delivered on 13 November 1973), referred to.**

**2. The language used in s534 of the *Crimes Act* 1958 ('Act') is such that s376 of the Act does not exclude evidence of subsequent offences (i.e. subsequent to the offence charged) for the purpose of fixing the minimum term under s534, whether prescribing such a term or its duration.**

**3. It was not proper to treat as a ground for reducing the sentence the possibility that the Parole Board may have declined to grant any further parole in respect of the residue of the 1968 term. But the totality of the terms of imprisonment had to be considered in relation to a person who was subject to personality deficiencies of the kind referred to in the evidence; and another consideration was the propriety (or possible propriety) of regarding the outbreaks of obscene behaviour since the offence for which sentence was imposed as an integral part of the same circumstances which led to the committal of the instant offence. These considerations could only be given effect in the circumstances of this case by making the sentence imposed concurrent with the two-year term imposed by the Magistrates' Court.**

**4. Having given the matter careful consideration the Court felt that it did not occur to the trial judge to regard the Broadmeadows episode committed while the offender was under treatment as a manifestation of the same condition that led to the offence for which the offender was being sentenced. If he had done so it might, in the interests of overall concern for the offender being called upon to serve the full potential term, have led him to provide that the sentence he was imposing should be served concurrently with the Broadmeadows sentence. In the result after giving the matter consideration this should have been done.**

**GOWANS J:** [delivered the judgment of the Full Court (Gowans, Nelson and Anderson JJ)]: This is an application for leave to appeal against sentence. The applicant, a man of 34 years of age, was presented on 6 February 1974 before his Honour Judge Hewitt in the County Court on one count of assault with intent to rape and on another count of indecent assault having been previously convicted of the same offence. He pleaded guilty to both counts. The charges were intended, we are informed by the prosecutor, as alternative counts, but no point has been made of the separate sentences imposed in respect of these counts having regard to the fact that the sentences were made concurrent.

The circumstances of the offence were these. On 10 July 1973 the prosecutrix, a young

married woman, 23 years of age, had returned to the Reservoir railway station from a visit to her parents, and from there she walked home. It was about 9:45 p.m. When she neared the gate of her home she was stopped by the applicant who presented a knife at her throat and under a threat of death invited her to come with him for some fun. He pressed his body against hers and it was apparent to her that he had an erection. She tried to talk him out of his request, and went on for about 20 to 30 minutes in the course of doing so. He persisted in rubbing his hand against her thigh and finally put the knife away at her request, repeating, however, his invitation. When the light went on in her home and her husband and a friend came out, the applicant tried to drag the prosecutrix away. She broke free from him, but was caught again and this time he also had the knife out. The husband and the friend came to the scene and the applicant decamped.

The applicant admitted a number of prior convictions which involved five court appearances and 13 counts in all. Most of them were concerned with offences of dishonesty, but on his last appearance on 1 April 1968 before the Supreme Court he was presented on two counts of abduction, and three counts of indecent assault on a girl under the age of 16, with a further count of gross indecency. He was sentenced on that occasion to seven and a half years' imprisonment in all, with a minimum sentence.

On the occasion of his appearance before his Honour Judge Hewitt he was represented by counsel. His counsel told the learned judge of his history. He said that the applicant still owed the Parole Board a period of about 18 months under the 1968 conviction. In actual fact that was not correct, the period being longer, a period of about three years and 28 days. He went on to say that this particular matter had been listed for trial in September but had not then proceeded, and his client had been placed under the care and control of Dr Robert Myers, a psychiatrist, who had been treating and consulting with him since September 1973. He went on to say that he proposed to call Dr Myers as a witness, and that the evidence would be that the applicant had been seeing the doctor regularly and had been taking medications as prescribed by him. He went on further to say that he would want the doctor to spend some time in detailing the background of the offences. Dr Myers, he said, would say it was not a case requiring certification but his evidence would be generally as to what he considered to be the problem and what prognosis he could make in respect of it. The effect of the evidence, counsel said, was that this single man had grave difficulties in establishing any type of normal sexual relationship and that was one of the peculiar problems associated with him.

Dr Myers was called in due course after the learned trial judge had called for a pre-sentence and psychiatric report. The doctor said that he had originally attended the applicant on 24 September 1973 and had seen him on 10 or 11 occasions since then. On the initial interview the applicant had informed the doctor that since 1967 he had been experiencing sexual impulses which he was unable to control. He was prescribed certain tablets by Dr Myers and reported on the next occasion when he was seen that the sexual impulses had considerably diminished. He had also said that he had a problem with alcohol, but on 8 January the applicant had reported that he had remained abstinent since the previous visit and had been feeling well. About two weeks later, however, he admitted to the doctor that he had again stopped taking his tablets and had been drinking and that he had again exposed himself on two occasions at an interval of two days.

The diagnosis expressed by the medical practitioner was that the applicant suffered from a severe personality disorder which would be categorized as mainly of the psychopathic type. He said that the basic personality disorder, the basic problem, was very difficult to treat, but that while the behaviour pattern could be modified, the biggest problem with this type of personality disorder usually proved to be poor motivation on the part of the patient and the tendency to impulsive behaviour and the inability to stick with anything for very long, whether it be a job or anything else. The usual pattern was repeated failure to persist with treatment and this had certainly been demonstrated with the applicant by "his failure to keep to the treatment that had been prescribed at Royal Park, and also his failure to persist with treatment prescribed by myself".

Finally the doctor said this:

> "With respect to the indecent exposure which occurred whilst he was under my control, I have only had contact with him a relatively small number of times, and it is somewhat difficult to assess in

> that he is an unreliable historian and I was convinced that quite often he was not telling me the truth, so that to that extent where I was relying on what he reported there is some difficulty. But he certainly did report to me that while he was taking the medication he did not experience the sexual impulses. This would appear to be borne out by the fact that while he was taking the medication the episodes did not occur, and after he stopped taking the medication they did."

In the result the learned trial judge sentenced the applicant to a term of seven years' imprisonment on the first count, and to a term of five years' imprisonment on the second count, making those sentences concurrent with each other. He fixed a minimum term of five and a half years before the applicant should become eligible for parole. The applicant has applied for leave to appeal against these sentences on the ground of "severity of sentence".

Mr Danos, for the applicant, has presented his submissions to the Court on two bases. One is that the learned judge took into account matters he should not have, namely, the fact that the applicant had been convicted on 4 March 1974 since the occurrence of the offences for which he was being sentenced. (That referred to the convictions at Broadmeadows for obscene exposure committed apparently somewhere about January 1974.) The second basis upon which the submissions were founded was that even if it were proper to take into account the matter that has just been referred to, the sentences imposed upon the applicant were manifestly excessive.

In relation to the first of these matters reliance was placed upon certain references by the learned trial judge in the course of the making of the plea and the imposition of the sentence. His Honour said after Dr Myers had been called (addressing the learned prosecutor):

> "Mr Dixon, I think I asked Mr Kayser who appeared last time, to inform me of how it was that the accused was granted bail on these counts when he was already in breach of his parole at the time of the offences and subsequently, the medical gentleman has announced, he committed further offences. Those subsequent offences do not affect me in respect of the length of sentence, but I suppose it might affect the length of the minimum term I might impose upon him—nothing to do with the maximum term, but the minimum term—how he is likely to behave during any period. In any case it seems that he should not have been free to commit these offences in January. I caused inquiries to be made of the magistrate. I am informed, subject to correction, that they were offences with respect to children. I was concerned about the fact that the magistrate had sentenced him to two years."
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> Mr Dixon: "Total of two years, 12 months on one count, six months on two other counts. I do not know that we could inquire from the magistrate as to why bail was granted, but the inquiry that was made, your Honour, was whether the application for bail was opposed."
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> His Honour: "That is the only inquiry I required to be made."
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> Mr Dixon: "The prosecutor in the Broadmeadows Court was a Sergeant Purchase, and unfortunately he is completely unable to remember whether he opposed bail or not."

Then later, after he had imposed the sentences, his Honour said this:

> "I am aware that you have been sentenced to two years' imprisonment by the Magistrates' Court at Broadmeadows on the 4th of this month, and I am aware of the fact that you are in breach of your parole by the conviction for these offences, and I have considered these matters; but I do not make the sentences I impose concurrent with any sentence you are undergoing, while I leave to the Parole Board the other matter that I have referred to."

In making his submission that the learned judge had taken into account wrongly the matters that have just been referred to, counsel placed reliance upon the decisions of this Court in *R v Wilson* [1956] VicLawRp 31; [1956] VLR 199; [1956] ALR 503, and of Sholl J in *R v Phillips* [1962] VicRp 6; [1962] VR 55. He said that no reliance could be placed upon the convictions subsequent to the occurrence of the instant offences for the purpose of arriving at the appropriate punishment.

In *R v Wilson*, *supra*, this Court held by a majority that the provision now contained in s376 of the *Crimes Act* 1958 by implication excluded proof of convictions against the accused other than those which were previous to the committal of the offence for which the offender was being awarded punishment, so that convictions subsequent to this offence but before sentence could not be taken into account.

In *R v Phillips*, *supra*, Sholl J applied this decision to produce the result that offences committed before the offence for which sentence was being imposed could not be taken into account if the conviction itself did not take place until after the commission of the offences for which sentence was being imposed.

Section 376 of the *Crimes Act* reads:

> "In any presentment indictment or information for any indictable offence it shall be lawful, in order to enable the court the better to exercise its discretion with respect to punishment, to add a count or counts averring and upon the trial to prove that the offender had previously to committing such offence been convicted of an offence, although either or both of such offences is or are not such as that by reason of any provision of this Act the degree character or punishment of the subsequent offence is affected."

In reaching his conclusion Sholl J ([1962] VicRp 6; [1962] VR 55 at p56) said this:

> "That section clearly enough contemplates that, in order to take advantage of its provisions, the Crown must be able to show that the prior conviction relied upon occurred before the commission of the instant offence, and once one treats that provision as exhaustively defining the right of the Crown in such matters, it becomes obvious, in my judgment, that the procedure which the section permits cannot be applied to a case where, previously to committing the instant offence, the accused had committed another offence but had not yet been convicted of it.
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> For my own part, I am of the opinion that the sooner the position, which, as it seems to me, the judgment in the majority in *Wilson's Case* establishes, is altered by legislation, the sooner will the courts be able to deal with accused persons according to their real merits, instead of upon a basis which, in some cases, may be unnecessarily artificial; and I know there are other members of the present Bench who are of the same opinion."

For ourselves, we would say that the time may arise when the majority judgment in *R v Wilson* will have to be given further consideration. It is clear enough in this present case that the learned judge did not take the further offences into account in fixing the length of the seven-year term. But it is said that he did take them into account in fixing the length of the minimum term under s534 of the *Crimes Act*. That section reads as follows:

> "(1) Where any person is convicted by the Supreme Court or the County Court or any magistrates' court of any offence and sentenced to be imprisoned then, if the term imposed is not less than two years the court shall, and if the term imposed is less than two years but not less than twelve months, the court may, as part of the sentence, fix a lesser term, (hereinafter called 'the minimum term') that is at least six months less than the term of the sentence during which the offender shall not be eligible to be released on parole: Provided that the court shall not be required to fix a minimum term as aforesaid if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate."

(It is unnecessary to read the other sub-section.)

This language shows that in the provision there are two conceptions involved; first, the "term imposed" when the convicted person has been "sentenced to be imprisoned", and, secondly, "a lesser term...during which the offender shall not be eligible to be released on parole". In *R v Governor of Her Majesty's Gaol at Pentridge; Ex parte Cusmano* [1966] VicRp 78; [1966] VR 583, this Court drew attention to the difference in the function of the court of first instance in imposing the one term and fixing the other, saying at p587:

> "That language requires the court to impose a term of imprisonment appropriate to the offences charged in the same way as if it were imposing a fixed sentence, and then, and only then, to proceed to the fixation of a minimum term."

Is s376 then to be read as excluding the further offences wholly from consideration when fixing the minimum term? Matter showing subsequent conduct, and indeed subsequent offences, may properly be placed before the court in pre-sentence reports for use for a proper end by the court. Reference may be made to the cases cited by the learned prosecutor of *R v Webb* [1971] VicRp 16; [1971] VR 147, and *R v Prendergast* (unreported, delivered on 13 November 1973). This material could not be used for the purpose of increasing the length of the maximum sentence which would otherwise be imposed, but it could be used for the purpose of determining such things

as the concurrency of the sentences. It is apparent that the court has to exercise a discretion in deciding how much of the term imposed when the offender is sentenced to be imprisoned is to be the subject of release on parole at the discretion of the Parole Board and how much is not.

In the exercise of this discretion by the court it must be relevant to decide whether the offender has been shown to be a person for whom such release is not appropriate. Indeed the section requires the court to take into account the "antecedents" of the offender. In referring to this provision in *R v Bruce* [1971] VicRp 80; [1971] VR 656, Smith J in this Court said this at p657:

> "The antecedents of the offender may, as the statute implies, be such as to persuade the court that the prisoner is not a suitable person to be dealt with under the parole system."

We see no reason for limiting the width of the term "antecedents" so as to exclude criminal conduct subsequent to the committal of the offence for which sentence is being imposed. That conduct may be decisive in determining whether he is a suitable person for release on parole.

The language used in s534 is such that we are of opinion that s376 does not exclude evidence of subsequent offences (i.e. subsequent to the offence charged) for the purpose of fixing the minimum term under s534, whether prescribing such a term or its duration.

We are satisfied that the learned trial judge did not go further than that. Having regard to these considerations we are of opinion that the learned trial judge did not err in having regard (if in fact he did have regard and this is not clear from the material) to the particular criminal conduct of the applicant referred to in the evidence, for the limited purpose which has been referred to. The first basis upon which the submission is made must, therefore, be rejected.

As to the second basis it is said that a term of seven years was excessive having regard to the unexpired portion of three years and 28 days of the earlier term imposed in 1968 which the applicant automatically became liable to serve as a result of his convictions, and having regard too to the two-year sentence imposed by the Magistrates' Court at Broadmeadows for obscene exposure. The Court is not prepared to accept it that an offence of this kind, which exposed a young married woman on her way home to such conduct as was shown by the evidence here, accompanied as it was by threats of death and the use of a knife, was not properly made the subject of a sentence of seven years' imprisonment.

We do not think it is proper to treat as a ground for reducing the sentence the possibility that the Board may decline to grant any further parole in respect of the residue of the 1968 term. But the totality of the terms of imprisonment has to be considered in relation to a person who is subject to personality deficiencies of the kind referred to in the evidence; and another consideration is the propriety (or possible propriety) of regarding the outbreaks of obscene behaviour since the offence for which sentence was imposed as an integral part of the same circumstances which led to the committal of the instant offence. These considerations could only be given effect in the circumstances of this case by making the sentence imposed concurrent with the two-year term imposed by the Magistrates' Court.

Having given the matter careful consideration the Court feels that it did not occur to the learned trial judge to regard the Broadmeadows episode committed while the applicant was under treatment as a manifestation of the same condition that led to the offence for which the applicant was being sentenced. If he had done so we think it might, in the interests of overall concern for the applicant being called upon to serve the full potential term, have led him to provide that the sentence he was imposing should be served concurrently with the Broadmeadows sentence. In the result after giving the matter consideration we think that this should have been done.

The result is that leave to appeal will be granted. The appeal will be allowed. The sentences imposed will be varied by making the terms imposed concurrent with the term being served under the order of the Magistrates' Court at Broadmeadows on 4 March, but otherwise the sentences will be affirmed. Appeal allowed; sentence varied.

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the Crown: John Downey.