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SUPREME COURT OF VICTORIA — FULL COURT

R v MORTON

Young CJ, King and Beach JJ

6-7, 13 June 1986 — [1986] VicRp 82; [1986] VR 863; (1986) 23 A Crim R 433)

CRIMINAL LAW – SENTENCING – PLEA OF GUILTY – EFFECT OF – WEIGHT ATTACHED TO PLEA WHERE SELF-INTEREST/REMORSE INDICATED - WHETHER COURT SHOULD STATE AMOUNT OF REDUCTION OF SENTENCE – WHETHER LEGISLATIVE PROVISION RETROSPECTIVE: *PENALTIES AND SENTENCES ACT* 1985, S4; *CRIMES ACT* 1958, S45; *INTERPRETATION OF LEGISLATION ACT* 1984, S52.

Having regard to the provisions of s4 of the *Penalties and Sentences Act* 1985, a court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest or a plea to lesser offences than those originally charged. Generally, it is undesirable that a court, when passing sentence, state the amount of reduction of a sentence where a plea of guilty has been entered.

***R v Gray* [1977] VicRp 27; (1977) VR 225, considered.**

THE COURT: **[1]** This is an application for leave to appeal against sentence by Brent William Morton who pleaded guilty in March last to a charge that at Mildura on 3rd February 1986 he attempted to have carnal knowledge of Elizabeth Francesca Schiliajew without her consent. The applicant is aged 21 and is part aboriginal. He was born in Queensland and came to Mildura seeking employment a few days before the offence in question was committed. Shortly after 3.30 pm. on 3rd February the applicant and three companions went to an hotel in Mildura where they remained drinking until closing time. After leaving the hotel the applicant proceeded to a flat occupied by a friend of one of his companions where he consumed a further quantity of alcohol. He then left the flat and for some undisclosed period of time walked around the streets of Mildura looking for a suitable place to sleep. **[2]** Whilst so engaged the applicant decided he would break into a house with a view to stealing money and blankets. The house he ultimately selected was that occupied by Elizabeth Schiliajew who was then aged 72. Mrs. Schiliajew was asleep in bed at the time the applicant entered the house. The first she realized anything was amiss was when she was woken from her sleep by the applicant grabbing her feet. The applicant then attempted to have intercourse with her. It is unnecessary to detail his attempts in that regard. Suffice it to say he subjected Mrs Schiliajew to a frightening and degrading experience.

Having failed in his attempts to have intercourse with Mrs Schiliajew the applicant allowed Mrs Schiliajew to leave the bedroom and go to the bathroom. According to what the applicant later told the police, whilst Mrs Schiliajew was absent from the bedroom he came to his senses, realized that what he was doing was wrong, and left the house. Unfortunately for the applicant, in his haste to leave the house he left behind his bankbook which had apparently fallen from his trouser pocket. It was a simple enough matter for the police to apprehend the applicant the following day. When questioned by the police, the applicant readily admitted his guilt, and in due course pleaded guilty to the offence. Much was made of those facts during the course of the plea made on the applicant's behalf to the learned trial judge. The applicant was a person of previous good character. He had left school at the age of 15 and had **[3]** followed a variety of unskilled occupations in Queensland before coming to Victoria. It was said on his behalf that shortly before he came to Victoria a close relationship he had had with a girl in Queensland was terminated. It was said that that concerned the applicant to such an extent that he began to drink heavily. As a consequence of his heavy drinking he lost his job in Queensland was forced to come to Victoria to seek work. At the conclusion of the plea the applicant was remanded in custody for sentence. On 11th March 1986 the learned trial judge sentenced the applicant to be imprisoned for a term of five years and directed that he serve a minimum term of four years before being eligible for parole.

By notice of application for leave to appeal against sentence dated 17th March 1986 the applicant sought leave to appeal upon the single ground that the sentence in all the circumstances was excessive. By order of Phillips J made on 16th April 1986 the applicant was given leave to add the following additional grounds of appeal:

> "(2) That the learned trial Judge misdirected himself as to the relevant maximum sentence applicable.
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> (3) That the learned trial Judge misdirected himself as to the provisions of Section 4 of the *Penalties and Sentences Act* 1985.
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> (4) That the learned trial Judge erred in the exercise of his discretion in failing to apply the provisions of Section 4 of the *Penalties and Sentences Act* 1985.
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> **[4]** (5) That the learned trial Judge erred in the exercise of his discretion when fixing the minimum term to be served before being eligible for parole.
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> (6) That the learned trial Judge failed adequately to take into account material indicating contrition and remorse on behalf of the applicant.
>
> (7) That the learned trial Judge failed adequately to take into account the age and antecedents of the applicant."

During the course of the plea the learned Judge indicated that the offence was charged at common law and, therefore, the penalty was at large. It further appeared that His Honour regarded the range of penalties properly open to him to be limited only by the prescribed penalty for the completed offence which is ten years: *Crimes Act* 1958, s45(1). In other words, as it was conceded that some custodial sentence had to be passed, His Honour proceeded upon the basis that he had, as it were, a range of up to ten years within which to select the appropriate sentence.

Unfortunately, neither counsel for the Crown nor counsel for the applicant drew to His Honour's attention s45(2) of the *Crimes Act* which fixes the maximum penalty for attempted rape at five years. It would have been in the applicant's interest if his counsel had drawn this provision to His Honour's attention: indeed this application for leave to appeal might have been unnecessary. Moreover, it was clearly the duty of counsel for the Crown to ensure that the judge was aware of the maximum sentence applicable. It is hardly necessary for counsel in every case to inform the judge of the maximum sentence applicable, but if a judge makes a slip, as the very experienced trial judge did in this case, he ought to be able to rely upon counsel for the Crown to remind him of the provision he has overlooked.

[5] The slip, however, is sufficient to establish that the learned judge's sentencing discretion miscarried and it will be necessary for this Court to re-sentence the applicant. The learned judge's first report to this Court in effect acknowledges this situation. During the plea reference was made to s4 of the *Penalties and Sentences Act* 1985 (No.10260). That section which came into operation on 12th February 1986 reads:

> "4. (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.
>
> (2) 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.
>
> (3) the failure of a court to comply with sub-section (2) does not invalidate any sentence imposed by it."

In his second report to this Court, which was provoked by the addition of the new grounds of appeal, the learned judge raised the question whether the section applies to offences committed prior to 12th February 1986. There is no reason why it should not so apply provided that the Court passed sentence after 12th February 1986 and the Crown did not contend otherwise.

It was suggested in argument that s52 of the *Interpretation of Legislation Act* 1984 (No.10096) was applicable. That section which is under the heading "Provision as to penalty applicable where penalty is varied after commission of offence" reads as follows:

> "52. Where on or after the commencement of this Act a person is convicted of an offence under an

> Act or subordinate instrument and the penalty that may be imposed in respect of the offence was **[6]** varied between the time of the commission of the offence and the time of the conviction, the penalty that may be imposed in respect of the offence is the penalty that could have been imposed in respect of the offence had the conviction been made at the same time as the offence was committed or the penalty that could have been imposed in respect of the offence had the offence been committed at the same time as the conviction was made, whichever is the lesser."

This section can have no direct application to the present case for it is concerned with the penalty that may be imposed when the penalty for an offence of which a person is convicted has been varied between the time of the commission of the offence and the time of the conviction. No such variation took place here. The offence was committed on 3rd February 1986 and the conviction was recorded on 11th March 1986. On both dates the maximum penalty that might be imposed was five years' imprisonment. It may be noted, however, that the section negatives the effect of the decisions in *DPP v Lamb* [1941] 2 KB 89; (1941) 2 All ER 499; 57 TLR 449; 165 LT 59; *Buckman v Button* [1943] KB 405; (1943) 2 All ER 82; 59 TLR 261; 165 LT 75 and *R v Oliver* [1944] KB 68; [1943] 2 All ER 800; (1944) 29 Cr App R 137; 60 TLR 82; 170 LT 110.

The words of sub-s(1) confer upon a court when passing sentence on a person who has pleaded guilty to an offence a power or authority to take into account in fixing the sentence the fact that the person pleaded guilty. The language is necessarily prospective; that is to say it speaks of a court passing sentence after the section comes into operation but nothing in the language used suggests that it is intended to apply only to a sentence passed for an offence committed after the section came into force. If that had been the intention of Parliament the words "committed after the coming into operation of this section" would have been inserted after the word "offence" (where first occurring). **[7]** In these circumstances there is no need to consider further the question whether the operation of the section is retrospective. "There is an only and well known saying with regard to new laws, that you are not by a new law to affect for the worse, the position in which a man already finds himself at the time when the law is actually passed": *Re Raison, ex parte Raison* (1891) 63 LT 709 at p710. But there is no reason to restrict the operation of a section which confers a benefit upon a person. The fact that a benefit is conferred outweighs the presumption against restrospectivity: see Bennion, *Statutory Interpretation* (1984), p445.

If sub-s(1) stood alone, it might be regarded merely as declaratory of the existing law, but the reference in the sub-section simply to the fact of the plea of guilty without qualification suggests that something more was intended. Parliament must be taken to know the law and the courts in this State have for a long time taken a plea of guilty into account when passing sentence in any case in which they have considered it appropriate to do so: see e.g. *R v Gray* [1977] VicRp 27; [1977] VR 225.

Sub-section (2) confirms that something more than a mere declaration of the existing law is intended. That sub-section shows first of all that the taking into account of a plea of guilty, if it has an effect at all upon the sentence passed, is to operate to reduce not to increase the sentence. So much might again be regarded as no more than declaratory. But having regard to the principles stated in *R v Gray*, the absence of any words of limitation in sub-s(1) or in sub-s(2) and the absence of any direction as to the purposes for which or the circumstances **[8]** in which a plea of guilty may be taken into account in fixing a sentence lead inevitably to the conclusion that a plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse which is regarded as relevant for sentencing purposes. The existence of sub-s(2) with its mandatory requirement upon the court, if it "under sub-section (1)" reduces the sentence it would otherwise have passed, to state that fact when passing sentence; shows the intention of Parliament to encourage the practice of a court's taking a plea of guilty into account in an accused's favour.

The judgment of the majority in *R v Gray* contains (at pp230-233) a discussion of the occasions upon which and the extent to which it was, prior to the passing of s4, appropriate for a court to allow a plea of guilty to operate in mitigation of sentence. It is unnecessary to rehearse what is there said, but in summary their Honours McInerney and Crockett JJ indicated that it was for a sentencing judge to evaluate a plea of guilty and having done so to give it such effect, if any, in reduction of sentence as he thought proper. Nothing in s4 renders that process unnecessary or inappropriate. But their Honours went on to suggest (at pp232-3) that pleas of guilty which are not designed to serve the public interest and in which the accused's self-interest is completely

dominant and pleas of guilty to lesser offences than those originally charged as a result of "plea bargaining" between the accused or his advisers and the Crown will not ordinarily weigh heavily in the accused's favour. This part of their Honours' judgment may be **[9]** modified by the new section.

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.

Sub-section (2) of s4 requires a court to state the fact that it has reduced the sentence that it would otherwise have passed. The requirement is to state the fact not the amount of the reduction and although there is nothing to prohibit a court's stating the amount of the reduction, it will generally be impossible or misleading to do so unless a similar quantification is placed upon all the other elements or considerations that have led to the calculation of the sentence actually imposed. Indeed it would generally be highly undesirable to do so.

Having reached the conclusion that the Court should intervene in this case, it is now necessary for **[10]** the Court to pass the sentence which it considers in all the circumstances to be appropriate. Whilst mindful of the serious nature of the offence committed by the Applicant, having regard to his age, previous good character, the fact that he pleaded guilty to the offence, and the fact that, in the view of the Court, he has experienced genuine remorse for his behaviour, it is the opinion of the Court that the appropriate sentence to pass on the applicant is that he be imprisoned for a period of two and a half years and that he not be eligible for release on parole for a period of twenty-one months. Having taken the applicant's plea of guilty into account, the Court has reduced the sentence it would otherwise have passed.

Solicitor for the applicant: J Garner.
Solicitors for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.
