09/74

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v KANE

Gowans, Nelson and Anderson JJ

7-9, 16 May 1974 — [1974] VicRp 90; [1974] VR 759

SENTENCING – OFFENDER FOUND GUILTY OF MALICIOUS WOUNDING – MAXIMUM PENALTY OF THREE YEARS' IMPRISONMENT – PRIOR CONVICTIONS – OFFENDER RELEASED UPON A GOOD BEHAVIOUR BOND – APPEAL AGAINST SENTENCE – WHETHER SENTENCE INADEQUATE – WHETHER FACTOR OF POTENTIAL REFORMATION OF OFFENDER GIVEN TOO MUCH WEIGHT BY SENTENCING JUDGE.

HELD: Appeal allowed. Good behaviour bond quashed. Sentenced to 18 months' imprisonment.
1. The factor of potential reformation of an offender does not take over substantially from all other sentencing considerations. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.
***R v Cooke* (1955) 72 WN (NSW) 132; and**
***R v Radich* [1954] NZLR 96, applied.**

2. Without attempting to allot to the various considerations their proper part in the imposition of punishment, the sentencing judge did not in this case give to the aspects other than rehabilitation—and in particular that of deterrence, whether general or special—the weight that ought to have been allocated to them in this case.

3. Whilst the Appeal Court was not to be taken as asserting that mercy can play no part in determining the course that a court should adopt as the passage above cited from *R v Radich (supra)* recognizes, justice and humanity walk together. Cases frequently occur when a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.

4. Having regard to the sentencing judge's undervaluation of the nature and circumstances and gravity of the offence, his misconception as to the assumption that should be made in respect of the respondent's conduct since the offence, and the imbalance in his approach with respect to the application of the relevant considerations in fixing punishment, the exercise of the judge's discretion miscarried, and that the sentence imposed was not appropriate and a different sentence should have been passed.

5. The offence must be regarded in the circumstances as deserving of punishment of some severity in the interests of deterring the use of firearms, and in particular their use against members of the police force in the discharge of their duties, by persons with records manifesting a tendency to violence, and in the interests of punishing those who resort to such conduct.

GOWANS J: [delivered the judgment of the Court (Gowans, Nelson and Anderson JJ)]: This is an appeal by the Attorney-General, on behalf of the Crown, under s567A of the *Crimes Act* 1958 against a sentence passed upon a man convicted on indictment, on the ground that a different sentence should have been passed. The basis of the appeal is that the sentence was inadequate and inappropriate having regard to all the circumstances.

The offence charged is one of maliciously wounding contrary to s19 of the *Crimes Act* 1958 for which, at the time, the maximum penalty prescribed was imprisonment for three years. The person charged was the respondent Leslie Herbert Kane. The victim was one Kenneth Reginald Rofe, a senior constable attached to the Licensing and Gaming Squad. The date of the offence was 17 January 1971.

The circumstances of the offence were that early in the evening of 17 January, the respondent and his brother and another man came into the Croxton Park Hotel at Northcote and were drinking there for some time. They joined two girls and there was some foolery in the course of which a jug of beer was poured over one of the girls and a disturbance ensued. At some time a gun was produced and placed on a table but later removed. Some police had entered the hotel in the course of their duties of investigating licensing and gaming activities. One of them was the victim. At the request of the management they asked the respondent and his companions to leave, disclosing their identity as police officers at the time. There followed some wild language, challenges to fight and threatening words and conduct on the part of the respondent and his companions, in the course of which a gun was produced by the respondent. There was a threat to show anyone who wanted to move them out that it was not a starting pistol. The gun was pointed by the respondent at the chest of one of the police named Bryant, who passed it off as a starting pistol and was immediately threatened with being shown whether it was a starting pistol or not. It was then pointed at the side of Rofe's head and again at Bryant. Then the respondent and his companions reached the door and saying that he would show them it was not a starting pistol the respondent pointed the gun at the lower part of Rofe's body and fired, hitting him in the front of the right leg above the ankle. He then ran out and escaped in a car.

The bullet passed through about one and a half inches of the flesh of the leg travelling downwards at an angle of 45 degrees. It caused no bone damage and left no bullet fragments in the wound and the tendons, vessels and nerves were not harmed other than by bad bruising. In the result Rofe had two days in St Vincent's Hospital and three days in the Police Hospital.

There appears to have been some difficulty in apprehending the person responsible for firing the gun, and it was not until November 1972 that the respondent was arrested. It was not until 1 March 1974 that he was presented before the County Court.

The respondent pleaded guilty to the only count which was presented against him, that of maliciously wounding. In doing so he admitted that he had intentionally done the act of firing the gun knowing that it was unlawful, and either knowing that it would wound or foreseeing that it might wound and nevertheless taking the risk: *R v Cunningham* [1957] 2 QB 396; [1957] 2 All ER 412; (1957) 41 Cr App R 155; [1957] 3 WLR 76; *R v Smyth* [1963] VicRp 97; [1963] VR 737. In admitting his guilt the respondent admitted the existence of one or other of these alternate states of mind.

He admitted convictions extending back to 1961. They included seven convictions for assault and a number for dishonesty. One of his appearances before the Court of General Sessions at Melbourne on 1 June 1965 had produced a sentence of three years on one count of assault occasioning actual bodily harm and six months on another count of common assault. His latest prior convictions were on two counts of assault on 20 February 1969.

The sentence imposed by the County Court judge in respect of the instant offence was that the respondent be released on his own recognizance of $500 to be of good behaviour for two years. For the purposes of s567A this involved a sentence: s567A(1A).

The reasons for this conclusion require some examination. Arranging the observations of the learned judge in a somewhat different order from that in which they were expressed but adhering to the language, the sequence of thought influencing him is then disclosed and appears to have been as follows:—

> "...you have pleaded guilty to a count of having in January 1971 maliciously wounded a member of the police force, Kenneth Reginald Rofe. You were involved in an altercation which took place apparently when members of the police force were asking certain persons, including yourself and a brother of yourself, to leave the hotel. You did a very serious thing in firing a gun and causing a wound, fortunately of a fairly trifling nature, to the constable's leg. I approach my task today on a view of the facts which I think is the most favourable view which can be taken from your point of view, and that is that this was something that happened quite spontaneously. It seems to me that the most serious aspect of that crime is not so much that you used the pistol in the way that you did, but that you had it with you, and that is one of the things that worries me greatly about this matter. You have also admitted a list of convictions which are rather depressing and truly justify the characterization of your past life which has been given to it by your counsel. On the other hand,

there have been in your record substantial gaps. Your last conviction was in February 1969, and prior to that August 1965. Of course, from 1965 to 1969 was nearly four years, or some three and a half years, and one would have thought that at the end of that period of three and a half years you were well on the way to reformation. That does, of course, give me some hesitation in accepting the view that you have in fact effectively reformed at the present time and over the last several years. On the other hand, I have been very impressed by the fact that you have not been in any further trouble in the meantime, and I proceed on the basis that there has been no attempt to evade justice on your part. On the other hand, I have been most impressed by the evidence that has been called on your behalf and by the eloquent plea that has been made to me by your counsel. I am firmly of the view that vengeance, while it is a natural human trait, is not the one which does greatest service to the community. I feel that if there is any chance that you will show that you have indeed reformed, I should take that chance, because if I do not take that chance and if in fact you are reformed or on the way to being reformed, a sentence of imprisonment may well alter the course which I am urged you have already undertaken in the way of reformation. Therefore I do not propose to sentence you to a sentence of imprisonment."

Then proceeding to the question as to whether the order should be that of placing the prisoner on probation or placing him on a bond the learned judge remarked:—

"It seems to me that if you have made the reformation—which I trust and hope you have—that you will be able to continue along that path without the assistance of a probation officer. I have been invited by your counsel to impose any conditions, no matter how stringent, upon you. I have been told that you are a teetotaller. I hope that that continues, by reason of the fact that I myself have strong personal views about the virtue of such a course, but I feel it inappropriate that I should impose my advice upon you as a condition, and my advice to you very strongly is for all sorts of reasons which are in your interest that you should continue to be a teetotaller and not find it necessary to pass any time in hotels, which would probably make it more probable that you would again get into trouble. If you are prepared to enter into a recognizance in the sum of $500 to be of good behaviour for the term of two years, I shall release you."

It appears from these observations that the learned judge was dealing with three topics:—

(a) The actual circumstances of the offence;

(b) the prior history of the offender; and

(c) the reformation of the offender in the light of his history subsequent to the offence, and his future prospects; and the weight to be given to that consideration.

With respect to the first of these subjects the Attorney-General relied on grounds in the notice of appeal which are numbered 3 and 8, as follows:—

"3. That the learned judge erred in regarding the wound inflicted by the respondent on the victim of the offence as a wound of a fairly trifling nature.

"8. That the learned judge erred in failing to give due and sufficient weight to the gravity of the offence committed by the respondent and to the penalty provided by the Legislature in relation to the offence."

As to the second topic, the Attorney-General relied on matters set out in grounds 2, 5 and 6 of his notice as follows:—

"2. The learned judge failed to give due or appropriate weight to the nature, number and gravity of the prior convictions admitted by the respondent.

"5. That the learned judge erred in that he failed to appreciate that the respondent had admitted that in June 1965 he had been sentenced to a total of three years six months' imprisonment.

"6. That the learned judge erred in the weight which he attached to the fact that the respondent had, after being convicted in August 1965, not been convicted again until 1969."

As to the third subject, reliance was placed on grounds 4, 7, and 1, as follows:—

"4. That the general submissions of counsel for the respondent to the learned judge and in particular the submissions (then followed a reference to particular submissions in paragraphs (a) to (h)) led the learned judge to err by assuming as a fact that the respondent had not been in trouble since the commission of this offence, whereas the fact is (then followed particulars).

"7. That the learned judge erred in that he failed to give any or any sufficient consideration to the question whether the said sentences would act as a deterrent to other persons minded to commit similar offences.

"1. That the said sentence was inadequate and inappropriate having regard to all the circumstances of the case and a different sentence should have been passed."

If the learned judge, as may well have been the case, regarded it as his duty to take the view of the facts most favourable to the prisoner, it would deny his freedom to form his own view of the facts within the limits of the conviction, and it would be a wrong approach: *R v Harris* [1961] VicRp 36; [1961] VR 236; *R v Webb* [1971] VicRp 16; [1971] VR 147, at pp152-3.

In his description of the circumstances of the actual offence the learned judge took a view indicated by the words—"this was something that happened quite spontaneously", "causing a wound fortunately of a fairly trifling nature", and "the most serious aspect of that crime is not so much that you used the pistol in the way that you did but that you had it with you", that reflected a peculiarly lenient weighing of the facts of the offence. Having regard to his right to form his own view of the facts, it may be difficult to say that in categorizing the wound as one "of a fairly trifling nature", he went outside the limits of his function.

But to say in the light of the evidence that the firing of the gun and the wounding was something which "happened quite spontaneously" and that the most serious aspect of the crime was not so much that he used the pistol in the way he did as that he had it with him, constituted a gross undervaluing of the nature and quality of the crime. The respondent not only had the loaded gun in his possession when he was a convicted felon, but by words and actions before the actual shooting he threatened to use it, and he in fact did use it, and he did so against a policeman acting in the discharge of his duties with, admittedly, either the intention to wound him or a reckless disregard of the foreseen danger of wounding him. It is impossible to treat the way in which the offence was described as a proper assessment of the facts.

In the consideration of the history of the offender prior to the offence for the purpose of assessing his capacity to reform, he was treated as having a gap in his convictions between 1965 and 1969 capable of indicating some movement on the way to reformation, when the fact was that after June 1965 he was undergoing sentences amounting to three and a half years (with a minimum of two years and three months) and an additional month. But the language in which this consideration is referred to does not afford a solid foundation for the conclusion that this misconception contributed to the sentence imposed, and the learned judge in his report has stated that it did not.

A comparable mistake occurred when the learned judge was dealing with the prospective conduct of the offender and said that he had been told that the respondent was now a teetotaller, and that it was in his interest to continue as such "and to not find it necessary to pass any time in hotels which would probably make it more probable that you would again get into trouble". The fact was that the evidence as to this matter referred to the respondent's father and not to the respondent himself. It is difficult, however, to say whether and how far this mistake affected the judge's views on the respondent's prospects of reformation.

But a consideration which clearly affected the learned judge's approach to the matter of the appropriate punishment was his conclusion that "if there is any chance that you will show that you have indeed reformed I should take that chance", and in this connexion he had said that he was "very impressed by the fact" that the respondent had "not been in any further trouble in the meantime". In his report to this Court, the learned judge said: "It seemed to me that by submissions made on behalf of the respondent it was clearly asserted that the respondent had not subsequently to the offence been in any further trouble, or been convicted. Having regard to the submissions and the fact that no issue was taken on behalf of Her Majesty I did make the assumption as is alleged in ground 4."

It is apparent that this assumption was not founded on any evidence. The evidence itself only went so far in the first instance as to show that the applicant had a good work record over a period which had commenced before the offence was committed, and had continued thereafter. Then there was evidence by members of his family as to his becoming a good family man. It has

been put to us by counsel now appearing for the respondent, who did not appear below, that the submissions made by counsel on behalf of the respondent before the learned judge were not intended to assert the state of facts on which the learned judge relied and that they were not capable of being so understood. In this situation, it is sufficient to say that the learned judge was led by counsel's remarks to misunderstand (and it is not necessary to say whether he reasonably so misunderstood it or otherwise) what counsel was intending to convey. This, as the learned judge says in his report, was a critical factor in the formation of his judgment as to what should be the appropriate punishment.

It is not necessary in this connexion for this Court to have resort to the additional evidence tendered by the Crown, and provisionally admitted, showing the erroneous nature of the assumption. But that evidence would appear to be admissible on the basis accepted in *Meek v Fleming* [1961] 2 QB 366; [1961] 3 All ER 148, as tending to establish an induced misapprehension by the judge as to a material matter, viz. the occurrence of subsequent convictions, producing a miscarriage of justice. Evidence admissible for that purpose on an appeal in civil proceedings is equally admissible on an appeal in criminal proceedings: *R v Cox* [1960] VicRp 102; [1960] VR 665.

One further matter needs to be adverted to. It is this: that the factor of potential reformation of the offender seems, in the learned judge's view of the matter, to have taken over substantially from all other considerations. While some criminologists would support that approach, the courts have not done so. It is appropriate to refer to the judgment of the Court of Criminal Appeal of New South Wales in *R v Cooke* (1955) 72 WN (NSW) 132, a case with some features resembling the present case. In the judgment reference is made to the observations of the Court of Appeal in New Zealand in *R v Radich* [1954] NZLR 86. In giving the judgment of the Court, Street CJ, said at p135:—

> "I am prepared to concede that in dealing with the appropriate sentence in the present case a long period of incarceration would not be necessary for the purpose of reforming these two individuals.... This Court is concerned, however, with other aspects of punishment when considering what the appropriate penalty is, and the interests of the community must not be overlooked. There is the deterrent aspect and 'deterrent' means not only deterrent in relation to the two persons charged, but deterrent to others who may be of like mind to commit acts of violence in circumstances of this nature, and who may be induced by weak leniency on the part of the Court to abandon self-control and give rein to vicious impulses. "I think the matter has been well expressed in a recent decision of the Court of Appeal in New Zealand in the case of *R v Radich*, a passage which this Court has had occasion to quote in other cases which have come before it. After referring to the argument with regard to the elements of retribution and reformation, the Court expressed their views as follows: 'We should say at once that this last argument omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.' I think the courts must accept the burden imposed upon them, not a burden pleasantly undertaken, of seeing that sentences are imposed of such a character as will deter others from embarking on similar exploits."

These views were endorsed in *R v Herring* (1956) 73 WN (NSW) 203, at p205:

> "This Court has on more than one occasion recently taken the opportunity of quoting from a passage of the judgment of the Court of Appeal in New Zealand in the case of *R v Radich*, and more than once has given express approval to the principles laid down in that passage. The New Zealand court was concerned also to consider quantum of sentence and to stress the various elements to which regard must be had when imposing sentence. After dealing in that case with the element of retribution and the element of reformation, both of which must have their place, the Court continued: ...". (The learned judge then gave the quotation from R v Radich which appears in the earlier case.)

More recently the principles were restated in *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272, at p274; [1967] 2 NSWR 329. At (WN (NSW)) p274; 67 SR (NSW) 95, Herron CJ said:

> "The function of the criminal law and the purposes of punishment cannot be found in any single explanation, for it depends both upon the nature and type of offence and the offender. But all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime. The sentence should be such, as having regard to all the proved circumstances, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others: per Jordan CJ *R v Geddes* (1936) 36 SR (NSW) 554; 53 WN (NSW) 157. Courts have not infrequently attempted further analysis of the several aspects of punishment (*R v Goodrich* (1952) 70 WN (NSW) 42) where retribution, deterrence and reformation are said to be its threefold purposes. In reality they are but the means employed by the courts for the attainment of the single purpose of the protection of society."

We have read the more recent decisions of the Court of Criminal Appeal in *R v Portolesi* [1973] 1 NSWLR 105, and *R v Sloane* [1973] 1 NSWLR 202 (both of which deal with the fixing of the minimum term), and we find nothing in them to suggest an abandonment by that Court of the principles adverted to in the cases cited.

Without attempting to allot to the various considerations referred to in these cases their proper part in the imposition of punishment, we are satisfied that the learned judge did not in this case give to the aspects other than rehabilitation—and in particular that of deterrence, whether general or special—the weight that ought to have been allocated to them in this case.

In saying what we have said, we are not to be taken as asserting that mercy can play no part in determining the course that a court should adopt. As the passage above cited from *R v Radich* recognizes, justice and humanity walk together. Cases frequently occur when a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.

For the reasons we have set out in relation to the learned judge's undervaluation of the nature and circumstances and gravity of the offence, his misconception as to the assumption that should be made in respect to the respondent's conduct since the offence, and the imbalance in his approach with respect to the application of the relevant considerations in fixing punishment, we are satisfied that the exercise of the judge's discretion miscarried, and that the sentence imposed was not appropriate and a different sentence should have been passed.

When this point is reached it follows from what this Court has said in *R v Butler* [1971] VicRp 109; [1971] VR 892, that there is a case for this Court to exercise its own discretion in place of that which miscarried. The exercise is to see what sentence, on its own assessment of the circumstances, it should now pass.

The Court considers that where an offence of the kind here committed is committed against a police officer carrying out his official duties by a person with a criminal record of the kind the respondent had, and it is not to be excused as a spontaneous act or on any other account, then, unless there is to be found some persuasive evidence of reformation thereafter or some other mitigating consideration, a term of imprisonment should, on a proper application of the appropriate factors in punishment, be the appropriate penalty.

The Court does not find it necessary to go to the additional evidence of the respondent's convictions subsequent to the committal of the instant offence for the purpose of determining the appropriate punishment. It may be that the evidence is receivable (as was submitted in argument) under s574 of the Act, and that the proviso to that section, which would, in the case of an appeal against sentence by a person convicted, prevent it being used to increase the sentence, is not applicable in the case of an appeal by the Attorney-General under s567A, having regard to the words in subs(5) of the last-mentioned section, "with respect to procedure", or the words, "with such modifications and adaptations as are necessary", but we do not find it necessary to decide

this. For it appears to us that in this case the evidence of the convictions subsequent to the offence for which punishment is being imposed could only be properly used in arriving at the appropriate punishment (apart from the fixing of a minimum term) to meet evidence of subsequent reformation, and we do not regard the evidence relating to the respondent's work record or the evidence relating to his record as a family man, as establishing a case of reformation in the relevant sense, that is, showing a tendency to turn from crime or crime of the kind under consideration.

The offence must, therefore, be regarded as one of the description set out above without any persuasive evidence of reformation in this relevant sense. Such an offence must be regarded in the circumstances as deserving of punishment of some severity in the interests of deterring the use of firearms, and in particular their use against members of the police force in the discharge of their duties, by persons with records manifesting a tendency to violence, and in the interests of punishing those who resort to such conduct.

The submission made on behalf of the respondent, that the lapse of time since the committing of the offence is itself a circumstance justifying leniency, suffers from the fact that there is reason to believe that the delay between the committing of the offence in January 1971, and the respondent's apprehension in November 1972 was contributed to by the respondent's own conduct, and at least that there is no good reason to think otherwise. But the delay after apprehension and before committal in April 1973, and the delay after committal and before conviction on 1 March 1974, in the absence of explanation, does constitute matter proper to be taken into account. Due regard has to be paid to the fact that the respondent was not in custody but free to carry on his ordinary employment and his ordinary pursuits. But regard must also be had to the fact that the delay would leave room for life to be ordered according to plan in the meantime, and consequently it must be regarded as a consideration. It is pertinent, too, to bear in mind that the maximum penalty for the offence, as the legislation stood at the time of the offence, was a term of three years' imprisonment only.

In all the circumstances of the case, the Court considers that the proper sentence is one of imprisonment for 18 months. It is not appropriate, having regard to the nature of the offence, and the antecedents of the respondent, including his subsequent convictions, to fix a minimum term. The appeal is accordingly allowed, and the sentence passed by the County Court quashed. In lieu thereof the respondent is sentenced to 18 months' imprisonment. There will be an order that a warrant of commitment issue in respect of the sentence. The term, in conformity with s122(1)(b)(ii) of the *Social Welfare Act* 1970, is to commence on the day the offender is apprehended in pursuance of the warrant. Appeal allowed.

Solicitor for the Crown: John Downey, Crown Solicitor.
Solicitors for the respondent: Delaney and Co.
