51/84

SUPREME COURT OF VICTORIA— COURT OF CRIMINAL APPEAL

R v THOR

Young, CJ, McGarvie and Gobbo JJ

11 May 1984

SENTENCE – APPEAL AGAINST – DISPARITY OF SENTENCES IMPOSED ON DEFENDANTS WHO WERE NOT CO-OFFENDERS – WHETHER GROUND OF APPEAL – WHETHER SENTENCING COURT SHOULD CONSIDER SEX OF OFFENDER: *CRIMES ACT* 1958, S568.

T. was found guilty of culpable driving and sentenced to a term of imprisonment. At the same sittings of the County Court a female offender was convicted of culpable driving, but in circumstances which were more serious; however, she received a sentence less than that imposed on T. T. appealed on the grounds of excessive disparity between the sentences and that the female offender had been treated differently from T., a male offender.

HELD: Application for leave to appeal dismissed.
(1) Disparity of sentences passed on offenders who are not involved in offences arising from the same circumstances is not a ground of appeal.

(2) In sentencing criminal offenders, it is incumbent upon the judge to carry out the sentencing process so as to avoid producing feelings of dissatisfaction or injustice resulting from excessive disparity between sentences imposed upon co-offenders for the same offence.

(3) Whilst in some cases the sex of the offender may be a relevant consideration in sentencing, the question of error in sentencing the female offender did not arise as she had not applied for leave to appeal against the sentence imposed on her.

YOUNG CJ, McGARVIE and GOBBO JJ *[referred to the facts, the sentences imposed on each offender, the grounds of appeal, and continued]:* … **[4]** The difficult task of sentencing criminal offenders is amongst the most important of the functions of a judge and whilst a judge must always fix the sentence which he considers appropriate to the offence and to the offender before him within the limits allowed by law, it is at all times incumbent upon him so to carry out the sentencing process as to avoid, if at all possible, producing such a sense of injustice. It is this consideration which has sometimes led this Court to interfere when there has been excessive disparity between the sentences passed upon co-offenders for the same offence: see *R v Goldberg* [1959] VicRp 52; [1959] VR 311; [1959] ALR 762; *R v D'Ortenzio and Burns* [1961] VicRp 68; [1961] VR 432 at **[5]** p433; *R v Pecora v R* [1980] VicRp 47; [1980] VR 499 at pp502-3; (1979) 1 A Crim R 293.

Mr Wraith submitted that this Court had the power to quash or vary the sentence imposed upon the applicant in order to remedy the injustice which had been inflicted upon him. Whilst it may be accepted that this Court has wide powers to prevent injustice, it is not and never has been the law that a sentence may be quashed or varied simply because the person sentenced entertains a grievance or feelings of having been unjustly treated or because a detached observer might feel dissatisfied. An applicant for leave to appeal must approach the matter in a different way. The task imposed upon this Court by the *Crimes Act* in relation to sentencing appeals is contained in s568(4) which reads:

> "On an appeal against sentence the Full Court shall, if it thinks that a different sentence should have been passed or a different order made, quash the sentence passed at the trial and pass such other sentence or make such other order warranted in law (whether more or less severe and including an order for probation) in substitution therefor as it thinks ought to have been passed or made, and in any other case shall dismiss the appeal."

By a long line of judicial decisions, the Court has approached this task by first considering whether there is any identifiable error in the sentence under examination and if there be none, whether the sentence is either so excessive or so inadequate that the conclusion must be reached that error, albeit unidentifiable, has entered into the sentencing process. When the present

application is considered in this way, it becomes immediately apparent that there was no identifiable error made by the learned judge. Mr Wraith was not able to point to any. What he relied upon was what **[6]** he described as error by the judge when sentencing Wyatt. It was quite wrong, Mr Wraith submitted, in this community today, to treat a female offender differently from a male offender and he cited some judicial pronouncements to that effect. But error made when sentencing one offender cannot give rise to a right in another offender to have his sentence reviewed. If the judge had in the case of the applicant said, for example, that he was imposing the maximum sentence because he was a male, doubtless error would have been shown. But, of course, His Honour said no such thing and did not impose the maximum sentence. No error appears in anything that His Honour said when sentencing the applicant.

The application accordingly does not raise for consideration the general question whether female offenders should be treated in the same way as male offenders. Indeed it seems probable that no application for leave to appeal against sentence could do so, for it is of the essence of the sentencing process that, within the limits prescribed by law, the sentence should be appropriate both to the offence and to the offender. In some circumstances the sex of the offender may be a relevant consideration: in others it may not. So in *R v Zampaglione & Ors* (6 A Crim R 287, Full Court, 28th April 1981), a case in which three men and one woman were charged with conspiracy to import heroin, and in which there was an appeal by the Attorney-General against the sentence imposed on the woman the Chief Justice and Murray J in a joint judgment in which they increased the sentence of the female offender said:

> "It may be thought that she should be treated more leniently simply because she is a woman but even if that has been the general **[7]** experience in the criminal courts and even if it be appropriate in some classes of cases, we see no reason why in this type of case any distinction should be made on the grounds of sex."

In that particular case the third member of the Court, Southwell J, dissented from the conclusion of the Chief Justice and Murray J because he was of the view that the sentencing judge was entitled to give considerable weight to the fact that the woman was the mother of a very young child. The case thus furnishes an example of some of the considerations that may enter into the sentencing of a female offender.

It is not open to this Court to consider on the present application whether the learned judge made any error in the case of Wyatt (the female offender). There has been no application by Wyatt for leave to appeal against the sentence imposed upon her, nor has there been any appeal by the Director of Public Prosecutions upon the ground that Wyatt's sentence was inadequate. It would be quite wrong for this Court to pass any opinion upon the sentence imposed upon Wyatt in the absence of argument by or on behalf of the person sentenced. Indeed it would be highly mischievous for us to do so. Moreover, even if it were the fact that another offender had been sentenced for a worse offence than the applicant on the same day as the applicant and had received a substantially lesser sentence, those facts alone would not justify or require the interference of this Court with the sentence imposed on the applicant.

When the Court turns to consider whether the sentence imposed on the applicant is so excessive that the conclusion is inescapable that some error entered into the **[8]** sentencing process, the Court must of necessity have regard to the general level of sentences for the offence of culpable driving. The Court commonly looks at the general level of sentences for particular offences, either as a matter of general experience or by reference to statistical material, for the purpose of considering whether a particular sentence is manifestly excessive. When it does so it may observe that another sentence to which it is referred is out of line with the general level of sentences for a specified offence but by so doing the Court does not suggest that there was necessarily error in the sentence to which it is referred. The Court is rarely in possession of sufficient information to enable it to indicate that there has been error in a sentence not formally before it and even if it were, for the reasons already given, the Court would not pronounce upon that sentence.

In this limited way, the sentence imposed upon Wyatt is relevant for present purposes. It is one of the sentences to which the Court has regard for the purpose of considering whether the sentence passed upon the applicant was manifestly excessive. The relevance of Wyatt's sentence, however, does not depend on the fact that Wyatt was a woman or that she was sentenced on the same day or at the same sittings as the applicant.

Reference has already been made to some of the authorities on parity of sentences. They are all cases concerned with the sentences of co-offenders for the same offence. It is within the Court's power in the case of co-offenders sentenced for the same offence, albeit by different judges and at different times, to redress in some measure feelings of dissatisfaction or injustice brought about **[9]** by sentences which differ too greatly from one another.

The same process cannot, however, be applied to sentences passed on offenders who are not involved in offences arising out of the same circumstances. Any other view would lead to every sentence being open to review whenever another sentence could be found which differed from that sought to be reviewed. Furthermore, it must not be forgotten that a sentence may in an appropriate case be reviewed by this Court on the ground that it is too lenient as well as upon the ground that it is too severe. The contention in the applicant's notice of application for leave to appeal that the sentence was excessive was not supported in argument except in the way we have described. We are clearly of the opinion that the sentence could not be described as manifestly excessive and accordingly as no error has been shown in what the learned judge did and as we are not of the opinion that a different sentence should have been passed, the application must be dismissed.
