10/86

SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

R v GILLS

Campbell CJ, McPherson and Thomas JJ

14 March 1986 — [1986] 1 Qd R 459; (1986) 22 A Crim R 115

CRIMINAL LAW – SENTENCING – BREACH OF PROBATION – EXTENT OF PUNISHMENT UPON BREACH – WHETHER NOMINAL OR CONCURRENT SENTENCE APPROPRIATE.

Release of an offender on Probation is no mere formality. Accordingly, a subsequent offence committed during the period of Probation will involve punishment for the offence in respect of which lenient treatment was provisionally given. Upon proof of the breach of Probation, generally speaking, the sentence should be more than a nominal one, and concurrent sentences for the original and subsequent offences should only be imposed in exceptional cases.

THOMAS J: (with whom Campbell CJ and McPherson, J agreed) *[after setting out the circumstances of the offences and dispositions, continued]:* … It is necessary to consider the nature of the exercise that a court performs in dealing with an offender after breach of probation. In the first place it is clear that the offender is to be dealt with for the original offence and that only. An original probation order is made "instead of sentencing" (s17 of the *Offenders' Probation and Parole Act*) and at the time of making the probation order the sentencing judge explains to the applicant that if he fails to comply with the requirements of the order or commits another offence during the probation period he may be sentenced for the original offence (s17(2)). In the second place it is clear that no additional penalty is justified by reason of the fact that the offender has breached the terms of his probation order or committed an offence during the relevant period. In the third place it is clear that the Court is entitled to use the benefit of the hindsight obtained from subsequent events (*R v Evans* [1963] 1 QB 979, 985).

A familiar instance of this (which is present in the instant case) is that it may become clear that probation is no longer a suitable sentencing option. The nature of the later offence may be relevant in demonstrating this. Of course he must not be punished twice for the later offence, but the reaching of a conclusion that probation is no longer suitable does not infringe that principle; it is the use of available information of events up to the date of sentence which will enable the sentencing judge properly to understand the conduct and character of the offender and to consider the sentencing options open to him. It is well established that the court may take into account all relevant circumstances up to the time of sentence, including those of offences committed since the probation order. (Cf. *R v Evans* (*supra*); *Jack v R* [1968] WAR 137, 138).

It was submitted for the applicant that a cumulative sentence should not have been imposed, and that any custodial sentence should have been made concurrent with that imposed by Grant-Taylor DCJ. This amounts to a submission that the sentence should have been one which would not result in any practical penalty to the applicant. Such an approach has been rejected in England. In *R v Webb* [1953] 2 QB 390, 393, it was observed that cases in which a court would think fit to make sentences for the original and subsequent offences concurrent would be "exceptional". It was also observed that :

> "It is most important that offenders should be made to realize that discharge whether on probation or conditionally is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which they were originally given the benefit of this lenient treatment."

In *R v Stuart* [1964] 49 Cr App R 17; [1964] 3 All ER 672, the above statement was approved with the further comment that the sentence should in general be made consecutive and should be more than a nominal one. Discretions in individual cases are not to be fettered by general statements about "usual orders", but I record my general agreement with the above statements. It

must not be thought that probation is a mere formality, and it should be known that subsequent offences will involve punishment for the crime for which lenient treatment is provisionally given.

It has been recognised that delay in dealing with an offender for breach of probation may result in hardship or a distortion of the consequences of the later offence, and that it is generally desirable that the offender be dealt with for breach of probation at or as near as possible to the time when he is dealt with for the later offence (*Jack v R* (*supra*)). There was no undue delay in the present matter although three months elapsed between the two appearances.

However, the relevant events are sufficiently close to make it appropriate to look at the total of the sentences imposed and consider whether the total is inappropriate for the totality of the criminal activity involved. This process is sometimes referred to as an application of the "totality principle". The applicant has been in custody for six months before being dealt with by Grant-Taylor DCJ. It follows that the three years imposed in the District Court and the cumulative 18 months imposed in the Supreme Court result in a total sentence of five years' imprisonment. The question arises whether that was manifestly excessive in the circumstances.

It was suggested in argument for the appellant that Grant-Taylor DCJ may have taken into account the circumstances of the original offence and that Shepherdson J may not have been aware that His Honour had done so. There is no merit in those submissions. It cannot be said (and was not in the end submitted) that Grant-Taylor DCJ's sentence was excessive. The question here is whether the additional 18 months was excessive. The applicant is a young man who is a border-line mental defective who has had difficulties early in life. He now finds himself with a fairly lengthy prison sentence as the result of few offences. He had a good employment history for a person of his limited mental capacity. On the other hand he was given a chance, and he failed to take advantage of it. He has demonstrated an unfortunate tendency to seek sexual encounters uninvited in other persons' houses. Unfortunately he represents a risk to the community. Standing in isolation the circumstances of the first offence may not appear particularly serious, but in the light of character as known from his subsequent conduct and the subsequent pre-sentence report it is difficult to say that a sentence of 18 months' cumulative imprisonment was excessive or that the total imprisonment for both offences was excessive. Considerable respect should be accorded to the discretion of the sentencing judge in a proceeding of this nature where his personal attention has been applied to the same offender on more than one occasion. In the circumstances I would not be prepared to interfere with the sentence imposed. Leave to appeal should be refused.

THE CHIEF JUSTICE and McPHERSON J concurred with the reasons of Thomas J.
[Judgment supplied courtesy of the CSM Queensland].
