

27/85

SUPREME COURT OF VICTORIA

R v HALEWYN

Young CJ, Kaye and Beach JJ

8 March 1984 — [1984] 12 A Crim R 202

CRIMINAL LAW – SENTENCE – ARMED ROBBERY – DRUG ADDICT – SUITABLE FOR TREATMENT AT ODYSSEY HOUSE – WHETHER SUCH DISPOSITION AVAILABLE – OFFENDER'S POSSIBILITY OF EXTRADITION INTERSTATE TO ANSWER FURTHER CHARGES – RELEVANCE OF TO SENTENCING TASK – EFFECT OF BREACH OF RECOGNIZANCE: ALCOHOLICS AND DRUG-DEPENDENT PERSONS ACT 1968, S13.

H. pleaded guilty in the County Court to a charge of armed robbery. During the course of the plea, evidence was led that H. was a drug addict, that treatment was recommended for his drug addiction and that he was suitable for treatment under the provisions of the *Alcoholics and Drug-Dependent Persons Act* 1968 ('Act'). There was evidence that H. was a suitable person to be treated at the Odyssey House Drug Rehabilitation Centre and it was sought that he be released to enter the programme at the Centre. It was later revealed in the plea by H.'s counsel that H. had committed further offences in New South Wales and that warrants to extradite H. would be executed on him if he left the court pursuant to a bond or probation order. H.'s counsel abandoned the plea for release under the provisions of the Act and subsequently H. was sentenced to 5 years' imprisonment with a minimum of 3. On application for leave to appeal—

HELD: Application granted. Appeal allowed. Sentenced to 7 years' imprisonment with a minimum of 5. Released upon entering into a \$1000 recognizance to undergo treatment at Gresswell Treatment Centre for 2 years as an in-patient until entering Odyssey programme and thereafter as an out-patient and to abstain from using drugs of addiction unless with authority of a legally qualified medical practitioner for a period of 5 years.

(1) The sentencing Judge gave far too much weight to the possibility that after pronouncing sentence, H. would be apprehended and extradited to New South Wales. The task of the sentencing Judge was to impose the proper sentence for the offence, having regard to all the relevant circumstances, including the circumstances personal to the individual offender before him. In sentencing it is difficult and sometimes dangerous to speculate too much about what might happen in the future and better to adhere firmly to the task of fixing the appropriate sentence for the offence and the offender.

(2) Provided that the necessary pre-conditions for release are met, it is possible for an offender to be released on a recognizance under s13 of the Act to be admitted into the Odyssey House programme.

(3) Any breach of the s13 recognizance renders the person released liable to serve the term of imprisonment imposed by the Court which released the person.

YOUNG CJ: (Kaye and Beach JJ, concurring) *[after setting out the facts, continued]:* ... [2] When the plea was made by counsel, it was said at the outset that the essence of the submission would be that the applicant was a suitable person to be treated under the Odyssey programme, and that what was sought was an order that he be released in order to enter that programme. Part of the material that was placed before the learned trial Judge was the report of Dr Pryor, the medical officer of an [3] assessment centre under the *Alcoholics and Drug-Dependent Persons Act*, and that report expressed the opinion that the applicant is a drug addict, that treatment was recommended and that the applicant was considered suitable for treatment under the provisions of that Act. There was a reservation expressed in respect of that last opinion to which I shall refer later. That report was mentioned at an early stage of the plea, and it provoked, not unnaturally, a statement from the learned trial Judge, "I will not send him to Gresswell". I say that that was a not unnatural statement because counsel had already said to His Honour that the essence of the plea would be that the applicant was a proper person to be treated under the Odyssey programme and should be released for that purpose. However, as will appear later in this judgment, the course of the plea including the opening of it turned out to be unfortunate. Evidence was adduced that the applicant was a suitable person to be treated under the Odyssey programme and that Odyssey would accept him for treatment. In support of the plea there was also adduced a report from Dr Bartholomew, who expressed the view that the applicant has the disposition to abide by what Dr

Bartholomew called "Odyssey House detention" and he supported the applicant's application for admission to the programme.

It is plain from observations made by His Honour during the course of the plea that His Honour was favourably impressed by that evidence, although he had, of course, not made up his mind until the conclusion of the plea. During the course of the plea it became necessary for a short adjournment, and after the short adjournment [4] counsel informed the learned Judge that the applicant had – and I quote counsel's words – "committed something like nine armed robberies in New South Wales during the fortnight preceding him coming here". A little later counsel said, "... so that the whole object of the exercise of trying to gain his admission to Odyssey in Victoria to enable him to undergo that programme would be nullified". Counsel said that the object would be nullified because he had been told that there were nine extradition warrants waiting at the Preston Police Station and that those warrants would be executed the moment that the applicant left the court, if he left it pursuant to a bond or a probation order. After counsel had made that announcement to the learned Judge, His Honour said that it had put an entirely different light on the whole situation and in the discussion which followed counsel then said, "If the authorities are going to execute extradition warrants, provisional warrants, as soon as they are able, then any order of this Court made for a non-custodial sentence in Victoria would be nullified. So that now I have been told that, there is no point, Your Honour, in proceeding in my submissions upon that basis". Thus, counsel quite clearly and unequivocally abandoned the plea for the release of the applicant to enable him to attend the Odyssey programme. Again during discussion His Honour reaffirmed that his attitude to the case had changed as a consequence of what he had learned after the short adjournment.

In the result, the learned Judge imposed the sentence that I have already announced and in the course of doing so referred to the fact that the offence was to a certain extent a planned offence; it was planned to the [5] extent that the applicant had a disguise with him, that he had a weapon and that he had his hands covered so that fingerprints would not be left. The applicant admitted as much during the record of interview. The weapon which was used was in fact an imitation weapon, but as has often been said in the courts, the fact is generally not known to the victim of an armed robbery and it has little mitigating effect on the offence committed. The learned Judge referred to the applicant's prior convictions, which were not numerous; four in number from two court appearances. They were not of great significance for sentencing purposes, save that the first two were related to possession and ingestion of heroin. Having regard to the course of events that I have related, it is perhaps not surprising that the learned Judge sentenced the applicant as he did and the sentence which he imposed, five years with a minimum of three, is certainly not an excessive sentence for an armed robbery of this type. Nevertheless, the Court has come to the conclusion that the learned trial Judge's discretion did miscarry in the course of the sentencing process. It miscarried because His Honour, encouraged by counsel, gave far too much weight to the possibility that after he had pronounced sentence the applicant would be apprehended and taken to New South Wales.

The task of a sentencing Judge is, of course, to impose the proper sentence for the offence, having regard to all the relevant circumstances, including circumstances personal to the individual offender before him. It would be going too far perhaps to say that the existence of the extradition warrants of which the learned Judge was told [6] was totally irrelevant to the task before the Judge, but I think that His Honour too readily assumed that if released the applicant would immediately be extradited and taken to New South Wales.

It is true that the statement made by his counsel to the learned Judge was a statement which was surprisingly, if I may say so, revealing, perhaps unnecessarily so, as to the applicant's involvement in the New South Wales charges. Notwithstanding that information, it should not be assumed that on the application for an extradition order the Magistrate who heard it would necessarily make the order sought. [7] In sentencing it is difficult and sometimes dangerous to speculate too much about what might happen in the future, and better to adhere firmly to the task of fixing the appropriate sentence for the offence and the offender. As I understand that the conclusion which I have expressed is shared by the other members of the Court, the consequence must be that the sentence imposed by the learned trial Judge is set aside and this Court resentence the applicant to such sentence as it thinks fit.

Before I proceed to that sentence, I shall indicate that what the Court has in mind is to sentence the applicant to a term of seven years imprisonment with a minimum of five, and if the applicant accepts the obligation, then to release him under the *Alcoholics and Drug- Dependent Persons* legislation upon condition that he undergo treatment at Gresswell Treatment Centre for a period of two years as an in-patient until such time as he enters the Odyssey programme and thereafter as an out-patient, and with the further condition that he abstain from using alcoholic liquors or drugs of addiction unless with the authority of a legally qualified medical practitioner for a period of five years. I indicate that intention at this stage so that the Court may be informed whether the applicant is prepared to accept such a recognisance. *[After being informed that the applicant was prepared to accept such a recognisance, His Honour continued]* ...When the Court comes to pass sentence upon this applicant it must of course start with the consideration that the offence is a very serious one. I have already referred to that aspect of the matter. It is an offence for which Parliament has prescribed a maximum sentence of twenty-five years.

As I have already said, the fact that the offender is a drug addict does not lead generally to mitigation of the penalty. There are, however, in the present case strong indications that the applicant is a person who might be rescued from the addiction to which he has been subject, and there is as it happens available to the Court a process which I think will mark the seriousness with which the Court regards the offence and yet afford an opportunity for the applicant to be rescued from drug addiction. He is a man of twenty-five years of age who comes from a good background and he has no significant prior convictions except the convictions relating to drugs. He has the advantage of being acceptable to the authorities at Gresswell, and Dr Pryor, who was the medical officer that indicated that he was acceptable, made plain that the reservation to which I have already referred which was in his report was because the applicant did not then have anywhere in Melbourne to live or any connections in Melbourne which would assist in his rehabilitation. The course at Gresswell is largely an out-patient course, and it is easy therefore to understand Dr Pryor's reservation [9] about admitting the applicant simply to treatment at Gresswell. However, we asked for Dr Pryor to be brought before us this morning and he has explained his reservation and indicated that if the applicant were either provided with suitable accommodation in Melbourne or admitted into the Odyssey programme, the reservation expressed in his report would be removed.

The applicant has the additional benefit of the clear support of Dr Bartholomew as a person suitable for admission of the Odyssey programme. Dr Bartholomew believes that he can cope with that programme and has the disposition to abide by what he calls "the Odyssey House detention". [10] Further than that, there was evidence given on the plea, as I have indicated, that Odyssey was prepared to accept that he was suitable for their programme, but in addition the witness from Odyssey added that the applicant "is quite remorseful for his behaviour and for the fact that he has become involved in drugs, and he has a genuine desire, and I stress the word 'genuine', to rehabilitate himself".

Those considerations lead, I think, to the conclusion that it is an appropriate case for the Court to take the course that I have already indicated. The applicant has indicated that he is prepared to enter into the appropriate recognizance. He will, of course, have to understand that if there is any breach of that recognizance he would render himself liable to serve the term of imprisonment to which we propose to sentence him.

The order of the Court, accordingly, will be that the application is granted. The appeal is treated as instituted and heard *instanter* and allowed. The sentence is quashed. In lieu thereof the applicant is sentenced to be imprisoned for a term of seven years. It is directed that he serve a minimum term of five years before being eligible to be released upon parole. It is further ordered that the applicant may be released upon his entering into a recognizance in the sum of \$1,000 upon condition that he undergo treatment at Gresswell Treatment Centre for a period of two years as an inpatient until such time as he enters the Odyssey programme and thereafter as an out-patient, and that he abstain from using alcoholic liquors or drugs [11] of addiction unless with the authority of a legally qualified medical practitioner for a period of five years from the date of this order. *(Bond acknowledged and signed and applicant conveyed to Gresswell Treatment Centre forthwith.)*