14/86

SUPREME COURT OF VICTORIA — FULL COURT

R v YOUNG

Crockett, Nicholson and Vincent JJ

7 October 1985

CRIMINAL LAW – SENTENCING - WHERE SENTENCE IN EXCESS OF TWO YEARS IMPOSED - WHETHER COURT REQUIRED TO FIX A MINIMUM TERM – *PRIMA FACIE* REQUIREMENTS – REASONS TO BE GIVEN WHERE MINIMUM TERM NOT FIXED: *COMMUNITY WELFARE SERVICES ACT* 1970, S190.

The provisions of s190(1) of the *Community Welfare Services Act* 1970 mandatorily require that where a sentence in excess of two years' imprisonment is imposed, the Court should fix a minimum term before which the accused should be considered eligible for parole. If the Court decides to depart from this *prima facie* requirement because of the nature of the offences and the antecedents of the accused, it should give specific reasons for adopting such a course.

CROCKETT J: (with whom Nicholson and Vincent JJ agreed) **[1]** In this application the applicant seeks leave to appeal against sentence. The applicant and his co-accused, one Carter, were on 28th May 1985, convicted in the County Court of one count of armed robbery. The offence occurred on 25th February 1985. Each accused pleaded guilty to the offence on which he had been presented. The applicant admitted 28 prior convictions arising from eight court appearances which had taken place between May 1976 and August 1983. An analysis of those convictions shows that 13 were for offences of dishonesty and six were for offences of violence of one kind or another.

However, the applicant had not in fact been previously convicted of the offence of armed robbery, although he did have a conviction for robbery. The Judge sentenced each of the offenders to seven years' **[2]** imprisonment and directed that no minimum period be fixed before which each should be eligible for parole. The Judge gave reasons for the sentences he elected to impose upon each of the prisoners. Those reasons however are somewhat cryptic. With regard to his decision not to grant either the applicant or the co-accused the benefit of a minimum term, the learned Judge did no more in support of that decision than state the words of the section.

The provisions of s190(1) of the *Community Welfare Services Act* 1970 do provide that in the event that the sentence is in excess of two years it is mandatory for the sentencing Judge to fix a minimum term on the expiration of which the person sentenced will be eligible for parole. Of course whether that parole is granted or not is a matter for the Parole Board. That provision is, however, qualified in as much as it is further provided that if the sentencing Judge should consider that by reason of the nature of the offence and the antecedents of the offender it is inappropriate to fix a minimum term then he may abstain from doing so.

A further analysis of the convictions shows that the applicant, who is now only 26 years of age, despite the number of prior convictions which he has incurred since May of 1976, has in fact been released on parole only once by the adult Parole Board. It is true that the applicant breached parole on that occasion. Nevertheless, the adult Parole Board has only once afforded him an opportunity to endeavour to rehabilitate himself.

In his notice of application the applicant relies in support of his application upon the single ground that the learned Judge erred in failing to fix a minimum term. **[3]** The applicant has not addressed the Court orally in support of his application. However, before the hearing of the application commenced he had provided each of the members of the Court with a copy of a written submission upon which he apparently chose to reply.

Among the matters which are set out in that submission is the statement that he no longer wishes to have a minimum term set. However, in response to direct enquiry by the Court it appeared that, if the applicant considered that there was some prospect that at the expiration

of a minimum term the Parole Board might in fact still grant him parole, then it was his wish to adhere to the original ground set out in his notice of application.

The view that I take of the matter is that it was inappropriate in this case not to have fixed a minimum term. In the result, it is unnecessary to pay any further attention to the various matters referred to in the applicant's written submission. I would be prepared in the circumstances to treat the ground stated in the notice of application itself as being the operative ground and to allow the application on the basis that that ground has been made out. However, I am, of course, mindful that the Court cannot interfere with the sentence simply because it takes the view that it would have imposed a different one. This Court can interfere only if it is persuaded that there was some error on the part of the sentencing Judge or that the sentence imposed is manifestly inappropriate.

There was no argument addressed to the learned Judge on the question as to whether there should be a minimum term set or not. It is reasonable in those circumstances, I think, to expect that counsel would have assumed that the learned Judge would have proceeded in the ordinary way to have set a **[4]** minimum term, and, if the contrary course was within his contemplation, he would have raised it with counsel to give counsel an opportunity to make submissions in connection with it. Not only did he not do so, but, in fact, the learned Judge, when giving reasons for sentence, gave no reasons why he had chosen not to fix a minimum term in the case of each of the prisoners other than simply to state and rely upon the words of the statute.

Having regard to the manner in which this applicant's plea had been conducted to have done that was in my view insufficient in the circumstances. The legislation mandatorily requires that, provided that the sentence to be imposed is in excess of two years, a minimum term should be set. If a Judge is disposed to act upon the qualification which the legislation introduces into the section then, unless there are strong reasons for the adoption of a different course, it seems to me that it is appropriate for him to give specific reasons as to why he is adopting a course which the legislation suggests is a departure from the *prima facie* requirement.

This means that ordinarily reasons should be given as to why the Judge considers that any, and if so what, antecedents are such as to compel him to adopt the course being considered by him, or why it is that he considers that the offence is of such a nature as to lead him to such a contemplated conclusion. Because of the failure of the Judge to explain in any way why he was of the view that no minimum term should be set, I am of the opinion that this Court is free to look at the matter for itself. In doing that, as I have already indicated, I think that, having regard to the obvious intent **[5]** of the legislation, the age of the applicant and the fact that in the past he has received from the adult Parole Board only one grant of parole, the proper course is to fix a minimum term.

I would therefore be prepared to allow the application and to vary the original sentence by fixing a minimum term of five years before which the applicant should be considered eligible for parole.
