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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v ALDERSEA

Pape, Menhennitt and Nelson JJ

8 March 1974

SENTENCING – THREE OFFENDERS CHARGED WITH BEING ACCESSORIES AFTER THE FACT TO AN ARMED ROBBERY – SAME SENTENCE IMPOSED ON ALL THREE CO-OFFENDERS – DIFFERENT MINIMUM TERM FIXED FOR APPELLANT – CONDUCT OF DEFENCE – FINDING BY SENTENCING JUDGE THAT APPELLANT WAS A PARTNER TO A CONSPIRACY TO PRESENT FALSE EVIDENCE – SUCH FINDING TAKEN INTO ACCOUNT WHEN FIXING MINIMUM TERM – WHETHER JUDGE IN ERROR.

Defendant was presented, *inter alia*, with being an accessory before the fact to armed robbery. He pleaded not guilty, and unsuccessfully disputed the admissibility of his record of interview on a *voir dire* on grounds of persistent assault by the interviewing police, and that, in any case, it was a concoction. He was sentenced to 6 years' imprisonment (with other concurrent terms) with a minimum term of 4 years. He had 30 prior convictions. His co-accused, Ashman and Flannery, who pleaded guilty, were given similar 6 year sentences but with minimum terms of 3 years. Ashman had 17 prior convictions, and Flannery 14. Defendant appealed against severity of sentence in that all three were equally guilty but he received a greater minimum term.

HELD: The trial judge's discretion miscarried in relation to a comment made in sentencing. However, in all the circumstances the appeal against sentence was dismissed.
1. What His Honour said in passing sentence was open to the construction that he was not disposed to extend leniency to the applicant because he was of the opinion that the applicant and his witnesses were partners to a criminal conspiracy to procure and present false evidence to the court. The authorities show that this was not a proper matter for His Honour to take into consideration.

2. In all the circumstances the sentence His Honour passed upon Aldersea (including the minimum term) was an appropriate sentence. It was what might be called a conventional sentence in that the minimum term was not disproportionate to the sentence itself. His Honour, according to his report, did not feel there were grounds for extending leniency to the applicant, but not for the reasons given by His Honour. There were circumstances applicable to Ashman and Flannery which were not applicable to Aldersea, and which the Court was entitled to take into account. The applicant's record was significantly worse than that of the others and he was nearly ten years older than they were. The whole enterprise depended upon the ability of the perpetrators to dispose of the stolen goods, a function which the applicant was able to perform, and by pleading guilty Ashman and Flannery were to be taken as having shown genuine remorse.

PAPE J: ... It is plain that the sentence imposed by the learned Judge in each case was the same, namely, six years' imprisonment and that it is only after an appropriate sentence has been passed that the court is concerned to fix a minimum term. *R v Governor of Her Majesty's Gaol at Pentridge; ex parte Cusmano* [1966] VicRp 78; [1966] VR 583 at p587 and *R v Campbell* [1970] VicRp 16; [1970] VR 120 at p130. Nevertheless, the minimum term so fixed is, according to s534(1) of the *Crimes Act* 1958, regarded as part of the sentence. There is, therefore, no disparity between the sentence that is imposed upon Aldersea and his co-accused for each received the same sentence of six years. The only disparity is in the minimum terms fixed by the Judge.

It is not easy to ascertain from what His Honour said in sentencing Ashman why he treated him differently from the manner in which he treated Aldersea. At p16 of his sentence he seems to have regarded all participants as being equally blameworthy for he said,

> 'It is clear that this operation was planned with a view to the three of you making simply an illegal profit.' He then refers to Ashman's bad record and says, 'It was put to me that you have quite a deal to look forward to in your future life. I would agree with that. I do not propose to impose too severe a sentence.'

We would regard that as being a reference to Ashman's youth. When he came to deal with

Flannery, after referring to his record, he referred to character evidence given by his employer Mr Fremder, to the effect that Flannery was a very good worker and very reliable. His Honour said that he was very impressed by that evidence. He then said,

> 'However, I cannot see any reason for adopting a different course with respect to you from the one I adopted with respect to Ashman.'

In sentencing Aldersea, His Honour said at pp400-401 of the transcript.

> "I am satisfied that you took an active part in the preparation for the theft of the truck and for the armed robbery. Indeed, you were a vital member of the group because it was you who, according to the evidence which has been accepted, were the one who, in the planning of the crime, planned for the disposal of the cigarettes once they had been stolen. I listened with great interest to what your counsel said this morning about your background. It is clear that you have had a number of opportunities and that you possess or possessed considerable sporting ability. That, apart from giving you satisfaction, ought to have given you the opportunity for meeting people and making both social and business contacts which would have been to your advantage. But that does not seem to have been the way in which you have made use of your opportunities. You, too, have accumulated a long list of convictions, eight between 1957 and 1968, and three more are now added to that list."

(In so referring to eight convictions His Honour was plainly referring to the eight court appearances and not to the convictions which were recorded on each of those appearances.)

> "In considering the weight to be accorded to the background which has been explained to me by your counsel today, and the extent to which the court should grant you some leniency, I consider that I must also take into account the way in which you conducted the defence to these charges. It is clear from the verdict of the jury, and it is clear in my own mind, that you quite deliberately told lies in the witness box. It is also clear from the verdict of the jury and clear in my mind that you were a party to a criminal conspiracy to procure false evidence with a view to trying to have the jury acquit you; and doing that involved making very serious allegations against the police. Those allegations were, in my opinion, rightly rejected by the jury. I hope I make it plain that I am not punishing you for what I believe you did in the witness box, because you have not been charged with perjury or conspiracy. But I will take them into account in deciding what weight I should extend to the matters put on your behalf by your counsel in mitigation. Taking all the matters into account, and taking all the circumstances into account, I cannot take other than a very serious view of your case. You are charged, so far as the first and fourth counts in the presentment are concerned, with being an accessory before the fact, which may sound as though it is not as serious a matter as being an actual principal. The law, however, provides that the accessory before the fact may be punished as if he were a principal felon. Furthermore, in my view you were at least as much involved in this matter as Ashman and Flannery, and are at least equally responsible. In fact, I am disposed to think that you are more responsible than those two. What I am going to do is this; on the first count I sentence you to be imprisoned for two years; on the fifth count I sentence you to be imprisoned for six years; on the sixth count I sentence you to be imprisoned for one year. I direct the sentences to be concurrent and I fix as the minimum term in your case four years."

What His Honour said in passing sentence is, we think, open to the construction that he was not disposed to extend leniency to the applicant because he was of opinion that the applicant and his witnesses were partners to a criminal conspiracy to procure and present false evidence to the court and we think that the authorities show that this was not a proper matter for His Honour to take into consideration. See *R v Quinn* (1932) 23 Cr App R 196, *R v Richmond* [1920] VicLawRp 3; [1920] VLR 9; 26 ALR 47; 41 ALT 176, and *R v De Haan* [1968] 2 QB 108 p110; [1967] 3 All ER 618; [1968] 2 WLR 626.

We find it difficult to see how this matter could assist His Honour in deciding what weight he should give to the matters of family background put to his Honour by counsel in his plea. The applicant had given no evidence about this and his credibility was thus not in issue with regard to these matters. We therefore think that His Honour's discretion miscarried in this regard and that this Court is free to impose the sentence which it regards as appropriate.

In his report to this court the learned Judge said this:

> "My reasons for sentencing Aldersea to a total of six years' imprisonment with a minimum of four years are set out in the transcript. In sentencing Ashman and Flannery I felt that there were reasons for exercising some leniency. I sentenced each of them a total of six years with a minimum of three

> years. I did not feel that there were grounds for leniency in the case of Aldersea. As mentioned in my reasons I considered that such matters which were put in the plea on sentence were to be considered in the light of the way in which he had conducted his defence. (I impute no criticism on Aldersea's counsel or his legal advisers.) He was at least as much responsible for the holdup as Ashman and Flannery and probably was more responsible. As is no doubt apparent from the tenor of this report, I formed an unfavourable impression of Aldersea."

Looking at the matter for ourselves we think that in all the circumstances the sentence His Honour passed upon Aldersea (including the minimum term) was an appropriate sentence. It was what might be called a conventional sentence in that the minimum term was not disproportionate to the sentence itself. His Honour, according to his report, did not feel there were grounds for extending leniency to the applicant, and with this view we are disposed to agree, but not for the reasons given by His Honour. We think that there were circumstances applicable to Ashman and Flannery which were not applicable to Aldersea, and which we are entitled to take into account. The applicant's record was significantly worse than that of the others. He is nearly ten years older than they are. The whole enterprise depended upon the ability of the perpetrators to dispose of the stolen goods, a function which the applicant was able to perform, and by pleading guilty Ashman and Flannery are to be taken as having shown genuine remorse.

We therefore think that the sentence imposed was an appropriate sentence, and that this Court is not inhibited from so deciding by reason of the fact that Ashman and Flannery were given lower minimum terms: cf *R v D'Ortenzio and Burns* [1961] VicRp 68; [1961] VR 432. For these reasons we think that the application for leave appeal against sentence must be dismissed, and the order of the Court is that the application for leave to appeal against sentence dismissed.
