68/1980

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v NEDELKOV

Young CJ, Menhennitt and O'Bryan JJ

3 October 1979

SENTENCING - CHARGES OF THEFT AND ATTEMPTED THEFT BY DECEPTION - PROPERTY TAKEN FROM A FRIEND - PLEAS OF GUILTY - ACCUSED A REFUGEE - QUALIFIED AS A FITTER AND TURNER - ACCUSED HAD PROBLEM WITH ALCOHOL - SENTENCED TO IMPRISONMENT FOR SIX MONTHS ON EACH COUNT TO BE SERVED CUMULATIVELY MINIMUM TERM FOUR MONTHS - WHETHER SENTENCE EXCESSIVE - WHETHER JUDGE SHOULD HAVE CONSIDERED A BOND WITH CONDITION TO SEEK TREATMENT: *ALCOHOLICS AND DRUG-DEPENDENT PERSONS ACT*.

HELD: Appeal allowed. Sentence quashed.
The only option presented to the Judge by counsel was probation. When probation was deemed inappropriate, the appropriate course for the Judge to have taken would have been to release the applicant on a common law bond. A custodial sentence in this man's circumstances was manifestly excessive. In all the circumstances, it is appropriate to allow the appeal and in lieu of the custodial sentence imposed, to order that the applicant be released upon him entering into a common law bond for two years. It will be a condition of his bond that he abstain from all violations of the law for the next two years and that he seek treatment for a period of six months as an out-patient at a treatment centre, within the meaning of the *Alcoholics and Drug-dependent Persons Act*.

YOUNG CJ: O'Bryan J will deliver the first judgment in this matter.

O'BRYAN J: The applicant pleaded guilty in the County Court on 29th August 1979 to one count of theft and one count of attempted theft by deception. He was sentenced on the same day by His Honour Judge Stabey to be imprisoned for six months on each count, such sentences to be served cumulatively. A minimum term of four months was directed to be served before the applicant could become eligible for parole. The applicant has applied to this Court for leave to appeal against the sentence imposed on him on the ground that the sentence was manifestly excessive.

The facts relating to the theft and attempted theft may be shortly stated. On the 14th March of this year Petko Petkov left the bungalow, where he resided, securely locked early in the morning before leaving for work. During the day the applicant broke into the bungalow and stole a radio cassette recorder, a State Bank passbook and a passport owned by Petkov. His actions were observed by a neighbour. The cassette player was valued at about $170. The applicant later sold the cassette recorder. The following day the applicant took the bank passbook to the bank and attempted to withdraw the total credit balance in the account, namely $1,100. However, the bank had been alerted to the theft of the passbook. The police were called to the bank and the applicant was taken into custody. He was interrogated by the police through an interpreter and admitted the offences. In the course of the interrogation he said that he knew Petkov as a friend, that he had sold the cassette player and he had gone to the bank with the passbook to obtain money to pay his bills and send some money home. There is room for suspecting that the applicant drinks alcohol to excess and that he had consumed a considerable quantity of alcohol before he went to the bank.

Before His Honour Judge Stabey the applicant was represented by counsel. No prior conviction was alleged against him. It appears that the applicant was born in Bulgaria and is twenty-seven years of age. He came to Australia as a refugee from Bulgaria late in 1978. He claims that he escaped from Bulgaria and was obliged to leave his family behind in Bulgaria. He was gainfully employed after his arrival in this country for most of the time, due no doubt to the fact that he has a trade qualification of fitter and turner.

During the plea a report prepared by a clinical psychologist was placed before the Court by counsel for the applicant. The clinical history reveals, not surprisingly, that the applicant has

experienced some difficulty settling down in this country. He does not speak English and can only communicate in the Bulgarian and Yugoslav languages. He quarrelled with his fellow countrymen at work over political issues and terminated his employment in March not long before he committed the offences for which he was sentenced by His Honour Judge Stabey. The report relates that the applicant was lonely in this country and he resorted to drinking excessive quantities of alcohol. Mr Healey, the psychologist, expressed the opinion that the applicant should receive treatment for his alcohol problem and that this could be achieved through probation. In the course of the plea before His Honour a priest of the Bulgarian Orthodox Church, the Reverend Popov, was called by counsel. Popov stated that, if the applicant were to be released by the Court on probation, members of the Bulgarian Church would offer him assistance.

During the plea it was revealed to the learned trial Judge that the applicant had been in some kind of trouble with the law in Bulgaria, but not of a serious kind. It is not a matter which should have affected the sentence to be imposed in any way, nor is there anything to indicate that it did so.

In the course of sentencing the applicant, the learned trial Judge referred to the fact that the applicant had stolen property belonging to his friend. This betrayal of friendship did not give him any confidence in the applicant. He also observed that the applicant's conduct since being admitted into Australia showed little gratitude for that opportunity. His Honour was clearly not favourably impressed by the applicant and stated that he was sceptical whether he had been told the whole truth about his background history.

In my view the learned trial Judge was perfectly entitled to regard these offences as having overtones of ingratitude about them, that ingratitude stemming from the fact that the applicant had violated the law of the host country so soon after his entry, and from the further fact that he had stolen property belonging to a person who had befriended him. However, there is nothing before this Court to indicate that His Honour's comments led him to impose a more severe sentence on account of these matters.

Mr Hender, who appeared for the applicant in this Court but not in the Court below, argued that the learned trial Judge gave insufficient weight to the fact that the applicant was a first offender, and ought to have been treated as such, notwithstanding that it had been disclosed to the Court that the applicant had been in some kind of trouble with the law in Bulgaria. He submitted that certain remarks made by the learned trial Judge during the plea and sentence tended to show that His Honour had overlooked the reformative aspect of punishment or had emphasised the punitive and deterrent purpose of punishment at the expense of the reformative aspect.

I do not consider that is a justified criticism of the learned trial Judge. He observed at the time of sentencing:

> "I have to take into account not only your welfare and your rehabilitation, but other factors, including imposing the appropriate punishment and exacting the appropriate retribution and providing a deterrent to other people."

Mr Hender submitted that probation would have been an appropriate course for the learned trial Judge to take with the applicant, firstly because he was a first offender who had little knowledge of English, and secondly because he could be helped considerably by the few friends he has made in the Bulgarian community and particularly by the Reverend Popov. The learned trial Judge came to the conclusion that probation was not appropriate in the circumstances. No doubt he felt that the applicant would prove to be an unsuitable candidate for probation, having in mind perhaps the language difficulty he would experience in communicating regularly with a probation officer. Possibly he was also troubled by the applicant's problem with alcohol.

However, there was an alternative option open to His honour which I consider would have been appropriate and desirable for him to take. In a suitable case a common law bond may be granted to an offender in lieu of probation or a custodial sentence. I consider such an option would have been a desirable course to take in this case, having regard to the following matters.

Firstly, the applicant was a very recent arrival in this country when he committed the crimes he pleaded guilty to, and due regard should be had to that fact with its obvious consequences. He had a turbulent background, having recently escaped from a Communist country, leaving his family behind. No doubt he was experiencing many of the difficulties and anxieties which beset nearly all new arrivals, such as loneliness, insecurity and cultural adjustment. Although unemployment was not a major problem for him because he is a qualified tradesman, he was experiencing some financial difficulty. At least that matter was adverted to when the police asked him to explain his conduct. Also he had turned to alcohol as a means of escaping from his problems.

Secondly, the imposition of a term of imprisonment for twelve months may operate more adversely against the applicant than it would in the case of another person. If the immigration authorities have to consider whether to grant the applicant permanent residence in Australia, the fact that he has been sentenced to a term of imprisonment will become a very serious matter for him. The consequence of the sentence of imprisonment may flow beyond the term imposed with results unintended by the sentencing Judge.

Thirdly, it is not uncommon for a court to impose a non-custodial sentence upon a first offender in the expectation that he will rehabilitate himself and turn away from crime. Such a course is one of the first options a sentencing judge may have regard to.

In the present case the only option presented to the learned trial Judge by counsel was probation. When probation was deemed inappropriate, I consider the appropriate course for the learned Judge to have taken would have been to release the applicant on a common law bond, for the reasons which I have given. A custodial sentence in this man's circumstances was manifestly excessive. In all the circumstances, I consider that the discretion of the sentencing Judge miscarried. It is appropriate, in my opinion, to allow the appeal and in lieu of the custodial sentence imposed, to order that the applicant be released upon him entering into a common law bond for two years. It will be a condition of his bond that he abstain from all violations of the law for the next two years. It will also be a condition of the bond that the applicant seek treatment for a period of six months as an out-patient at a treatment centre, within the meaning of the *Alcoholics and Drug-dependent Persons Act*.

YOUNG CJ: I agree in the judgment which has just been delivered by O'Bryan J and in the course which His Honour proposes.

MENHENNITT J: I also agree.

YOUNG CJ: The order of the Court will be as follows: The application is granted, the appeal treated as instituted and heard instanter and allowed. The sentence is quashed. In lieu thereof the applicant is released on a bond in the sum of $100 to be of good behaviour for a term of two years, on the further condition that he seek treatment as an out-patient for a period of six months at a treatment centre within the meaning of the *Alcoholics and Drug-dependent Persons Act*.
