15/74

SUPREME COURT OF VICTORIA — FULL COURT

R v MITCHELL

Pape, Menhennitt and Nelson JJ

5, 22 March 1974 — [1974] VicRp 75; [1974] VR 625

SENTENCING – CONSPIRACY TO DEFRAUD – OFFENDER ONE OF A NUMBER INVOLVED IN THE OFFENCE WHICH INVOLVED FORGED LETTERS OF CREDIT ON BANKS – OBJECTIVE TO OBTAIN OVER $1 MILLION – SCHEME IMPLEMENTED BUT ONLY PARTIALLY SUCCESSFUL – OFFENDERS SENTENCED TO TERMS OF IMPRISONMENT – RESPONDENT RELEASED ON A BOND TO BE OF GOOD BEHAVIOUR – WHETHER SENTENCE MANIFESTLY INADEQUATE.

HELD: Appeal by the Attorney-General allowed. Respondent sentenced to 18 months' imprisonment and to serve a minimum of 8 months before being eligible for release on parole.
Having regard to the principles which are established in relation to appeals against sentence, the sentencing Judge's discretion miscarried when he released the respondent on a bond. This was a very serious crime and one for which the course taken by his Honour was quite inappropriate. His Honour's conclusion that the respondent played a minor part in the whole affair was plainly erroneous, as was his conclusion that all the respondent did was to drive a car. The crime to which the respondent confessed by his plea of guilty was that of conspiracy to defraud, and the essence of that crime was the agreement of the conspirators to do an unlawful act rather than the acts done in performance of it. It was inaccurate to describe the respondent's role as merely to drive a car. Admittedly he did drive a car but the purpose of his so doing was to collect the money obtained by the front man and the letter of credit on which it was obtained and then to provide the front man with a forged letter of credit so that further moneys could be taken from another branch. The respondent was a trusted and important member of the gang for the entire proceeds of the visits to the branches were to be delivered into his custody and in fact on this particular run the respondent received $21,000, none of which has been recovered. Whilst it may well be true that he was not part of the main brains behind this crime in the sense that he did not conceive the idea or plan the various steps that were to be carried out, he was a very essential cog in the machine. He came from Sydney to attend the briefing and the practice run and was in a position of trust when the plan was put into operation. Had the "brains behind this crime" not provided a "minder" who was to follow the front man and take the proceeds into his possession, and had Mitchell merely been the man who drove the front man to each bank, when the police intercepted Turner, the front man, and his driver the $21,000 which had been collected would have been found in their possession and recovered. As it was, because the police did not know of the presence of the minder the respondent was able to leave the scene with the money. In all these circumstances it is difficult to imagine that Mitchell was not fully aware of the object of the exercise and the part he and others were to play in it. This was a conspiracy of gigantic proportions and it clearly was not a case in which any participant should have been released on a bond.

PAPE J: (with whom Menhennitt and Nelson JJ agreed) This is an appeal by Her Majesty's Attorney-General for the State of Victoria pursuant to s567A of the *Crimes Act* 1958 against a sentence imposed upon one Terrence Robert Mitchell (hereinafter called the respondent) in the County Court at Melbourne presided over by his Honour Judge Dethridge on 15 November 1973, when the learned Judge ordered that the respondent be released upon entering into a recognizance in the sum of $100 to be of good behaviour for five years and to come up for sentence if and when called upon.

Section 567A(1)A provides that:

> "For the purposes of this section 'sentence' in relation to a person convicted on indictment includes... an order that the person be released upon his entering into a recognizance to receive and undergo sentence when called upon."

The respondent was presented along six others, Noel Dennis Doull, Michael Dounis, Lawrence Arthur Johnson, Norman Harold Turner, Alfred Steven Leslie and Neville Charles Robertson. They were charged for that "on divers days in and between the month of November

1969 and 21 March 1970 at Brunswick and at divers places they conspired together and with Kevin John James, Barry Pine, Bob McCormack, John Sharrock and with other persons unknown to defraud the Commercial Bank of Australia Limited by inducing divers branches of the said bank in the said State to part with money upon the presentation of forged letters of credit falsely purporting to be letters of credit drawn upon the branch of the said bank situated at Nelson Bay in the State of New South Wales together with cheques drawn upon the said branch of the said bank falsely purporting to be cheques drawn upon accounts at the said branch of the said bank". The conspiracy with which the accused were charged had for its objective the acquisition of over one million dollars by the presentation of forged letters of credit to various branches of the Commercial Bank of Australia Ltd in New South Wales and Victoria. It was a scheme which was cunningly contrived and ingeniously executed, and the stakes were very high indeed. It would appear that the planners of his scheme have not been brought to trial, but it was suggested that they were residents of Sydney and the names of two men were mentioned.

[The details of the scheme were then considered, a summary whereof is as follows: An account under a false name was opened at the branch of the bank located at Nelson Bay in the State of New South Wales. A letter of credit was then obtained from that branch authorizing the drawing of sums from any branch of the bank to a maximum total of $800. One hundred copies of the letter of credit (in which the amount of credit was altered to $25,000) were then forged. Teams of men then prepared to present the forged letters of credit virtually simultaneously to predetermined branches of the bank. Each team included a front man (who was to present the forged letter of credit to the branch of the bank), a driver and a "minder" (who was to received the money obtained by the front man and the forged letter of credit used and to hand over another forged letter of credit to be used at the next branch). On 20 March 1970 the scheme was implemented but was only partially successful. The respondent was the "minder" for one of the Victorian teams.]

The trial of all of the accused began on 6 April 1972 in the County Court before his Honour Judge Byrne. The accused Doull and Dounis did not answer to their bail and their recognizances were estreated and warrants issued for their arrest. The trial proceeded in relation to Johnson, Turner, Leslie, Mitchell and Robertson, all of whom pleaded not guilty. After the trial had proceeded for some days Johnson, Turner and Leslie changed their pleas, were re-arraigned and each pleaded guilty. On 6 April 1972 Robertson stood his trial and eventually was found not guilty by direction. On 14 April 1972 Leslie (who admitted two prior convictions in the Children's Court in Sydney and in the Petty Sessions Court at Balmain in 1962 for causing malicious injury and for larceny) was sentenced to 18 months' imprisonment with a minimum term of six months. On 17 April 1972 Turner (who admitted seven prior convictions on four court appearances between 1945 and 1947 for office breaking and stealing, office breaking with intent to commit a felony, larceny, unlawful assault and housebreaking and stealing in respect of which in total he was sentenced to 18 1/2 months' imprisonment) was sentenced to five years' imprisonment with a minimum term of 12 months. On 17 April 1972 Johnson (who admitted 10 prior convictions on five court appearances between 1967 and 1969 for larceny, embezzlement and five driving offences in respect of which he was sentenced in all to seven months' imprisonment) was sentenced to five years' imprisonment with a minimum term of three years.

The respondent Mitchell stood his trial, but the jury failed to agree and he was remanded for retrial at the May 1972 sittings of the court. His defence was an alibi in that he contended that he was not in Victoria at the relevant times and he gave evidence that he knew nothing of the conspiracy and was not present at any time on the Eltham run. At this time Doull (who had absconded from bail) had not been apprehended and was not arrested until much later when he was extradited from New Zealand. Mitchell was not re-presented for trial until after Doull had been arrested and on 15 November 1973 Mitchell and Doull were presented for trial before his Honour Judge Dethridge. On this occasion Mitchell pleaded guilty as did Doull. Mitchell admitted 19 prior convictions on four court appearances between 1957 and 1960 for larceny (12 charges), attempted breaking and entering with intent to commit a felony (four charges), a betting charge and two charges of robbery in company. In respect of three of these charges he was sentenced to 18 months' imprisonment and in respect of 13 others to be committed in an institution in New South Wales for nine months on each charge. Mr Bourke appeared for him and made a plea on his behalf. His Honour thereupon ordered that Mitchell be released on his own recognizance of $100 to be of good behaviour for five years and to come up for sentence when called upon. Doull admitted eight prior convictions on four court appearances (all of them in New Zealand) between 1963 and 1966 for resisting the police, disorderly behaviour, assault, causing wilful damage, threatening behaviour, burglary, escaping from custody and receiving. In all he was sentenced

to terms of imprisonment totalling two years and four months. He was sentenced by the learned Judge to two years' imprisonment with a minimum term of nine months. To complete the narrative, Dounis who absconded from bail has not been apprehended and has not been tried, Kevin John James was (as has been stated) given Crown immunity and has not been tried. Barry Pine, who also absconded from bail, has not been found. We were not told what happened to the man McCormack mentioned in the presentment. The man John Sharrock was later arrested in New South Wales and was presented for trial before his Honour Judge Byrne on 14 March 1973. He pleaded guilty and admitted four prior convictions particulars of which were not available to us. He was sentenced to 16 months' imprisonment with a minimum term of six months.

In sentencing the respondent his Honour said:—

> "Prisoner at the bar, you have pleaded guilty to a count of conspiracy and the circumstances surrounding the conspiracy are such that ordinarily you could expect a gaol sentence; this would be so even though it is claimed on your behalf that your part in the whole affair was rather minor. I accept that statement that it was of a minor character. There is nothing to suggest that you did more than drive a car, and certainly nothing to suggest that you were part of the main brains that were behind this crime. It is urged on your behalf that so much time has passed since the offence, that although you were a participant. I should at this stage show you some leniency, and one ground for this, as I understand it, was that your wife was pregnant at the present time, but apparently she has lost that pregnancy. Still it is claimed by the doctor that the strain of the situation is such that her health is being affected. Now ordinarily the effect upon a wife has no influence upon me nor upon any other judge, I would think, but I am prepared to take the view that this and other submissions made by your counsel should be dealt with by my refraining from sentencing you to gaol, which would not have been for a very long period anyway in view of the way one or two of the others involved have been treated; by refraining from a gaol sentence and releasing you on a bond. I have decided that the situation so far as you are concerned is such that this course should be followed. I am influenced by the fact that your last prior conviction was in 1960. I think the stage has been reached where that conviction does not have the weight that it ordinarily would have. The sentence of the court is that you be released upon your own bond of $100, the condition of the bond being that you be of good behaviour for a period of five years and that you come up for sentence if and when called upon. If you take a seat in court that bond will be prepared. [Bond signed and acknowledged.] When you next see that doctor, you can thank him for that report, because I think without it you probably would have served a short sentence. When the court adjourns you can go. We will adjourn until 10 o'clock tomorrow morning."

On the following day his Honour sentenced Doull. In sentencing him his Honour said:--

> "Prisoner at the bar, you have pleaded guilty to a count of conspiracy. You were one of the conspirators who embarked on a grandiose scheme to extract apparently at least a million dollars from a bank. It has been urged on your behalf that you did not play a leading role and that you should be treated with considerable leniency. Even if you were not one of the actual leaders, I think there is material in the depositions in this case which I am entitled to act upon, which suggests that you were one of the leaders. You were not just a man who was going to perform some formal act of driving a car or something of that nature. I think it is essential that you should receive a gaol sentence for your complicity in this very ambitious crime. However, I am aware that some of the perpetrators of this crime have received what appeared to be a fairly minor sentence. I am prepared to be guided to some extent by what has already been ordered to be served by those men. As far as you are concerned, I think a fair sentence would be one of two years with a minimum of twelve months and as to three months of that sentence of twelve months I order that it be served concurrently with the sentence you are at present undergoing. I think I was told when the plea was made, you received six months for not answering your bail. The three months of that twelve months is concurrent with that six months. So in effect you are receiving nine months from me today."

Then there was some question raised as to his Honour's ability to make any part of the sentence concurrent and his Honour then went on to say:—

> "I will give you the benefit of this another way. I reverse what I already said. I am at liberty to fix a fresh penalty as the matter has not been finalized. I sentence you to two years with a minimum of nine months. I cross out any reference to concurrency. Two years with a minimum of nine months, you understand. I intended, as you heard me say originally, that you leave this court with an actual sentence of nine months, but it has been pointed out by counsel for which I am grateful that I am not competent to do it the way I was going to. So I am going to do it another way. You will get two years with a minimum of nine months."

The notice of appeal listed some nine grounds as follows:—

"1. That the sentence was inadequate and inappropriate having regard to all the circumstances of the case and a different sentence should have been passed.

"2. That the learned trial Judge having properly concluded that the offence was of such a nature as to ordinarily warrant a gaol sentence was in error in concluding that there were circumstances in the case which justified the passing of a more lenient sentence.

"3. That the learned trial Judge erred in that he failed to give due or appropriate weight to the serious nature of the conspiracy to which the said Terrence Robert Mitchell was a party.

"4. That the learned trial Judge was in error in concluding that the part played by the said Terrence Robert Mitchell in the conspiracy was of a minor character.

"5. That the learned trial Judge was in error in granting leniency to the said Terrence Robert Mitchell on the ground that leniency has been extended to other prisoners convicted of the same offence in that the circumstances leading to leniency being extended to the other prisoners were circumstances that were not applicable to the said Terrence Robert Mitchell.

"6. That the learned trial Judge erred in that he failed to give due or appropriate weight to the prior convictions that were admitted by the prisoner.

"7. That the learned trial Judge failed to pay due regard to the sentences of imprisonment passed on the other persons who were involved in the aforesaid conspiracy with the said Terrence Robert Mitchell and who had been previously convicted.

"8. That the learned trial Judge erred in failing to give due and sufficient weight to the need to pass a sentence which would be calculated to deter other persons disposed to commit similar offences from committing such offences.

"9. That the learned trial Judge erred in failing to take into account that a substantial part of the money stolen and not recovered was money that had been placed in the hands of the said Terrence Robert Mitchell."

Before us Mr Bourke appeared for the respondent and submitted that the Court should not interfere with the order made by his Honour Judge Dethridge for, *inter alia*, the following reasons:—

1. The respondent is now 32 years of age, married with two children aged respectively seven and four and a half.

2. He has possessed a good character since 1960.
3. Character evidence was called on his behalf.

4. It was conceded by the Crown that Doull played a more active part in the conspiracy than did the respondent.

5. The delay between the disagreement of the jury on the respondent's trial on 6 April 1972 and his being re-presented for trial on 15 November 1973, a little more than 18 months, and the fact that he has been at liberty under the learned Judge's order since 15 November 1973, a period of about four months, made it unjust that he should now be sentenced to a term of imprisonment.

6. Having regard to the sentences passed on the other accused any sentence which this Court might impose must of necessity be a light sentence and that in those circumstances it would be unjust to the respondent to require him to serve such a sentence.

We have given these submissions earnest consideration but we have not found ourselves able to give effect to them. We must apply to this appeal the same principles which are established in relation to appeals against sentence by convicted persons: *R v Butler* [1971] VicRp 109; [1971] VR 892. These principles have been restated by the majority of the Full Court in *R v Taylor and O'Meally* [1958] VicRp 46; [1958] VR 285, and have been consistently applied by this Court. Applying those principles we are of opinion that the learned Judge's discretion miscarried when he released the respondent on a bond. This was a very serious crime and one for which we think that the course taken by his Honour was quite inappropriate. We think that his Honour's conclusion that the

respondent played a minor part in the whole affair was plainly erroneous, as was his conclusion that all the respondent did was to drive a car. The crime to which the respondent confessed by his plea of guilty was that of conspiracy to defraud, and the essence of that crime is the agreement of the conspirators to do an unlawful act rather than the acts done in performance of it. It is, we think, inaccurate to describe the respondent's role as merely to drive a car. Admittedly he did drive a car but the purpose of his so doing was to collect the money obtained by the front man and the letter of credit on which it was obtained and then to provide the front man with a forged letter of credit so that further moneys could be taken from another branch. The respondent was a trusted and important member of the gang for the entire proceeds of the visits to the branches were to be delivered into his custody and in fact on this particular run the respondent received $21,000, none of which has been recovered. It may well be true that he was not part of the main brains behind this crime, as the learned Judge observed, in the sense that he did not conceive the idea or plan the various steps that were to be carried out, but he was a very essential cog in the machine. He came from Sydney to attend the briefing and the practice run and was in a position of trust when the plan was put into operation. Had the "brains behind this crime" not provided a "minder" who was to follow the front man and take the proceeds into his possession, and had Mitchell merely been the man who drove the front man to each bank, when the police intercepted Turner, the front man, and his driver the $21,000 which had been collected would have been found in their possession and recovered. As it was, because the police did not know of the presence of the minder the respondent was able to leave the scene with the money. In all these circumstances it is difficult to imagine that Mitchell was not fully aware of the object of the exercise and the part he and others were to play in it. This was a conspiracy of gigantic proportions and in our view it clearly was not a case in which any participant should have been released on a bond.

In his report to this Court, the learned Judge said:—

> "I have the honour to report that I took the view that the sentence imposed upon Mitchell was reasonably open to me in all the circumstances having regard to the minor role played in the conspiracy by him, the passage of time since the offence and the light sentences imposed upon some of the other conspirators. "As to ground 9 of the notice of appeal, I did not consider that I could reasonably infer against Mitchell that he was more than a courier in all the circumstances. "Despite my final remark to the prisoner the question of his wife's health was a minor factor among those which influenced me in deciding the appropriate sentence."

For the reasons given we cannot agree that the role played by Mitchell was a minor role, nor do we take the view that he was nothing more than a mere courier. The plea of guilty to conspiracy alone shows that he was a party to the conspiracy and not merely an unwitting courier performing a minor role in the execution of the plan which was agreed to and conceived by others. It would appear from what his Honour said in sentencing Mitchell and particularly what he said in the concluding paragraph of his sentence that he was in fact influenced by the health of Mitchell's wife. We of course accept what his Honour said in the last paragraph of his report, that this was only a minor factor which influenced him, but plainly enough he did take it into account and in dealing with a crime as serious as this one was, we think that was a consideration of minimal weight. We therefore think that his Honour's discretion miscarried and that the appeal must be allowed and this his Honour's order that the respondent be released on a bond should be set aside. We think that the appellant has established grounds 1, 2, 3, 4, 8 and 9 set out in the notice of appeal.

In determining what sentence ought to have been imposed upon Mitchell we too must be influenced (as his Honour was) by the light sentences passed on the other conspirators. The accused Leslie who was the driver in Mitchell's team was sentenced to 18 months' imprisonment with a minimum term of six months. Turner who was the front man in that team received a sentence of five years' imprisonment with a minimum term of 12 months. Johnson who was the front man in the Dandenong team was sentenced to five years' imprisonment with a minimum term of three years. Doull who was the minder in the Lilydale team and who played an important part in recruiting other conspirators, and in the organization of the operation, and whose part in the enterprise was conceded by the Crown to have been more active than that of the respondent, was sentenced to two years' imprisonment with a minimum term of nine months. We find it hard to reconcile these sentences, all of which (with the possible exception of the five year sentences passed on Turner and Johnson) we regard as inadequate and quite out of proportion to the

gravity of the crime. Even in the case of Turner we find the minimum term of 12 months hard to comprehend. But we are not concerned with these sentences (for there has been no appeal against them) except to preserve in Mitchell's case some degree of parity with them. Since Doull was dealt with by the same Judge who dealt with Mitchell, it would seem to us that we are constrained to pass a sentence on Mitchell which will not be disproportionate to that passed on Doull, whose part was conceded to be more active in the planning stage than was that of Mitchell.

Although we regard the sentence we are about to impose as inadequate, having regard to these other sentences the respondent will be sentenced to 18 months' imprisonment and we direct that he serve a minimum term of eight months before becoming eligible for release on parole.

The question then arises as to the date from which this sentence is to commence. S122(1) of the *Social Welfare Act* 1970 provides:—

> "Subject to the provisions of this section and s124 sentences of imprisonment or of imprisonment with hard labour shall commence upon and be reckoned from the days following, namely:—
>
> (a) where the sentence is imposed at a sitting of the Supreme Court or the County Court and the court does not otherwise order—the first day of the sitting at which the offender is convicted or pleads guilty; and
>
> (b) in any other case—
>
> (i) where the offender is detained in custody at the time the sentence is imposed—the day the sentence is imposed; or
>
> (ii) where the offender is at large at the time the sentence is imposed--the day the offender is apprehended in pursuance of a warrant of commitment issued in respect of that sentence."

It seems clear that when his Honour ordered that the respondent be released on a bond he was not imposing a sentence upon him within the meaning of this section for a condition of the bond was that the respondent come up for sentence when called upon, although for the purposes of this appeal that order is regarded as a sentence: see s567A(1A) of the *Crimes Act* 1958 to which we have already referred. It would, therefore, seem to follow that the sentence is that imposed upon him by this Court and a literal reading of subs(1)(a) would indicate that that sentence (unless this Court otherwise orders) is to commence from the first day of the sitting at which the respondent was convicted or pleaded guilty. He pleaded guilty and was convicted on 15 November 1973 and the first day of the November sitting was 1 November 1973. That is one possible construction s122(1).

The other possible construction is that subs(1)(a) has no application to cases where the sentence is not imposed by the Court before whom the accused pleaded guilty and was convicted, but was imposed by this Court pursuant to s567A of the *Crimes Act* 1958. In *R v Judge Frederico; Ex parte Attorney-General* [1971] VicRp 51; [1971] VR 425, this Court (speaking of s18(1) of the *Gaols (Commencement of Sentences) Act* 1966 which is reproduced by s122 of the *Social Welfare Act* 1970) said at p429:—

> "The words in s18(1) 'and the court does not otherwise order' are in their setting capable of being satisfied by attributing to them the meaning 'and the court does not order that the first day of the sittings is not to be the date of commencement.' In all the circumstances they should be given that meaning. The extent of the power granted to the court is to order to that effect and not otherwise. If that power is exercised and the condition in paragraph (a) is thus left unfulfilled, the case is one falling within paragraph (b), and then in the ordinary case where the prisoner is in custody the date of commencement of the sentence will be the day the sentence is imposed."

We find it unnecessary to choose between the two constructions to which we have referred. If the first suggested construction is correct it would be contrary to our intention that the sentence we have imposed should be deemed to have commenced on 1 November 1973 so that more than half of the minimum term would have been already served and we would otherwise order. If the second suggested construction is correct then s122(1)(b)(ii) is directly applicable and it is not necessary to otherwise order. We will, therefore, order *ex abundanti cautela* that the first day of the sitting at which the respondent pleaded guilty and was convicted shall not be the date of the commencement of the sentence. The result upon either construction of the section will be that

the sentence will commence at the time fixed by s122(1)(b)(ii), namely the day the respondent is apprehended in pursuance of any warrant of commitment issued in respect of this sentence.

The order of the Court is that the appeal is allowed. The order of his Honour Judge Dethridge whereby the respondent was released on his own recognizance in the sum of $100 to be of good behaviour for five years and to come up for sentence if and when called upon to do so is set aside, and in lieu thereof the respondent is sentenced to 18 months' imprisonment and it is directed that he serve a minimum term of eight months before being eligible to be released on parole.

It is further ordered that the first day of the sitting at which the respondent pleaded guilty and was convicted shall not be the date of the commencement of the sentence, and that the sentence now imposed shall in accordance with s122(1)(b)(ii) of the *Social Welfare Act* 1970 commence and be reckoned from the day the respondent is apprehended in pursuance of any warrant of commitment issued in respect of this sentence. In so far as it may be necessary, direct that a warrant of commitment be issued. Orders accordingly.

Solicitor for the Attorney-General: John Downey, Crown Solicitor.
Solicitors for the respondent: McMennemin and Vassis.
