49/78

SUPREME COURT OF SOUTH AUSTRALIA

R v WHITE and WHITE

Bray CJ, Sangster and Jacobs JJ

31 August 1977

(1977) 16 SASR 571 (Noted 1 Crim LJ 320)

SENTENCING – ACCESSORY AFTER THE FACT TO A FELONY – PARITY OF SENTENCING – WHETHER SENTENCE IMPOSED ON ACCESSORY CHARGE SHOULD BE REDUCED BELOW SENTENCE PASSED ON PRINCIPAL OFFENDER –.

1. In modern times a much more lenient punishment is awarded to the person who is only an accessory after the fact. Instead of being, like accessories before the fact, liable to the same heavy maximum of sentence as the principal, the person is punishable with nothing more than two years' imprisonment.

2. Accordingly, the sentence of being an accessory after the fact should be reduced below the sentence imposed on the principal offender Reed in obedience to the implied command of Parliament.

BRAY CJ: The appellants were charged jointly with one Reed, who was charged with larceny of the car in question. Reed stole the car; the two appellants had nothing to do with that, though they heard him speak about having a key which would fit a parked car and noticed after they emerged from a shop that that car was missing. They went to the premises where Reed was living and helped him to strip it. All that NS White did, according to his statement to the police, was to take some of the bolts off the doors. He said that he was given ineffectual tools and that by the time he had got the bolts off the near rear side door the others had finished their task. WK White said that he took off the alternator and the front passenger door and was allowed to help himself to the headlights, the alternator and the coil for his pains. These were the goods which he was convicted of receiving.

The two appellants are brothers, WK at the time of the offences being twenty-two years of age and NS twenty. Both of them have previous convictions for offences of dishonesty.

The learned judge sentenced Reed to imprisonment with hard labour for a year and to a further cumulative term for a year for another larceny with which the appellants were not concerned. As I have said, WK White was sentenced to imprisonment for a year on each count, the sentences to be concurrent, and NS White to imprisonment for a year on the one count with which he was charged of being an accessory.

The amended ground of appeal in each case is that the sentence, when compared with the sentence passed on Reed, did not reflect the true degree of responsibility of each appellant for the commission of his offence or offences.

The two appellants here were present when Reed talked about stealing the car, they followed close on his heels after he had stolen it, and enthusiastically, if in the case of the younger appellant clumsily set about the task of disintegration. No doubt, too, the learned judge bore in mind that he was going to sentence Reed on the independent charge of larceny, and he may have thought it made little difference whether he sentenced him to a year on each charge or to fifteen months on one and nine months on the other so long as the sentences were cumulative, though I do not say that an additional sentence on a co-offender for an unconnected crime ought to be taken into account on the question of disparity. Reed's record was somewhat worse that of either of the two appellants, but he was the youngest of the three.

I agree, with respect, with what is stated in *Kenny's Outlines of Criminal Law*, 19th ed. (1966) at

p121:

> 'In modern times a much more lenient punishment is awarded to the man who is only an accessory after the fact. Instead of being, like accessories before the fact, liable to the same heavy maximum of sentence as the principal, he is punishable with nothing more than two years' imprisonment.'

I see no reason to interfere with the sentence imposed for receiving, but I think that the sentence of being an accessory after the fact should be reduced below the sentence imposed on Reed in obedience to the implied command of Parliament.

In my opinion, the appeal should be allowed and the sentences of imprisonment with hard labour for one year for being an accessory after the fact to felony imposed on each appellant should be set aside. In lieu thereof there should be substituted in each case a sentence of imprisonment with hard labour for six calendar months to date from the commencing date of the sentences imposed by the learned Judge. The sentence of imprisonment for a year with hard labour imposed on the appellant Wallace Kym White for the charge of receiving should stand, to be served concurrently with the sentence for being an accessory.

Not surprisingly Reed, at least so far as we were informed, has made no complaint as to the lenient treatment meted out to him. Kym and Shane each sought leave to appeal originally on the ground that the sentence ... was manifestly excessive but their counsel conceded before us that that ground – i.e. on the basis of the sentences upon Kym and Shane only – is untenable. I agree that that is so. Before Walters J each added the further ground that his sentence 'when compared with the sentence passed on the principal offender' (Reed) did not reflect the true degree of responsibility of the appellant in the actual commission of the offence.'

Finally the appeal was argued on the basis of the following test found in *Thomas on the Principles of Sentencing* (1970) at pp45-46:

> 'The principle that the sentence need not discriminate between offenders on the basis of factors not immediately connected with the offence must be distinguished from the principle that sentences should reflect varying degrees of responsibility in the actual commission of the offence. This point clearly emerges from the *Great Mail Train Robbery case* where a number of men were sentenced to terms of twenty-five and thirty years for conspiracy to stop a mail and armed robbery. In the cases of the appellants thought to have been primarily involved in the conspiracy, the "inner circle", sentences of thirty years were upheld, the Court making no allowance for variations in record and age, and expressly following *Curbishley* (1965) QB 402 at p408. In the case of other persons convicted, but considered not to have been in the "inner circle", sentences were reduced, the Court saying that "the Court must look at the part played in the conspiracy by the particular person, bearing in mind that in a large undertaking of this kind there may be many different shades of guilt between those who played different parts in the conspiracy". The sentence passed on the particular appellant, whose part in the offence was that or assisting in the disposal of the stolen money rather than participation in the actual robbery, was reduced to fourteen years' imprisonment.'

The Mail Train Robbery case was *Reg. v Boal* (1965) 1 QB 402 at p416 — see particularly per Widgery J at pp416-417 where on the question of sentence his Lordship said that in any given case the Court had to look at the part played by a particular person, bearing in mind that in a large undertaking like the mail train robbery there might be many different shades of guilt, between those who played different parts in the conspiracy, and that as Cordrey's guilt in the matter could fairly be likened to an extremely grave case of receiving where, in the absence of special considerations, the maximum sentence would normally be fourteen years, justice would be served if the sentence of twenty years passed upon him was set aside and a sentence of fourteen years on each count, concurrent, was substituted. It was difficult to distinguish between the cases of Cordrey and Boal and they could fairly be put on par in regard to sentence as in other matters, and, accordingly, Boal's sentence of twenty-one years on the conspiracy count would be set aside and the sentence on Boal would likewise be fourteen years in respect of each count, concurrent.

I put to the appellants' counsel that this surely involved comparison of sentences imposed, or to be imposed, upon several persons convicted of the same offence, but counsel expressly disclaimed any argument based on a comparison with the sentence imposed on Reed.

This seems to me to have left no argument for us to consider. That, I think, is all that needs to

be said. In my opinion, the only apparent error was in dealing too leniently with Reed, which apparent error is beyond correction. I would dismiss both appeals.

JACOBS J: The relevant facts are recited in the judgments of the other members of the Court and it is not necessary for me to repeat them. Having regard to the arguments addressed to us, however, it is necessary to notice the role played by the two applicants *vis-a-vis* the role of Reed who, in the language of the law, was 'the principal felon'. There is evidence that they were both aware of Reed's intention to steal the car. Kym White said that Reed told him 'that he was going to take the food out of the car back at his flat ' and he saw Reed drive the car away; Shane White refers to a conversation with Reed about a key that would fit the car; back at Reed's flat they both helped him unload the groceries out of the car and Kym at least agreed to give a false explanation to Reed's girl friend as to how he came by them both the applicants in Kym's car then followed Reed in the stolen car to a place where it was stripped, a "back-yard" workshop where Shane's car was already undergoing repairs; they both helped in stripping the stolen car; it was thoroughly stripped; and the three men, using Kym's car, then towed it away to be dumped, a useless wreck.

On a bare recital of these facts it is in my view impossible to contend that the sentence of imprisonment for one year was inappropriate. Neither was a first offender; both had previous convictions for dishonesty, Kym for larceny, and Shane for larceny and receiving; their role as accessories after the fact was blatant and far-reaching.

It has been urged upon us, however, that the crime of the 'principal felon' is more serious than that of the accessories, as reflected in the prescribed penalties. There is, in my opinion, no basis in the legislation for such a view. *[His Honour then referred to s268 of Criminal Law Consolidation Act and continued]* ... This section appears to me to indicate a clear legislative intention that an accessory is to be dealt with according to his involvement as an accessory, irrespective of the principal felony, or the fate of the principal felon. The section speaks of any felony, and I draw attention in particular to sub-s(2) which expressly leaves out of account the fate of the principal felon. He may even be pardoned, but that does not mitigate the accessory's crime. Take the present case. Suppose that Reed had been a first offender, in steady employment, with an impeccable background, who had yielded to temptation, perhaps encouraged by others, and who might in such circumstances have been given the benefit of the *Offenders Probation Act*. That could not possibly justify leniency to the present applicants, simply because the principal offence, in some circumstances, carries a higher maximum penalty than the crime with which they are charged. If Parliament had intended that the punishment of an accessory after the fact must be in some way related either to the seriousness of the principal offence or the punishment of the principal offender, it might have been expected to say so in language very different from s268.

Having regard to the grounds of appeal as eventually formulated, it is unnecessary to say very much about the penalty imposed upon Shane White, as compared with his brother, who also pleaded guilty to receiving, for which he received a concurrent sentence of imprisonment also for one year. In the result, they both received the same effective sentence. There can be no doubt that Kym's two offences called for a concurrent sentence, since they were clearly part of the same transaction, it may be that in the circumstances the sentence for receiving was low, or it may be that the learned sentencing Judge thought that the difference between the two appellants was sufficiently reflected by the stigma of two convictions in the case of Kym. Having regard to principles upon which this Court acts in cases of alleged disparity of sentence, I can see no error to justify our intervention. I would dismiss both appeals.
