75/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v KLUBAL

Crockett, O'Bryan and Gray JJ

9 August 1989

SENTENCING – PRE-SENTENCE AND PSYCHIATRIC REPORTS OBTAINED BY COURT – CONTENTS OF REPORTS NOT DISCLOSED TO ACCUSED'S COUNSEL – CONTENTS OF REPORTS ACTED ON BY SENTENCER – WHETHER IMPROPER PROCEDURE – WHETHER SENTENCE VITIATED.

1. Save in exceptional circumstances, a court, before proceeding to sentence an accused person, should make available to the accused's legal advisers, copies of any pre-sentence reports obtained by the court.

***R v Carlstrom* [1977] VicRp 44; (1977) VR 366, followed.**

2. Failure to do so is an improper procedure and may serve to vitiate the sentence imposed.

CROCKETT J: [1] The applicant in this case was presented for trial in the County Court at Melbourne on three counts of theft. She pleaded not guilty to each count, but after a trial which lasted almost a fortnight she was convicted on counts 1 and 2 and acquitted on count 3.

The Judge, after hearing a plea for leniency, remanded her in custody for sentence and indicated that he intended to obtain a pre-sentence and psychiatric report to assist him in determining upon what he thought was an appropriate sentence to impose upon the applicant. In fact, both reports were procured by him and he thereafter sentenced her to one month's imprisonment on count 1 and two years' imprisonment on count 2, thus making an effective term of two years' imprisonment, and he fixed a minimum term of sixteen months.

The applicant now seeks leave to appeal against that sentence upon a number of grounds. By reason of the view of the matter that I have taken, it is necessary to mention one only of those grounds, that is that the sentencing Judge failed to disclose the contents of the pre-sentence reports to counsel for the applicant before he sentenced her.

Before turning to that ground, I should say something very briefly about the circumstances in which the offences came to be committed. The applicant had been employed between 17 October 1983 and 20 August 1986 as a saleswoman in the women's fashion section of the Melbourne store of David Jones Pty Ltd. Over the period from February 1984 until August 1986, when she was dismissed from that employment, she had been taking articles of **[2]** women's clothing and various accessories from the store. The goods taken were apparently removed surreptitiously from the store as the applicant went to and from it in the course of her employment. The offence was fortuitously detected by means quite external to the operation of the store itself. The applicant kept the stolen goods at her home. The goods took up a great deal of space in various bureaux, wardrobes and dressers, and, indeed, quite a number of articles of clothing were stored in the garage attached to the applicant's home. She appears to have made no personal use of the clothing with the exception of a very small number of items which the evidence shows displayed signs of having been worn.

The explanation for the thefts was never forthcoming either in the course of the trial or during the hearing of the plea. Evidence of psychiatrists would suggest that what the applicant did she did because of some mental peculiarity as a result of which she acted merely as a collector of clothes without any intent to turn her criminal activity to any financial advantage to herself.

The question of what motivated the theft was largely the reason for the Judge's seeking the pre-sentence reports. Having received those reports, it would appear from the reasons that he gave for sentence that he acted upon their contents, at least to some extent.

As I have said, the only ground to which I think it is necessary to have regard is that which was based upon the allegation that the Judge, in doing what he did, failed before sentencing to make available to the applicant's legal advisers the reports, or copies of them, so that they **[3]** might take such course as they may be advised in the further interests of their client in the light of what those reports disclosed.

In that connection I am of the view that the Judge followed an improper procedure and it was one which served to vitiate the sentence which he imposed. A similar procedure was adopted by the sentencing Judge in *R v Carlstrom* [1977] VicRp 44; [1977] VR 366. In relation to that procedure in a joint judgment this court there said at p367:

> "After hearing the plea, the learned Judge remanded the applicant for psychiatric report. In due course his Honour was given a report by Dr Bartholomew upon which, as appears from what he said at the time and from his report to this Court, he relied heavily in passing sentence. Unfortunately, however, his Honour did not show that report to the applicant's advisers. Indeed, they were not able to obtain a copy of it until the appeal began in this Court. The failure to make this material available to the applicant's advisers produced a very unsatisfactory state of affairs which, we trust, will never occur again. It is fundamental that, save in exceptional circumstances, counsel for a prisoner should have an opportunity of seeing and commenting upon any material which is provided to the trial judge, although in some cases it is necessary to obtain from counsel an undertaking not to disclose, for instance, a psychiatric report to his client. If there be a case in which the judge thinks that, for some exceptional reason, a report or some part thereof should not be made available to a prisoner's legal advisers, the trial judge should tell them that he has it and should give most explicit reasons for not allowing them to see it."

There was no suggestion in the present case that the Judge deliberately withheld the reports, or copies of them, from the applicant's advisers. On the other hand, he proceeded to sentence without extending to them the opportunity to read and comment if necessary upon their contents. Counsel appearing for the applicant has assured **[4]** this Court from his enquiries from those connected with the matter that the Judge did not, in fact, make available to the applicant or her advisers reports, or copies of them, at any time before the sentence was imposed. Counsel for the Crown has said that he is in no position to deny the accuracy of those assurances. In those circumstances, I think that this Court should act upon them and thus conclude that the Judge has failed to follow the course that the Court in *Carlstrom's* case indicated was the correct one in the circumstances. The Judge has reported to this Court but has not dealt with this particular ground. It was added by leave granted by the Registrar only yesterday and, in consequence there has been no opportunity for the Judge to be advised of that additional ground. In all the circumstances, however, I think that this Court ought not to feel called upon specifically to ask the Judge what observations, if any, he might wish to make upon the matter to which I have referred.

I think that in the circumstances there can be no doubt that the impropriety which I have mentioned is of itself sufficient to lead to the vitiation of the sentence passed. I think that as much was made clear in the subsequent case of *R v Harding*, a decision of this Court, unreported and delivered on 28 October 1983. In that case the learned Chief Justice delivering the judgment of the Court said:

> "It thus appears that no further reference was made during the course of the plea and sentence to the report which the learned Judge had obtained. He had not obtained a report from Pleasant View or a report under the *Alcoholics and Drug-dependent Persons Act*. He had, in fact, obtained a psychiatric report from Dr Bartholomew. As it happened it was a **[5]** report that was very favourable to the applicant, but the applicant's counsel was not made aware of it, nor did he have any opportunity to comment upon it. This failure was a serious departure from what the Court has said in the past is the proper procedure to be followed when reports of this kind are obtained and we think that the failure of the learned Judge to make the report available to the applicant's counsel requires this Court to set aside the sentence imposed by the trial judge and itself to re-sentence the applicant."

And *Carlstrom*'s case is then referred to. Accordingly, I think the ground relied upon has been established.

Turning then to what in my opinion is the sentence which ought now to be imposed by this Court, there are, of course, both some matters operating in aggravation of the offences and some in mitigation of them. The major aggravating feature is, I think, that the goods taken which

are the subject of count 2 (count 1 relating to a single item of clothing only) have been assessed as having a retail value of $100,000. About that this could be said. If that sum is the assessed retail value of goods of this nature, one may, with confidence infer that the cost to David Jones Pty Ltd of the same goods would have been very much less than $100,000. Then, again, although the sum is, of course, substantial – and on any view, the value of the goods stolen and referred to in count 2 must have been not insubstantial – I repeat that the goods were stolen not for the purpose of financial gain, but in some strange way to satisfy the bower-bird mentality with which the applicant is apparently afflicted.

Again, if I can describe it as such, restitution has, in fact, been made inasmuch as the goods have been recovered and returned to their owner. It may well be that in their subsequent disposal they have not or will not recover the same value **[6]** as might have been expected had they been sold at or about the time that they were stolen. I should, of course, add also as an aggravating feature, the undoubted fact that the applicant when doing what she did breached the trust which was reposed in her as an employee of David Jones Pty Ltd.

On the other hand, the applicant is now a woman of 62. She has no prior convictions. She is a married woman living with her husband. Her children are adults and live away from the matrimonial home. She has had in some respects, as the evidence shows, a difficult life. There is in addition, of course, the matter to which I have already referred, that she is, according to the psychiatric evidence, an hysteric who as a result of some mental aberration has been led into the commission of this particular crime. It is a crime which otherwise appears to be motiveless. It is clear enough that at her age and with her limited skills, it is extremely improbable she will now gain other employment. She has had to suffer a lengthy trial followed by almost five months of imprisonment to this date. I think in those circumstances that justice would be done if she were now released upon a common law bond of three years in the sum of $1,000, and I so propose.

O'BRYAN J: I agree. I wish to add nothing.

GRAY J: I agree.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant Klubal: Mr OP Holdenson, counsel. Nicholas J Sevdalis & Associates, solicitors.
