07/74

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v YOLE

Gowans, Nelson and Anderson JJ

21 May 1974

SENTENCING – OFFENDER ON PAROLE AT TIME OF COMMITTING OFFENCE – STATEMENT BY TRIAL JUDGE DURING SENTENCING THAT THE OFFENDER'S LIABILITY TO SERVE OUT THE BALANCE OF THE TERM OF IMPRISONMENT PREVIOUSLY IMPOSED WAS NOT A RELEVANT CONSIDERATION – WHETHER JUDGE IN ERROR.

Application for leave to appeal against severity of sentence of 12 months' imprisonment imposed for attempted abduction of a girl under the age of 16 years. Reference had been made by the trial judge to the fact that the defendant owed the Parole Board 2 years 9 months in respect of a 7-year sentence imposed in 1966 for rape and was not a relevant consideration in selecting an appropriate sentence.

HELD: Appeal refused.

1. In *R v Bruce* [1971] VicRp 80; [1971] VR 656, it was laid down that the policy which was likely to be followed by the Parole Board as to re-claiming an offender was irrelevant and speculation about it was to be excluded from consideration at the time of imposing the sentence. But the fact of the applicant's liability to serve out the balance of term was not an irrelevant consideration in the selection of an appropriate sentence.

2. Having regard to the trial judge's misapprehension, there was a miscarriage in relation to the exercise of discretion by the learned judge. However, that was not a ground for granting leave to appeal against sentence unless the Appeal Court was of opinion that a different sentence should have been imposed.

3. The offence of which the offender was convicted (attempted abduction) was a serious matter, as any parent in the community would regard it, and it was the more serious particularly with a man of the record that the applicant had, notwithstanding the family setting referred to. Attempts of this kind were calculated to set up a situation which could have had consequences far beyond the criminality of the particular actions for which the offender had to answer. The possibility of his having to serve the expired part of the term imposed in 1966 could be regarded, but it did not mean that the sentence which was imposed in this case was excessive. Having regard to all these considerations, the sentence imposed by the learned judge could not be interfered with by the Appeal Court. The application was therefore refused.

GOWANS J: ... The next part of the case is concerned with the application for leave to appeal against sentence. The offence of which the applicant was convicted was of course an attempt to commit an offence under s63(2) of the *Crimes Act* for which the maximum penalty is imprisonment for two years. As an attempt it is punishable at common law, and while there is no fixed limit so far as the punishment is concerned, it is usual to regard the substance of the offence as a ceiling for the penalty for the attempt. The applicant admitted twenty-three prior convictions involving seven appearances before Courts between 1955 and 1960. They were mostly offences relating to dishonesty or in connection with contraventions of the law as far as motor cars were concerned.

But his last conviction on 1st September 1966, was one for rape which earned him a sentence of seven years' imprisonment with a minimum term of five years being fixed before he was eligible for parole. We are told that the applicant was released on 6th November 1970 and that the balance of the term which he was liable to serve at the time of this offence was somewhere about two years four months and some few days. The learned trial judge remanded the Applicant for sentence, requiring a pre-sentence report and a psychiatric report, both of which were furnished. It is hardly necessary to refer to those because they add very little to the picture. But there is one consideration which was adverted to and entered into the factors which influenced the learned judge.

In the course of the plea being made, reference was made to the fact that the accused owed the Parole Board this period said to be two years nine months or thereabouts. But His Honour said:

> "That is not a matter with which I am permitted to concern myself, Mr Lazarus. The exercise is for the discretion of the Parole Board, it has nothing to do with me."

Mr Lazarus said that that was the factual position, but His Honour replied:

> "Well, I don't know what the factual position is. I am bound by authority to deal with the matter which is before me without regard to any possibility as to what the Parole Board may do."

And later, in making his observations at the time of imposing the sentence, the learned judge said:

> "I have been urged to bear in mind that you will be required to serve all or some part of the uncompleted sentence, but, as I said to Your counsel, such matters are not my province."

In saying that, the learned judge was under a misapprehension. He had, as he said in his report, failed to recollect precisely what had been decided in *R v Bruce* [1971] VicRp 80; [1971] VR 656. That case merely laid it down the policy which was likely to be followed by the Parole Board as to re-claiming an offender was irrelevant and speculation about it is to be excluded from consideration at the time of imposing the sentence.

But the fact of the applicant's liability to serve out the balance of term is not an irrelevant consideration. So the position is that the learned Judge was influenced by this misapprehension and he recognised it in his report, although he added in the report that he did not think that he would have imposed a lesser sentence even if he had applied that decision correctly. Having regard, however, to this misapprehension, there appears to have been a miscarriage in relation to the exercise of discretion by the learned judge. However, that is not a ground for granting leave to appeal against sentence unless this Court is of opinion that a different sentence should be imposed.

The submission that has been made here is that there were various circumstances accompanying the committal of this offence which justified a lower sentence being imposed, and indeed, made the actual sentence of twelve months' imprisonment excessive in the circumstances. It was said that no force had been used on the girl who is the subject the charge, and that must be agreed. It said also that there was no physical interference with her, and that, too, must be agreed. Then it was said that it was a pretty half-hearted attempt that the applicant made, which would appear it be so, at all events, he desisted from pursuing it, whether that was because of the situation in which he found himself, whether he intended to only make a half-hearted attempt, is a matter perhaps for speculation. Then it was also said that there was no overt sexual suggestion made to the girl. In that respect we are disposed to agree with the remarks of the learned trial judge when he said:

> "Your method of approach to this young girl and your conversation with her suggests strongly that your motivation was sexual – at least in part."

That observation can stand consistently with the fact that there was no element involved in the charge of intent to have carnal knowledge of the girl.

We take the view that this is a serious matter, as any parent in the community would regard it, and it is the more serious particularly with a man of the record that the applicant has, notwithstanding the family setting we have been referred to. We think that attempts of this kind are calculated to set up a situation which could have consequences far beyond the criminality of the particular actions for which the accused has to answer. The possibility of his having to serve the expired part of the term imposed in 1966 can be regarded, but it does not mean, in our opinion, that the sentence which was imposed in this case was excessive. Having regard to all these considerations, we think that the sentence imposed by the learned judge cannot be interfered with by this Court. The application will therefore be refused.