44/86

SUPREME COURT OF VICTORIA — FULL COURT

R v McGOOKIN and ROBINSON

Young CJ, Fullagar and Tadgell JJ

11 June 1986 — [1986] 20 A Crim R 438

CRIMINAL LAW – DRUG OFFENCES - SELL/TRAFFICK IN CANNABIS L. – SENTENCING CONSIDERATIONS – POLICE INFORMER – SENTENCING OF – WHETHER SUBSTANTIAL DISCOUNT OF SENTENCE WARRANTED – EXTENT OF DISCOUNT.

1. Per curiam: High public policy dictates that prisoners who inform and render assistance of a high order are to be rewarded by a very substantial discount (as high as 50% in a proper case) for what would otherwise be their sentence.

2. Per Tadgell J (Young CJ agreeing): The notion that sentencing for offences involving Cannabis is to be approached on the footing that that drug does not present as a really serious social hazard is quite unwarrantable.

FULLAGAR J: *[After setting out the facts and grounds of appeal not relevant to this Report, His Honour continued]* … **[18]** I turn to the appeals against sentence, and I would like to say at the outset that, in my opinion, the offences on which these two applicants were convicted were very serious offences indeed, and were very serious offences for at least two reasons. In the first place, the crimes were committed to get money by the supply of dangerous drugs to the community and especially to the young. They are drugs which the legislature obviously treats as dangerous because of the penalties imposed. Secondly, it was making money (and a very, very large sum of money was hoped to be made) out of criminal activities, and it is well-known that crime breeds crime as well as violence, and it is to be observed that, even at the site where these plants were growing, there was violence; a man was killed.

I deal first with the applicant McGookin and his application for leave to appeal against sentence. He was sentenced, as I have said, as appears on the presentment, to a total sentence of 5½ years with a minimum of 3½ years. In my opinion, the learned Judge's sentencing discretion miscarried. I accept Mr Langslow's submission that the learned Judge's remarks on sentencing the co-accused, **[19]** Gentile, on 3 April 1986, after His Honour's discovery that the actual maximum sentence applicable was 15 years, rather than the 25 which he had previously thought was applicable, showed that His Honour would have sentenced McGookin to the same overall sentence, that is to say, on both counts, as Gentile, if he had not been under a misapprehension as to the maximum penalty in respect of count 2.

In the course of sentencing Gentile, however, His Honour stated erroneously the sentence he had given on one of the counts to McGookin, but I do not think that matter weakens Mr Langslow's argument in this respect, because I think His Honour has informed this Court, by his sentencing remarks, that he sentenced McGookin on a mistaken basis, and has informed this Court by his sentencing of Gentile that, if he had known of the actual maximum at the time of sentencing McGookin, he would have awarded a different and lesser sentence to McGookin. That to my mind is conclusive in favour of Mr Langslow's submission that the learned Judge's discretion on sentence miscarried. The sentence must therefore be set aside.

It is then, of course, a matter for this Court to re-sentence McGookin. Whilst this Court is not bound by the learned sentencing judge's views, it should, especially in a case of this kind, pay close attention to them. In my opinion it is difficult to show any error by the learned Judge in his conclusion that the applicant McGookin and Gentile deserved about the same sentence. Gentile received a total of 4 years with a minimum of 3 years and there seems to be no substantial reason why McGookin should suffer any heavier sentence, as he has. In my opinion, the authorities relating to parity of sentencing **[20]** require that the sentence of McGookin should be reduced to accord

with the sentence awarded to Gentile. Accordingly, I would propose that McGookin be sentenced as follows: on count 1, 4 years' imprisonment; on count 2, 4 years' imprisonment, and order that the two sentences be served concurrently, making a total sentence of 4 years' imprisonment, and direct that the applicant serve a minimum of 3 years before being eligible for parole.

As to the applicant Robinson, he received a total sentence of 8 years' imprisonment with a minimum of 3 years. At the time of sentencing, the learned Judge misapprehended the maximum penalty fixed by law on count 2 – his belief being 25 years, and the fact being 15 years. It might well be argued that this in itself is so great a margin that it would seem to follow *prima facie* from this alone that His Honour would have awarded a lesser sentence to Robinson if he had known of the much lower maximum. But His Honour made a report to this Court in which he said, as I understand the report, that he would not have awarded any lesser sentence to Robinson even if he had known the precise maximum obtaining.

Mr Kaye of counsel, for the applicant Robinson, has delivered a very forceful and persuasive argument, quite independently of this last consideration, and his argument has persuaded me that Robinson's head sentence of 8 years' imprisonment is too high when one bears in mind that he is a police informer who is likely to have life made very difficult and indeed dangerous for him in prison and who is likely to be kept in high security, quite likely solitary confinement, and when one bears in mind also that he has, at considerable risk to himself, rendered very valuable services to the police and thereby to the **[21]** community in respect of not only these serious offences but in respect of other serious offences and suspected offences.

It is quite plain, in my view, on the authorities, that high public policy dictates that prisoners who inform and who render assistance of a high order, as this applicant has done, are to be rewarded by a very substantial discount for what would otherwise be their sentence. See *R v Lowe* (1977) 66 Cr App R 122; *R v Davies & Gorman* (1978) 68 Cr App R 319; *R v Hayes* [1981] WAR 252; (1981) 3 A Crim R 286; *Hayes v R* (1980) 3 A Crim R 286; *R v Golding* (1980) 24 SASR 161; 3 A Crim R 26; *R v Bruzzese*, unrep, Vic CCA, 8/12/1982 and *R v Paul* (1928) SASR 16. As to the law's long and consistent acknowledgement of the very great service rendered to the police by informers, and of the necessity for encouraging persons to inform, see the authorities collected in the recent civil case of *Signorotto v Nicholson* [1982] VicRp 40; (1982) VR 413.

In my view the learned trial Judge, despite his remarks on sentencing Robinson, did not adequately reflect in the head sentence these considerations, and I think that His Honour's sentencing discretion miscarried for that reason alone, whether or not for other reasons. To give to Robinson, a ringleader, the same sentence of 8 years with a minimum of 6 years as was awarded to Peter Javanovski, who was another ringleader, with prior convictions, but who is not an informer and has not done the things which Robinson has done to earn a discount is, in my opinion, plainly wrong. In my opinion the head sentence ought to be reduced in the case of Robinson to 5 years.

As to the minimum sentence, great difficulty arises. The first thing to observe is that the authorities do take **[22]** into account not merely the services rendered by informers and the risks they take, and the desirability that people be encouraged to inform, but take into account also the hardships suffered by informers in prison and suggest that in a proper case the discount may even be as high as something like 50 per cent. A discount from 8 years with a minimum of 6 to 5 years with a minimum of 3 is very close to a discount of 50 per cent, to which some of the authorities refer as a rough guideline maximum. Of course every case must be considered on it own facts.

In my view, the minimum sentence of 3 years appropriately takes into account the matters that have been urged in favour of the applicant Robinson save for one matter. I would myself think that the piece of advice, or recommendation, that His Honour made to the Parole Board, which might be thought to detract in some way from the low minimum of 3 years, was wrong and should not have been added to that minimum sentence. I would suggest that the appropriate sentence for Robinson is a sentence of 5 years on each count, that the sentences on each count be served concurrently, making a total sentence of 5 years, and that a simple minimum of 3 years be set without any recommendation by way of rider or advice being attached thereto.

TADGELL J: I have reached the same conclusions as those reached by Fullagar J and substantially for the reasons expressed by him. I would add just a few sentences to express my opinion on the scale of gravity against which these offences should be gauged. The crimes for which the applicants were sentenced represented attempts to make huge sums of money out of protracted criminal activity by persons who were members of a team. What **[23]** was being done by them involved, and necessarily involved, a clandestine operation, a substantial degree of secrecy and was calculated to create between the participants distrust and even a degree of enmity. What they were doing was calculated further to breed an incentive to engage in other criminal activity for the purpose of safeguarding and fostering their enterprise. Considerations such as these arise irrespective of the fact that the money-making criminal activity happened to involve the production of and trafficking in an illicit drug. The greater the potential pot of gold the greater the incentive to protect it by desperate measures. It is also notorious that the disposal of a drug such as cannabis up to the point of its ultimate consumption is likely to involve criminal conduct. It goes without saying that the greater the quantity of illicit drug produced by people such as the present applicants, the greater its potential to generate collateral criminal activity.

The potential damage to the community that might be wrought by the applicants' conduct in this case was immense, quite apart from any damage that might be caused to those who consumed the drug in the end. I have taken the trouble to say what is really quite obvious, because there is sometimes expressed the notion that sentencing for offences involving cannabis is to be approached on the footing that that drug does not present as a really serious social hazard. It is a notion that, in my opinion, is quite unwarrantable. The scale of some offences involving cannabis is such that it is not less serious than some offences involving more immediately addictive kinds of drugs, such as heroin. **[24]** The offences now in question might well be regarded as being in that category.

YOUNG CJ: I agree with the judgments which have just been delivered and there is nothing I wish to add. *[His Honour then announced the orders of the Court].*
