44/88

SUPREME COURT OF VICTORIA — FULL COURT

DPP v VOEGELER

Murphy, King and Gobbo JJ

8 April 1988 — (1988) 36 A Crim R 174

CRIMINAL LAW – SENTENCE – DRUG ADDICT – RELEASED ON S13 BOND – ADDICT REQUIRED TO SEEK TREATMENT FOR 2 YEARS – REQUIRED TO ABSTAIN FROM USING DRUGS OF ADDICTION FOR SAME PERIOD – WHETHER SUCH ORDER IN COMPLIANCE WITH ACT: *ALCOHOLICS AND DRUG-DEPENDENT PERSONS ACT* 1968, S13.

Where a Court decides to release a person on a recognizance pursuant to S13 of the *Alcoholics and Drug-Dependent Persons Act* 1968, in addition to the period fixed for the person's seeking treatment in a treatment centre, the Court is required to fix a further term during which the person should be bound to abstain from using alcoholic liquors or drugs of addiction (as the case may be).

MURPHY J: [with whom King and Gobbo JJ agreed]: **[1]** This appeal by the Director of Public Prosecutions is made against sentence imposed upon Herbert Voegeler by a learned County Court Judge who, on 23rd November 1987, sentenced Voegeler to an effective term of four years' imprisonment, fixing a minimum of three years before which he should become eligible for parole. He then in effect suspended the sentence pursuant to s13 of the *Alcoholics and Drug-dependent Persons Act* of 1968, conditioned upon the respondent entering into a recognizance in the sum of $500 for a period of two years, conditioned on his seeking treatment at the Heatherton Hospital Rehabilitation Centre as an in-patient or an out-patient, as the medical centre Director or his nominee should direct, for a period of two years and that he abstain from using drugs of addiction or alcoholic liquor within the meaning of the said Act for the same period, unless with the authority of a medical practitioner **[2]** and that he obey all lawful commands of the said Director or his nominee.

The offences to which the respondent had pleaded guilty at the time were three counts of armed robbery. The case was clearly a case which called for the learned sentencing Judge to balance the well-recognised need for serious and condign punishment of armed robbers against the need to consider the prospects of rehabilitation of the respondent himself. There has been debate at the Bar as to whether or not the case need be shown to be an exceptional case, and it may indeed be a matter of semantics as to whether or not this is an appropriate word to apply when consideration is being given to whether or not a s13 disposition should be applied in the case of armed robbery.

In the present case the respondent had no prior convictions and was aged twenty-seven years. He was a qualified tradesman, an aircraft maintenance engineer, who had finished his apprenticeship in March of 1980. He had, in April 1987, married the girl with whom he had been associating for several years. The offences in question with which the learned sentencing Judge had to deal occurred in a spate between 3rd July 1987 and 24th July 1987. The respondent's wife, it was said, had been a heroin taker and had introduced the respondent to that drug. As the various witnesses who were called on the plea, and the learned sentencing Judge himself observed, this was an important factor for his consideration when determining the respondent's criminality and the failure of his attempts in the past to break with this drug. **[3]** Despite the attempts which the respondent and his wife had made to break from their addiction, it had pursued them and kept its relentless hold upon them. The armed robberies were committed to fund their joint habit. Several witnesses were called on the plea and testified to the good character of the respondent and to his efforts in the past to overcome his addiction. I do not intend to traverse the full details of that evidence.

The robberies were committed by the respondent in the company of other drug addicts who had prior criminal records and the respondent's parts varied, in the case of the first count

driving a get-away car, to collecting the money whilst his fellow offenders terrorised the bank officials and customers in the bank. The crimes, of course, were most serious, and their prevalence amongst drug users renders it all the more important that when an offender is apprehended the sentencing court should give full weight to the need to impose a sentence that would at least be seen as likely to act as a general deterrent. Furthermore, as the learned sentencing Judge himself noted in his reasons for sentence, the terror inspired in the victims of these crimes was such that it was the Court's duty to bear in mind that it should visit crimes of this sort normally with condign punishment. However, we have not yet reached the position in Victoria of saying that every crime of this nature must invariably be visited unconditionally with imprisonment for some years; each case must still be individually considered.

Having carefully read the sentencing reasons of the learned Judge, which I do not intend to set out but which **[4]** I would adopt in the main, I have been unable to find the learned sentencing Judge's discretion erred in any way in deciding to follow the course of granting a s13 disposition in this case. He did not, in my view, fail to give due weight to any irrelevant consideration. His decision was, in my opinion, not only open on the material which was placed before him, but the material demanded that he should consider whether or not to exercise his discretion in the way in which he did. The respondent had at the time when he was sentenced spent from July until November of 1987 in custody, and although some four months, that is altogether too short a time to consider it anything but an indication of intent. Everything in the present case at that time suggested to the learned sentencing Judge that the respondent might be rehabilitated into society if given the opportunity.

Many matters have been traversed before this Court on this appeal, and I do not intend to refer to all of them. The two major issues which arose were whether in the first place the exercise by the Judge of his discretion to grant a s13 disposition amounted to a miscarriage of justice, and secondly, whether the sentences which were imposed by the learned sentencing Judge in respect of each of the individual crimes was inadequate. I have expressed my view in relation to the s13 disposition. In regard to the sentences themselves which were imposed, namely, three years in respect of each one of the armed robberies, it is my view that such a sentence in respect of the crime of armed robbery of the kind set out in this matter was an inadequate sentence. **[5]** In my view, it must be seen the learned trial Judge, whilst not failing in his reasons for judgment to consider any and all relevant matters, must simply have under-estimated the weight which he ought to have given to the heinousness of the offences and to what would amount to an inadequate gaol sentence for such repeated crimes.

In relation to the sentences which were imposed, I would allow the appeal made by the Director of Public Prosecutions and would propose that in place of the sentences in respect of each of the three counts, this Court should substitute on the first count a sentence of four years' imprisonment, on the second count a sentence of five years' imprisonment, and on the third count a sentence of six years' imprisonment, and that six months of the sentence imposed on count 1 and count 2 should be made cumulative with the sentence on count 3, amounting to an effective term of seven years' imprisonment, and I would suggest that a minimum term of five years should be fixed as the term before which the respondent should not become eligible for parole.

Returning to the terms which His Honour the learned sentencing Judge imposed in connection with the bond that he granted under s13 of the Act, Mr Fitz-Gerald, who appeared for the Director of Public Prosecutions, has pointed out, validly in my view, that the bond is defective and does not comply with the terms of the Act in that it does not impose a further term during which the respondent should be bound not to consume drugs of addiction, the words of the Act being: "... and that he abstain from using alcoholic liquors or drugs of addiction unless with the **[6]** authority of a legally qualified medical practitioner for such further period as the Court thinks fit and fixes by the order."

In the present case there has been no mention of the prevalence of alcoholic liquors to which the Court is required to give its attention and in my view it is appropriate in the present case to vary the final part of the order made by the learned sentencing Judge so that it reads:

> "... and that he abstain from using drugs of addiction unless with the authority of a legally qualified medical practitioner for a further period of three years after the two year period, during which the respondent shall remain undergoing treatment at the Heatherton Hospital Rehabilitation Centre".

and I propose that alteration to be made to the bond which the respondent should be asked to undertake. For these reasons my view is that the appeal should be allowed, sentences should be varied in accordance with the terms to which I have referred, that the sentences should be suspended pursuant to s13 of the *Alcoholics and Drug-dependent Persons Act* 1968 upon the respondent entering into a recognizance in the terms of the recognizance which were set out by the learned sentencing Judge, save that he should be required to abstain from taking drugs of addiction unless with the authority of a medical practitioner for a further period of three years beyond the two year period during which he is to undergo treatment at the Heatherton Hospital Rehabilitation Centre.

KING J: I agree and have nothing to add.

GOBBO J: I also agree.
