02/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v KEVIN CAREW and STEPHEN CAREW

Crockett, Fullagar and Hampel JJ

27, 28 November 1990

CRIMINAL LAW – SENTENCING – BURGLARY/HANDLING STOLEN GOODS – PARITY BETWEEN SENTENCES – RELEVANT DISTINGUISHING FACTORS BETWEEN CO-OFFENDERS.

KC., with other offenders, used two stolen motor vehicles to commit burglaries on shop premises taking large quantities of valuable goods. The proceeds from the burglaries were taken to premises occupied by SC. who agreed to store the goods and one of the stolen cars in his garage. Subsequently, KC. and SC. pleaded guilty to offences as charged, and were sentenced as follows: KC. to 6 years 9 months' imprisonment with a minimum of 5 years 9 months plus disqualification of 8 years from driving; SC. to 4 years 3 months' imprisonment with a minimum of 3 years 3 months. Upon applications for leave to appeal against sentence—

HELD: (1) In relation to KC., save for the disqualification period being reduced to 6 years, sentences imposed affirmed. It was open to the sentencing judge:
(a) to allow some reduction of the sentence on one charge because of a co-offender's receiving a suspended sentence of three months' imprisonment;

(b) to distinguish between the sentences imposed on SC. having regard to differences in the nature and extent of the offending and the circumstances of the offenders; and

(c) to order partial cumulation of the sentences, given that the motor vehicle offences were discrete offences compared with the burglary offences.

(2) In relation to SC., having regard to his peripheral involvement in the offences together with certain personal factors, application granted and an effective sentence of 3 years' imprisonment with a minimum period of 2 years before eligible for release on parole imposed.

CROCKETT J: [1] The applicants Kevin Carew and Stephen Carew are brothers aged 28 years and 27 years respectively. They were arraigned in the County Court at Melbourne on a presentment which charged the applicant Kevin Carew with three counts of burglary and two counts of theft and which charged Stephen Carew with three counts of handling stolen goods. Additionally each was by count 1 jointly charged with an additional count of handling stolen goods. Each applicant pleaded guilty to each of the counts on which each was presented. Upon entering their pleas, Kevin Carew admitted 28 previous convictions from 15 court appearances between May 1979 and November 1985 which convictions included 14 for crimes of dishonesty and Stephen Carew admitted 11 previous convictions from eight court appearances between 1980 and 1987. He had two convictions for crimes of dishonesty.

The Judge heard a plea for leniency advanced on behalf of each of the applicants and then sentenced each as follows. On each of the three counts of burglary, Kevin Carew was sentenced to three years' imprisonment. On each of the two counts of theft he was sentenced to two years' imprisonment. On the charge of handling stolen goods he was sentenced to three years' imprisonment. After orders of cumulation were made, the effective sentence was one of imprisonment for six years and nine months, with respect to which the Judge fixed a minimum period of five years and nine months. In addition the Judge directed that one year and nine months of the effective sentence be served concurrently with any sentence then being served by the applicant. In fact the evidence discloses that at that time the applicant Kevin Carew was serving a sentence for arson, the balance of **[2]** which was at least a period of one year and nine months. The Judge further directed that that applicant be disqualified from obtaining a licence to drive a motor vehicle for eight years. The applicant Stephen Carew was sentenced on each of the four counts of handling stolen goods to which he had pleaded guilty to a term of two years. In his case directions as to cumulation produced an effective sentence of four years and three

months' imprisonment, in respect to which the Judge fixed a minimum term of three years and three months. Each of the applicants has sought leave to appeal against those sentences. The applications were heard together.

I turn then to deal with the applicant Kevin Carew's application, but I shall do so after making a brief reference to the facts which formed the foundation for the various charges to which I have referred. Kevin Carew, in company with offenders other than the applicant Stephen Carew, in 1988, with the use of two cars each of which had been stolen for the purpose, carried out burglaries upon shop premises. The offences were committed in the early hours of the morning under cover of darkness when entry was forced into the shops concerned. In two cases a substantial quantity of women's clothing was removed. In the third case a quantity of photographic goods was stolen from the shop premises. These are the burglaries charged in counts 5, 7 and 9. The proceeds from the burglaries were taken immediately upon the completion of the thefts to a garage on **[3]** the premises in which the applicant Stephen Carew lived. He had earlier been asked by his brother if he would make available the garage for the temporary storage of the goods which had been stolen and of one of the stolen cars. Pursuant to the consent that was given to do so, the goods from each of the three burglaries, and one of the cars also, were housed in the garage for several days.

It was this temporary storage in the garage of such goods that formed the basis of the four counts of handling stolen goods to which Stephen Carew pleaded guilty. It was with respect to the proceeds of a burglary other than the three burglaries to which Kevin Carew pleaded guilty, in counts 5, 7 and 9 that he (Kevin) pleaded guilty to the offence in count 1 of handling. The two counts of theft related to the two stolen cars. As to these offences, the Judge, when sentencing Kevin Carew, summarised the course of law-breaking that was involved in the commission of them in these words:

> "Mr Carew, you have pleaded guilty to three counts of burglary, two counts of theft of cars and one count of handling stolen goods. All of these offences occurred during a period of about five weeks in March/April 1988. It seems clear that you are a member of a group or a gang which engaged in burglaries and thefts as a business. It was a highly organised and professional group using modern aids, including electronic gear, using stolen cars and using the garage of a rented house as a storehouse. The raids were carried out, as I understand it, with planning and precision and large quantities of goods valued at tens of thousands of dollars were involved."

Those observations appear to have been fully justified by the evidence concerning the commission of the offences. In support of his application the applicant Kevin Carew relied upon a number of grounds, the first of which amounts to an allegation in effect that the Judge departed **[4]** from the principles of parity when determining upon an appropriate sentence to impose upon this applicant. The argument in that connection was threefold. In the first place it was said that the Judge, in sentencing the applicant to three years' imprisonment in respect of each of the crimes of burglary and also to three years' imprisonment in respect of the crime of handling, failed sufficiently to distinguish between those two types of offences. It was explained in some detail in the course of making the submission why the Judge (so it was said) ought to have drawn a distinction in the penalties imposed so that, accordingly, his failure to do so amounted to judicial error.

It was then said that, with regard to the sentence of three years imposed in relation to count 9 (which was a count of burglary), that was a sentence totally disparate to the sentence of three months' imprisonment suspended for a period of twelve months imposed upon a co-offender, one Wallis, who was dealt with for the same offence of burglary in a Magistrates' Court. Undoubtedly the sentences are disparate. They are disparate because the sentence imposed upon Wallis was wholly inappropriate to the offence to which he apparently pleaded guilty and it was thus a manifestly inadequate sentence. The principle in *Pecora's Case* [1980] VicRp 47; [1980] VR 499; (1979) 1 A Crim R 293 thus, on the face of it, would seem to have required, in relation to that particular charge of burglary, that the applicant should have had some reduction in what otherwise might have been thought to be appropriate in order to assuage his sense of grievance arising from his knowledge that his co-offender had been so mercifully dealt with. It is clear that, as the Judge **[5]** imposed in relation to the remaining counts of burglary the same term of imprisonment as he passed on count 9, he could not on account of that factor have reduced the sentence he otherwise thought appropriate to pass upon the applicant in respect of count 9.

With regard to these two particular arguments, it may be said, I think, that the Judge did not necessarily fail to take into account the matters to which I have referred. He may have determined not to give any overt effect to them, as it were, because he was required, in determining upon an appropriate disposition, to have regard to the principles of totality. He may well have been prepared to give weight to the considerations to which I have adverted, but as in the end he was constrained to pass an effective sentence which he thought was proportionate to all of the offences he might not have been concerned to consider in detail the particular penalty for each individual offence. Thus he might have tailored those sentences in order ultimately to produce an appropriate effective head sentence. I think, for those reasons, it could not be said that the Judge was in error in relation to the two arguments that I have mentioned. Even if I were persuaded there was error which called for correction of those sentences, speaking for myself, I would be of the view that I would not allow such a correction to lead to a different head sentence than that which the Judge considered to be appropriate in all the circumstances.

The third argument under this general ground is that the Judge erred in sentencing the applicant to a term of three years' imprisonment in respect of the joint count of handling stolen goods, whereas the joint offender, his **[6]** brother, Stephen Carew, was sentenced for that same offence to a term of two years' imprisonment. There is, I think, in the circumstances of the offenders, if not of the offences themselves, to be found sufficient distinction to justify the disparity in those two sentences that the Judge saw fit to impose on each of the applicants. I think, then, that this ground dealing generally with the question of parity has not been sustained.

The next ground with which counsel dealt was that the terms of imprisonment with respect to the two counts of theft, relating as they do to the stealing of each of the two cars, ought to have been made wholly concurrent with the sentences for burglary. It was said that the theft of the cars and their use in the burglaries amounted in substance to the one piece of criminal conduct, and that it was therefore appropriate there should be no extension in the term of imprisonment to be served for burglary by reason of the offences of theft of the cars. The Judge ordered partial cumulation in respect of these sentences. It is sufficient in my opinion to say that it was open to him in all the circumstances to have done so on the basis that, notwithstanding the point made by counsel, to some extent at all events, the thefts of the cars were discrete offences as compared with the offences of burglary.

The next ground to which counsel turned his attention was one which asserted that the Judge was in error in holding, as he did, that he was not satisfied that the applicant had determined to give up a life of crime. It was said from the Bar table in the course of the plea for leniency that the applicant had "turned over a new leaf". **[7]** The nature and number of the applicant's prior convictions show that he had devoted himself for a considerable time to a life of crime. He had a poor work record and was not in employment at the time of the commission of the instant offences. It would, thus, be unlikely on the face of it to expect a sudden rehabilitation of the applicant simply because he had been convicted and sentenced for the offences with which the Court is now concerned.

However, it was said that the applicant's attitude towards his rehabilitation arose from the fact that each of two of his close companions – and, it seems, confederates in past crime – had, since the commission of the present offences, on separate occasions been shot and killed by police officers. The circumstances of those two killings are matters of public notoriety and it is unnecessary to say anything further about them. So far as is here relevant, it was said on behalf of the applicant that those events had had such a traumatic effect upon him as to lead to his decision dramatically to change his lifestyle. That assertion was not challenged by the prosecution in the course of argument. The Judge at that stage made no comment upon it. It was said that in those circumstances it was unreasonable for the Judge to have been unpersuaded about the claim as to the applicant's rehabilitation.

In my view, the matter was not one which the Judge was required to consider as not being in dispute, and thus one which did not require evidence to be called in order to make good the claim being made. No evidence on the matter was called, and the matter was left for the Judge to determine what view he should form about it. The onus of **[8]** establishing the claim rested upon the applicant. The Judge simply was unpersuaded that the onus had been discharged. There was no obligation in those circumstances on the Judge to have indicated, prior to the giving of his

reasons for sentence, that the claim being made left him so unmoved that the applicant should, if he wished, call evidence in an endeavour to establish the assertion.

The judgment as to whether or not evidence, whatever its nature might be, should be called was for the applicant's counsel to make. If he chose not to call the evidence he could not thereafter be heard to complain that the Judge found himself unsatisfied as to the proof of the contention sought to be established. I think, therefore, that this ground too has failed.

The final ground is that the sentences imposed, in particular the head sentence, were manifestly excessive. Having regard to the nature and extent of the law-breaking involved, the fact that it occurred in the context of a professional operation described in the terms of the sentencing Judge to which I have already referred, and the applicant's past criminal history, it cannot, I think, be said that the sentences selected by the Judge were in excess of the discretion which was his to exercise in relation to the matter. In particular, it could not, I think, be said that the effective sentence was beyond the limits of that discretion. I would, however, say, with regard to the motor vehicle driving disqualification period, that that would appear to me, in the light of the authority to which counsel directed our attention, to be excessive in the circumstances. I would propose to the Court that the application of Kevin Carew therefore, be dismissed save to the extent that the **[9]** period of disqualification be reduced from one of eight years to one of six years.

I turn now to the application of the applicant Stephen Carew. A number of grounds were argued in support of the application. I find it unnecessary to refer to the majority of them. The grounds include a complaint that the effective sentence was manifestly excessive. Moreover, there was the further complaint that the applicant's effective sentence, when compared with that imposed upon his brother, Kevin Carew, was disproportionately high. The arguments in support of that complaint were in effect, I think, arguments relating to alleged disparity, although, in order to make good the argument, counsel in the end was, I think, driven to contend that the effective sentence imposed upon his client was manifestly excessive. Whether one takes the arguments as amounting to two grounds or as being presented in conjunction so as to amount to one ground, the contentions should, I think, be accepted as having been sustained.

The role which Stephen Carew played in the criminal activities of which some description has been given was, on any view, peripheral to that with which the other offenders were concerned. It is true that he kept secure the garage on his premises during the time it housed the proceeds of the burglaries and one of the stolen cars. Beyond that, it is said – truthfully, I think – that the part he played was totally passive. He was asked for and gave his consent to the use of the garage for the temporary storing of what he knew to be stolen goods. The particularised allegation against him of handling stolen goods pursuant to s88 of the *Crimes Act* which is to be found in the presentment is that he **[10]** "assisted in the retention of stolen goods". It is implicit, therefore, that his criminality consisted of no more than the extension of acts of assistance consisting of the assent which he gave to his brother, acting, no doubt, on behalf of the other co-offenders, to the use of the garage in the manner that I have mentioned.

Then again, there is a good deal to be said for counsel's argument that, as to the offence in count 3 (which related to the assistance in retention of the stolen motor car) and the offences in counts 6 and 8 (which related to assistance in the retention of the proceeds of burglaries that were committed within 70 minutes of each other on the same night and in which the car in question was that used for both of those burglaries), it could reasonably be inferred that the car and the proceeds from both those burglaries were assumed by the applicant to have been placed in the garage that night as the one transaction. Such considerations would seem to attract the need for consideration for total concurrency in respect of those particular offences. Whether the argument was considered by the Judge or not does not appear. However, he failed to direct total concurrency in respect of those particular counts.

Then, so far as the offender himself is concerned, his convictions are fewer in number than those of his brother and involve a great deal less criminality than do those which Kevin Carew admitted. Unlike his brother, Stephen Carew was in regular employment. He was maintaining a home in which he was the breadwinner and he provided testimonials from past employers and acquaintances as to his reliability and honesty.**[11]** Having regard to the substantial difference between the type and number of offences to which each applicant pleaded guilty, the role played by Stephen Carew in the commission of the offences, the fact that the Judge expressly found

that Stephen Carew played no part in the planning of the commission of the offences, and the matters personal to Stephen Carew as compared with his brother, it appears to me that, upon a comparison of the effective sentence passed upon him as compared with that passed upon Kevin Carew, the former sentence is either unacceptably disparate to that passed upon Kevin Carew, or (as it may alternatively be said) it was manifestly excessive in all the circumstances.

I would therefore be prepared to allow the application and I would propose that the applicant be re-sentenced to a term of two years on each of the four counts of handling stolen goods but that four months in respect of the sentence on counts 3, 6 and 8 be directed to be served cumulatively upon each other and upon the sentence passed on count 1, making an effective head sentence of three years. I would propose that a non-parole period of two years be fixed.

FULLAGAR J: I agree on all points.

HAMPEL J: I agree also.

CROCKETT J: The application of the applicant Kevin Carew is granted. The appeal is treated as instituted and heard instanter and allowed to the extent only of varying the period of disqualification from driving a motor vehicle from eight years to a period of six years. The sentences imposed are otherwise affirmed. **[12]** The application of the applicant Stephen Carew is granted. His appeal is treated as instituted and heard instanter and allowed. The sentences imposed below are quashed. In lieu the applicant is sentenced to a term of two years' imprisonment on each of counts 1, 3 6 and 8. It is directed that four months of the sentence passed on each of counts 3, 6 and 8 be served cumulatively upon each other and upon the sentence passed on count 1, making an effective sentence of three years' imprisonment. A term of two years is fixed as that to be served before the applicant should be eligible for parole.

Mr MARIN: Your Honour, I am instructed that I am required by the Legal Aid Commission to request a certificate under the *Appeal Costs Fund Act* for Monday when the matter was listed but not reached. I believe it is 18(1)(d) of the Act.

CROCKETT J: Without deciding whether the provision to which you referred us technically has application to your circumstances Mr Marin, but assuming for present purposes that it does, we are not prepared to grant the certificate.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant K Carew: Mr C Heliotis, counsel. Pryles & Defteros, solicitors. For the applicant S Carew: Mr P Marin, counsel. Pryles & Defteros, solicitors.
