24/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v DONNELLY

Winneke P, Charles JA, Hedigan AJA

11, 12 March 1997 — [1998] 1 VR 645; (1997) 91 A Crim R 550

SENTENCING – PLEA OF GUILTY – EFFECT OF – WHETHER REDUCTION IN SENTENCE FOR SERIOUS OFFENCE – WHETHER COURT MAY ACT ON CROWN CONCESSION FOR DISCOUNT: *SENTENCING ACT* 1991, S5(2)(e).

Section 5(2)(e) of the *Sentencing Act* 1991 provides that a court must have regard to the plea and the stage of the proceedings at which it is entered or an intention to plead indicated. Whilst a plea of guilty may not always result in a sentencing discount, it is a mitigatory factor which cannot cease to be so because there are aggravating features. The assessment of an appropriate discount for a plea of guilty will vary greatly depending on many matters which include the strength of the case against the accused. A court may accept a Crown concession that there should be a discount in sentencing in consequence of a plea.

***R v Hall* (1994) 76 A Crim R 454;**
***R v Gray* [1977] VicRp 27; [1977] VR 225, referred to.**

CHARLES JA: *[After setting out the facts of the offence, the sentencing remarks and the sentence, His Honour continued*]...**[6]** The question then arises whether the learned judge gave the applicant any discount for his plea of guilty. Australian courts have not spoken in unison as to the consequences which should follow a plea of guilty. In Queensland (*R v Cox* [1972] QWN 54) and the Northern Territory (*Miles v R* (1992) 110 FLR 437) it has been said that a plea of guilty could operate in mitigation only so far as it evidences genuine remorse. In Victoria, in *R v Gray* [1977] VicRp 27; [1977] VR 225, the Full Court said this was too restrictive a view. The court said (at p232) that the sentencing judge possesses a discretion of great width, that it would be improper to seek to define or prescribe the area in which that discretion is to operate and that it is for the judge to interpret the quality and implications of the plea. The court took the view that the judge might take a plea of guilty into consideration in the accused's favour notwithstanding an absence of genuine remorse but that as to a plea of guilty by an accused —

> "No doubt great cost to the community in time, convenience and money is thereby saved. However expedient this may be from the point of view of the executive, it is not a matter which requires the sentencing judge to reduce the sentence below that which he otherwise believes to be proper in the circumstances."

Cf *R v Shannon* (1979) 21 SASR 442; *R v Morton* [1986] VicRp 82; [1986] VR 863; (1986) 23 A Crim R 433. On the other hand, in *R v Phelan* (1993) 66 A Crim R 446, Hunt, J, speaking for the Court of Criminal Appeal in New South Wales, said of the plea of guilty there to charges of making false entries in the books of an employer that —

> **[7]** "The plea of guilty — although saving a considerable amount of time and money for the criminal justice system, and underlining the applicant's remorse and contrition — was nevertheless inevitable in this case in the face of the material which was discovered. The applicant is however entitled, by reason of his early admission and plea, to a substantial reduction in the sentence which he receives: *R v Winchester* (1992) 58 A Crim R 345 at 350."

The assessment of an appropriate discount for a plea of guilty will vary greatly depending on many matters which include the strength of the case against the accused. In *R v Hall* (1994) 76 A Crim R 454, Crockett and Southwell, JJ said, at p469-p470 –

> "Furthermore, his Honour appears (in the passages quoted) to have reasoned that the more serious the offence the less mitigatory becomes the plea of guilty. The reasoning is flawed. In this case, the victims have already suffered almost overwhelming trauma. To be called upon to re-live that trauma in the witness box would in itself be at the least highly distressing. The pleas of guilty have excused

the victims from attending court. It may well be said that where crimes of this nature are concerned, the more serious the crimes, the greater the weight to be given to a plea of guilty.

A plea of guilty is a mitigatory factor. Moreover, it is statutorily stated to be so. See s4 (1) of the *Penalties and Sentences Act* 1985 (Vic) replaced by s5(2) (e) of the *Sentencing Act* 1991 (Vic). The latter provision (which is that now in force) states that:

'In sentencing an offender a court must have regard to—
(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so.'

Both provisions were obviously intended to act as an inducement to an offender to enter a plea, furthermore, an early plea, in return for a lesser penalty than otherwise might have been expected to have been passed: see *Morton*, at p867. A court may (although such a case would be rare) elect to give no weight to such a plea. For instance a plea which is no evidence of remorse, is entered at the 'eleventh hour' and is made in a case of overwhelming strength may attract no reduction in sentence. But it will not fail to do so because it is cancelled or outweighed by other considerations of an aggravating nature. A plea of guilty is a mitigating factor. It cannot cease to be so because there are aggravating features. A court's **[8]** attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances."

In the present case the learned judge noted that by the plea of guilty the applicant's formal admission of the crime spared the victim's family and friends the trauma of a trial and demonstrated remorse, a matter confirmed by other evidence. The Crown concession that this entitled the applicant to a discount was accompanied by the acknowledgment that "a great many people have been able to avoid the experience of giving evidence in court". The learned judge's reasons suggest that he accepted that some discount in the sentence should in the circumstances of this case be made for the plea of guilty.

Accordingly I am persuaded, notwithstanding the learned judge's very careful reasons, that the sentence imposed was manifestly excessive. A particular factor leading me to this conclusion is the nature of the crime itself. The advantages of a plea of guilty obviously extend beyond the families involved, the stress which a trial would cause them and the removal of the trauma to which witnesses would otherwise be subjected. That stress is plainly magnified when the trial is for murder. Furthermore the State itself benefits from the guilty plea, as the Full Court noted in *Gray* [1977] VicRp 27; [1977] VR 225 (at p232), and which provides one explanation for the presence of s5(2)(e) in the *Sentencing Act* 1991. These considerations were, I think, implicit in the concession formally made by prosecuting counsel during the plea that "the Crown does concede that the fact that this is this [sic] plea of guilty to the crime of murder justifies a **[9]** discount in relation to the term of imprisonment that the court would impose". Even though the Crown case was a strong one, which must have influenced the applicant's decision to enter a guilty plea, the plea was accepted by the Crown, as well as by his Honour, as a clear indication of remorse.

I do not intend to convey that a plea of guilty must always result in a sentencing discount; cf *Wangsaimas, Vanit and Tansakun* [1996] NTSC 58; (1996) 133 FLR 272; (1996) 6 NTLR 14; (1996) 87 A Crim R 149, at p171. The law is merely that the judge must have regard to the plea and the stage in the proceedings at which it was entered or an intention to plead indicated. Nor do I say that a judge is bound to accept a Crown concession that there should be a discount in sentencing in consequence of a plea, although ordinarily one would expect the judge to give reasons for not acting on such a concession. In this case, however, the Crown made the concession, and the learned judge appeared to accept the concession. The sentencing reasons suggest that his Honour intended to act on the concession. The sentence imposed leads me to conclude, however, that his Honour cannot have done so. I would therefore allow the application...*[His Honour then dealt with the question of sentence.]*

APPEARANCES: For the Crown: Mr G Flatman QC and Mr JD McArdle, counsel. Solicitors: PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr BJ Bourke, counsel. Bullards, Solicitors.
