35/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v SIMMONS

Brooking and Hayne JJA and Ashley AJA

23, 27 June 1997 — [1998] 2 VR 14; (1997) 93 A Crim R 589

CRIMINAL LAW - SENTENCING – YOUNG OFFENDER – INAPPROPRIATE TO SEND TO ADULT PRISON – SUSPENDED SENTENCE IMPOSED AND AN INTENSIVE CORRECTION ORDER MADE – WHETHER COURT EMPOWERED TO MAKE SUCH ORDERS: *SENTENCING ACT* 1991, SS19(3), 27(3).

1. The effect of s27(3) and s19(3) respectively of the *Sentencing Act* 1991 is that a court is not to impose a suspended sentence or make an intensive correction order if the sentence of imprisonment by itself would not be appropriate in the circumstances having regard to the provisions of the Act.

2. Accordingly, where a sentencer formed the opinion that having regard to the age of the offender it was inappropriate to send him to an adult prison, the sentencer was in error in imposing a suspended sentence and making an intensive correction order.

BROOKING JA: **[1]** Ashleigh Lawrence Simmons is now 18. Between June 1995 and August 1996, when he was aged between 16 and 17, he embarked upon a criminal spree in the course of which he committed no less than 27 offences. This brought him before the County Court last October, where, as a first offender, he pleaded guilty to 27 counts in a presentment and indeed four additional charges, all summary charges of unlicensed driving, dealt with by consent.

The presentment contained 18 counts of theft, one of attempted theft, one of armed robbery and seven of burglary. Half the counts of theft concerned the theft of motor cars, as did the single count of attempted theft. Some of the cars were used for joy-riding and then abandoned. Others were used to carry out the armed robbery and a series of burglaries. Some of the cars were damaged and some were stripped of their sound systems, wheels and spoilers. The value of what was taken, quite apart from the value of the cars themselves, was by no means inconsiderable. Some of the property taken from the cars was never recovered. Most of the offences — and I am not here limiting what I say to the thefts — were committed by the applicant in company with other persons. The co-offenders were all dealt with in the Children's Court, with the exception of one Talbot, who was presented along with the applicant, charged with the armed robbery and the related car theft. Most of the burglaries were committed on houses, a stolen car being used to take the offenders to and from the house and remove the spoils from it. The property was usually sold and the proceeds divided between the **[2]** offenders. One of the burglaries was committed on a service station in the small hours, the applicant reversing a stolen car into the glass entrance doors three times to smash them open. On another occasion firearms were stolen. The total value of goods and cash stolen in these offences was many thousands of dollars.

My brief account does not really do justice to the overall antisocial nature of the activities of the applicant and his companions. The judge described the applicant's own actions as cool, calm, determined and deliberate and as displaying a degree of sangfroid which belied his years. The armed robbery was committed on 1 August 1995, when the applicant was aged 16 years and eight months. He was accompanied by Talbot and a 16-year-old male named Nguyen, who provided and carried a loaded sawn-off double-barrelled shotgun. A stolen car was used. The men were equipped with gloves and balaclavas or a beanie. The applicant was a party to this armed robbery, which was committed at a milk bar in which the cash register itself was removed after the proprietor had been struck with the shotgun. The applicant's role was the driving of the getaway car. It was on 16 April 1996 that he was first interviewed by the police in relation to any of the offences. After being charged with a number of offences he proceeded to commit the remaining offences charged on the presentment within a very short space of time, a disturbing feature of this case.

[3] At the time of sentence the applicant was 17 years and 10 months. He had, as I have said, no prior convictions. He lived at home. At the time of the offences he was smoking heroin. A good deal of evidence was called by his counsel on the plea, which I need not summarise. The judge obtained pre-sentence reports in respect of both the applicant and Talbot, one of his co-offenders in the armed robbery. On 1 November 1996 her Honour sentenced Talbot, who was 20 at that time, to a total effective sentence of twelve months' imprisonment for the armed robbery and related car theft and ordered that the sentence be served by way of an intensive correction order. She sentenced the applicant to terms of imprisonment on the 27 counts on the presentment ranging from 14 days to nine months and fined him for each of the summary offences. The details of the sentences need not be mentioned. It is enough to say that cumulation orders were made which produced a total effective sentence of nine months' imprisonment for the armed robbery and related car theft (counts 5 and 6) and a total effective sentence of twelve months' imprisonment on the remaining 25 counts. Her Honour further ordered that the total effective sentence of nine months on counts 5 and 6 be served by way of an intensive correction order and that the total effective sentence of twelve months on the other counts be wholly suspended for two years.

It may be noted that on 4 March 1997 Talbot was brought up before her Honour to be dealt with for breach of the intensive correction order and was in consequence sentenced to three months' detention in a youth training centre on count 5 and twelve months' detention in a youth training **[4]** centre on count 6, making a total effective sentence of twelve months' detention. The provision dealing with breach of an intensive correction order, s26 of the *Sentencing Act* 1991, did not authorise the judge to pass sentences of youth training centre detention in lieu of the sentences of imprisonment originally passed, and counsel were not able to refer us to any other statutory provision which might be said to authorise what was done.

The applicant's notice of application for leave to appeal against sentence contained a number of grounds, none of which need, for reasons which will become apparent, be now stated, for, at the outset of the hearing of the application, the Court raised with counsel what it saw as a difficulty in the reasons for sentence touching the applicant. According to the pre-sentence report obtained by the judge, the applicant was suitable both for a community-based order and for an intensive correction order. Her Honour, having referred to the possibility of a sentence of detention in a youth training centre, went on to say to the applicant: "Your age is such that it would be inappropriate to send you to an adult prison." Later, in the course of explaining the effect of her orders to the applicant, the judge said, in relation to the suspended sentence:

> "If you commit another offence punishable by imprisonment and thereby breach that order, you will come back before me — not a magistrate and not another judge. On that occasion I will listen to what is said on your behalf, but I can assure you you will serve every day of those twelve months and by then you will qualify for imprisonment in an adult gaol."

[5] I think it is impossible to avoid the conclusion that her Honour formed the opinion, an opinion which I should indeed have expected her to form, that, having regard to the age of the applicant, it was inappropriate to send him to an adult prison. The Crown accepts that it is clear this opinion was formed by the judge and, in the circumstances, I think we may properly proceed to consider the point without seeking any further report from the judge. Nor do I think we need go through the formality of having the grounds of appeal amended to cover the point. The Crown accepts that error vitiating the determination to impose a suspended sentence and to make an intensive correction order has been shown.

The difficulty is this: The effect of s27(3) and s19(3) respectively of the *Sentencing Act* is that a court is not to impose a suspended sentence or make an intensive correction order if the sentence of imprisonment by itself would not be appropriate in the circumstances having regard to the provisions of the Act. The language of the two sub-sections differs but this is their substantial effect. Of course, once the court determines that a suspended sentence or an intensive correction order is the appropriate disposition, it follows that a sentence of imprisonment simpliciter is *not* appropriate, but the two sub-sections require the sentencer to consider whether, were it not for the existence of the alternative disposition constituted by a suspended sentence or, as the case may be, an intensive correction order, the imposition of the sentence of imprisonment in contemplation would be the appropriate disposition.

[6] In the present case the judge had very properly, if I may say so, already determined that,

leaving aside the provisions of the Act enabling sentences to be suspended or directed to be served by way of intensive correction order in the community, it would not be appropriate to send this young first offender to prison, notwithstanding the number and nature of his offences and the fact that he was re-offending shortly after being charged with earlier offences. This determination having been made, the statute did not permit the imposition of the kinds of sentence actually imposed, and the applicant was, so far as this Court was concerned, shown, in my view, to be entitled to have those sentences set aside. But this created a great practical difficulty. In the circumstances of this case there was much to be said for the imposition of a sentence of youth training centre detention notwithstanding that the applicant was a first offender. The conduct of the applicant viewed as a whole was such that it might have been difficult to regard a community-based order as an adequate sentence in the light of his offending viewed as a whole. On the other hand, the applicant has, of course, now been at large for some seven months since the judge sentenced him, and this Court would no doubt have hesitated before requiring him now to serve a custodial sentence in a youth training centre.

I interpolate that we were told by counsel that the intensive correction order had not been carried into effect, it having been suspended by the Director-General of Corrections, possibly in consequence of the launching of the application for leave to appeal. The power to suspend given by s24 depends upon the illness of the **[7]** offender or "other exceptional circumstances". We cannot say with confidence on what basis the Director-General acted in this case. I doubt whether it would be right for the Director-General to suspend an intensive correction order by way of granting an informal stay until the outcome of an application for leave to appeal is known, but it may be that this was not the basis upon which the present order was suspended.

Mr Willcox, counsel for the applicant, being aware that the Court was minded to set aside not only the intensive correction order but also the suspended sentence, and being aware of the possibility that the Court might in those circumstances feel constrained to pass a sentence of youth training centre detention, propounded the solution that his client should elect not to pursue his application in so far as it related to the suspended sentence, on the basis that he would be content to have the intensive correction order replaced by a 24-month community-based order. The Crown saw no difficulty about the adoption of this course in the unusual and difficult circumstances of this case, and I think that we may properly, and should, adopt it.

HAYNE JA: I agree.

ASHLEY AJA: I also agree.

BROOKING JA: The order of the Court is that the application for leave to appeal against sentence is granted. The appeal is treated as instituted and heard instanter and allowed. The sentence imposed below on counts 5 and 6 is set aside and the sentences are otherwise confirmed. In lieu of the sentence imposed on counts 5 and 6 the applicant will, in a moment, be placed on a community-based order for a period of 24 months commencing this day.

APPEARANCES: For the Crown: Mr DG Just, counsel. PC Wood, Solicitor for Public Prosecutions. For the applicant: Mr RIE Willcox, counsel. Solicitors: Victoria Legal Aid.
