06/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v LAU

Crockett, Fullagar and Hampel JJ

14 November 1990

CRIMINAL LAW – SENTENCING – CRIMINAL DAMAGE TO PUBLIC PROPERTY – OFFENDER INTELLECTUALLY HANDICAPPED – GENERAL DETERRENCE – WHETHER RELEVANT IN SENTENCING.

Whilst in company with other youths and intoxicated, L., aged 24 years, caused $1010 criminal damage by breaking 383 glass windows of a railway carriage. In the course of the plea, it was said that due to a motor vehicle accident some years earlier, L. suffered head injuries which, to some extent, left him intellectually deficient. The sentencing judge indicated that the prevalence of vandalism of public property called for a sentence which would act as a general deterrent, and accordingly, imposed an unsuspended sentence of 8 months' imprisonment. Upon application for leave to appeal—

HELD: Application granted. Sentence quashed. In lieu, an unsuspended sentence of 4 months' imprisonment imposed.
1. Where there is evidence to indicate that an offender was mentally ill at the time of the commission of the offence, a court may consider the offender not to be an appropriate vehicle for the purpose of general deterrence and accordingly, lessen the sentence which might otherwise be proper.
***R v Anderson* [1981] VicRp 17; [1981] VR 155; (1980) 2 A Crim R 379, applied.**

2. In the present case, the evidence of the offender's mental handicap required that little weight be given to the question of general deterrence and accordingly, served to lessen the sentence which might otherwise have been imposed.

CROCKETT J: [1] The applicant was presented in the County Court at Ballarat on a presentment which contained two counts of damaging property. The jury, after a trial, acquitted the applicant of the charge in count 2 and convicted him of the first count. The applicant by his counsel made a plea for leniency after the applicant, who is now aged 24 years, had admitted 23 prior convictions from nine Court appearances, the great majority of which post-dated the applicant's involvement in a motor car accident to which I shall shortly refer. Three of the prior convictions were for causing wilful criminal damage and one was for being on premises without lawful excuse. The Judge imposed a sentence of eight months' imprisonment on the applicant. It is that sentence with respect to which the applicant now seeks leave to appeal.

There were a number of grounds relied upon in support of the application. That which was put at the foremost of the grounds and which received by far the greater attention from counsel was expressed in these terms:

> "The learned sentencing Judge erred in finding that this was a case where general deterrence was a significant aspect of the sentencing process."

That ground invites some attention not only to the facts which were germane to the commission of the offence, but also to those which relate to the applicant's level of more moral culpability for the law-breaking for which he was responsible.

[2] Dealing first with the facts, they may be stated with considerable brevity. The applicant, along with some other youths, at night between 21st and 22nd January, 1989, and whilst they were, or certainly at least the applicant himself was, intoxicated, entered the railway station yards at Ballarat. The applicant, using a piece of timber he picked up, proceeded to break 383 glass windows of the carriages of a stationary train parked in the yards. Eight of those windows were of frosted glass. In addition, two additional carriages with wood panelling suffered damage. The total cost of the repairs of the glass windows and the wooden panels was estimated at $1,010. The applicant was duly apprehended and interrogated about his part in the offences. He immediately made full

admissions to the police. He gave an account which strongly suggested that the commission of the offences was a spontaneous act. He could give no explanation for his participation in the orgy of vandalism which had occurred, other than that at the time he was, as he said, under the influence of intoxicating liquor.

The applicant was involved as a pedestrian in a motor vehicle accident which occurred on 16th July, 1983. The Court below was furnished with a substantial number of medical reports, all of which dealt with the applicant's injuries that were caused by that accident and the nature, extent and consequences of those injuries. It is clear from the reports that, among other injuries, the applicant suffered a severe closed head injury which caused him to be **[3]** unconscious for about one week. As a result, he suffered brain damage and in particular frontal lobe damage. It is also clear that before the accident the applicant suffered from a measure of intellectual deficit. It is equally clear that that deficit was increased by reason of the brain damage caused by the accident. Subsequent to his involvement in that accident, he has been assessed as being at the bottom of the borderline range of intellectual ability, or merely one point above being a mental defective. Associated with such a condition is the fact that he is barely employable, is easily led and that particularly when adversely affected by alcohol intake, apt to show irresponsibility in his actions.

In the course of the plea counsel emphasised the matters to which I have just referred with a view, of course, to seeking to demonstrate a lessened degree of moral culpability on the part of the applicant for the part he had played in the commission of the offence. His co-offenders it seems have left the State and have not been apprehended or dealt with. In connection with that aspect of the plea to which I have just referred counsel referred the Judge to this Court's decision in *R v Anderson* [1981] VicRp 17; [1981] VR 155; (1980) 2 A Crim R 379. The Judge was asked to treat the applicant with regard to the element of general deterrence as one to whom what this Court said in *Anderson's Case* applied. It is sufficient to make the point, I think, to refer to the relevant passage in the headnote of the case. It is in these **[4]** terms:

> "Where an offender adduces evidence in support of a plea in mitigation to the effect that he was mentally ill at the time of the commission of the offence, whether by establishing legal insanity or mental illness short of legal insanity, a sentencing judge, in considering personal and general deterrence on the one hand with rehabilitation on the other hand, may take into account the offender's mental condition, not by way of any reduced responsibility for the offence but by way of giving little weight to general deterrence, such an offender not being an appropriate medium for making an example to others."

The Judge, if I may say so, appears not to have given effect to the propositions to be found in that passage, notwithstanding his attention's having been deliberately drawn to it. His Honour, in the course of his reasons for sentence, said, among other things, this:

> "It is perfectly plain that you do have problems inasmuch as the results of tests yield the information that you are towards the bottom end of the queue when it comes to intelligence ratings."

However, His Honour went on immediately then to say:

> "I am of the view that the community expects the courts to take some action about activities such as that that you have been engaging in. I am confident that I am correct in saying that the community's patience with people who deliberately vandalise public property has expired and I believe that I need to balance the factors of community expectation, your prior history, together with your disabilities, and as your counsel has correctly said in a very ably presented plea, you pose a difficult sentencing problem."

The Judge then indicated he wished to think further about the matter and accordingly the matter was stood over for some two days. **[5]** In the passage to which I have just referred it may be said that the Judge was indicating that the question of general deterrence was a matter to which consideration had to be given by him in his selection of an appropriate sentence. The matter, however, is by no means clear. The brief further reasons for sentence which on the adjourned day were given by the Judge include this sentence:

> "The community is entitled to have this brought to a stop, whether or not it deters others is a matter for them in the end, but in your case you have conducted yourself so that the courts have run out of options."

That passage I think does indicate, although again it is not I think totally clear, that the Judge was determined not to lessen the sentence which otherwise might be proper by reason of the applicant's not being an appropriate vehicle for the purpose of general deterrence. In any event, the Judge, if he took the view that *Anderson's Case* was inappropriate to the present case, has given no reasons as to why he took such a view or why he thought that this case was one in which it was possible properly to depart from the application of what the Court has said in *Anderson's Case*.

For those reasons I am of opinion that the Judge's sentencing discretion miscarried. There is, I think, disclosed in what the Judge has said to which I have referred *verbatim* identifiable sentencing error. I am fortified in coming to that view by the fact that counsel for the Crown did not, I think, attempt to justify what it was the judge had said in the course of his reasons for **[6]** sentence. Counsel was, I believe, concerned to do no more than to seek to persuade the Court that the sentence which ultimately was imposed should not be held to be manifestly excessive.

In those circumstances, it becomes necessary for this Court to re-sentence the applicant. In doing so, for my part I would act upon the principle to be found in *Anderson's Case* and to which I have referred. I would, after taking into account all of the relevant matters that act in mitigation, as well as those, too, that operate to aggravate the offence, I conclude, after considering all of the possible alternative sentencing options, that the case was an appropriate one for the imposition of a term of imprisonment and I would propose that in lieu of the sentence passed below the applicant be sentenced to a term of four months' imprisonment.

FULLAGAR J: I agree.

HAMPEL J: I also agree.

CROCKETT J: The application is granted. The appeal is treated as instituted and heard instanter and allowed. The sentence below is quashed. In lieu the applicant is sentenced to a term of four months' imprisonment.

APPEARANCES: For the Crown: Mr N Papas, counsel. JM Buckley, Solicitor for the DPP. For the applicant Lau: Mr SA Shirrefs, counsel. Dobson Morrow, solicitors.
