

04/86

SUPREME COURT OF VICTORIA — FULL COURT

DPP v LARDIERI

Young CJ, O'Bryan and Brooking JJ

30 September 1985

SENTENCING – SELLING/TRAFFICKING IN DRUGS OF ADDICTION – PREVIOUS CONVICTIONS FOR SIMILAR OFFENCES – SENTENCING CONSIDERATIONS – APPROPRIATE PENALTY.

L. was convicted of two counts of selling heroin and one count of trafficking in heroin, and sentenced to a total effective sentence of 18 months' imprisonment concurrent with the sentence he was then undergoing with three months minimum before being eligible for parole. L. admitted two previous convictions relating to the selling and possession of heroin. Upon appeal by the DPP against the sentences imposed as being manifestly inadequate—

HELD: Appeal allowed. Sentence quashed. Six years' imprisonment substituted with a minimum of 3½ years before eligible for parole.

(1) Whilst rehabilitation of an offender is a matter of importance, general deterrence is of primary importance in respect of those who sell and traffick in drugs of addiction.

(2) In view of the defendant's prior conviction for a similar offence and the circumstances surrounding the trafficking offence, a severe custodial sentence with an appropriate minimum term was called for.

YOUNG CJ: (with whom O'Bryan and Brooking JJ agreed). [1] This is an appeal by the Director of Public Prosecutions, pursuant to s567A of the *Crimes Act*, against a sentence imposed on Alfonse Lardieri in the County Court on 31st July this year.

On that day the respondent was presented on a presentment which contained three counts. The first two counts charged him with selling heroin contrary to the *Poisons Act*, and the third count charged him, with two other persons, with trafficking heroin. The respondent pleaded guilty to each count and after a plea had been made by counsel on his behalf he was sentenced by the learned trial Judge to twelve months' imprisonment on the third count. An order was made that the sentence imposed on [2] counts 1 and 2 should be served concurrently with the sentence imposed on count 3, producing a total effective sentence of eighteen months. It was further ordered that that effective sentence be served concurrently with such sentences as the respondent was then undergoing, and an order was made that he should serve a minimum period of three months before being eligible to be released on parole.

The sentence which the respondent was undergoing at the time was a total of forty-nine months, which had been imposed upon him in December 1983; first of all, on 12th December on thirteen charges in relation to cheques and, secondly, on 21st December on eighteen charges in relation to cheques, the total minimum term of the sentence imposed on those dates being seven months.

By reason of the fact that he had broken his parole and had been reclaimed by the Parole Board, he was required to serve a further portion of that sentence by the Parole Board. The parole which was broken by the offences for which he was sentenced in December 1983 was a sentence of eighteen months which had been imposed upon him in June 1982 when he was convicted in the Magistrates' Court at Prahran on two charges of selling a drug of addiction, namely heroin, and on a further charge of being in possession of a drug of addiction, namely heroin. Those sentences were imposed on 8th June 1982; he was released in August or September 1982, therefore, owing the Parole Board a total of fifteen months, or thereabouts.

The offences with which we are now concerned were committed in May and June 1983, when the respondent was arrested and bailed, and he was then finally reclaimed by the Parole Board in November 1983. [3] The facts relating to the present offences can, I think, be very

shortly stated. The first two counts, which allege sales of heroin, were established by evidence of what might be called street sales. The respondent was approached in a cafe by two men who subsequently turned out to be police officers, and the respondent offered to sell heroin to the two officers for \$50 a cap. Initially, the respondent told the police officers that he could not sell them only two caps but ultimately one of the officers handed the respondent \$100 in exchange for two small paper envelopes containing white powder which was subsequently analysed as containing heroin.

Those events took place on 23rd May 1983. On 1st June 1983, one of the police officers, this time in company with a different second officer, located the respondent in Fitzroy Street, St. Kilda, and when approached, the respondent asked him whether he wanted to score, to which the police officer replied that he did. An elaborate series of events, moving about in cars, then took place but in the end again \$100 changed hands and some white powder in something called a small foil was ultimately handed over and found to contain heroin. So much for the first two counts. The third count which, as I have already stated, was with regard to trafficking, was of a different character altogether. One of the police officers, this time with a policewoman, again arrived in Fitzroy Street, St. Kilda, and spoke to the respondent, telling him they wished to buy about \$10,000-worth of heroin. The respondent told them that he could not supply that amount himself but that he would be able, in effect, to arrange it and an appointment was made [4] for two days later, in the afternoon, when the respondent met the police again. The details of what then occurred are again somewhat elaborate but, for present purposes, it is sufficient to say that the respondent introduced the police officers to a man named George Scott – one of the co-accused on the third count – one who has not yet been dealt with. Scott, in due course, produced a bag of white powder which he said was heroin, and he asked \$5,000 for it and said that he would produce another bag for which a further \$5,000 would have to be paid. At this point other police officers surrounded the car in which the undercover police, the respondent and Scott were seated and they were arrested and taken for interview.

The Director of Public Prosecutions appeals against the sentences imposed upon the respondent upon the ground that having regard to all the circumstances the sentences were manifestly inadequate.

In the course of passing sentence the learned Judge observed first of all that the respondent was a small-time operator and that he sold heroin in order to fund his own habit, an addiction to that particular drug. Whilst that observation in a sense is justified, it is clear from the brief resume of the facts which I have given that the respondent was prepared to move into a much larger operation by introducing the police to someone who could supply \$10,000-worth of the drug.

Secondly, His Honour said that he was satisfied that the respondent was not a person who had large stocks of heroin for sale, and no doubt that conclusion was entirely justified. [5] Thirdly, His Honour said that it was not unimportant that "the police were acting as agents provocateurs clearly not so much to catch you but to ensnare bigger fish in the pond". Again that observation was no doubt justified. No doubt the objective of the police was to catch some of the bigger dealers in this pernicious trade, but although that might have been the object of the police, it cannot in my view have much influence upon the proper sentence to be passed on the respondent for the offences of selling and trafficking in the drug.

A little later in His Honour's observations His Honour referred to the fact that the respondent had already spent time in gaol and been denied the opportunity of parole because of these present charges, and for that reason His Honour felt able to take a more lenient view as to sentence than would otherwise have been appropriate. It seems clear that it was that view that led to His Honour's imposing the very, very light sentences which he did impose. In my opinion, His Honour fell into error in that respect.

His Honour referred to the respondent's being denied the opportunity of parole. In so saying, His Honour was evidently assuming that had the respondent not been charged with the present offences he would have been granted parole by the Parole Board. That seems to me to be an impermissible speculation as to what the Parole Board might have done, and further than that, it would seem that His Honour treated the fact that the respondent was not on parole as

though he were serving a sentence for the present offences. Having said as much, His Honour then added: "I think now your rehabilitation back into the community is of paramount importance".

[6] Undoubtedly rehabilitation of an offender is a matter of importance, but it has been said time and again that in the case of drug offenders, those who sell drugs and those who traffick in drugs, general deterrence is of primary importance, and in my view the learned Judge did not give sufficient weight to that consideration when passing these sentences.

I have referred already to some of the respondent's previous convictions. Those were the one in 1982 when he was convicted of selling heroin on two counts and on a further count of being in possession of heroin. Earlier than that he had had two previous convictions, one of them in 1977 for being in possession of Indian hemp. I am bound to say that over the years he appears to have been very lightly dealt with for these offences. In particular, the offences in June of 1982 of selling heroin attracted a sentence of only nine months on each charge and a very, very low minimum term of three months. What is perhaps more significant is that notwithstanding those convictions the present offences were committed in 1983 when he must have been on parole for the offences committed in 1982.

A further observation I make is that the minimum term fixed by the learned trial judge in the present case, of three months on a total effective sentence of eighteen months, seems to me to be quite disproportionately low. It is not right to be rigid about the fixing of a minimum term any more than it is right to be rigid about the fixing of any sentence, but the difference between eighteen months and three months seems to me, in the circumstances, to be altogether too great. **[7]** I therefore think that the learned Judge's sentencing discretion miscarried and that this Court should re-sentence the respondent accordingly. Like any sentencing task, it is a difficult one. The sale of heroin is a very great social evil. It must be met with severe punishment. When it is committed by someone who has already been convicted for the same offence, it must attract more than a nominal custodial sentence. Further than that the third count, of trafficking, is one which varies greatly in severity and seriousness, but in the particular case of this respondent demonstrated, I think, that he was prepared to move into a much bigger area of operations than he had previously engaged in. For someone already convicted of selling heroin, and someone who had been very leniently dealt with, that consideration must, in my view, attract a severe custodial sentence.

For those reasons I would propose to the Court that the appeal be allowed and the sentence imposed upon the respondent quashed and in lieu thereof the respondent should be sentenced on the first count to a term of three years' imprisonment; on the second count to a term of three years' imprisonment; and those two sentences should be served concurrently; on the third count the respondent should be sentenced to five years' imprisonment. Further order that two years of the sentence on counts one and two should be served concurrently with the sentence on count three, making a total six years' imprisonment, and I would further direct that a minimum term of three and a half years be served before the respondent should be eligible to be released on parole.

[8] O'BRYAN J: I agree.

BROOKING J: I agree, for the reasons given by the Chief Justice, that the appeal should be allowed. I would myself be disposed to pass somewhat higher sentences than those proposed to be imposed by the Chief Justice, but the resulting total effective sentence would not differ substantially from that imposed and I am content to concur in the order which commends itself to the other members of the Court.