25/75

SUPREME COURT OF VICTORIA — FULL COURT

R v CLUNE (No 2)

Gowans, McInerney and Nelson JJ

11-13 February 1975 — [1975] VicRp 73; [1975] VR 737
(Note: The VR Report does not include the question of identification by suggestion)

CRIMINAL LAW – IDENTIFICATION – WITNESS IDENTIFIED THE ACCUSED FROM A PHOTOGRAPH OF THE ACCUSED WHICH HAD THE ACCUSED'S NAME ON IT – WHETHER THE TRIAL JUDGE SHOULD HAVE REJECTED THE EVIDENCE.

SENTENCING – ACCUSED SPENT 18 MONTHS IN GAOL AWAITING TRIAL – TRIAL JUDGE DID NOT REDUCE THE HEAD SENTENCE BUT REDUCED THE MINIMUM PERIOD TO BE SERVED BEFORE ELIGIBLE FOR PAROLE – WHETHER SENTENCING JUDGE IN ERROR.

HELD: Appeal allowed. Head sentence reduced.
Identification:
1. If a witness whose previous knowledge of the accused has not made him familiar with his appearance has been shown the accused alone as a suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence direct or circumstantial.

2. Identification evidence does not become inadmissible merely because circumstances exist which may affect its reliability. The weight to be attached to such evidence is a matter for the jury, and questions as to its weight can seldom if ever be a ground for its exclusion. Nor will an appellate court necessarily set aside a verdict which may have been based upon identification evidence which may have been tainted with some impropriety, or unfairness, or other unsatisfactory feature. The Court must be satisfied that upon the whole evidence the verdict ought not to stand. What is essential is that the jury should be clearly warned of the dangers implicit in the evidence.

Sentence:
3. If in a particular case the time spent by an accused person in custody awaiting trial is to be taken into account in fixing the term of imprisonment which he is to serve, it should be taken into account in fixing the substantive sentence. If a minimum term is fixed, the judge will no doubt have regard to the time which has already been spent in custody in determining the desirable length of the minimum term, but that does not mean that the time spent in custody should be excluded from consideration in determining the substantive sentence. According to the circumstances, the judge may or may not attach the same significance to the time spent in custody, when considering the appropriate substantive sentence and when considering the length of the minimum term. The substantive sentence however is the sentence which the offender is liable to serve, and if it is proper that because of the period which he has already spent in custody he should obtain some mitigation of the sentence which would otherwise have been imposed, then that fact should be reflected in the sentence which he is liable to serve for the offence which he has committed.

NELSON J delivered the judgment of the Court (Gowans, McInerney and Nelson JJ): The applicant, Brendan John Clune, together with a co-accused, one Donald James Marshall, was convicted in the County Court at Melbourne on 22 November 1974, before the late Judge Coleman, on a charge of robbery under arms. He was sentenced to imprisonment for a term of eight years, and the learned judge directed that he serve a minimum term of three and a half years before being eligible for parole. He seeks leave to appeal both against conviction and sentence. [The Court then dealt with the grounds of appeal against conviction and held that the application for leave to appeal against conviction should be dismissed.]

[Identification by Suggestion: A witness Murray, who did not previously know the appellant, intercepted Clune in a motor car with weapons and disguises similar to those used in the robbery. One week later Murray identified a photograph of Clune from amongst 100 other police photos, but the photograph had the appellant's name on it.. His Honour continued] ... Mr Casey, for the applicant, initially contended that the evidence

should have been excluded by the Judge in the exercise of hid discretion on the ground that it was of little or no weight, and its prejudicial effect to the applicant would be out of all proportion to its evidential value. See *Noor Mohamed v R* [1949] AC 182; [1949] 1 All ER 365; 65 TLR 134; 93 Sol Jo 180. He concluded, however, that if the evidence of identification were accepted its probative value in support of the Crown case was considerable, and that his real attack upon it was that because of the criticisms to which it could be properly subjected, in particular, the fact that the witness had been informed that the applicant was one of the men involved before he had identified the photograph of the applicant, it would not be reasonably relied upon, and that either it should have been rejected by Judge or the Judge should have directed the jury that they could not rely upon it.

He relied upon a passage in the reasons for judgment of his Court in *R v Davies & Cody* [1937] VicLawRp 47; [1937] VLR 226 at p228, where the Court said:

> 'It is the duty of a Judge presiding at a criminal trial to be closely observant of the conduct of the police as it appears from the evidence. Should he find anything to reprobate he does not as a rule hesitate to say so, and should he find that any witness has been so handled that his evidence has been affected by pressure or suggestion or trick, he will apply the appropriate remedy of rejecting the evidence. An illustration of the education of a witness in this way is to be found the facts of the case of *R v Dickman* (1910) 5 Cr App R 135; (1910) 26 TLR 640. We can find nothing of this kind in the evidence before us.'

Mr Casey contended that the reasonable inference to draw from the evidence was that Murray's identification had been affected by suggestion, and therefore on the basis of the citation from the Full Court's Judgment, the Judge should have rejected the evidence.

It does not appear to us to be necessary to examine the precise limitations or implications involved in the passage cited, particularly when it is viewed in the light of the evidence as to the circumstances of the various identifications in that case, and the fact that the Court could find nothing in such evidence to which its observations would apply. There may be cases in which a Judge may be entitled to take the extreme course of excluding evidence of identification on the ground that it was obtained by unfair means, but the evidence in this case fall far short of that which would be necessary to warrant such a course. The case of *Davies & Cody v R* went to the High Court where it is reported at [1937] HCA 27; (1937) 57 CLR 170, and the appropriate principles to guide in appellate court in determining whether a conviction should be set aside because of alleged deficiencies in identification evidence were there discussed. It is appropriate before citing certain of those principles to recite the facts as to the identification with which the Court was dealing in that case. Those facts are set out at p178 of the report as follows:

> 'The prisoners were arrested about nine months after the date of the crime. None of the witnesses who identified them or either of them claimed any previous knowledge of the prisoner . But when after the prisoners were taken into custody, it was desired to ascertain whether the witnesses could identify either of them, none of the precautions was taken upon which the English Court of Criminal Appeal has so long insisted in such circumstances. The prisoners were not placed in company with other men, but each was shown singly to the witness, who was asked to say whether he was one of the men in question. In some cases this was done at the detective office, in other cases when the prisoners were in the dock at the police court charged with the crime for which the identification was sought. In one case, although the prisoners were in custody in the Metropolitan Gaol, the witness was shown some photographs from which he picked out one of the prisoners, and some days afterwards, when that prisoner was brought up to the police station, he was shown him singly for the purpose of identifying him.'

The Court then pointed out that in the case before it the learned Judge who had tried the prisoners left the matter to the jury without any definite warning of the dangers which such a method of identification was in other jurisdictions considered to involve.

The Court then went on to deal with the approach which had been made to identification cases in the Courts in England and the view which had been taken by the Court of Criminal Appeal as to the circumstances in which a conviction should be quashed because of defects in that evidence and after saying that some of the observations made in those cases went beyond the decision in the particular case involved, the Court said this:

> '... in each case the question must be, not whether the identification has been conducted with propriety and fairness, but whether upon the whole evidence as it in fact existed when it came to be laid before the jury, and having regard to the treatment of the matter at the trial, the actual verdict ought not to stand because a miscarriage of the kind described occurred.'

The Court at a later stage referred to the different procedure which has been adopted in Victoria from the procedure adopted in England, and expressed the opinion that the view accepted in England should be applied in Victoria. At p182 the judgment proceeds:

> 'That view, as we understand it, is that, if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone as a suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence direct or circumstantial.'

The Court went on:

> 'As the responsibility for convicting must rest with the jury their appreciation of the question is an important consideration, the question is an important consideration, and in a case where the method of identification is open to the objections we have discussed, they should be clearly warned of the dangers, which according to the accepted view, do exist.'

And at the end of the judgment which was a joint judgment of the five Justices constituting the Court, the Court said, (and this passage is of significance having regard to the circumstances in which identification had taken place in that case): -

> 'We are clearly of opinion that, notwithstanding the mode of identification adopted, the evidence is enough to support a conviction if there were a proper warning to the jury.'

The passages we have cited make it clear that identification evidence does not become inadmissible merely because circumstances exist which may affect its reliability. The weight to be attached to such evidence is a matter for the jury, and questions as to its weight can seldom if ever be a ground for its exclusion. See *R v Donnini* [1972] HCA 71; (1972) 128 CLR 114 particularly at pp119, 138 and 146; [1972-73] ALR 1093; (1973) 47 ALJR 69. Nor will an appellate court necessarily set aside a verdict which may have been based upon identification evidence which may have been tainted with some impropriety, or unfairness, or other unsatisfactory feature. The Court must be satisfied that upon the whole evidence the verdict ought not to stand. What is essential is that the jury should be clearly warned of the dangers implicit in the evidence."

[Minimum Sentence: The trial Judge took into account the facts that the accused had spent 18 months in custody awaiting trial; that he played a minor part in the robbery: and that his antecedents were minimal in comparison with his co-accused. The Judge reduced the minimum term to served before parole rather than the substantive sentence. His Honour continued] ... It remains to deal with the application for leave to appeal against sentence. The grounds of the application are as follows:

> "1. The sentence was excessive.
>
> "2. The learned trial judge failed to give sufficient weight--
>
> (a) to the applicant's antecedents;
>
> (b) to the length of time the applicant was in custody awaiting trial."

The applicant, as we have said, was sentenced by his Honour to a term of imprisonment for eight years and a minimum term of three and a half years was fixed. It is relevant to observe the sentences which have been passed upon other men who have been convicted of this offence. The man Freeman, who had pleaded guilty to the offence, was sentenced to a term of imprisonment for seven years and directed to serve a minimum term of five years before becoming eligible for parole. His previous criminal record was a very much worse one than that of the applicant although the applicant himself did have previous convictions for dishonesty. The applicant's co-accused, Marshall, was also sentenced to a term of imprisonment for eight years and a minimum term of five and a half years before he would be eligible for parole was fixed by the learned judge. Marshall also had a much more serious previous criminal record than the applicant did.

It appeared that for a number of reasons which it is unnecessary for us to examine in detail, the applicant had spent a considerable time in custody awaiting his trial. The period amounted altogether to something like eighteen months. In the course of sentencing the applicant, the learned trial judge said that he had been for a very substantial period of time in gaol, and that he would have to take that into account. He said, however, in relation to each of the accused that he saw no reason for any distinction between the term of imprisonment to be imposed, and that they would each be sentenced to eight years' imprisonment. And then in relation to the applicant he went on: "In your case, Clune, I will direct, having regard to the length of time you spent," (which clearly is a reference to the time in custody) "the difference in your records and the lesser part that you played in this offence, I will direct that you serve a minimum of three and a half years before being eligible for parole."

It is therefore apparent that the learned trial judge, while he considered that he should take into account in determining the sentence to be imposed upon the applicant, the period of time which he had spent in custody awaiting trial, did not take it into account in fixing the substantive sentence for the offence, but did take it into account as one factor amongst others in determining the minimum period to be served before becoming eligible for parole. Indeed, in the course of the plea he had indicated that he thought that that was the proper course for him to adopt.

In our opinion, if in a particular case the time spent by an accused man in custody awaiting trial is to be taken into account in fixing the term of imprisonment which he is to serve, it should be taken into account in fixing the substantive sentence. If a minimum term is fixed, the judge will no doubt have regard to the time which has already been spent in custody in determining the desirable length of the minimum term, but that does not mean that the time spent in custody should be excluded from consideration in determining the substantive sentence. According to the circumstances, the judge may or may not attach the same significance to the time spent in custody, when considering the appropriate substantive sentence and when considering the length of the minimum term. The substantive sentence however is the sentence which the offender is liable to serve, and if it is proper that because of the period which he has already spent in custody he should obtain some mitigation of the sentence which would otherwise have been imposed, then that fact should be reflected in the sentence which he is liable to serve for the offence which he has committed.

What we have said in relation to the time which is spent in custody by an accused man applies equally to the other two matters which his Honour said he was taking into account in determining the length of the minimum term, namely, the difference in the records of the two accused men, and the lesser part which was played by the applicant in the particular offence. All such considerations are matters which a trial judge should take into account in determining the punishment which is appropriate to the crime with which he is dealing, and it is not sufficient that they should be taken into account merely in dealing with the minimum term which is being fixed prior to the prisoner being eligible for release upon parole. Cases of course do frequently occur where a judge in determining the appropriate substantive sentence to impose upon an offender will properly consider that certain relevant factors are to be subordinated to others but that the former can be given greater weight when he is determining the length of any minimum term. He is not however entitled to exclude those factors from consideration in determining the substantive sentence as the learned trial judge appeared to do in this case.

In our opinion, therefore, it has been demonstrated that the learned trial judge did apply a wrong principle in determining the appropriate sentence to be imposed upon the applicant, and that his discretion is thereby vitiated, and the question arises as to whether a different sentence should have been imposed, and if so, what that different sentence should have been.

We consider that as the judge had decided that the time spent in custody by the applicant should be taken into account and reflected in the sentence which he was imposing, (a view in which we concur), a different sentence should have been imposed upon the applicant and it therefore falls to us to determine what the appropriate sentence should be.

The offence which was committed was an extremely serious offence, and it cannot be suggested that it could be regarded at all leniently. The applicant, moreover, had prior convictions for dishonesty. But some parity, we think, should be maintained with the sentences which were

imposed upon other offenders whose criminal record was much more serious and whose degree of complicity in the offence was regarded by his Honour as being more culpable than the degree of complicity of the applicant. Bearing all those matters in mind, and making due allowance for the period when the applicant was in custody awaiting trial, in our opinion the appropriate sentence to be imposed upon the applicant is a sentence of imprisonment for a period of six and a half years.

The question now arises as to the minimum term, and in dealing with the minimum term we are, of course, in no way bound by the minimum term which had been fixed by his Honour in the sentence that he had imposed. That minimum term had been a period of three and a half years, which it might well be said, having regard to the seriousness of this crime, was a period which erred on the side of leniency. On the other hand, it would afford the applicant a justifiable ground for resentment if, having succeeded in his appeal against sentence, he were then to find himself directed to serve a minimum period which exceeded the period which had already been fixed by the trial judge on the longer substantive sentence which had been imposed. There is also, we think, a ground upon which a minimum term of three and a half years, short though it may appear in comparison with the sentence, can in this case be justified; that is, that he should be given some consideration for the time that he has spent in custody, not only in the maximum sentence imposed upon him, but also in the minimum term which he is directed to serve, and bearing that matter in mind, some degree of parity should be maintained between him and the co-offenders who have already been sentenced. In all the circumstances, in our opinion, it is appropriate to fix the same minimum term as the minimum term which was prescribed by the learned trial judge.

In our opinion, therefore, the sentence which was imposed should be quashed and in lieu thereof the applicant should be sentenced to a term of imprisonment for six and a half years, and directed to serve a minimum term of three and a half years before becoming eligible for parole. The order of the Court will be: application for leave to appeal against conviction refused; application for leave to appeal against sentence granted and appeal allowed, the sentence set aside, and in lieu thereof sentence imposed of six and a half years' imprisonment and a period of three and a half years fixed for the minimum term before the applicant becomes eligible for parole. Orders accordingly.

Solicitor for the Crown: John Downey, Crown Solicitor.
