11/86

SUPREME COURT OF VICTORIA — FULL COURT

R v HARTWICK

Crockett, O'Bryan and Brooking JJ

28 October 1985 — [1985] 17 A Crim R 281

CRIMINAL LAW – GOING EQUIPPED FOR BURGLARY – ELEMENTS OF – ACCUSED ACTING IN CONCERT – ARTICLES FOR BURGLARY READILY AVAILABLE FOR USE BY ACCUSED – ARTICLES IN ACTUAL POSSESSION OF ONE ACCUSED – WHETHER OTHER ACCUSED "HAD WITH HIM" ARTICLES FOR BURGLARY – WHETHER DOCTRINE OF ACTING IN CONCERT APPLICABLE: *CRIMES ACT* 1958, S91(1).

(1) The common law doctrine of acting in concert has not been excluded by the legislature in creating the offence in s91 of the *Crimes Act* 1958 of going equipped for burglary.
***R v Lowery and King (No. 2)* [1972] VicRp 63; [1972] VR 560, referred to.**

(2) On a charge of going equipped for burglary, where the evidence establishes that the accused were acting in concert, and the articles for burglary were sufficiently ready to hand, it is immaterial that only one accused had the actual physical possession of the articles at the relevant time.

CROCKETT J: (with whom O'Bryan and Brooking JJ agreed): **[1]** On 16th July 1985 the applicant was presented in the County Court at Melbourne on one count of going equipped for burglary. He pleaded not guilty but, after a three day trial, was found guilty of the charge. On 19th July 1985, after hearing a plea by his counsel for leniency, the learned Judge imposed a sentence of two years and six months' imprisonment and ordered that twelve months of that period be served concurrently with the period of imprisonment the prisoner was then undergoing. As a result of representations made on behalf of the applicant, the Judge did not fix a minimum term. The offence with which the applicant was charged is created by s91(1) of the *Crimes Act* 1958. It is in these terms:

> **[2]** "91(1) A person shall be guilty of an offence if, when not at his place of abode, he has with him any article for use in the course of or in connexion with any burglary, theft or cheat."

The presentment charged the applicant jointly with a co-accused, one Burns. The charge alleged that the articles they had with them for use in connection with burglary were two screwdrivers, one knife, a pair of black socks and a striped towel. The evidence led at the trial established that at all relevant times when the applicant and his co-accused were under the observation of witnesses who testified at the trial it was the co-accused Burns who, by using the striped towel in which to carry the above-mentioned articles, was the one who was in actual possession of them. There was ample evidence to establish that the two men had those articles sufficiently ready to hand and for use that it could be said of them that they were for use in connection with a burglary. The learned Judge, when directing the jury as to the elements of the offence, told it that so far as the second element was concerned it had to be shown that the accused "had with him" the specified articles. His Honour said that that element was satisfied even if it were not shown that the applicant had them on his person provided that they were readily available for his use. The Judge pointed out that if they were in the physical possession of an accomplice who was a person with whom the applicant was acting in concert, that was sufficient. The applicant now seeks leave to appeal against his conviction and relies upon two grounds, to the first alone of which I think I need refer. It is in these terms:

> **[3]** "The trial Judge erred in law in saying that if the accused had with him articles for the use in the course of or in connection with burglary that those articles do not have to be on his person but it is enough if the articles are in the physical possession of the accomplice."

At the close of the Crown case, upon an application to direct the jury to acquit on the ground that there was no case to answer the Judge ruled that, if in fact it were shown that the

two accused were acting in concert and that the other had physical possession of the various articles, that would be sufficient to establish the case against the applicant. The Judge's direction to the jury was, as has already been indicated, in conformity with that ruling.

The point now taken in ground 1 is that the employment in the statutory provisions of the words "has with him any article for use" etc. requires that before a person can be convicted of the offence it must be shown that he had physical possession of those articles. This contention is without foundation and in my view, the learned Judge was perfectly correct in giving the direction that he did. What for the purposes of instruction to juries in this State has been treated for some years as the classical exposition of the relevant law can be found in the passage from a direction of Smith J in *R v Lowery and King (No.2)* [1972] VicRp 63; [1972] VR at p560. His Honour there said:

> "The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime."

[4] In the present case the learned Judge charged the jury in substance to that effect. No exceptions were taken with regard to the terms employed by him in charging the jury as to what amounted to acting in concert and it was open on the evidence for it to find that both the applicant and his co-accused were, in fact, acting in concert. It is plain that it was immaterial in the circumstances whether it was Burns or the accused who, in fact, had actual physical possession at the relevant time of the particular articles with which it was said both were going equipped for the purpose of burglary.

An examination of the expressions used in the creation of many other offences in various sections of the *Crimes Act* leaves it clear beyond a peradventure that the concept of acting in concert is not to be treated as having been excluded by the words employed in the statute. Similarly, although the words in s91 may, on the face of it, appear to be somewhat more than usually explicit, it is clear in my view as a matter of principle, that the common law doctrine of acting in concert was never intended to be excluded by the legislature by any such expression as has been used in the creation of the offence found under s91. If any such exclusion were intended it would have to have been expressed in the clearest and most unequivocal language. Indeed, I think, after argument, counsel for the applicant did concede that it was, in fact, impossible to contend otherwise.

It is unnecessary to deal with the second ground in the Notice of Application. Counsel, after referring to it, indicated to the Court he found it impossible to address argument in support of it. In my view, the concession **[5]** made was entirely proper. The application for leave to appeal against conviction must, therefore, fail.

The Judge imposed the sentence that he did after the applicant had admitted 64 prior convictions from 28 court appearances. Those convictions occurred between March 1969 and June 1981. A great number of these were offences of, or related to, dishonesty. The applicant was aged 30 years at the time of the commission of the present offence. He now seeks leave to appeal against his sentence on two grounds. The first is that the sentence imposed was manifestly excessive. The second is that, having regard to the principles of parity of sentence, when one has considered the sentence which was imposed upon his co-accused, the sentence imposed on the applicant is seen to be demonstrably unfair. Accordingly, it was said that the sentence imposed should be quashed and a more lenient penalty substituted by this Court. After a plea of guilty the co-accused, Burns, was sentenced as long ago as 12th September 1983. The reason for the substantial effluxion of time before the applicant was dealt with is, not only that he pleaded not guilty thus requiring a trial, but also because he absconded after being bailed in respect of a quite different offence and some considerable period elapsed before he was apprehended and extradited to Victoria.

The same Judge sentenced both the applicant and Burns. After hearing a plea on his

behalf, Burns was released by the Judge on a bond in the sum of $500 to be of good behaviour for a period of five years. The bond was made subject to a number of conditions. Those included the **[6]** submission by Burns to treatment for a drug addiction and his undertaking to abstain from the consumption of intoxicating liquor and drugs during the period of the bond. It appears that Burns also had an impressive list of prior convictions. They were, however, not as substantial as those of the applicant. Burns was also some two years younger than the applicant at the time of the commission of the offence. Burns, at the time he was dealt with, was a voluntary resident in Odyssey House, receiving treatment for drug addiction.

In those circumstances, as I say, it has been submitted on the applicant's behalf that there has been a disparity of such a degree in the selection of his sentence that this Court should interfere. In my opinion it was perfectly open to the Judge to form a view about the prospects of each of the offenders that would have allowed him to treat them in the disparate manner that he did without that treatment's being stigmatized as unfair. I think, therefore, that that particular ground also has not been made out. Nor can it be said, when all of the circumstances are considered, that the sentence is manifestly excessive.

It was pointed out that the sentence imposed was one that amounted to five-sixths of the maximum penalty of three years which the statute has fixed for the offence. It is said, therefore, that the sentence must on that account alone be treated as excessive. But I think it may be said that the offence is one which is not of a type which is likely to possess noticeably different gradations of seriousness. In consequence, the period of imprisonment to be imposed has to be selected by reference to criteria rather different **[7]** from those which are dependent upon the particular gravity of the offence committed. If that is an appropriate way of approaching the matter, as indeed I believe it to be, then the past record of the applicant, grave as it is, is, I think, sufficient for it to be said that the sentence chosen by the judge, close though it may be to the maximum penalty, was, nonetheless, a permissible one. This ground of the application too, therefore, fails. The application for leave to appeal against sentence must also be dismissed.
