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SUPREME COURT OF SOUTH AUSTRALIA — IN BANCO

R v MILLS

Bray CJ, Sangster and Jacobs JJ

31 August 1977

(1977) 16 SASR 581 (Noted 1 Crim LJ 332)

SENTENCING – PRINCIPLE THAT MAXIMUM SENTENCE BE RESERVED FOR WORST CASE OF ITS KIND OF ACCESSORY AFTER THE FACT TO A FELONY CONSIDERED.

Since the maximum penalty for being an accessory after the fact to larceny is the same as the maximum penalty for being an accessory after the fact to murder or rape or robbery, presumably Parliament intended to place all cases of being an accessory after the fact to felony, whatever the felony, on an equal footing. After all, the ordinary form of the crime is to shelter or harbour the criminal or conceal the evidence of the principal crime. We have to scale this sentence against the appropriate sentence for the worst case of being an accessory after the fact to any felony. Judged by that scale, it seems the present case falls considerably short.

BRAY CJ: The case related to a car stolen by one Thorn. The appellant had nothing to do with the theft. According to him, Thorn approached him a little under two weeks after he had stolen the car. He suggested that the appellant should co-operate with him in disguising the car and selling it. This was to take place at a farmhouse near Cobera. Thorn supplied the appellant with a map. The appellant and Thorn recruited Thompson and Samels. The appellant, Thompson and Samels set out in the stolen car and had an accident on the way. Thorn, perhaps prudently, was going to follow in another vehicle, and it does not appear what sentence has been imposed on him or, indeed, whether he has ever been apprehended.

The learned Judge, as I have said, sentenced the appellant to imprisonment for two years and Thompson and Samels to imprisonment for one year each. Both Thompson and Samels have many more convictions than the appellant. He has one conviction only, but that was for rape for which he was sentenced to imprisonment with hard labour for two years by a Court at Alice Springs. Apparently the sentence was served in an adult gaol, no doubt in conformity with the law of the Northern Territory, although at the time he was not seventeen years of age. He is now eighteen. Nevertheless the considerations which make a court hesitate before sentencing a young man to imprisonment for the first time do not apply.

It is said that the sentence was manifestly excessive. The learned Judge differentiated between the appellant and his accomplices because of the greater part which he had played in the organisation of the plan to disguise and sell the stolen car. I do not think we can say that he was not entitled to do that, despite the longer record of Thompson and Samels and in the case of Thompson his greater age. I do not think that we can interfere on the ground of disparity.

The fact remains, however, that the maximum sentence which can be imposed for the crime of being an accessory after the fact to a felony is imprisonment for two years and that is the sentence which has been passed on the appellant.

In the case of *Reg. v White and White* (1977) 16 SASR 571 I said something about this crime, and drew attention to the great disparity between the maximum sentence provided by Parliament for most felonies and the sentence provided by it, for the crime of being an accessory after the fact to a felony. I will not repeat what I said there. A slightly different principle is relevant here, the principle that the maximum sentence should be reserved for the worst case of its kind.

In applying this principle do we look at the worst possible cases of being an accessory after the fact to larceny or the worst possible case of being an accessory after the fact to any felony? Mr

Duggan, for the Attorney-General, argued for the first alternative. Indeed, he said that we ought to look at the worst possible case of being an accessory after the fact to car stealing and see how far the present case fell short of that, if at all. Perhaps if that line of reasoning were carried to its logical conclusion we should look at the worst possible case of stealing a 1975 Ford, which was the car in question here.

I cannot agree with this fissioning approach. Since the maximum penalty for being an accessory after the fact to larceny is the same as the maximum penalty for being an accessory after the fact to murder or rape or robbery, presumably Parliament intended to place all cases of being an accessory after the fact to felony, whatever the felony, on an equal footing. After all, the ordinary form of the crime is to shelter or harbour the criminal or conceal the evidence of the principal crime. I think that we have to scale this sentence against the appropriate sentence for the worst case of being an accessory after the fact to any felony. Judged by that scale, it seems to me that the present case falls considerably short.

I think it would be sufficient if the appellant were sentenced to imprisonment for one year and six calendar months. That would differentiate him from his associates and bear a reasonable proportion to the statutory maximum.

In my opinion, the appeal should be allowed, the sentence of imprisonment with hard labour for two years set aside, and a sentence of imprisonment with hard labour for one year and six calendar months substituted in its place.

SANGSTER J: The appellants sole ground of appeal is that the sentence is manifestly excessive although this was, in argument before us, put in two ways: (1) it represented the imposition of the maximum sentence in a case not the worst of its kind (2) it reflected disparity with the sentences imposed on the other two.

The learned sentencing Judge addressed the three prisoners as follows:

> "Each of you has pleaded guilty to being an accessory after the fact to a felony, the felony being the stealing of a motor car. You, Mills, were closely associated with a thief and with him approached Samels and Thompson for their assistance in driving the car to the country and there repainting it, prior to its illegal disposal. Samels and Thompson, you were each to get either $150 or $200 for your part in the exercise. You, Mills, had an equal sharing agreement with the thief, so it is that all of you were involved in a serious criminal offence. All of you have previous convictions. I take into account what has been put to the Court by counsel for you Samels and you Thompson. I regard your part, Mills, in the criminal exercise as more serious than that of the other prisoners."

There is no doubt as to the principle that, generally speaking, the maximum sentence prescribed by a statute for an offence is to be reserved for the worst cases of that type of offence. A question which, in my opinion, must be answered *in limine* is whether that means, in relation to the offence of accessory after the fact, "worst" in the degree of assistance rendered as an accessory only, or "worst" taking into account also the principal felony and the circumstances of it.

At first sight there may seem to be some basis for thinking that the categorization of the acts of the accessory depends upon the particular felony to which it relates and to the circumstances of the commission of that felony by the principal felon. On reflection, however, I am sure that such thinking is in conflict with the plain meaning of the words of s268 and out of step with fundamental principles of sentencing. The offence of being an accessory after the fact is, primarily, that of assisting the felon who has already committed the principal felony. An ordinary example would be to shelter or harbour a felon to enable him to avoid apprehension or to conceal the evidence of the principal felony. In most examples that come readily to mind the accessory would be most unlikely to know the whole of the circumstances of the principal felony. The gravamen of the accessory's crime is to stand between another felon and the law. To judge an accessory by reference to the nature and circumstances of the principal felony would in most cases involve punishing the accessory – or extending leniency to him – according to the seriousness or otherwise of the criminal conduct of another person for whose conduct he was not responsible and of the details of which he was unaware.

In any case the Legislature has not linked the punishment for the accessory with the nature of

the principal felony, but has provided the one maximum sentence for being an accessory after the fact to any felony. In my opinion, the conduct of the accessory alone is in question. It may well be, of course, that the nature and circumstances of the principal felony, so far as were known to the accessory at the time, formed an important element of the criminal conduct of the accessory. So, too, would any pressure exerted on the accessory by the principal felon – pressure which might well be most effective if applied by someone who had just committed one murder and might as easily murder the proposed accessory as well if he did not comply with a demand for assistance. Further, in some felonies (such as murder) subsequent assistance has no effect on the results of the principal felony – in others (such as larceny) subsequent assistance may do more harm to the victim than the original felony itself.

In the present case the learned sentencing Judge was dealing with three young men who had assisted a car thief. One of those three – the appellant – had become an equal partner with the car thief in the criminal project of altering the stolen car so as to render it acceptable to a proposed receiver of that stolen property. There was no suggestion that he was under any pressure to join in. I have already referred to the nature and extent of the appellant's participation. I am quite unable to see how any appellate Court could say that the learned sentencing Judge was in error in treating the appellant's conduct as the very worst kind of assistance to a principal felon.

The appellant was sentenced to imprisonment for two years, Samels and Thompson for one year, but I am unable to see any cause for complaint by the appellant on that score – their respective degrees of participation were, as my earlier references to the facts clearly demonstrate, substantially different.

The appellant is still under the age of twenty years and his only previous conviction was, as a juvenile, for rape. Counsel for the appellant relied on the oft-stated principles applicable to the sentencing of a young offender. Principles of sentencing, however, do not all point in the same direction: many of them are direct opposites, and the main task of a sentencing tribunal in the first instance is to hold fairly the scales of justice between the offender and the community at large. Sometimes the interests of the community itself are best served by some result that will keep a young offender out of prison so as to facilitate his rehabilitation. Sometimes the circumstances require that a young offender – even for a first offence – serve a prison term notwithstanding the risk that he may not thereafter attain any degree of rehabilitation. Different judges might well reach different conclusions about the one case, but in the absence of demonstrable error, or of a result beyond a fair range and which must therefore have flowed from error not specifically demonstrated, appellate tribunals do not interfere. There can be no suggestion that the learned sentencing Judge was less than fully familiar with the relevant principles and with the problem of the young offender. No specific error appears to have been made by him. In my opinion, he has not gone beyond a fair range, nor failed to extend any form of leniency which any appellate court could say ought necessarily to have been extended. I would dismiss the appeal.

JACOBS J: There can be no doubt at all that this was a very bad case, and that the appellant's role was much more serious than that of his paid assistants, who also pleaded guilty as accessories, and were sentenced to imprisonment for one year.

It is trite law that the maximum sentence ought to be reserved for the worst cases, but for reasons already given, I do not think that means that the worst case of "receiving, relieving, comforting or assisting" a car thief can never be as bad as the worst case of assisting one who has committed a more serious crime. Parliament has prescribed a maximum penalty of two years imprisonment for an accessory to any felony; if the argument in support of this appeal is followed to its logical conclusion, it would seem to follow that the notional maximum penalty in the present case would be merely nominal, since larceny, (in terms of penalty) is less serious than almost any other felony.

Human ingenuity is such that it is no doubt possible, in considering almost every case, to conjure up in the mind a worse case, but I do not think that Courts charged with the practical task of dealing with crime, are required in indulge in metaphysical speculation. It is true that the learned Judge did not expressly advert to the fact that he was imposing the maximum penalty, but I am not prepared to assume that he did so by inadvertence. In my opinion, it is impossible to say that his assessment of this crime was erroneous. I would dismiss the appeal.