10/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v STOREY

Winneke P, Brooking, Hayne, Callaway JJA, Southwell AJA

6, 7 November, 6 December 1996 — [1998] 1 VR 359; (1997) 89 A Crim R 519

CRIMINAL LAW – SENTENCING – DISPUTED SENTENCING ISSUES – STANDARD OF PROOF – USE OF SENTENCING FACTS – PROOF BEYOND REASONABLE DOUBT IF USE ADVERSE TO OFFENDER – PROOF ON BALANCE OF PROBABILITIES IF USE IN ACCUSED'S FAVOUR.

The basis for regulating proof of facts which bear on sentence is:

(a) the Court may take facts into account in a way that is adverse to the interests of the accused if those facts have been established beyond reasonable doubt.

(b) the Court may take facts into account in a way that is in favour of the accused if those facts have been established on the balance of probabilities.

***R v Ali* [1996] VicRp 56; [1996] 2 VR 49; (1995) 84 A Crim R 181, disapproved.**

[Note: Some of the footnotes in the judgment have been omitted. Ed.]

WINNEKE, P, BROOKING and HAYNE JJA, SOUTHWELL, AJA: *[After setting out the nature of the charges, the sentence imposed, the grounds of appeal, and relevant authorities, the Court continued]...*
[12] We do not accept that the distinction sought to be drawn in *Ali* [1996] VicRp 56; [1996] 2 VR 49; (1995) 84 A Crim R 181 between the circumstances of the offender and those of the offence should be adopted as a basis for regulating proof of facts which bear upon sentence. First, for the reasons which we have already given, it is not clear how the two kinds of circumstance are to be distinguished. The suggestion in *Ali* [1996] 2 VR 49 at 60 that the "detailed application [of the distinction] will have to be worked out on a **[13]** case by case basis, a task that will fall both to sentencing judges and to this Court" seems to us to be unsatisfactory. Secondly, recent experience in this Court shows that the adoption of the distinction proposed in *Ali* has sometimes led to confusion and the undue lengthening of sentencing proceedings.

The distinction between circumstances of the offence and the circumstances of the offender is a distinction which does not identify sufficiently the kind of problem that has to be solved and, in particular, does not focus upon the use that is to be made of findings of fact in sentencing or upon the way in which disputes about such facts arise.

Sentencing is not a mechanical process. It requires the exercise of a discretion. There is no single "right" answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the "instinctive synthesis" (*R v Young* [1990] VR 951) which takes account of the various purposes for which sentences are imposed (*Sentencing Act* 1991, s5) – just punishment, deterrence, rehabilitation, denunciation, protection of the community – and which pays due regard to principles of totality, parity, parsimony and the like. To divide facts between those that constitute the circumstances of the offence and those that constitute the circumstances of the offender assumes that all of the facts that are relevant to the question of sentence can be classified in this way. In our opinion, no such *a priori* classification is possible. Imposing a just sentence requires the judge to consider what the offender did and why, as well as who the **[14]** offender is.

In cases of indictable crime, the judge will ordinarily be informed of what the offender did from the evidence given at the trial or from the material at the committal. If there is a plea of guilty, the plea will stand as an admission of the elements of the offence charged, but, of course, of no more than those elements. Sometimes, the Crown and the accused will agree upon a statement of facts that is to be used for the purposes of the plea. If a verdict of guilty has been returned after trial the facts implied by the verdict will usually be clear. In such cases, there will be no difficulty in identifying what the offender did. The facts implicit in the verdict or plea of guilty cannot be controverted. The judge must sentence according to those facts, whatever views he or she may

hold about the verdict. (*R v Webb* [1971] VicRp 16; [1971] VR 147; *R v Boyd* [1975] VicRp 16; [1975] VR 168). Similarly the judge must not sentence for an offence with which the accused has not been charged. (*R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383; 35 ALR 265; 5 A Crim R 329; 55 ALJR 469). The difficulties arise in cases where the factual implications of the plea or verdict are not clear or one or other of the parties wishes to rely on a fact that is not established in one of the ways described earlier and is disputed by the other party or the judge intends to act on a view of the matter that is not accepted by both parties.

On the hearing of this appeal it was submitted that the question presented in such cases is "which party bears what **[15]** onus in relation to sentencing facts or issues?". As we have said, counsel for the applicant submitted that the Crown bears the onus of proving all matters affecting sentence beyond reasonable doubt. The Director submitted that matters in aggravation of the offence should be proved by the Crown and that some, but not all, of those facts should be proved beyond reasonable doubt; he submitted that matters in mitigation of punishment should be established by the offender on the balance of probabilities. There are several points to be made about this formulation of the question and the answers that were proposed on behalf of the parties.

First, when a judge comes to sentence an offender, there is no general issue joined between the Crown and the offender as there is on the trial of that offender. It is not for the Crown to undertake some general burden of proving all facts relevant to sentence. The offender has been found guilty of, or has pleaded guilty to, an offence. The elements of the offence are thereby proved or admitted. The judge is called on to sentence the offender for that crime. The offender may, and commonly will, make a plea in mitigation. There can be no question of either party's undertaking any onus of proving any further fact unless and until it is suggested that there are matters beyond the bare elements of the offence (elements that are established by the verdict or plea) which the judge should take into account in passing sentence.

To speak of one party's undertaking an onus of proving that further fact may distract attention from the process that is to be undertaken: the judge is to find those facts which he or she considers bear upon the sentence to be passed. Some of **[16]** those facts will be facts that the judge will take into account in a way that is adverse to the interests of the offender; some will be taken into account in the offender's favour. If there is nothing in the material before the judge that raises a particular matter for consideration it will not be taken into account. It follows that in most cases it will be one or other of the parties which will seek, in the course of the plea, to raise particular issues for consideration by the judge. It will then usually be apparent whether the asserted fact is controverted by the other party or (as may sometimes happen) is not accepted by the judge. There may also be cases in which the parties do not raise a matter as one affecting sentence but the matter is one which the judge thinks relevant. The judge may invite the attention of the parties to the matter before making use of it and it will then become apparent whether the parties embrace or reject it.

If there is a dispute about a particular matter (whether because the parties are in dispute or because the judge is not prepared to act on the assertion that has been made) what is important is what use the judge will make of the matter – will it be adverse to the offender or in the offender's favour? – and what the degree of satisfaction it is that the judge must have before he or she can use that matter in determining an appropriate sentence. Neither of these questions requires consideration of which party bears the onus of proving the matter. The question which party bears an onus of proof may be one that arises only where there is some joinder of issue between parties to a suit and, as we have said, there is no general joinder of issue, analogous to the joinder of issue on trial, in relation to sentence.

It is not for the Crown to **[17]** prove what is a proper sentence for the offender or to prove the facts that should be taken to account in reaching such a sentence any more than it is for the offender to prove either of those matters; it is for the judge to find the facts which he or she considers affect the exercise of the sentencing discretion and then determine an appropriate sentence. That may be reason enough not to examine the present issues in terms of which party bears an onus. Whether or not that is so, discussion of which party bears an onus will, in our view, obscure rather than illuminate the process. To say, as did counsel for the applicant, that the Crown bears the onus of proving *all* facts relevant to sentence assumes that there is some

general joining of issue between Crown and offender; there is not. We, therefore, do not think it appropriate or useful to ask which party bears an onus. The question is, what is the standard of proof that is to be met and on what matters.

*[After referring to additional authorities, the Court continued]...***[19]** Even if the High Court's decision in *Anderson v R* [1993] HCA 59; (1993) 177 CLR 520; (1993) 117 ALR 1; (1993) 67 A Crim R 582; 67 ALJR 911 does not compel the result (and it may do so) we consider that principle requires the conclusion that if the circumstance is one that the judge considers aggravates the offence, the judge must be satisfied of that fact beyond reasonable doubt. Despite the caveat entered by Brennan and Dawson JJ in *Anderson* we do not consider that that conclusion is at odds with what was said by the High Court in *R v Tait and Bartley* (1979) 46 FLR 386 at 396; 24 ALR 473 at 483. What the Court in *Chamberlain* [1983] VicRp 110; [1983] 2 VR 511 at 514; (1982) 14 A Crim R 67 referred to as "[t]he basal requirement of the criminal law" entails the conclusion to which we have come. We would not confine the proposition to circumstances which "aggravate the offence" but would extend it to any circumstance which the judge proposes to take into account adversely to the interests of the accused - "adversely" in the sense that it is "likely to result in a more severe sentence than would otherwise be the case". (*Langridge v R*, Sup Ct of W.A., (1996) 17 WAR 346; (1996) 87 A Crim R 1, 17 May 1996 per Kennedy J at p37).

Accordingly, bearing in mind that the sentencing decision is commonly no less important to the offender than the decision about guilt or innocence, we are of the view that it follows from that same "basal requirement" that the judge may not take facts into account in a way that is ***adverse*** to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account ***in favour*** of the accused, it is enough if those circumstances are proved on the balance of probabilities. We do not accept the submission on behalf of the applicant that the Crown must disprove, beyond reasonable doubt, matters which the judge proposes or is invited to take into account in favour of the offender.

[The Court examined the question in further detail and then dealt with the appeal against sentence. Callaway JA delivered a separate judgment. Ed.]

APPEARANCES: For the Crown: Mr G Flatman QC, Ms K Judd and Mrs C Quin, counsel. Solicitor: PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr PF Tehan and Mr OP Holdenson, counsel. Solicitors: Haines & Polites.
