50/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v ELIASEN

Crockett, McGarvie and Phillips JJ

2 August 1991 — (1991) 53 A Crim R 391

CRIMINAL LAW – SENTENCING – OFFENDER SENTENCED TO IMPRISONMENT – DIAGNOSED AS HAVING AIDS – IMPRISONMENT LIKELY TO WORSEN CONDITION – WHETHER REDUCTION IN SENTENCE APPROPRIATE.

1. If the burden of imprisonment is likely to be increased by reason of an offender's ill health, a court may consider granting some relief in respect of the length of the sentence.
***R v Smith* (1987) 44 SASR 587; (1987) 27 A Crim R 315; MC 23/1988, applied.**

2. Where an offender returned a positive result to a test for AIDS and there was evidence to conclude that the condition would be worsened by the need to serve a long period of imprisonment, a reduction of 12 months' imprisonment in the period to be served was appropriate.

CROCKETT J: [with whom McGarvie and Phillips JJ, agreed] [*After setting out the sentences imposed, the ground of appeal, the facts and whether the Court should permit the application to proceed, His Honour continued*] ... **[5]** [I]t is plain that authority now establishes that this Court may, if it considers the case an appropriate one so to do, permit evidence of matters or events that have occurred since the date of the passing of the sentence upon an applicant to be placed before this Court with a view to this Court's reconsidering the matter in the light of that additional evidence. It must follow that, if the Court does think that the additional evidence should lead to the imposition of a sentence different from that imposed by the Judge, then even where the judge's sentencing **[6]** discretion has not miscarried the case must be treated as one calling for appellate intervention.

It has been said by this Court that if, on the material placed before it for the hearing of an application for leave to appeal against sentence it considers that the sentence imposed was not an appropriate sentence, then the application may be allowed and a different sentence passed in lieu of that imposed below: see *R v Prior* [1966] VicRp 64; [1966] VR 459; *R v Tutchell* [1979] VicRp 24; [1979] VR 248, and *R v Martin* (unreported) a decision of this Court delivered on 19th March 1990.

Upon the application being made to us, we considered that in all the circumstances it was appropriate in this case to allow the additional evidence sought to be placed before us to be admitted in evidence. No opposition to the adoption of that course was raised by the Crown. The evidence laid before this Court was partly oral and partly on affidavit. It came from three medical practitioners, all of whom had extensive experience in the field of this particular illness. The medical superintendent at Pentridge hospital, Dr Peter Hearne, told the Court that the applicant had entered Pentridge prison in late July 1990 following his arrest for the offences with which this application is concerned and in regard to which it appears he had never been bailed. An antibody test for the Acquired Immune Deficiency Syndrome was conducted in late 1990 at the applicant's request as he believed that he may have been infected. That was the test which had been commenced just prior to the applicant's being sentenced.

[7] Dr Hearne further testified that the result returned in January 1991 showed positive, that is, that the applicant had HIV, a condition which the witness said in the overwhelming majority of cases is followed by the development of Acquired Immune Deficiency Syndrome, and that in our present state of knowledge that disease leads to an invariably fatal outcome. The other evidence of some importance to this application was given by Dr Ian Brighthope. From his extensive experience in relation to the AIDS virus, he told the Court that apart from the stress arising merely from incarceration itself, it could be expected that the prisoner could suffer a further increase in stress due to the threat of death which the virus would be likely to cause. As

the stress increased so, in turn, it could be expected to lead to an aggravation of the applicant's condition.

So far as the applicant's service of a term of imprisonment as a sufferer from AIDS is concerned, Dr Hearne also provided to the Court some information on that topic. He pointed out that, in the first place, it must be conceded that there is an advantage to the applicant in being treated at Pentridge inasmuch as he is kept in a special unit which is a dedicated facility committed to the task of care and treatment of AIDS sufferers.

On the other hand, there were, he maintained, undoubtedly not insubstantial disadvantages to be suffered by somebody in the applicant's position. For instance, he was not eligible for a security prison. Moreover, he would be restricted to the division, "K" **[8]** Division, which is (amongst other things) devoted to the care of AIDS sufferers. He would have no access to the rest of the prison system, which would have provided him with better occupational prospects and the amenities which are supplied within the general prison system. On the other hand, the witness was of opinion that in Pentridge there was a better acceptance by others of persons suffering the disease than could be expected to be met elsewhere in an average city.

There has been some recent authority that provides some assistance as to the course which the Court should adopt in cases which have taken the turn this particular application has taken. The Court of Criminal Appeal in South Australia had to consider a case of a similar kind in *R v Smith* (1987) 44 SASR 587; (1987) 27 A Crim R 315. It is, I think, sufficient to refer to the headnote which is in these terms:

> "The appellant was sentenced to four years' imprisonment with a non-parole period of three years. He had been diagnosed as suffering from AIDS. Further evidence of his condition and the impact of imprisonment on it was sought to be tendered in the appeal hearing."

It was held that:

> "It is permissible to have regard to events occurring after sentencing for the purpose of showing the true significance of facts which were in existence at the time of sentence. Evidence of the extent and implications of the AIDS conditions was admitted on appeal."

The Court further held that:

> "There being a substantial risk that the stress associated with a further period of imprisonment would cause some deterioration in the AIDS condition, the non-parole period should be reduced to nine months."

That case was referred to with approval as to the principles to be found in it by the Court of Criminal **[9]** Appeal in New South Wales in *R v Bailey* (1988) 35 A Crim R 458. The judgment of Lee J was agreed on by the other members of the Court. The headnote records Lee J's opinion that:

> "It has, for a long time been the practice to take into account circumstances which make the incarceration of the prisoner more burdensome upon him than would be the case of the ordinary gaol inmate. Accordingly the court should allow evidence of the appellant's medical condition to be given on appeal and should re-open the matter of sentence."

I interpolate to say that it is my understanding that that proposition has long been accepted as valid by this Court and I would add that it is, of course, correct to say that once the evidence is admitted the question no longer is one as to whether the sentencing judge has erred in the exercise of his sentencing discretion. The question then which is for this Court to determine is whether on the material then before it a different and, if so, what sentence should be substituted for that passed by the sentencing judge. It is for that reason that I think this Court is relieved from the task of having to examine the various allegations made as to error on the part of the judge when selecting the sentence that he thought appropriate in the circumstances.

The headnote proceeds to report that:

> "The provision of proper medical attention is the responsibility of the prison authorities and the Court of Criminal Appeal will not interfere in that regard."

That statement, too, I think, represents what has long been accepted as correct by this Court. It is then recorded that:

> **[10]** "In every case where health is raised as a factor bearing upon sentence, the court must determine the extent to which it should be taken into account, and this is a matter to be weighed along with other relevant factors, such as seriousness of the offence, the prisoner's record and any mitigating circumstances."

That is the task which I apprehend is that which is for this Court to deal with on the present application. I would emphasise the limitation to which Lee J referred at p462, namely:

> "In my opinion in a case such as the present where it is clear that the disease with which the appellant is now suffering, was in fact, in existence at the time he was sentenced, it is proper for this Court to allow evidence to that effect to be given on the appeal and to reopen the matter of the proper sentence be imposed."

That is the position in the present case. It should also be noticed that the present application was instituted within the 14-day time limitation for the institution of applications of this nature. Thus, no extension of time was required; although a late amendment of the grounds was necessary in order to raise the issue of importance.

Again, I think I should emphasise what King CJ in *Smith's* case (*supra*) is recorded as saying (p317) (which was adopted by Lee J in *Bailey* at p462) namely:

> "Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health."

Bearing those propositions in mind, it has been shown to my satisfaction that the burden of the sentence to be served by the applicant will be increased by reason **[11]** of the disease from which he is suffering. There are disadvantages (which outweigh any advantages) which will be undergone by him in the course of serving that sentence. Furthermore, there are grounds for concluding that the condition will be worsened by the need to serve what, on any view, must be a prolonged period of incarceration. I shall not repeat the evidence or the details relating to it which emerged in the course of the tender of the medical evidence to us this morning. That evidence was not challenged by the Crown and, indeed, the learned prosecutor conceded that such evidence having been tendered to the Court and received by it, it would be appropriate in all the circumstances to reconsider favourably the sentence which was imposed in the County Court.

I am of opinion, for those reasons, that there should be some relief granted to the applicant in respect of his sentence. In that regard, I would propose that the existing sentences remain in place together with the directions as to cumulation, save that I would direct in lieu of His Honour's order that two years and six months' imprisonment of the head sentence imposed by the judge be served cumulatively upon any other sentence being served and cumulatively upon the balance of any sentence ordered to be served by the Adult Parole Board.

McGARVIE J: I agree.

PHILLIPS J: I agree also.

CROCKETT J: The application is granted. The appeal is treated as instituted and heard instanter and allowed. **[12]** In lieu of the order for cumulation pronounced by the judge, there will be substituted an order that two years and six months' imprisonment of the three years and six months effective sentence imposed by the judge be served cumulatively upon any other sentence being served and cumulatively upon the balance of any sentence ordered to be served by the Adult Parole Board. The sentences otherwise imposed on the applicant are affirmed.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant Eliasen: Mr I Himmelhoch, counsel. Allan McMonnies, solicitor.