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SUPREME COURT OF SOUTH AUSTRALIA (IN BANCO)

R v McDONALD

Hogarth, Wells and Sangster JJ

21 May, 12 June 1974 — (1974) 8 SASR 388

SENTENCING – PERSISTENT OFFENDER – YOUNG MAN – WEIGHT TO BE GIVEN TO FACTOR OF REHABILITATION – DETERRENT EFFECT OF LONGER SENTENCES OF IMPRISONMENT .

Observations as to the weight to be given to the factor of rehabilitation in determining the sentence to be imposed upon a young man who, notwithstanding several short sentences of imprisonment had persisted in the crimes of breaking and entering and stealing.

HELD: Appeal refused.
1. In relation to the first ground of appeal that the sentences were manifestly excessive, the defendant's conduct was seriously criminal in its character and the sentences were not manifestly excessive.

2. In relation to the second ground of appeal that the sentencing judge failed to take into account the rehabilitation of the defendant, this submission overlooked the rehabilitative effect which the deterrence of a long sentence itself may provide. In such a case a long sentence, taken in conjunction with the powers of the Parole Board to order the release of the prisoner under supervision during the course of the sentence, may be the only effective means of rehabilitating the offender.

3. Where an offender's history shows a consistent disregard for the law and the rights of others over a long period, a court would be betraying its duty to the public and indeed to the offender himself if it created the impression that he could hope for a continuation of short sentences, when previous experience had shown that short sentences had not had the effect of leading him to become rehabilitated.

THE COURT (Hogarth, Wells and Sangster JJ): This is an application for leave to appeal against sentence. Having heard counsel for the applicant leave was refused, but we intimated that we would deliver our reasons later; and we now do so. The applicant is a young man aged twenty-two. He was arraigned at the March sittings of the Central Court, charged on two counts. The first count was of shop-breaking and larceny, contrary to s170 of the *Criminal Law Consolidation Act* 1935-1973; he was charged with having broken into a shop at Warden on 18th January 1974, in company with two other men, and having stolen seven saddles of the value of $1,851, and money amounting to $17. The second count was for breaking and entering a hotel with intent to steal; namely, that he broke and entered an hotel at Klemzig on 20th January 1974, in company with the same two men, with intent to commit a felony.

The defendant has been before courts on many occasions from June 1966 onwards. While these all form part of his history, and as such should be borne in mind when determining what is the appropriate penalty for the offences in connection with which the sentences under review were imposed, we regard the more recent offences, and the penalties imposed in relation to them, as the most relevant. In November 1969 he was convicted in a Magistrates' Court of having driven a motor vehicle while disqualified from holding a driving licence and also with having illegally used a motor vehicle; and on each count he was imprisoned for six months.

In January 1970 he was convicted of three counts of clubhouse breaking and larceny, and sentenced to twelve months' imprisonment on each count (concurrent) to commence at the termination of the sentence which he was then serving. In August 1971 he was twice convicted of having driven a motor vehicle while disqualified from holding a licence and also with having given a false name and address; and was sentenced to three months' imprisonment in all. In the following month he was again convicted of having driven a motor vehicle while disqualified and he was sentenced to three months' imprisonment, concurrently with the sentences then being

served. Later in the same month he was sentenced to four months' imprisonment on a charge of unlawful possession. In April 1972 he was again convicted on three counts of having driven a motor vehicle while disqualified, and was sentenced to four months imprisonment. In June 1972 he was charged with restaurant breaking and larceny, shop-breaking and larceny, shop-breaking and larceny, clubhouse breaking and larceny and simple larceny. He was sentenced on each count to two years' imprisonment, the sentences to be served concurrently. It appears that within two months of his release he was committing the offences which he asked should be taken into account.

The learned trial Judge sentenced the applicant to imprisonment with hard labour for four years and six months on each count, the sentences to be served concurrently. The maximum penalty which might have been imposed for the first count was eight years imprisonment and the maximum for the second count seven years.

The applicant put forward two grounds of appeal namely:

> '(1) That in all the circumstances the sentences imposed on both charges was manifestly excessive.
> (2) That the learned trial Judge failed to take into account or failed to adequately take into account the rehabilitation of the defendant.'

Before us Mr Bollen, for the applicant, said everything that could be said for him. We have no hesitation, however, in coming to the conclusion that neither ground can be sustained.

As to the first ground it is true that the sentences are lengthy; but the applicant's conduct was seriously criminal in its character. We agree with the comment by the learned trial Judge in his remarks on sentence, namely,

> 'The law now has to deal with you as one who has embarked on a course of committing serious crimes ... You would line up your receivers and you knew where to get rid of the stuff you had stolen. I am afraid that the law has got to take a very serious view of your conduct'.

It is proper, of course, that a court should impose as lenient a sentence as is reasonable in the circumstances of the particular case. But where an accused man has experienced leniency, including a bond (which he broke by committing further offences) and a series of comparatively short sentences over a period of years, which have neither led him to reform nor to avoid crime for fear of the consequences, then it becomes progressively more difficult for a court to extend leniency. Where, as here, a man recently released from gaol commits eighteen serious offences against honesty, commits them deliberately and in a professional manner, in a period slightly less than one month, the extent to which a court may extend leniency in the form of imposing a short sentence is extremely limited. It is trite law, of course, that an applicant in the present circumstances does not succeed by demonstrating (were it so – and we do not say that it is so) that the sentences which members of this Court would have imposed had they been hearing the case at first instance would have been less than those actually imposed. He has to show reasonable grounds for arguing that the sentences are manifestly excessive that is to say clearly and obviously excessive. This he has not done.

As to the second ground, it is relevant to ask what the learned trial Judge could have done other than what he did. It is clear that he had in mind the rehabilitation of the applicant. Having pointed to the fact that when he was in prison on the last occasion the applicant had learned the trade of a boiler attendant he said, at the end of his remarks on sentence:

> 'Now, McDonald, I can only hold out one hope for you, that is that whilst you are in prison this time you will continue to study — and you can study — and hope that the Parole Board will see fit to release you and Act you settle down, but rest assured that it will get worse if you continue breaking the law.'

It has become commonplace of late for persistent criminals to complain that the trial judge has failed to take his rehabilitation into account properly. This complaint, in the case of a persistent criminal who receives a longer sentence than he has previously experienced, seems to us to overlook the rehabilitative effect which the deterrence of a long sentence itself may provide. In such a case — and we emphasize that we are speaking of the persistent criminal only in this

context — a long sentence, taken in conjunction with the powers of the Parole Board to order the release of the prisoner under supervision during the course of the sentence, may be the only effective means of rehabilitating him.

For the first offender, or in some circumstances the man with few previous convictions a suspended sentence may be the most appropriate course. But the course is clearly inappropriate in the case of a persistent offender such as the applicant in this case. Comparatively short sentences in the past have not had the required rehabilitative effect on the prisoner; and we think it proper that the trial Judge should have taken the course which he did; namely to impose a longer sentence in the hope that a combination of the deterrent effect of longer sentences, together with the power of the Parole Board to supervise the conduct of the applicant if it sees fit to release him during the course of the sentence, is the best means of achieving the rehabilitation of the prisoner in the present case.

In cases such as this the ultimate fate of the prisoner lies in his own hands. Courts and rehabilitative agencies will do their best to see any man re-established in society if he wishes to give up a course of criminal conduct. But where a man's history shows a consistent disregard for the law and the rights of others over a long period, a court would be betraying its duty to the public and indeed to the prisoner himself if it created the impression that he could hope for a continuation of short sentences, when previous experience has shown that short sentences have not had the effect of leading him to become rehabilitated.

Our references to the Parole Board are not to be taken as an indication of how the Board will, or should, act. The Board must, of course, not only make its own decisions, but do so in the light of the circumstances at the time, including some which lie in the future. For these reasons the application was refused.
