19/90

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v YOUNG & ORS

Young CJ, Crockett and Nathan JJ

21 November 1989; 19, 20 February, 1 March 1990

[1990] VicRp 84; [1990] VR 951; (1990) 45 A Crim R 147

CRIMINAL LAW – SENTENCING – PROPER APPROACH TO SENTENCING – WHETHER TWO-STAGE SENTENCING METHODOLOGY SHOULD BE ADOPTED.

The task of a sentencer is to pass such sentence as the sentencer thinks appropriate having regard to the nature, gravity and circumstances of the offences, the circumstances relating to the offender, relevant statutory provisions and the sentencing principles developed by the Courts. It is erroneous to adopt a two-stage sentencing process. Accordingly, a sentencer was in error in imposing a sentence by firstly determining the sentence proportionate to the gravity of the offence then secondly in considering factors personal to the offender, the purposes sought to be achieved by the sentence and the principle of totality.

R v Williscroft **[1975] VicRp 27; (1975) VR 292, followed.**

Veen v R (No 1) **[1979] HCA 7; (1979) 143 CLR 458; 23 ALR 281; (1979) 53 ALJR 305;**

Veen v R (No 2) **[1988] HCA 14; (1988) 164 CLR 465; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224;**

Baumer v R **[1988] HCA 67; (1988) 166 CLR 51; (1988) 83 ALR 8; (1988) 35 A Crim R 340; (1988) 8 MVR 289; (1988) 63 ALJR 113, considered.**

[Note: The High Court refused special leave to appeal. Ed.]

THE COURT: [*After setting out part of the reasons given by the sentencing judge, the Court continued*] ... **[3]** [I]t is perhaps desirable that we should say at once that there is nothing whatever new in what the learned judge called the principle of proportionality. We shall have to return to the question later but for the moment it is sufficient to say that for as long as any member of the Court can remember it has been the law in Victoria that an offender **[4]** must not be sentenced to a more severe punishment than is appropriate or proportionate to the offence which he has committed. (See *R v Dole* [1975] VicRp 75; [1975] VR 754 at p762).

We do not, however, understand the learned judge's report to be concerned to tell this Court about the principle of proportionality but rather to explain for the Court's assistance the method by which he arrived at the sentences which he imposed. The amended grounds of appeal in the cases of Dickensen and West may be said to attack the method employed and certainly the argument before us was very largely concerned with a discussion of that method.

From the learned judge's report and from His Honour's very full remarks made when passing sentence both in the cases of Dickensen and West and in the case of Young it is possible to ascertain what method he used to arrive at the sentences to be imposed. His Honour approached the task in two stages. First he arrived at what he described as "the sentences which were proportionate to the gravity of each the charges." He said "in my view the sentence which is proportionate to each of the crimes of armed robbery on the banks is twelve years' imprisonment so far as Dickensen is concerned." After saying that West was under the influence of the other co-offenders His Honour said: "In his case, in my view, the proper sentence which is proportionate to his crime, is six years in respect of each of the armed robberies at the banks."

What facts or circumstances His Honour took into account in arriving at those sentences is not entirely clear but it would seem that, speaking generally, he excluded what **[5]** might be described as factors personal to the particular offender under consideration, such as previous convictions. His Honour does not appear to have been entirely consistent in the process, for he plainly did not exclude in the cases of West the fact that he was under the influence of the co-offenders.

It is not clear whether His Honour thought that in view of the passages in the authorities which he quoted he was obliged to proceed in the way that he did or whether he did it merely as a matter of preference. We think the latter must be the true view of what he did because he said, in the first paragraph we have quoted from his report that he had found the approach helpful. To put the matter beyond doubt, however, we think we should say quite unequivocally, that as we understand the High Court cases, there is nothing in them to suggest that a sentencing judge is required to approach the task in the way that the learned judge did in these cases. Indeed Mr Flanagan who appeared for the Crown to support the learned judge's sentences conceded without any qualification that the High Court imposed no such restraining method upon sentencing judges. We are clearly of the opinion that the concession was rightly made. What arises for decision, however, is whether it is open to a sentencing judge to proceed in the way the learned judge proceeded in these cases.

Any judge who has been called upon to sentence an offender would agree that the task is a most difficult one. In almost every case the passing of a sentence involves the exercise of a discretion, a discretion which must of course be **[6]** exercised judicially. In exercising the discretion a sentencing judge is, of course, constrained by any legislation governing the matter before him and by the sentencing principles developed by the Courts. In Victoria now there is a substantial amount of legislation which a sentencing judge must bear in mind when sentencing an offender. He must of course bear in mind the maximum sentence prescribed for the offence by the statute creating the offence, e.g. the *Crimes Act*. And he must also follow the manifold directions of the *Penalties and Sentences Act* 1985. The statutory instructions, speaking generally, make the task of the sentencing judge more difficult, if for no other reason than that he must keep in mind a number of provisions which are not invariably clearly expressed. Experience in this Court shows that sentencing judges often encounter difficulty with the statutory provisions.

Subject to the constraints to which we have referred the task of a sentencing judge is to pass such sentence as in all the circumstances relating to the offence and to the offender is that which he regards as the appropriate sentence. The sentence thus arrived at may not be exactly the same sentence as another judge would pass, but the statement of that possibility does no more than recognize that when a sentence is discretionary different minds will reach different conclusions. It has always been recognized that subject to any particular statutory limitation a sentencing judge has open to him a range of sentences. He may choose between a custodial and a non-custodial sentence and if he properly chooses the former, he has open to him a range of terms of **[7]** imprisonment. A sentence within the latter range, assuming that imprisonment is called for, cannot be said to be inappropriate.

In Victoria it has long been accepted that "the purposes of punishment are manifold" (*R v Williscroft* [1975] VicRp 27; [1975] VR 292 at p299). There will often be differences of opinion as to the purposes both amongst sentencing judges and amongst members of the public or of any section of the public and in addition the purposes may vary from offender to offender and from one offence to another. Any judge with experience of sentencing knows that no two cases are the same and that the circumstances of particular offences and particular offenders are infinitely various, especially where multiple offences and a number of co-offenders are concerned. It is for these reasons that in this State the task of the sentencing judge has never been regarded as capable of being confined, without injustice, within rigid formulae. It is for these reasons that a majority of the Court said *Williscroft's Case* in a passage which has become well known (at p300):

> "Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless (as it was thought to be in *Kane's Case*) to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination."

Kane's Case is reported at [1974] VicRp 90; [1974] VR 759 and reference may particularly be made to pp764-766. *Williscroft's Case* has been referred to with approval in a number of cases in other Courts but particular **[8]** reference may be made to *R v Holder* (1983) 13 A Crim R 375; [1983] 3 NSWLR 245 per Priestley JA at p270. It has not, so far as we are aware, ever been questioned. It is frequently cited and followed in this Court.

In a number of High Court cases to which we shall shortly turn an opportunity would have been open to the High Court, if it had thought that the approach in *Williscroft's Case* was

wrong, to have said so in clear terms. So far from doing any such thing members of the High Court expressed themselves in a number of places in terms which are only consistent with what we might call the *Williscroft* approach and in one case where the High Court re-sentenced an offender the judges adopted precisely the same approach. [*The Court then considered a number of decisions of the High Court and continued*] ... **[16]** Again there is no justification for a suggestion that a sentencing judge should approach his task in two stages or by other formalized steps. The contrary view seems to stem from a notion that the very principle that a sentence must not be disproportionate to offence charged of itself imposes an order in which a sentencing judge is to consider factors relevant to his task.

It is said that, therefore, a sentencing judge must first fix a sentence which is proportionate to the crime, taking into account some only of the relevant factors. We see no justification for this course whatever and we think that its adoption would be likely to lead either to the imposition of inadequate sentences or to injustice. It would certainly lead to an increase in appeals against sentence. What is a sentence proportionate to an offence is a matter of discretion and there must in most cases be a range of sentences open to a sentencing judge which are proportionate to the offence. There cannot be said to be a sentence which is the proportionate sentence, as the learned judge in his report in these cases said that he had purported to fix. Thus to attempt to fix a proportionate sentence before fixing the sentence to be imposed will only multiply the possibilities of error. Upon what facts is the proportionate sentence to be fixed?

[17] There was some suggestion that the proportionate sentence should be arrived at on the "objective facts or circumstances" only and it was said that support for this view is to be found in a passage in Wilson J's judgment in *Veen (No. 2)* [1988] HCA 14; (1988) 164 CLR 465; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224 where His Honour said (at CLR p488):

> "A sentence cannot represent appropriate punishment for the particular offence if by reason of a concern to protect the community it exceeds that sentence which is the maximum the circumstances of the offence, viewed objectively, will bear."

Mr Woinarski who appeared before us as *amicus curiae* said that he had not been able to find any other reference to "objective facts" or similar expressions. In *Hoare v R* [1989] HCA 33; (1989) 167 CLR 348; (1989) 86 ALR 361; (1989) 63 ALJR 505; 40 A Crim R 391 the High Court did however say (at ALR p365):

> "Secondly a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances (see *Veen v R (No.2)* [1988] HCA 14; (1988) 164 CLR 465 at 472 485-6, 490-1, 496; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224;)."

All that we need say about those quotations is that nowhere does the Court discuss what is meant by "objective" and to cite the warning of Wilson J in *Veen v R (No.2)* (at pp486-7) where His Honour said:

> "Nevertheless the case [*Veen (No.1)* [1979] HCA 7; (1979) 143 CLR 458; 23 ALR 281; (1979) 53 ALJR 305] illustrates the ease with which obscurity of meaning can infect this area of discourse."

How, for instance, should the circumstances of a homicide be viewed objectively when, as Sir Owen Dixon pointed out as long ago as 1935, the law of homicide has gradually evolved "from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act." See 9 ALJ (Supp) 64. **[18]** It is neither necessary nor desirable for us to go further at the moment. It is sufficient for us to observe that we can find no warrant in authority or justification or advantage from a practical point of view in the adoption of an artificial process for arriving at an appropriate sentence or any process which unnecessarily limits further the discretion of a sentencing judge. We think that the adoption of such a process is calculated to lead to error and injustice. Until Parliament or the High Court indicates to the contrary we are clearly of the opinion that artificial processes or methods should not be adopted in Victoria.

We were referred by Mr Woinarski to a passage in *Principles of Sentencing* 2nd ed. by DA Thomas, (Heinemann, London 1979) at p35 where the author under the heading "Fixing the Ceiling"

makes some observations which might be thought to support the approach of the learned judge in the present case. In particular on that page the author quotes from an unreported decision in 1972 which reads:

> "the proper way of sentencing is to look first at the offence itself and the circumstances in which it was committed, then to assess the proper sentence for the offence on the basis that there are no mitigating circumstances; and finally to look to see what the mitigating circumstances are, if any, to reduce the assessed sentence to give effect to the mitigating circumstances."

All we shall say about that passage is that whatever authority it may have in England, where the problems of sentencing are somewhat different from those in Victoria, we do not think it should, for the reasons we have already given, be adopted here.

As we have already indicated Mr Flanagan submitted that although the learned judge was not obliged to proceed in **[19]** the way that he did, he was entitled to do so if he so wished. In the first paragraph which we have quoted from the learned judge's report His Honour says that he has found the approach helpful. Far be it from this Court to prevent a judge called upon to sentence offenders from adopting a course which he finds helpful in "ensuring that all relevant matters are considered", but we feel compelled to say for the reasons that we have given that the procedure adopted by the learned judge is such a departure from the long established practice in Victoria and so likely to lead to error (as it did in a technical sense in the cases of Dickensen and West, see His Honour's report) and possible injustice that the adoption of the process should itself be regarded as a sentencing error requiring this Court to consider the sentences for itself and if necessary to re-sentence the applicants.

[*The Court then dealt with each application for leave to appeal against sentence.*]

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Solicitors for the applicant West: Rennick and Verhoeven.
Solicitor amicus curiae: Legal Aid Commission.
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