79A/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BURCHIELLI

Young CJ, Lush and Kaye JJ

10 June 1977

SENTENCING – ACCUSED PLEADED GUILTY TO SELLING HEROIN – RELEASED ON PROBATION FOR FOUR YEARS WITH SPECIAL CONDITIONS TO UNDERGO ASSESSMENT AND TREATMENT – WHETHER SENTENCE MANIFESTLY INADEQUATE.

B. who pleaded guilty in the County Court to a charge of selling a drug of addiction, namely heroin, without being authorized or licensed to do so (*Poisons Act* 1958 s32) was placed on probation for four years with special conditions requiring him to report to Pleasant View for assessment and treatment. On appeal by the Attorney-General pursuant to *Crimes Act* 1958 s567A—

HELD: Appeal dismissed. Per Young CJ and Lush J (Kaye J dissenting): The County Court judge was entitled to make the order appealed against.
There were two matters which tended to reduce the heinousness of the crime itself – that B. was selling only to persons who were already users of heroin and so was not by his sales spreading its use, and that it was at least arguable, or consistent with the proved facts, that the financial objective in selling was to get the money necessary to support his own addiction. Whilst the personal factors alone or the extenuating factors alone would have justified the order made, when they were considered in combination, as they must be to obtain a whole picture of the individual case, it could not be said that the sentencing Judge was demonstrably wrong.

YOUNG CJ and LUSH J: ... At the hearing in the County Court two reports by Mr RV Conway, psychologist, were tendered and received. These stated that the respondent had said that since the arrest he had taken substantial steps towards controlling his addiction, and that there was no reason to disbelieve this. The respondent was essentially of a weak and dependent character who seemed able to adapt himself only to the society of others like himself. A gaol sentence would impose strains beyond the capacity of his personality to sustain, and he might well become psychopathic. The final report pleads for the taking of a lenient view by the Bench, the respondent having shown goodwill and determination in his efforts to break his addiction. The comment should be made that the recounted facts relating to these efforts were entirely unproved. It is common enough for pleas to be handled in this way, but in our opinion it should be clearly understood that the trial Judge is not bound to accept as true statements of fundamentally important facts which are put forward in this way, and it is not to be assumed that, not being satisfied, he will allow the plea to be heard a second time on better evidence. The general practice in this State is that prosecuting counsel will assist the Judge on matters of law relevant to his sentencing powers, but do not offer submissions as to the manner in which a discretion in the choice of courses should be exercised. The decision in these matters is the essence of the exercise of the sentencing power: the responsibility for it is the Judge's and the Judge's alone. We do not think that the Judge should regard himself as disbarred from inviting the comments of either counsel on a course which he is considering. In cases in which an appeal is brought under s567A, the traditional course followed by prosecutors may appear, after the event, to be open to the criticisms that it has given the Judge no assistance in the critical assessment of the plea and that the accused, having heard his plea presented without opposition and in substance accepted, is faced with a challenge to the result made by a Crown authority which did not, through the prosecutor, express its views in Court.

These considerations suggest that it is desirable that prosecutors should be prepared to take, in their discretion, a more active part in the hearing of pleas. Beyond that statement we do not wish at present to go. We certainly do not envisage the development of a practice under which prosecutors make submissions on the extent of the punishment to be imposed.

The Solicitor-General argued that the crime of selling a drug such as heroin was serious in itself, was of increasing prevalence, and called for a sentence of general deterrence. Drug selling

was an area of crime in which sentences could have a deterrence operation. The factors in the situation personal to the respondent were of limited relevance. Release on probation would offend the community sense of what was appropriate in the case of a man engaged for an appreciable time in the sale of heroin. Generalisations are of little ultimate assistance in determining the sentence in an individual case. With that qualification, we would accept all the Solicitor-General's submissions as to penalties for drug selling. But that is not to say that there cannot be cases in which a probation order is proper. The respondent's addiction and his personality defects were not so much extenuating circumstances in relation to the commission of the offence as factors personal to him relevant to the selection of an appropriate penalty, as were his efforts to rid himself of his addiction.

There were really only two matters which tended to reduce the heinousness of the crime itself – that the respondent was selling only to persons who were already users of heroin and so was not by his sales spreading its use, and that it was at least arguable, or consistent with the proved facts, that the financial objective in selling was to get the money necessary to support his own addiction.

We do not think that either the personal factors alone or the extenuating factors alone would have justified the order made, but when they are considered in combination, as they must be to obtain a whole picture of the individual case, we are unable to say that the learned Judge was demonstrably wrong. This Court examined in *R v Robinson* [1975] VicRp 81; (1975) VR 816 at pp826-828 the matters which must be proved as a basis for an order under s13 *Alcoholics and Drug-Dependent Persons Act* 1968. The decision in *Bloom's Case* [1976] VicRp 67; (1976) VR 642 makes it clear that the trial Judge is under no obligation to institute an inquiry into the question whether the section is applicable to the particular case. The accused person is not entitled to have one plea heard in which a bond or probation is asked for, and when that fails, another in which an order under s13 is sought. ... On the material placed before him in this case, the learned Judge was entitled to make the order appealed against. The appeal should therefore be dismissed.

KAYE J: ... For the reasons which I am about to state, in my opinion the appeal should be allowed and the respondent should be sentenced to a term of imprisonment. ... I have reached this conclusion after considering each of the following matters separately and in combination one with another.

Firstly, the seriousness with which the community views the crime of trafficking in drugs is evidenced by the maximum penalty fixed for the offence. The community's concern is to protect its own wellbeing by preventing both the uninitiated from being introduced to drugs of addiction as well as users and addicted persons from obtaining further supplies. Moreover, the community abhors the conduct of a person who enriches himself by supplying drugs of addiction to others. The learned Judge was constrained to conclude that on a number of occasions over a period exceeding one year the respondent had sold to users and addicted persons quantities of heroin and that he had done so for his own monetary gain. Secondly, less than ten months before the commission of this crime, the respondent had been convicted of the offence of importing into Australia a quantity of heroin for which he was fined $100. It was apparent, therefore, that the respondent had not been deterred by a non-custodial penalty for a previous criminal activity arising out of his dealings with heroin.

Thirdly, the sentencing process, is founded upon the assumption that appropriate punishment by imprisonment does deter repetition of some offences. Furthermore, punishment is intended to give forewarning to all, both addicted and non-addicted persons, of the manner in which the Court is likely to deal with a particular type of offence.

Fourthly, in recent years it has become common practice of some to be concerned with the effect of imprisonment on a convicted person almost to the total exclusion of all other relevant and proper considerations. This practice might have developed out of the increasing use of opinions of persons qualified in matters pertaining to human conduct and relations. But such opinions ought not to be used as a substitute for the exercise of the Judge's discretion. If for no other reason, this is so because the concern of the expert and the duty of the sentencing Judge differ. In my view the sentencing process is primarily directed towards punishment of the offender for breach of the criminal law, so that the public might be protected from conduct which is inimical.

I express agreement with the observation made by Lush J that many of the facts upon which Mr Conway based his opinions and predictions were not verified by sworn evidence and that they were thereby lacking in evidentiary value. The learned Judge was induced to make a probation order because he was concerned with serious adverse effects which Mr Conway predicted the respondent was likely to suffer by a term of imprisonment because of his fragile and vulnerable personality. While concern for mental well-being of an offender is proper, it ought not to be the decisive factor in the decision whether he ought to be punished by imprisonment if his crime is a heinous one.

Fifthly, it was a material circumstance for consideration by the learned Judge that the respondent, who was represented, did not make application for an order under s13 of the *Alcoholics and Drug-Dependent Persons Act* and that he offered no explanation for his preference for a probation order. ... In my view, the respondent, in the proper exercise of the learned Judge's discretion, should have been sentenced to a term of imprisonment.
