25/87

SUPREME COURT OF VICTORIA — FULL COURT

R v IBRAHIM

Young CJ, Kaye and Gray JJ

3 June 1987 — (1987) 27 A Crim R 460

CRIMINAL LAW – PROCEDURE – FITNESS TO PLEAD – ACCUSED SILENT WHEN ARRAIGNED – COURT TO DETERMINE WHETHER ACCUSED MUTE OF MALICE OR MUTE BY THE VISITATION OF GOD.

1. Where an accused person does not verbally answer a charge when it is read out, the Court must ascertain whether the accused is fit to plead. In order to determine this question, the court must determine whether the accused is mute of malice or mute by the visitation of God.
***R v MacCarthy* [1967] 1 QB 68; [1966] 1 All ER 447.**

2. Where an accused, immediately prior to arraignment, had discussed a matter in the hearing of the court, an inquest to determine his fitness to plead was not necessary, as it was clear he stood mute of malice.

YOUNG CJ: **[1]** The Court has before it an application for leave to appeal against conviction and an application for leave to appeal against sentence by Alex Ibrahim, who was convicted in the County Court last year on a presentment which charged him with one count of trafficking in a drug of dependence, namely heroin, and four counts of theft. In circumstances which I shall relate in a moment a plea of not guilty was entered and the trial proceeded, during which the applicant remained mute. He was duly convicted and was sentenced by the learned trial Judge to be imprisoned on the count of trafficking for a term of eight years and on each of the counts of theft for a term of six months, and the learned trial Judge directed that the sentences of six months on counts, 2, 3, 4 and 5 should be served concurrently with the sentence of eight years imposed on the first count. That made a total effective sentence of eight years and the **[2]** learned Judge fixed a minimum term of seven years before which he should not be eligible to be released on parole. An order was also made forfeiting to the Crown certain scales and weights, a walkie-talkie radio, a video game and three knives.

It is unnecessary for the purposes of the application to relate the facts upon which the Crown relied. It is sufficient to say that the applicant, who was not represented in this Court, presented to the Court an elaborate series of written submissions which he invited the Court to consider. In all, there were fourteen grounds of appeal, but I find it unnecessary to deal with all of them. There were three, however, that warrant some attention.

The first was that the learned trial Judge should have adjourned the trial to permit the applicant to exhaust his rights to legal aid. What had happened was that the trial was held in December of last year and the applicant had first made application for legal aid some months before that, and had then declined to provide the Legal Aid Commission with some of the information which they required. He said that the Legal Aid Commission would only fund his representation if he would plead guilty, and he did not wish to do that. When the trial began he applied to the trial Judge for a further adjournment to let him make another application to the Legal Aid Commission. The learned Judge granted a sufficient adjournment to enable an officer from the Legal Aid Commission to go to the Court and to consider again the applicant's desire to be represented.

There was **[3]** some discussion about the failure of the applicant on a previous occasion to provide the information which the Legal Aid Commission had sought, and the applicant endeavoured to have the matter put off until this year. The learned Judge indicated that he was not prepared to grant so long an adjournment, but he did give the applicant the opportunity of speaking to the Legal Aid Commission again, and again the Commission decided that they would not fund his defence. I have not related the whole of the details of that application. In fact the trial

began before the negotiations with the Legal Aid Commission had been completed, and the learned Judge indicated that if legal aid were ultimately granted, he would be prepared to abort the trial. It is quite apparent that the learned Judge gave the applicant every opportunity of obtaining legal aid through the Legal Aid Commission, and there is nothing in what occurred which suggests that His Honour incorrectly exercised his discretion. Accordingly, I would not uphold that ground of appeal.

The second ground of appeal that needs to have some consideration concerns what occurred when the applicant was arraigned. He stood mute, and thereupon the learned Judge directed that a plea of not guilty should be entered on the record, and such a plea was entered. The applicant has now said in the written submission which is before us that the learned Judge ought to have empanelled a jury to determine whether the applicant was mute of malice or mute by the visitation of God. In view of the fact that the applicant had been discussing his legal aid situation with the learned Judge for a **[4]** considerable time, the ground of appeal may seem a little curious. I am satisfied that in the circumstances the learned Judge was well entitled to direct that a plea of not guilty should be entered on behalf of the applicant without the necessity of empanelling a jury to go through the formality of finding, as it would have had to do, that the applicant stood mute of malice.

It is, of course, well established that if an accused person does not answer the charge on arraignment the Court must ascertain whether he is mute of malice or mute by the visitation of God, and very often it is necessary for that question to be determined by a jury empanelled for the purpose. But so long ago as 1800 it was stated quite clearly that if an accused "spoke the same day in the hearing of the court, then such inquest of office is not taken, for the court is of their own knowledge ascertained of his ability to speak": *Hale's Pleas of the Crown*, Volume 2, p315. In other words if the reason for the accused's standing mute is not in doubt it is unnecessary for the judge to empanel a jury to try the issue. Hale's proposition is directly in point. The applicant had spoken the same day in the hearing of the Court and, accordingly, the empanelling of a jury to determine whether he was mute of malice or by visitation of God was unnecessary.

Further support for that proposition can be found in the decision of the Court of Criminal Appeal in England in *R v MacCarthy* [1967] 1 QB 68; [1966] 1 All ER 447, where the appellant was a deaf mute. Some conduct on his part caused the trial Judge to remand him for a medical report. **[5]** When the adjourned hearing came on, the trial Judge had before him certain medical reports, all of which showed that despite his infirmities, he was fit to plead and could understand communications in writing. Before the jury was sworn and before the appellant was put in the dock, the trial Judge, being told by counsel for the prosecution that one of the doctors was present, put questions to the doctor relevant to the appellant's fitness to plead. Neither the prosecution nor the defence nor the Judge raised the question of fitness to plead and the trial proceeded. The prisoner was convicted, and on appeal against that conviction, it was said that a question had arisen which required the deputy chairman to have caused a jury to be empanelled to decide the question whether the appellant was fit to plead.

In holding that it was in that case unnecessary to empanel a jury, Lord Parker CJ added at p448:

> "In passing, this court is quite clearly of opinion that in the present case it would have been unnecessary to empanel a jury to decide what was the first question posed by Alderson B, namely, whether the appellant was mute by malice or mute by visitation of God, because it has always been assumed, and rightly assumed, that he was deaf by the visitation of God."

The importance of that passage is that it was held to have been rightly assumed that the applicant in that case was deaf by a visitation of God. I refer also to an article entitled "Standing Mute and Fitness to Plead" by Mr AR Poole, Lecturer in Criminology at Exeter University [1968] Crim LR 6 where after reference to Hale's authority and to *R v MacCarthy*, the author says (at p10):

> **[6]** "In general terms, then, the law may now be stated in this way: if the accused stands mute on arraignment and there is any doubt as to whether he is standing mute by the visitation of God or of malice, the issue must be determined by a jury. If it is clear that he is mute by the visitation of God, this procedure is unnecessary, as it is when it is clear that he is mute of malice."

Accordingly, there is, in my view, no substance in the ground of appeal which suggests that the learned Judge ought to have empanelled a jury to determine whether the applicant was mute of malice.

The only other ground of appeal which I think merits any consideration at all is the suggestion that this Court should now create or recognize a right in an indigent accused without an adequate command of the English language to be defended by counsel. There is no right to counsel in Victoria, but this case is not one in which the question whether we should create or recognize such a right arises, for there was no sufficient evidence before the Court that the applicant was indigent, and it is certainly not true to say that he did not have an adequate command of the English language. The transcript reveals that in discussion with the learned Judge which was conducted without the assistance of an interpreter he plainly did have a command of the English language.

It is, therefore, unnecessary for this Court to consider any further that ground of appeal which complains that the learned Judge did not elevate the right in s397 of the *Crimes Act* into a right to have counsel appointed by the Court.

[7] The other grounds of appeal which are set out and elaborated in the written statement are for the most part variants of the three grounds to which I have referred. I find no substance in any of them. Ground 12, however, was an independent ground. I shall refer to it briefly. The complaint in that ground is that the learned trial Judge ought to have found that there was no case for the applicant to answer on the count of trafficking, because the Crown had not proved that he was not authorised or licensed under the *Drugs, Poisons and Controlled Substances Act* 1981 to sell heroin. In view of s104 of that Act, the Crown was not obliged to adduce such evidence. If the applicant had been authorised or licensed under the Act to sell heroin, it was for him to establish it before the Court. Accordingly, there is no substance in that ground.

Ground 13 which was concerned with the counts of theft was another independent ground but I find no substance in that ground either. I would accordingly dismiss the application for leave to appeal against the conviction and turn to the application for leave to appeal against the sentence, which is advanced on the single ground that the sentence imposed by the learned trial Judge was excessive.

I shall not relate the facts in any detail. It is sufficient to say that the applicant was a taxi driver of some experience and worked at a service station in Brunswick. From March 1984 onwards a Miss Waltham commenced living **[8]** with him and continued to do so until approximately 1st August 1984. Miss Waltham gave evidence of the identity of people who visited the applicant at the premises where they lived at 88 Gold Street, Brunswick, and described how the applicant trafficked in heroin with these people during the time that she lived with him.

As the learned trial Judge said when passing sentence, the trafficking took place over a substantial period of time, it was on a considerable scale, and it was done deliberately and methodically by the applicant. The applicant himself was a drug addict, and the learned Judge took that into account. In those circumstances, I can see no basis for saying that the sentence was manifestly excessive, and I would accordingly also dismiss the application for leave to appeal against the sentence.

KAYE J: I agree that both applications should be dismissed for the reasons stated by the learned Chief Justice.

GRAY J: I also agree.

YOUNG CJ: The order of the Court is that the application for leave to appeal against conviction and the application for leave to appeal against sentence are each dismissed.
