09/88

SUPREME COURT OF VICTORIA — FULL COURT

R v GIAKAS and ORS

Young CJ, Crockett and Marks JJ

2-3, 26 February 1988 — [1988] VicRp 88; [1988] VR 973; (1988) 33 A Crim R 22

CRIMINAL LAW – SENTENCING – SIGNIFICANCE OF PLEA OF GUILTY – DISCOUNT TO BE ALLOWED EXCEPT IN EXCEPTIONAL CIRCUMSTANCES – NO REMORSE SHOWN – ACCUSED ORIGINALLY CHARGED WITH MORE SERIOUS OFFENCE – WHETHER SPECIAL REASONS FOR DISALLOWING DISCOUNT – ELIGIBILITY FOR PRE-RELEASE – WHETHER SENTENCING COURT SHOULD ORDINARILY DENY SUCH ELIGIBILITY: *PENALTIES AND SENTENCES ACT* 1985, SS4, 19; *CORRECTIONS ACT* 1986, SS80, 82, 84.

1. Unless there is some special reason or exceptional circumstance, a plea of guilty should ordinarily be taken into account by the sentencing court in the accused's favour.
***R v Morton* [1986] VicRp 82; (1986) VR 863; (1986) 23 A Crim R 433, followed.**

2. The fact that the accused was originally charged with a more serious offence or showed no remorse would neither alone nor in combination amount to special reasons or exceptional circumstances justifying a disallowance of a discount for a plea of guilty.

3. Pursuant to s19 of the *Penalties and Sentences Act* 1985 a sentencing court may order that an accused be ineligible for release under a pre-release permit. As the primary purpose of the pre-release provisions is the encouragement of an offender's prospects of rehabilitation and that at the time of passing sentence it is not easy to assess an offender's prospects of rehabilitation, a Court should not ordinarily exercise the power to deny eligibility for pre-release. Such power should be exercised only when there are clear supervening factors such as the offender's antecedents and/or the gravity/circumstances of the commission of the offence which are thought to bear adversely upon the offender's prospects of rehabilitation.

THE COURT: *[After setting out the circumstances of the offences, the verdicts and the sentences imposed, the Court continued]:* … **[8]** It is unnecessary to set out the other grounds of appeal relied upon but all relied upon his Honour's failure to allow a discount for the plea of guilty and his Honour's denial of eligibility for pre-release as indicating sentencing error.

Unfortunately we do not have the benefit of his Honour's views on these questions. Although as we have indicated his Honour raised the questions with counsel and indicated his tentative view so that counsel might deal with it, in his sentencing judgment his Honour simply said that it would be wrong to reduce the sentences by reason of the pleas of guilty but gave no reasons for declining to do so. Similarly at the end of his judgment the learned judge simply said that in all the circumstances none of the applicants should be eligible for pre-release and his Honour ordered accordingly. Again his Honour gave no reasons. Similarly when his Honour reported to this Court pursuant to section 573 of the *Crimes Act* he did not report any reason for not allowing a discount for the pleas of guilty or for ordering that the applicants be ineligible for pre-release although these questions had been made the subject of grounds in at least some of the notices of application for leave to appeal.

We draw attention to the fact that his Honour gave no reasons for the course he took not the purpose of **[9]** finding that his Honour fell into error but simply for the purpose of emphasising that we did not have the assistance of his Honour's reasons. A sentencing judge is not obliged to express in his reasons for sentence every single matter that he has taken into account, nor to give reason for every single step that he takes, but we feel bound to say that in a case like the present where the judge himself raised the question whether a discount should be allowed for a plea of guilty and whether eligibility for parole should be denied, some reasons for his Honour's conclusions might have been expected. They would certainly have been helpful. In the absence of his Honour's reasons the first question for consideration by this Court is whether the mere fact

that his Honour did not allow a discount for the plea of guilty, whatever the reason, amounts to an error in the exercise of his Honour's discretion.

This Court dealt with the significance of a plea of guilty in the light of section 4 of the *Penalties and Sentences Act* 1985 (No. 10260) in *R v Morton* [1986] VicRp 82; [1986] VR 863; (1986) 23 A Crim R 433. The conclusion was expressed as follows (pp867-8):

> "The result of this consideration of the section is that a court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest and even though it is a plea to lesser offences than those originally charged or intended to be charged. Doubtless, however, a plea of guilty which is indicative of remorse or of some other mitigating quality will ordinarily carry more weight than a plea dictated solely by self-interest. Nevertheless, Parliament having indicated by the requirement that a court state the fact that it has reduced the sentence that it would otherwise have passed on account of a plea of guilty, that encouragement is to be given to pleas of guilty, such a plea **[10]** should ordinarily be taken into account in the accused's favour. But nothing in this judgment should be taken as indicating a requirement that a court should pass a sentence that in all the circumstances it considers to be inappropriate."

There is little use in trying to paraphrase the passage but it may be helpful to emphasize that a plea of guilty should ordinarily be taken into account in the accused's favour. This must follow from Parliament's intention to encourage pleas of guilty. The last sentence in the passage quoted is not intended to limit the force of the earlier statements in it. It was inserted simply because the situations which confront a sentencing court are infinitely variable and there might be a situation in which the sentencing judge felt that for special reasons or exceptional circumstances it was not practical or desirable to allow a discount for a plea of guilty. When that happens it would ordinarily be expected either that the reasons or circumstances were so obvious as to need no explanation or that the sentencing judge would express the reasons which led him to refuse a discount.

When a judge reduces a sentence that he would otherwise have passed pursuant to section 4(1) of the *Penalties and Sentences Act* he is of course obliged by section 4(2) to state that fact when passing sentence.

In the present case we can see no special reason or any exceptional circumstance for denying any of the applicants a discount for his plea of guilty and we have accordingly come to the conclusion that his Honour fell into error by doing so. It is sufficient to say that neither the fact that the applicants were originally charged with a more serious **[11]** offence, whether or not there was a serious risk of conviction for that offence, nor any lack of remorse on the part of any applicant would either alone or in combination amount to special reasons or exceptional circumstances. We are accordingly obliged to re-sentence the applicants ourselves. Before doing so, however, there is another ground of appeal with which we should deal. It concerns eligibility for pre-release.

As previously stated the learned trial judge denied eligibility for pre-release to each of the applicants but gave no reasons for doing so. So far as the absence of reasons by his Honour is concerned we would make the same observations as we made in connexion with the pleas of guilty. In the circumstances all that we can do is to consider whether the mere fact that his Honour denied the applicant's eligibility for pre-release amounted to an error in the exercise of his Honour's discretion.

The statutory provisions relating to pre-release are to be found in Division 6 of Part 8 of the *Corrections Act* 1986 (No. 117 of 1986) which came into operation on 6th May 1987. We shall not transcribe the whole of the Division which comprises sections 80-84 inclusive but it may be useful to set out sections 80, 82 and 84 which read as follows:
[The Court then set out the statutory provisions and continued]

... **[13]** Some discussion took place during the argument as to the purpose of these provisions and we were referred to the second reading speech of the Minister introducing the Bill which became the *Community Welfare Services (Pre-Release Programme) Act* 1983 (No. 9968) which is the origin of the pre-release scheme. However no statement in that speech assists in determining the policy of Parliament in enacting it and accordingly we can only derive the purpose from the

language used. Although, as has been suggested, a purpose of the pre-release provisions may have been to reduce the gaol population, the matters which the Board may consider in determining whether to grant a pre-release permit and the linking of a prisoner's release to eligibility for parole strongly suggest that the primary purpose of the pre-release provisions is the encouragement of an offender's prospects of rehabilitation.

The Parole Board would have to consider before granting a pre-release permit whether and on what conditions the offender would be granted parole when he became eligible for it. From the sentencing Court's point of view, of course, it is not easy at the time of passing sentence to assess an offender's prospects of rehabilitation, but a Court should not ordinarily exercise the power to deny eligibility for pre-release granted by section 19(1) of the *Penalties and Sentences Act* 1985 which might seriously diminish an offender's prospects of rehabilitation, particularly as the **[14]** provisions merely concern eligibility for those prospects being tested. The discretion given to the Court to deny eligibility for pre-release is to be exercised only when there are clear supervening factors such as the antecedents of the offender or the gravity of the offence and the circumstances of its commission or a combination of such factors which are thought to bear adversely upon the offender's prospects of rehabilitation. A sentencing Court, for example, might conclude in a given case that the factors to which we have referred mean that the purpose of the pre-release provisions is but remotely capable of being served.

In the case of the present applicants, most of them had no prior convictions. The two who did, Giakas and Politis, had convictions which were not great in number nor comparable in gravity with the offence with which we are concerned. The antecedents of the applicants particularly those without previous convictions and the evidence of character and background in each case were such that no reason emerges for denying any of them eligibility for consideration under the pre-release scheme and we think that such an order should not have been made.

[The Court then dealt with the question of sentences.]
