29/88

SUPREME COURT OF VICTORIA — FULL COURT

R v DENNAOUI and ORS

Young CJ, Kaye and Southwell JJ

5 May 1988

SENTENCING – BURGLARY ON CLOTHING STORE – YOUTHFUL OFFENDERS OF GOOD CHARACTER – REMORSE SHOWN – WHETHER UNSUSPENDED CUSTODIAL SENTENCE APPROPRIATE.

D. and 3 co-offenders (average age 21 years), pleaded guilty to one count of burglary on a sportswear store at night. Each offender had no relevant previous convictions, came from a good family, had had the advantages of a good education, had good prospects and had shown remorse in respect of the commission of the offence. The trial judge sentenced each offender to 2 years' imprisonment with a minimum of 15 months before eligible for parole. On appeal—

HELD: Appeals allowed. Sentences quashed. Each offender sentenced to 12 months' imprisonment of which 9 months suspended pursuant to s21(1)(b) of the *Penalties and Sentences Act* 1985.

YOUNG CJ: [with whom Kaye and Southwell JJ agreed]: **[1]** The Court has before it an application for leave to appeal against sentence by four applicants, Ahmed Dennaoui, Redwan Dennaoui, Dimitrious Apostolou and Antonios Spiridonis. The applicants are young men aged twenty-two, twenty-three, twenty-one and twenty respectively. They were charged in the County Court at Warrnambool with one count of burglary. Each applicant pleaded guilty, and after elaborate pleas had been made by counsel on behalf of each applicant, the learned Judge sentenced each of them to be imprisoned for a term of two years and His Honour fixed a minimum term of fifteen months before which they should not be eligible to be released on parole. Each applicant now seeks leave to appeal against the sentence so imposed upon the ground, in substance, that the sentence was manifestly excessive.

[2] I shall recount very briefly the facts which gave rise to the charge. The burglary was committed upon a store known as the Black Magic Sports Wear Store in Liebig Street, Warrnambool. It is a store which contains a large quantity of men's and ladies' leather wear. At about six o'clock on Saturday, 1st August, the premises were secure and the proprietor left, but by twenty past eleven that evening the burglary had been committed and a quantity of clothing had been removed. The entry had been effected by forcing a sliding door at the rear of the premises, probably with a crowbar. At about twenty past eleven in the evening police arrived at the back of the store, which was a large car park area. The police were in plain clothes and in an unmarked police car. They there saw a man who was later identified as Spiridonis walking from the back of the store towards a parked car and carrying what appeared to be clothing. They also saw another man leave the area with Spiridonis. The two men left when they realised, no doubt, that they had been seen. They ran off and were pursued by the police, but they escaped. Outside the back of the store the police saw a Commodore sedan in which there was a large quantity of leather garments and a driving licence with the name Tony Spiridonis on it. There were also some red-handled bolt cutters found in the car.

Early the following morning, at about 1.45, the police attended an hotel in Warrnambool and there they interviewed the applicant Spiridonis, who first of all denied any involvement in the burglary and said that the keys of his car had been stolen, and indeed that the car itself had **[3]** been stolen earlier that evening. Later in the morning at about 7.30 a.m., after the applicants Apostolou and Redwan Dennaoui had been interviewed by the police, Spiridonis made a statement to the police admitting his part in the burglary. The applicants Apostolou and Redwan Dennaoui had been seen by the police at about six o'clock in the morning. They were seen in some flats at Warrnambool. The police introduced themselves, and before anything more could be said, Apostolou replied, "We know. We were just going to ring you to give ourselves up". The two applicants Apostolou and Redwan Dennaoui were then interviewed and made full admissions as

to their parts in the burglary. The remaining applicant, Ahmed Dennaoui, was seen at flats in Warrnambool the following day, 3rd August 1987, as a result of an appointment made with the police. He was interviewed and he made full admissions also as to his part in the burglary. The admissions were recorded and records of the interview were placed before the Court. From the interviews it appeared that the applicants had been together on the evening of 1st August and for some reason which has not been explained during the course of the evening it was decided to commit the burglary.

The learned Judge who sentenced the applicants described the burglary as "a planned burglary for profit", or words to that effect, and counsel who appeared for the applicants in this Court did not deny the description. Although it is a description that is apt, there does not appear to be any basis for concluding that it was planned earlier than the evening in question, though the Judge **[4]** rejected, and I agree with him, that it was a "stealing to order".

It was suggested in the course of argument that the burglary itself perhaps escalated during the course of its execution. By that, I mean it was suggested that the original plan was merely to take clothing for the participants and their friends, but that as the clothing was being removed, it became apparent to the participants how easy it was to remove the clothing from the store, place it in the cars which were outside in the car park, and enthusiasm for the burglary may then have increased.

I have already indicated that the four applicants are young men. The ages which I have given are their present ages. They were obviously a little younger at the time of the offence. Each of them pleaded guilty, and none but Apostolou had any previous convictions. Apostolou acknowledged two previous convictions on 2nd August 1983, in the Children's Court, where he was charged with burglary and theft, both charges being found proven but adjourned to a date not exceeding fifty-two weeks, in other words, without penalty being imposed. The learned Judge properly said that those convictions were not significant for present purposes.

In addition to the factors which I have already mentioned, there was a substantial body of evidence in respect of each of the applicants indicating that they were young men of good character. Each of them came from a good family; each of them had had the advantages of good education, and **[5]** each of them had good prospects in life. There was evidence also that each of the applicants had shown some evidence of remorse. The learned Judge's view was the real attitude of the applicants was more in the nature of fear about their immediate future than true remorse or contrition. "At best", His Honour said, "it is imperfect remorse". Nevertheless His Honour went on to say, "I give it some weight, but not as much as I would have given to true remorse".

His Honour recognised that he was faced with the sentencing of four young men of good character, without relevant previous convictions, and that the law has invariably, in cases of that kind, wherever possible, considered that it is desirable that there be a non-custodial disposition. Further than that, s11 of the *Penalties and Sentences Act* now requires the Court to consider all other methods of disposition before imposing a sentence of imprisonment. His Honour recognised that, but ultimately said:

> "I am satisfied that to impose non-custodial sentences in the case of a planned burglary for profit, by people who had no excuse for taking part, would bring the law into disrepute."

His Honour then imposed the sentence which I have already announced. He did so after allowing some discount, not specified, for the pleas of guilty, and after taking into account the ages, absence of previous conviction and good character of the applicants. His Honour said that had he not taken those matters into account, he would have imposed a more severe sentence.

The question for this Court is whether in those circumstances the sentence so imposed can be described as manifestly excessive. **[6]** 1 do not think it is a situation in which it is possible to say that the mere fact that His Honour imposed a custodial sentence made the sentence excessive, although I would not be disposed myself to agree with His Honour's observation that a non-custodial sentence in the case of this particular burglary by these particular applicants would bring the law into disrepute, if that is what His Honour meant. I think it was open to a sentencing Judge to take the view that the case called for a custodial sentence of a moderate

kind, but I think that a sentencing Judge might also have taken the view that a non-custodial disposition was appropriate. A sentencing Judge has, and must have, a substantial discretion in the sentence to be imposed. I do not think that the imposition of a non-custodial sentence in this case would in the public mind, if the public could be fully informed of all the circumstances, bring the law into disrepute.

There is only one other observation that I would make about the learned Judge's sentencing remarks. I indicated that His Honour thought that that the attitude of the applicants was more fear than true contrition. It would not be appropriate for me to disagree with His Honour's view, although it was submitted to us that there was no basis for that conclusion. That submission, however, was made without the matter having been specifically raised in the grounds of appeal, and accordingly we had no observation from His Honour on that question in his report to the Court. It is sufficient, I think, for me to say that it is always difficult, of course, to judge whether a person is truly contrite or merely concerned **[7]** about his or her future disposition. But it does appear to me that if the learned Judge had given some weight to their contrition, some weight to their good character, some weight to their pleas of guilty and some weight to their youth and absence of previous convictions, he must have had in mind a sentence for the offence that was substantially greater than the one that he imposed.

Whether that be so or not, I have come to the clear conclusion that the sentence which His Honour did impose can properly be described, in the circumstances, as manifestly excessive and the sentence should not be allowed by this Court to stand. As I understand that that view is shared by the other members of the Court, I proceed to indicate the sentence which I would propose to the Court be substituted for the sentence which the learned Judge imposed. I would propose that each applicant – for I should add that I see no sufficient basis in this case for distinguishing between them – should be sentenced to be imprisoned for a period of twelve months and that nine months of that sentence be suspended. I propose that sentence to the Court.

KAYE J: I agree that the application should be allowed and with the sentence proposed by the learned Chief Justice and for the reasons expressed by him.

SOUTHWELL J: I also agree.

YOUNG CJ: The order of the Court is that each application is granted. Each appeal is treated as instituted and heard instanter and allowed. The sentences are quashed. In lieu thereof each applicant is sentenced to be imprisoned for a term of twelve months and nine months of each such sentence is suspended pursuant to s21(1)(b) of the *Penalties and Sentences Act* 1985. **[8]** Pursuant to s21(3) of the said Act, it is ordered that each applicant must not, within the period of twelve months from 29th March, 1988, commit another offence punishable by imprisonment. The sentences so imposed, by the operation of s14(1)(a) of the said Act, commence on the day the original sentence was imposed, namely 29th March 1988, the sentences imposed by this Court being substituted for those sentences. Section 16 of the said Act will operate so that the time spent by the applicants in custody prior to 29th March will be reckoned as a period of imprisonment already served under the sentence now imposed.
