07/73

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v NEWLANDS

Winneke CJ, Adam and Crockett JJ

6 April 1973

CRIMINAL LAW – SENTENCING – MALICIOUS DAMAGE TO A HOUSE AND INDECENT ASSAULT/CARNAL KNOWLEDGE AGAINST A GIRL UNDER THE AGE OF 16 YEARS – DEFENDANT HAD SUFFERED A LONG PERIOD OF PSYCHIATRIC DISORDER AND HAD BEEN IN INSTITUTIONS AT VARIOUS TIMES FOR TREATMENT – DEFENDANT SENTENCED TO TWO YEARS' IMPRISONMENT – NO MINIMUM TERM FIXED DUE TO THE NATURE OF THE OFFENCES AND THE ACCUSED'S ANTECEDENTS – JUDGE REQUIRED TO FIX MINIMUM TERM OF IMPRISONMENT UNLESS INAPPROPRIATE – WHETHER JUDGE IN ERROR: *CRIMES ACT* 1958, S534.

HELD: Application for leave to appeal granted. Sentences quashed. Accused sentenced to two years' imprisonment with a minimum term of twelve months' imprisonment.
Whilst the offences were of a serious kind, there was nothing in the nature of the offences or in the offender's antecedents to justify no minimum term being imposed. A minimum term should have been imposed and the case left to the parole authorities to determine the appropriate period at which the offender should be released and it was reasonable that the offender should have been under some reasonable period of parole.

WINNEKE CJ: These are applications by Ian Lawrence Newlands. The first application is in respect of a conviction and sentence in the County Court at Ballarat before His Honor Judge Byrne. On that occasion the applicant, on the 24 October 1972, was presented on one count of setting fire to a house with intent to injure or defraud, and a second count of maliciously damaging the same house, the damage being of an amount exceeding $10. The applicant pleaded not guilty, and in the result was acquitted on the first count and convicted on the second count. On 1 December 1972, the learned Judge, after having heard plea by counsel, and after having considered psychiatric and pre-sentence reports, sentenced the applicant to a term of two years' imprisonment.

The application was in respect of both the conviction and the sentence. Upon the hearing of the application, however, the applicant abandoned the application in respect of conviction, and was granted leave to file late notice of abandonment. The application then proceeded as an application against the sentence.

The second application, related to a presentment that came before His Honor Judge Dethridge in the County Court at Melbourne on 30 October 1972. That presentment contained five counts, three counts — the first three counts — of indecent assault against a girl under the age of sixteen years, the fourth count of carnal knowledge and the fifth count of buggery. All the offences related to the same girl who was a daughter of the woman with whom the applicant had been living in a de facto relationship for some three years.

The applicant pleaded guilty to each of those counts, and again, after hearing a plea from counsel on his behalf, he was remanded for sentence and for pre-sentence and psychiatric reports. On the 20 December 1972, Judge Dethridge then being ill, the applicant was sentenced by His Honor Judge Byrne, the learned Judge stating that he was imposing the sentences that had been determined by His Honor Judge Dethridge. On the first three counts the applicant was sentenced in respect of each offence to six months' imprisonment, and the learned Judge ordered that the sentences be served concurrently with each other, and on the fourth and fifth counts he was sentenced to terms of eighteen months' imprisonment, the Judge again ordering those two sentences be served concurrently. That made an effective sentence of two years; the learned Judge ordered that twelve months of the total period of imprisonment be served concurrently with the sentences of imprisonment he was then undergoing.

At the request of the applicant and the Crown not objecting, the applications in relation to both sets of sentences were heard together.

We have heard the applicant in support of his applications and we have studied the transcripts in relation to both sets of applications, including the pleas made by counsel in which was set out the substance of medical reports relating to the applicant. The material disclosed that the applicant had had a long period of psychiatric disorder. He had been in institutions at various times for treatment, and it is plain from the reasons for judgment given by Judge Byrne that he took the view that at the time the malicious damage offence was committed, the applicant was suffering from a severe form of psychiatric disorder, and that he was also, as he himself maintains, under the influence of intoxicating liquor.

On an application against sentence, where orders of a discretionary nature are involved, it is incumbent upon the applicant in accordance with long-established principles to satisfy this Court that in some discernible way the discretion has miscarried, or that upon the face of the sentence they are manifestly too severe.

The applicant admitted two prior convictions but as the learned Judges said in giving Judgment, they did not take them into account having regard to their nature, and we think the learned judges were perfectly entitled to take that view. At the same time, there is no question that all these offences were offences of a serious kind, and, so far as the actual terms imposed by each of the learned Judges are concerned, we see no reason to doubt that they were in any way unreasonable or inappropriate to the nature of the offences, or the circumstances in which the offences were committed. Indeed, the applicant himself did not suggest to the contrary. He did, however, contend that there was nothing in the nature of the offences or in his antecedents to justify no minimum term being imposed. And he contended that having regard to the material which was placed before the learned Judges and to certain additional information relating to his de facto wife which he placed before this Court, a minimum term should have been imposed, and that it should have been left to the parole authorities to determine the appropriate period at which he should be released, and that it was reasonable in his case that he should be under some reasonable period of parole.

In expressing their reasons for Judgment, the learned judges simply said that having regard to the nature of the offences and the antecedents of the accused it was considered that it would be inappropriate to impose a minimum term. In neither of the cases was any reason given for that view, nor did either of the learned Judges in their reports to this Court give the Court the benefit of the reasons which induced them to arrive at that conclusion.

The section dealing with sentencing, s534, provides that where a sentence of not less than two years is imposed the Court shall fix a minimum term as part of the sentence unless the Court in the exercise of its discretion considers that having regard to the nature of the offence or the antecedents of the offender it would be inappropriate to fix a minimum term. In many cases which come before this Court the report furnished by the trial Judges, particularly in relation to matters of sentence, afford little assistance to the Court, and, of course, in many cases it is probably unnecessary to go into any detail as very full reasons are given whilst sentence is being passed. But in cases such as the present, where on the face of it there appears to be little or nothing either in the nature of the offence or in the antecedents of the offender to justify departure from the primary rule prescribed by the section it would be of great value to this Court if in their reports the learned trial judges indicated the reasons which induced them to exercise their discretion not to impose a minimum term.

Having reviewed all the circumstances of this case, we see little reason, either in the nature of the offences or in the antecedents of the offender, to form a conclusion that it would be inappropriate to fix a minimum term. On the contrary, there appear to be reasons why a minimum term might be useful, not only in the interests of the applicant himself but in the interests of his family and in the interests of the public. If a minimum term were fixed it would be for the parole authorities having regard to the behaviour of the applicant and to the reports they would undoubtedly receive concerning his psychiatric condition, and having regard to the effect on his condition of the consumption of alcoholic liquor, to determine at what period he should be released, on what conditions he should be released, and what the period of the release should

be. In our view, this was a case on the material before the Court, in which the terms of s534 should be carried out. As we have said, we are unable to detect any sufficient reasons either in the nature of the offences or in the antecedents of the offender why a minimum term should not be prescribed. The reports of the learned judges certainly gave no such reasons. It should perhaps be said, with regard to the later presentment that came before His Honor Judge Dethridge, that it may well have been that he did not see any useful purpose to be served in fixing a minimum term because by that time the applicant had already been sentenced to a straight sentence of two years by His Honor Judge Byrne.

For the reasons we have given, we think this is a case, on the material before us, in which a minimum term should have been imposed, and in each case we see no sufficient reason in the material before us to depart from the mandatory provision contained in s534, that ordinarily where a sentence of two years or more is imposed a minimum term shall be fixed.

For these reasons, the applications will be granted in respect of the sentences and the appeals will be allowed. The sentences imposed by the trial Judges in each case will be quashed. In lieu, on the Ballarat presentment for causing malicious damage to property the applicant will be sentenced to a term of two years' imprisonment, and the Court fixes a minimum term of six months before he will be eligible for release. On the presentment that came before His Honor Judge Dethridge in Melbourne on counts one, two and three the applicant will be sentenced in each case to a term of six months' imprisonment, and each of those sentences will be served concurrently with each other. On each of counts four and five of the presentment the applicant will be sentenced to a term of eighteen months' imprisonment, and each of those sentences will be served concurrently with each other. That makes on that presentment an effective term of two years' imprisonment, and in respect of those sentences the Court fixes a minimum term of twelve months' imprisonment.
