23/87

SUPREME COURT OF VICTORIA — FULL COURT

R v HARDWICK

Young CJ, Kaye and Gray JJ

4 June 1987

CRIMINAL LAW – BURGLARY – SENTENCING – SUBSEQUENT CONVICTIONS – COMMUNITY-BASED ORDERS MADE – OFFENDER UNSUITABLE FOR FURTHER SUCH ORDERS – WHETHER NON-CUSTODIAL ORDER APPROPRIATE FOR BURGLARY CHARGE.

H., assisted by another person, broke a window of a house, entered the house and ransacked it. Approximately $12,000-worth of property was stolen including items of great sentimental value. When H. was later intercepted, he admitted the charge and assisted police in recovering $3,000-worth of the property. H. pleaded guilty to the charge and admitted two previous convictions, one for drink/driving, the other for imposition. Subsequent to the commission of the burglary, H. was twice convicted for dishonesty-related offences and twice released upon the making of community-based orders. However, a report to the Court showed that H's response to the orders was poor and that he was not suitable for a further such order. H. was sentenced to be imprisoned for 3½ years with a minimum of 2¼ years before being eligible for release on parole. On appeal that sentence was manifestly excessive—

HELD: Application for leave to appeal dismissed.
In view of H's criminal history, the seriousness of the offence and his failure to respond adequately to the community-based orders, a non-custodial sentence was not appropriate, and the sentence so imposed was not manifestly excessive.

YOUNG CJ: [1] We have before us an application for leave to appeal against sentence by Geoffrey Paul Hardwick, who was sentenced in the County Court on 1st April this year on one count of burglary, to which he pleaded guilty. After a plea had been made by counsel on his behalf, he was sentenced to he imprisoned for three and a half years and the learned trial judge fixed a minimum term of two years and three months to be served before he should be eligible to be released on parole. He seeks leave to appeal upon the single ground that the sentence was manifestly excessive.

I shall refer only briefly to the facts of the case. The applicant was charged together with a man named Williams, who has already been dealt with and who was sentenced to be imprisoned for five years with a minimum term of three years. Williams had evidently been working at the house of a Mrs Falkiner which was situated in Mulgrave, and during that period he became familiar with the layout of the house. He took the **[2]** applicant to the house in April 1986, but he, Williams, remained outside. When the house owner returned to her house at about five o'clock in the evening, she found that a window had been broken and the house had been ransacked. Three bedrooms had been searched and all Mrs Falkiner's jewellery, much of it of great sentimental value, had been taken. The laundry, kitchen, dining room and lounge room had been cleared of movable goods, and in all approximately $12,000-worth of property had been stolen. Amongst the property stolen were Mrs Falkiner's wedding and engagement rings and all of her jewellery, personal effects, documents, radios, television sets, video cassette recorder, clock, ornaments and other electrical equipment, and a bag of her wedding albums and family photographs. Later she was able to identify some of that property at the Glen Waverley Police Station, but most of her valuable jewellery was not recovered.

The applicant was approached by police on 3rd May and at first denied that he knew anything about the burglary, but shortly after that, when the police entered his house to commence a search, he admitted it and said, "I've done a terrible thing and I deserve to get caught". After that he co-operated with the police and showed them where he had hidden some of the stolen property, that is to say, some of that part of it which he had not already sold or otherwise disposed of. Some of the property, including most of the documentary items, was simply thrown into the rubbish bin. The total amount of the value of the property lost was somewhere of the order, we were told, of $9,000.

The applicant is a man of thirty-three years of age. In other words, he has reached an age where it might have been **[3]** thought that this kind of thing, since he is a man without serious criminal record, was not likely to occur. His criminal record consisted only of two previous convictions, one in 1932 for driving a motor car whilst having a blood alcohol content exceeding .05 per cent, and on 6th March 1984 he was convicted of one count of imposition and sentenced to pay a fine of $75. However, he had committed other offences, although they were not previous convictions. He was convicted of theft on 3rd June 1986 and given a twelve months community based order, and on 19th August 1986 he was again convicted of theft, forgery and uttering and was again allowed to be released on a community based order.

An extensive plea was made on the applicant's behalf from which it appeared quite clearly that the applicant was a person who one might say would not be expected to engage in this kind of offence. He was described by his counsel as having had a background which was that of a normal, middle-class family. I shall not detail what was said on his behalf elaborating upon his background, except to say that at some stage, not long before the commission of the present offence, he started taking drugs and, perhaps, that was his undoing. He denied that he had ever taken heroin, but he admitted that he had taken amphetamines.

The learned Judge gave a great deal of attention to the plea, and after the first time that the matter was mentioned, His Honour adjourned its further hearing so that a psychiatric report could be obtained. The result was that His Honour had before him on the plea a pre-sentence report **[4]** which dealt with the position under the community based orders, a psychiatric report dated 26th February 1987, prepared by Dr Grigor, a second report called "Progress Report", from the officers in charge of the Community Correction Centre to which the applicant was intended to report, prepared by the Regional Manager of the Southern Region, and we ultimately discovered a fourth report in the form of a letter to the applicant's solicitors from Dr Madeline Philip. That is dated 16th February 1987.

A good deal of time during the application in this Court was taken up in finding out exactly to what reports reference was being made, which of them were before the trial Judge at which stage, and what, indeed, was contained in Dr Philip's report which, it was claimed, had been before the trial Judge but which was not in the papers exhibited to this Court. Those difficulties prompt me to say that when reports are tendered by counsel for prisoners on whose behalf a plea is being made, they should invariably be marked as exhibits in the ordinary way so that it is quite clear to what the trial Judge is referring.

Where the trial Judge himself obtains reports directed simply to the Judge, he will, of course, show them to counsel, but the manner in which he treats them for record purposes is a matter for his discretion. What is important, however, is that all reports, exhibited or not exhibited, should be clearly identified and retained by the Judge's Associate until the time for making application for leave to appeal has expired, so that there is no uncertainty, when the matter comes to this Court, as to the material before the sentencing Judge.

[5] I make those observations pending the making of Rules about these matters so that we will not, in future, encounter the difficulty which has been exemplified in this case and in other recent cases. I return to the sentence which His Honour imposed. His Honour expressed himself fully and elaborately in the course of passing sentence and drew attention to the fact that the applicant really played the main part in the commission of the offence, that it was he who entered the house and that Williams was his assistant in that he drove the car and assisted to load it. His Honour explained that Williams had a very bad record extending over twenty years or so and that is why he received a sentence substantially greater than that passed upon the applicant.

The question for our consideration is whether the sentence actually passed of three and a half years' imprisonment can be said to be manifestly excessive. It has often been said in this Court that the question whether a sentence is manifestly excessive is not capable of sustained argument. Either the excess is manifest or it is not. However, Mr Dickinson argued very fully a number of matters which might be said to have been directed to showing that in the circumstances the sentence actually passed was manifestly excessive. That is to say, he sought to show that if the observations of the learned Judge upon the plea made before him were properly understood, it could be seen that the sentence passed was manifestly excessive. If those arguments did not

lead to the conclusion that in the circumstances the sentence was manifestly excessive, then they were irrelevant to the ground of appeal relied upon.

[6] The learned Judge, in the course of sentencing, referred to the applicant's criminal history. He referred to the aggravating factors in the very serious burglary, a burglary of a type which instils terror into a household, and to the domestic background of the applicant. Although an attempt was made, I think, to persuade His Honour that a non-custodial sentence might be appropriate, His Honour had, in the second of the reports about the community based orders, the advice from the officers of the Corrections Department that the applicant was not suitable for a further community based order, given his poor response to the two existing orders. His poor response was that he frequently failed to attend the Centre when he was required to do so, and failed to take notice of a number of warnings which were given to him by the Corrections officers. In those circumstances, any suggestion that the applicant was a suitable candidate for a non-custodial sentence would seem to be out of the question. Even so, the learned Judge said that he was at one stage prepared to take the view that the applicant had probably behaved reasonably within the community based orders, but the question was whether that could properly save him from a gaol term having regard to the seriousness of the offence with which His Honour was concerned. Then His Honour referred to the reports which he said disclosed an extraordinary situation where it was obvious that the applicant had failed to take advantage of the opportunities that had been offered to him. In those circumstances, His Honour felt, and in my view rightly felt, that he had no alternative but to impose a custodial sentence.

[7] The question then is whether that sentence so imposed is manifestly excessive. Having listened to all that Mr Dickinson very properly put before us, and having considered the matter fully, I am quite unable to say that the sentence is manifestly excessive and accordingly I think that this application should be dismissed.

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

GRAY J: I agree.

YOUNG CJ: The order of the Court is that the application is dismissed.
