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SUPREME COURT OF VICTORIA

R v BLOOM

Young CJ, Starke and Fullagar JJ

6-7 April, 20 May 1976 — [1976] VicRp 67; [1976] VR 642

SENTENCING – CONDITION OF ACCUSED TO BE TAKEN AT THE TIME OF SENTENCING – ACCUSED SAID TO BE A DRUG ADDICT – ACCUSED ON MEDICALLY-SUPERVISED AMOUNTS OF METHADONE – NO APPLICATION MADE BY ACCUSED'S COUNSEL FOR A BOND UNDER THE *ALCOHOLICS AND DRUG DEPENDENT PERSONS ACT* – WHETHER JUDGE IN ERROR IN NOT GRANTING A BOND: *ALCOHOLICS AND DRUG DEPENDENT PERSONS ACT* 1968, S13(1).

Bloom sought leave to appeal against a sentence of four years' imprisonment imposed for armed robbery of a chemist shop. Argued that as she had made progress in her attempt to give up drugs, the Court should have turned its mind to dealing with the accused under the *Alcoholics and Drug Dependent Persons Act*.

HELD: Application for leave to appeal refused.
It was for the sentencing Judge (not for the Court of Appeal) to be satisfied of the jurisdictional facts in the section and in all the circumstances (including the fact that he was not asked to consider the matter) it was impossible for the Appeal Court to say that he fell into error because he was not so satisfied. Parliament has clearly evinced an intention that orders under s13(1) should not be made in the absence of direct evidence of all the jurisdictional facts involved.

The judgment of the Court (YOUNG CJ, STARKE and FULLAGAR JJ) was delivered by Young CJ: ... It was submitted that the learned Judge should have considered the possibility of making an order releasing the applicant pursuant to s13(1) of the *Alcoholics and Drug-dependent Persons Act* 1968, notwithstanding that it was never suggested to him that he should do so. In our opinion, however, such an obligation could only fall upon a trial judge in a case where the making of an order under the section was a real possibility. That is to say, such an obligation will only fall upon a trial judge if application is made to him to make an order under s13(1) or if, no such application being made, the necessary facts are proved in evidence before him and there is something in that evidence or in the plea made which suggests that, if a favourable report were obtained under s13(8), it is quite likely that an order would be made releasing the prisoner under s13(1). An applicant cannot come to this Court contending that a trial judge has erred in the exercise of his discretion because he has not in passing sentence referred to a course which is theoretically open to him but which the material before him does not suggest is a reasonably practical possibility. For example, in a serious robbery case in which a person convicted must inevitably be given a custodial sentence, it is not possible to contend successfully in this Court that the discretion has miscarried because the judge passing sentence does not say that he considered releasing the prisoner on a common law bond. A judge faced with the task of sentencing a person convicted of an offence is not obliged to consider courses which are not on the material before the Court reasonably open as a practical way of sentencing the offender. Far less is a judge obliged to refer in his reasons for sentence to courses which are not reasonably practical possibilities.

The first question, therefore, is whether the material before the learned trial Judge did suggest the possibility of making an order under s13(1). First, it is necessary to consider whether the conditions set out in pars. (a) and (b) of that subsection were satisfied. The applicant had been convicted and sentenced to a term of imprisonment for an offence in respect of which drug addiction contributed to the commission of the offence so that the conditions in par. (a) may be said to have been satisfied but it is not easy to say the same about par. (b). That paragraph requires the Court to be satisfied by evidence on oath that the person convicted habitually uses (i.e. at the time of sentence: *R v Robinson* [1975] VicRp 81; [1975] VR 816, at p827) drugs of addiction to excess. No attempt was made to prove before the learned trial Judge that the applicant was, at the time of the plea, habitually using a drug of addiction to excess. Nor was any application made to this Court for leave to adduce additional evidence, but that observation is not intended to indicate

that such an application, if made, would necessarily have been successful. A number of other considerations would have been involved. It is, however, fair to say that it was apparently assumed throughout the hearing of the plea by counsel and by the learned Judge that the fact was that the applicant was a drug addict. It may, therefore, seem unduly legalistic to conclude that the material before the learned Judge did not suggest the making of an order under s13(1), but in our opinion that conclusion is inescapable. Not only was the Judge not asked to make an order under s13(1) but also the basis for his doing so in the form of sworn evidence was not there. It was suggested that the Judge himself should have thought of the possibility of making an order under s13(1). But even if he had done so he would not have found in the material any evidence on oath upon which he could have been satisfied as required by par. (b). What then was he to do? It would be all very well for the Judge, if asked to make an order under s13(1), to say that the evidence was insufficient and to allow the adducing of further evidence. But if the Judge is not even asked to act under that section it is impossible to suggest that he should himself invite the presentation of particular evidence. If a judge were to assume that role he might in some cases extract evidence which the convicted person did not wish to have placed before the Court. It must not be forgotten that a plea is often made in the hope of obtaining a common law bond and evidence or arguments in support of some intermediate course between release on a bond and a severe custodial sentence withheld because it is thought to weaken the chances of release. There is no basis for thinking that that course was pursued in this case but the observation is made to emphasize the impossibility of casting on to a judge faced with the task of passing sentence the responsibility of suggesting what evidence should be called. Of course, a judge may if he wishes send for pre-sentence reports, psychiatric reports and the like and this is often done, but it is altogether another thing to say that a judge's discretion in sentencing has miscarried, where a convicted person who is represented by counsel has not even asked for an order under s13(1), because he has not himself suggested the obtaining of the evidence necessary to justify the contemplation of such an order.

Mr Black's able and persuasive argument consisted to a large extent of matter which belonged to a plea to the sentencing Judge rather than to the intervention of this Court but no doubt it was an attempt to persuade this Court to make an order under s13(1). He sought to overcome the deficiency in the evidence to which we have just referred by saying that it appeared as a matter of necessary inference from the evidence that the applicant at the time of sentencing habitually used a drug addiction to excess. Dr Rutter, from the Health Department, was, as we have already said, called as a witness on the plea. He had interviewed the applicant first in 1973 and he learned on 12 September 1974, that it was reported from Pleasant View that she was a drug addict. She was then put on a methadone dosage, Dr Rutter said, of 50 milligrams a day. He also saw the applicant on Thursday, 26 February 1976, and he expressed the considered opinion that she has every chance of overcoming the drug habit.

It could not in our opinion be said to appear as a necessary inference from that evidence that the applicant habitually used a drug of addiction to excess. The suggestion made in argument, but it was not founded on direct evidence, was rather that she was taking a controlled dosage of methadone (admittedly a drug of addiction) in order to enable her to withdraw from the habit of addiction to heroin. Her addiction to heroin was only deposed to as a matter of hearsay and the controlled use of methadone seems hardly an excessive usage of methadone. But be that as it may, it was for the sentencing Judge (not for this Court) to be satisfied of the jurisdictional facts in the section and in all the circumstances (including the fact that he was not asked to consider the matter) it is impossible for this Court to say that he fell into error because he was not so satisfied. Parliament has clearly evinced an intention that orders under s13(1) should not be made in the absence of direct evidence of all the jurisdictional facts involved.

One of the matters of which the Court must be satisfied is that the person convicted "habitually uses" drugs of addiction. In *R v Robinson*, *supra*, at p827, it was said that this requirement relates to the time of sentencing, but the Court there added the warning that this conclusion imposes no narrow consideration of the situation existing on one particular day; a man can satisfy the requirement that he habitually uses alcohol to excess despite proof of the fact that, at the day of sentencing, he has not touched a drop of alcohol for a week or more, or despite proof of the fact that he is still in the process of being weaned off alcohol by means of a hypnotically induced addiction to milk. The Court added:

> "A man can be said to use alcohol habitually when the statement concerning him is made during an interval between bouts, or at a time when what may be regarded as a normal interval is prolonged by some self-imposed restraint or by restraint imposed by an outside force or authority."

Mr Black's submission, that a necessary inference from the evidence of Dr Rutter is that the applicant at the time of sentencing habitually used a drug of addiction to excess, is not necessarily met by the answer that she was at the time of sentencing taking a medically controlled dosage of methadone to enable her to withdraw from a habit of ingesting heroin to excess. In the first place the facts mentioned in that answer are not necessarily inconsistent with the fact that she was at the time of sentencing using heroin to excess; whether it was or was not inconsistent would turn upon evidence as to a number of matters, including the time when heroin was last ingested before sentence, how long it usually or probably takes to wean an addict from heroin to methadone or more pointedly what was the position of the accused herself in this regard at the time of sentencing in the opinion of qualified persons.

The concept of user "to excess" connotes the overstepping of due limits. In the case of a drug covered by the Act which had no known therapeutic or beneficial use, any use by way of ingestion would seem to be a user to excess. But in the case of substances which are used for therapeutic purposes the use, in order to be "to excess", would have to be other than therapeutic use or beyond or outside the scope of therapeutic use. In the case of a drug such as methadone, it would seem that habitual use on the advice of a medical adviser for the purpose of weaning a heroin addict from the use of that drug would *prima facie* not be a use of methadone to excess. On the other hand, the fact of methadone being used at the time of sentencing for the purpose of weaning a person from addiction to heroin would *prima facie* indicate that the person was still an habitual use of heroin to excess notwithstanding perhaps the lapse of a considerable period of time since the last ingestion of heroin. But in each case the ultimate conclusion would depend upon a close examination of all the relevant facts.

In the present case the attention of the learned trial Judge was never directed to these questions and no direct evidence was placed before him to enable them to be resolved. Of course, there may be cases where the evidence so clearly establishes the fundamental bases for an order under s13(1) that the mere fact that the attention of the trial Judge was never directed to the possibility of making an order under the section would not relieve him of the burden of considering whether an order should be made. But this is certainly not such a case.

For these reasons we are of the opinion that in all the circumstances the material before the learned Judge was not such as to require him to consider making an order under s13 of the Act. Thus the ground taken for showing that the discretion of the trial Judge miscarried, and that this Court should interfere, must fail.

The only other ground relied upon was that the sentence imposed was manifestly excessive, but we are clearly of the opinion that this ground cannot be made out, and accordingly the application must be refused. Order accordingly.

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the respondent: John Downey, Crown Solicitor.
