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## SUPREME COURT OF VICTORIA — COURT OF APPEAL

# *R v DOLE*

**Gowans, McInerney and Nelson JJ**

**6, 7, 28 February 1975 — [1975] VicRp 75; [1975] VR 754**

**SENTENCING – ACCUSED FOUND GUILTY OF INDECENT ASSAULT – ACCUSED HAD PRIOR CONVICTIONS OF A RELEVANT NATURE – IN SOME HE HAD BEEN RELEASED ON A BOND WITHOUT CONVICTION – THESE PRIOR APPEARANCES WERE MADE AVAILABLE TO THE SENTENCING JUDGE – WHETHER SUCH MATERIAL WAS ADMISSIBLE: *CRIMES ACT* 1958, S376.**

**HELD: Such material was admissible.**
**The material relating to the respondent's appearances on charges of obscene exposure, which had not resulted in convictions but in adjournments only, was apparently tendered by the Crown and admitted without objection after the respondent's counsel in his plea had made reference to the respondent having "exhibited some signs of community responsibility" in the form of social activities, and to his having a "respected background". This material did not relate to convictions and for that reason did not come within any ban imposed by s376 of the Crimes Act 1958 under the construction adopted by the majority of the Court in *R v Wilson* [1956] VicLawRp 31; [1956] VLR 199. It was relevant matter at least to rebut or discount what was being alleged in favour of the respondent and, in the circumstances, became admissible.**

**GOWANS J:** This is an appeal by the Attorney-General on behalf of the Crown against the sentence passed upon three convictions. The contention in each case is that the sentence was inadequate and a different sentence should have been passed. The appeal is brought under s567A of the *Crimes Act* 1958.

Each of the three convictions was for the offence of unlawfully and indecently assaulting a girl, contrary to s55(1) of the *Crimes Act* 1958. The maximum penalty prescribed for that offence is one of five years' imprisonment. When the respondent was presented before his Honour Judge Franich in the County Court at Bendigo on 27 November 1974, he entered a plea of guilty to each count. Upon each of the convictions there was made an order that the respondent be released upon his entering into a recognizance in the sum of $100 to be of good behaviour for three years and to come up for sentence if and when called upon and within seven days to report to a named doctor in the Parkville Psychiatric Unit and thereafter undergo such medical or psychiatric treatment, whether as an in-patient or an out-patient, as the doctor or his nominee should prescribe.

As to such an order two things need to be said at once. First, upon a proper analysis of its character such an order amounts to a postponement or deferring of the completion of the trial, which is not completed until sentence is passed, and the Court has the power to bring the offender before it to complete the trial by passing sentence (*R v Nicholson* [1951] VicLawRp 36; [1951] VLR 273); on breach of any condition, such as a further offence or a failure to undergo the treatment prescribed, the offender may be called up and sentence passed for the original offence; but if there is no breach sentence goes unpassed. Secondly, by s567A(1)(A), such an order is made to constitute a "sentence" from which an appeal may be brought under that provision.

The Crown case, therefore, is that in the circumstances sentence should not have been deferred in that way but a penalty of imprisonment imposed with immediate effect.

The respondent to the application, Kelvin Martin Dole , is a man of thirty-six years of age living at Bendigo. He is by occupation a fitter's assistant in the Railways. On his presentment he admitted having been convicted at the Court of Petty Sessions at Bendigo on 29 March 1961, on two charges of obscene exposure. He was then living with his first wife and had three children. For those offences he was placed on probation for two years and ordered to seek medical attention and psychiatric treatment if deemed necessary. It was common ground that on two further occasions

in 1962 and 1963 the respondent was before the same Court on charges of obscene exposure and the cases were adjourned and ultimately disposed of without conviction. The respondent's wife died and he married again in 1963 and had two more children. He was again convicted in the Court of Petty Sessions at Bendigo on 21 March 1966, on two charges of wilful and obscene exposure. He was placed on probation for three years and ordered to seek psychiatric treatment and observe the treatment prescribed. Again it is common ground that after that the respondent was before the Court on four occasions in 1968, 1969, 1971 and August 1974, on charges (seven in all) of obscene exposure, and the cases were again adjourned and ultimately disposed of without conviction. There is some rather sketchy information derived from a medical report put in evidence before the learned Judge as to the respondent having received treatment. He was attending the Parkville Psychiatric Unit in 1968 on account of his history of exhibitionism, and in 1971 he received treatment, described in the report as "vigorous and unpleasant", with which he is said to have co-operated and which, it is said, had "apparently successful" results; thereafter he was seen at the Unit about once a month as an out-patient.

The first offence, at present under consideration, was committed (like the last case of obscene exposure) in August 1974. At that time the respondent was living with his second wife but she left him soon after to live with another man. The circumstances of the offence were that the respondent was in the habit of picking up from school his own children and those of a family who were living nearby, including the prosecutrix, a girl of nine. She occasionally came to the respondent's house to collect her brother. On the occasion of the respondent's taking a shower he caused the girl to come into a bedroom and he got her to handle his private parts and take off her pants and he put his penis in contact with her body in the vicinity of her vagina until he ejaculated. Then he gave her a small sum of money for sweets. This conduct was repeated on two other occasions early in October; they formed the subject of the other two counts. The respondent was apprehended on 27 October and committed for trial on 29 October.

The above account of the offences is contained in a record of interview between the respondent and the police and in the depositions of the prosecutrix and her mother and some police officers which were before the learned Judge. At the time of sentence on 27 November 1974, apart from the admissions of the previous convictions and the details of the respondent's criminal record, the learned Judge had before him a psychiatric report furnished by Dr Bell of the Parkville Psychiatric Unit which set out the above account of the respondent's treatment and added the fact that since 4 November he had become a day patient at the Unit.

The material relating to the respondent's appearances on charges of obscene exposure, which had not resulted in convictions but in adjournments only, was apparently tendered by the Crown and admitted without objection after the respondent's counsel in his plea had made reference to the respondent having "exhibited some signs of community responsibility" in the form of social activities, and to his having a "respected background". This material did not, of course, relate to convictions and for that reason did not come within any ban imposed by s376 of the Crimes Act 1958 under the construction adopted by the majority of this Court in *R v Wilson* [1956] VicLawRp 31; [1956] VLR 199. It was relevant matter at least to rebut or discount what was being alleged in favour of the respondent and, in the circumstances, became admissible. *[His Honour (with whom Nelson J agreed) then considered the sentence which had been imposed by the sentencing Judge and held that the Judge's discretion was infected by error and he imposed a sentence of two years' imprisonment with a minimum term of nine months before being eligible for parole.]*

**McINERNEY J:** The facts in this appeal have been fully stated in the reasons for judgment delivered by Gowans J, which I have had the advantage of reading. Since I am unable to agree in the conclusions arrived at by my brothers Gowans and Nelson, it becomes necessary for me to state the reasons that have impelled me to a different conclusion...

Some discussion took place before us as to how far it was permissible for the learned Judge or for us to look at the material disclosed in the criminal history sheet not constituting prior convictions referred to in the presentment. Reference was made to the provisions of s376 of the *Crimes Act* 1958 and to the construction put upon that section by the majority of the Court (Gavan Duffy and Dean JJ, Lowe J, dissenting) in *R v Wilson* [1956] VicLawRp 31; [1956] VLR 199; [1956] ALR 503, followed and applied by Sholl J in *R v Phillips* [1962] VicRp 6; [1962] VR 55 and quite recently considered by this Court in *R v Poulton* [1974] VicRp 85; [1974] VR 716. I agree with the

view expressed by Gowans J in his reasons for judgment that since the material in question did not relate to "convictions" it did not come under any ban imposed by s376 under the construction adopted by the majority in *R v Wilson*, *supra*, and it does not therefore become necessary, in this case, to consider the correctness of that decision.

Speaking for myself, I am bound to say that for the learned Judge to have been denied the additional information as to the respondent's previous acts of wilful exposure when he was being asked to take the course which he did in fact take would have been altogether unreal, and I agree with Gowans J that this material was relevant. There was some discussion as to whether this material was adduced before the learned Judge by the prosecution at the request of or at the instance of the counsel for the respondent, or whether it was tendered by the prosecution to rebut the submission of counsel for the respondent that this was a proper case for requiring the respondent to undergo a course of psychiatric treatment with a view to his ultimate rehabilitation. If the latter be the true explanation of the tender of the material, then it was, as Gowans J has said, relevant matter at least to rebut or discount what was being alleged in favour of the respondent. If, on the other hand, the material was tendered at the request of counsel for the respondent, that request and that tender were entirely proper having regard to the course which counsel for the respondent was inviting the learned Judge to take.

Indeed, the withholding of this material from the learned Judge might have given foundation for an argument that the discretion as to sentence had been vitiated by the sentencing Judge's ignorance of the respondent's history of acts of indecent exposure. The learned Judge's reference to "the long history" of "offences of wilful exposure" makes it clear that he had this material present to his mind when he said that "the effect of the information placed before me in each of these proceedings is that you require psychiatric treatment and intensive attention. You have had it before, of course, for this aberration you have for wilful and obscene exposure and some temporary recovery, according to the doctors, was achieved but it had no lasting rehabilitative effect, and it appears that you need more intensive and extensive treatment than you have so far received or you need it at this stage." *[His Honour then considered the question of sentence.]*

**GOWANS J:** The order of the Court is as follows:—
Appeal allowed; order of the County Court set aside; in lieu thereof respondent sentenced to two years' imprisonment on each count, terms to be concurrent, and a minimum term of nine months fixed as term to be served before becoming eligible for parole; warrant of commitment to issue; sentences now imposed to commence not from the date referred to in s122(i)(b)(i)(a) of the *Social Welfare Act* 1970, but from the day the respondent is apprehended pursuant to the warrant of commitment.

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

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