01/88

SUPREME COURT OF VICTORIA — FULL COURT

R v EL KURDI

Young CJ, Murphy and Hampel JJ

18 November 1987

CRIMINAL LAW – SENTENCING – TRAFFICKING IN HEROIN – YOUTHFUL OFFENDER/DEPRIVED BACKGROUND/NO FINANCIAL GAIN MADE/OLDER CO-OFFENDER/REMORSE SHOWN – WHETHER SENTENCE OF SEVEN YEARS WITH MINIMUM OF FOUR MANIFESTLY EXCESSIVE.

EK pleaded guilty to two charges (*inter alia*) of trafficking in heroin. At the time of the first offence, EK was aged 17 years; in respect of both offences, he acted in company with a co-accused, a man in his thirties. Both offences netted $14,900; however, there was no evidence that EK derived any financial benefit. On the plea, it appeared that EK well understood the extent of his involvement in the offences, that he had disassociated himself from the co-accused since commission of the offences, and that his background was somewhat deprived. The judge imposed a total sentence of 7 years' imprisonment with a minimum of four years, with a direction that EK be ineligible for release on a pre-release permit.

HELD: As to length of sentence, no error shown. Sentence varied by eliminating the direction as to the accused's ineligibility for pre-release.

YOUNG CJ: *[After setting out the nature of the charges, the facts briefly and the disposition, His Honour continued]:* ...**[3]** When interviewed by the police, the applicant made full admissions and revealed also that he knew exactly what was taking place. He knew that there was being handed over to the undercover police some sort of 'dope', which he said was speed, heroin, or something. He did not appear to be in any ignorance of what was going on. A full and careful plea was made by counsel on the applicant's behalf, during which it was revealed that the applicant, who was at the time of the first offence only seventeen years of age, was living in a house in Brunswick **[4]** with his aunt, who was the mother of the co-accused. The co-accused, Omar, was a man in his thirties, who was running the house. He accepted the present applicant into the house because the applicant's parents had separated, his mother living in Sydney and his father, I think, in Melbourne. It was suggested on the plea that the applicant was dominated by the older man and looked upon him as a father figure and that, accordingly, the applicant should be regarded as playing a less significant role in the commission of these offences than might otherwise be the case. That view was supported to some extent by one of the police officers who gave evidence on the plea.

When passing sentence, the learned Judge referred to the position of the co-accused, who had failed to answer his bail, and has accordingly not yet been dealt with. The learned Judge permitted himself a little speculation as to where the co-accused was and suggested that he might be in hiding, waiting for the applicant to be dealt with, hoping that leniency would be extended to him because of his youth, and hoping further that when ultimately dealt with he would be able to rely upon that leniency through the doctrine of parity of sentence; but it is clear that His Honour did not take that speculation into account in passing sentence. Indeed, in his report to the Court, His Honour indicated that his recollection was that he inserted those remarks into his sentencing observations by way of reminder to himself or to any other Judge who might subsequently be called upon to deal with the co-offender. His Honour took into account, plainly, all of the matters that were urged on the applicant's behalf, some of which **[5]** I shall refer to in a moment, and then sentenced the applicant in the manner that I have already related.

I shall deal first of all with the second and third of the grounds of appeal, to which I have already referred. In my view, there is no substance in the second ground, that the learned Judge was in error in taking into account factors concerning the whereabouts and conduct of the co-accused since the date of the commission of the offences. I think it is clear that His Honour did not take such factors into account, and that ground does not need any further discussion.

The third ground can, I think, also be dealt with briefly. The direction that two years of the sentence on the third count be served cumulatively with the sentence on count 1 was an appropriate means of tailoring the total sentence to produce what the trial Judge clearly considered to be an appropriate total effective sentence for all the offences, and I think there is no need to discuss that ground further.

The ground that has given me most trouble in this matter is the first ground, which was that the sentence was manifestly excessive. The offence of trafficking in heroin must be met with condign punishment. The courts are continually conscious of and concerned with the great evils which the use of heroin in our society causes, not only to those who are addicted to it, but to those who become the victims of the many crimes committed in pursuit either of the heroin or of the funds necessary to obtain it.

However, there were certain factors in this present case which were factors that operated strongly in favour of the **[6]** applicant. Perhaps the clearest and strongest factor in his favour was his youth. As I have said, he was just under eighteen years of age at the time of the first group of offences. Secondly, I think it is fair to say that he probably played a subservient role in the commission of the offences, although that was not very clear from the evidence, and there are indications in it that he well knew and understood exactly what he and his co-accused were doing. Further, there was no evidence which established that he received any financial benefit from the transactions. That is not to say that he did receive none, but simply that there was no evidence of it, and in the circumstances it should be regarded as the appropriate basis for sentencing that he had not derived financial benefit from what he did. Further, he pleaded guilty to the charges, and that plea entitles him to some discount on the sentence which would otherwise be imposed, and finally, his own personal situation, having been born of Lebanese parents when his mother was very youthful indeed and having had little initial advantages in life, when coupled with the action which he has taken since the offences were committed, of disassociating himself from the co-accused and exhibiting some degree of remorse for what he has done, combine to make a substantial ground for a less severe sentence than might otherwise be imposed.

Having said all that, however, the question is whether the sentence of seven years with a minimum of four should be described as manifestly excessive. As I have said, the question has troubled me. The argument which Mr McInnis presented in this Court included everything that could be said **[7]** on the applicant's behalf, but in the end I have come to the conclusion that the Court should not interfere with the sentence imposed by the trial Judge, and largely for the reason that it is necessary to look at the whole of the sentence which His Honour imposed, and that is not only the effective seven years but the minimum term of four years, which is a lower minimum term than would more commonly be imposed when there is a head sentence of seven years, and that sentence itself now means that he would be required to serve no more than two years and eight months in gaol before being eligible to be considered for parole by the Parole Board.

There is, however, one modification that I would make upon the sentence which the learned Judge passed, and that is I would eliminate the direction that His Honour gave disqualifying the applicant from eligibility for pre-release. I think this is a very suitable case to allow the provisions relating to pre-release to stand, for it will enable the authorities at the appropriate time to consider whether he might not be released from gaol substantially before the completion of the minimum term, and to be released in circumstances which would ensure that he was supervised for the balance of the minimum term period. In all the circumstances, with that modification, I think it cannot be said that the sentence is manifestly excessive, and therefore I think that the application should otherwise be dismissed.
