06/88

SUPREME COURT OF VICTORIA — FULL COURT

R v CHISHOLM

Murray, King and Ormiston JJ

3 December 1987

SENTENCING – BURGLARY – $19,000 WORTH OF PROPERTY STOLEN – YOUTHFUL OFFENDER WITH NO RELEVANT PRIORS – SENTENCED TO 2½ YEARS' IMPRISONMENT WITH MINIMUM OF 1¼ YEARS – QUASHED ON APPEAL – 18 MONTHS YTC SUBSTITUTED.

C. was convicted of a burglary of a garage involving the theft of $19,000 (approx.) from a safe in the garage. On the plea, it was said that C. was aged 19 years, had two children (the younger aged 7 months (approx.)) and had no relevant prior convictions. The trial judge sentenced C. to 2½ years' imprisonment with a minimum of 1¼ years before being eligible for parole. On appeal against severity of sentence—

HELD: Application for leave to appeal granted. Sentence quashed. Offender ordered to be detained in a Youth Training Centre for 18 months. The trial judge's sentencing discretion miscarried in failing to give sufficient weight to the accused's youth and the fact that she had no relevant previous convictions.

MURRAY J: **[1]** This was an application by the applicant Tracey Marie Chisholm for leave to appeal against the alleged severity of the sentence passed on her after a trial lasting some eleven days at the County Court at Mildura, where after hearing a plea, the learned County Court Judge imposed a sentence, on 22nd September, 1987, of two years and six months' imprisonment and he fixed a term of one year and three months as the minimum term before the applicant should become eligible for parole.

The applicant was charged with a co-offender in relation to the burglary of a garage situated near the centre of the town of Mildura whereby the co-offender climbed on to the roof of the garage, climbed through the roof and through the ceiling, lowered himself down into the office of the garage, and let the applicant in. Some $19,000 were stolen from a safe to which access could be gained, without unlocking the door, by a shute. The lid of the shute was **[2]** secured by a padlock which the applicant's co-offender apparently dealt with with a sledgehammer, and the applicant was able, although obviously with some difficulty, to get her hand and arm down the chute, and over a period, it was suggested of about one hour, was able to empty the contents of the safe.

A third person had originally been involved with the offence, a man named Johnson, who had been employed at this garage, and it was he who directed the attention of the co-offender Hagen to the possibilities of carrying out this burglary. Hagen and the applicant lived together from time to time in a de facto relationship. Having given Hagen all the information necessary for carrying out the burglary, Johnson apparently withdrew from the plan and at an early stage confessed his part and pleaded guilty both at the committal proceedings and before the learned trial Judge. The applicant was born in March of 1969 and is now only nineteen years old. She has two children, the younger of the two being born in February of this year. These children are by her relationship with Hagen, the co-offender. Hagen was sentenced to three and a half years' imprisonment and a minimum term was fixed in his case. But his case was substantially different from that of the applicant, insofar as he had a very poor record of previous convictions and he was the organiser and the leading light in carrying out the offence in question. Consequently, the distinction between the sentence imposed on him by the learned Judge and that imposed on the applicant can be readily understood, and indeed a greater distinction could easily have been drawn between the two than His Honour did in fact draw.

[3] Before us Mr Marin asked for leave to add to the single ground in the notice of appeal, which simply said "Severity of sentence", a further ground in which he submitted that the learned trial Judge erred in that he did not give sufficient weight to considerations of parity between the

applicant and the co-offender Bernard Johnson. Johnson was released on a bond for his part in the matter. In my opinion, the distinction between the sentence imposed on Johnson and that imposed on the applicant cannot be successfully attacked on the ground of disparity. Johnson showed every sign of remorse. He did so at an early stage, and he not only pleaded guilty, but he assisted the police and gave evidence for the prosecution at the trial. Consequently, in my opinion, the sentence imposed on Johnson, in comparison with the sentence imposed on the applicant, does not show any defect in the applicant's sentence purely by reason of a comparison between the two.

However, for my part I am impressed with the fact that the applicant is still a very young person. She has two children, and above all she has no previous convictions which are of any real relevance. She has two convictions in fact for offences of using indecent language, or something of that nature, but she has no previous convictions for offences which involved actual criminality.

I have given very serious consideration to whether the learned trial Judge was right in the view that he formed that a custodial sentence should have been passed on the applicant having regard to those two factors: her youth and the fact that she had no relevant previous convictions. **[4]** However, on reading what fell from His Honour in passing sentence, I find myself in some difficulty in being able to point to any specific error. His Honour obviously had in his mind the various considerations which are relevant to sentencing. After a great deal of consideration, however, it does appear to me that His Honour's sentencing discretion miscarried in that His Honour did not pay sufficient attention and give sufficient weight to the youth of the applicant and to the fact that in imposing a custodial sentence, he was sentencing the applicant to imprisonment, as it were, for a first offence. The courts have said over and over again that in the case of young people it is very often appropriate to give them a chance and not to sentence them to a custodial sentence on the first occasion.

On the other hand, His Honour had a very much better opportunity of observing the applicant and forming an opinion of her by reason of the plea of not guilty and the long trial which eventuated and by reason of the fact that both the applicant and her co-offender, Hagen, gave evidence on oath. His Honour had a very good opportunity of forming an opinion of her character and of the prospects of her rehabilitation, and no doubt formed an estimate of whether she would really be better served by being punished severely and being given a custodial sentence. His Honour said in passing sentence:

> "You and each of you have retained the benefits of the proceeds of the burglary, and without any signs of remorse, you have maintained, against overwhelming evidence, your innocence. During the trial, every avenue whereby you could attribute your criminal conduct to others was explored, and you were prepared to protest on oath your innocence. **[5]** Under those circumstances, your respective counsel were unable to place before me any matters mitigatory of the offence, other than those which might be gleaned from a consideration of the evidence given at the trial."

I have found a great deal of difficulty in arriving at a clear conclusion as to the appropriate resolution of this application; but, in the end, I have come to the conclusion that the sentence was too severe. For my part, I would propose that the sentence imposed be quashed and, in lieu thereof, the applicant be sentenced to a period of eighteen months in a youth training centre.

KING J: I agree.

ORMISTON J: I also agree. I would add this only: that it appears to me that the learned trial Judge, in referring to the nature of the crime of burglary and the necessity to deter others, perhaps failed to give sufficient consideration to the alternatives , including those which involved depriving the applicant of her liberty in a way which did not, in the end, require her to be sent to gaol.

Her counsel, however, has suggested only a suspended sentence or detention in a youth training centre. The circumstances are such that she herself is just over eighteen years of age, with a background which is one of considerable difficulty and disadvantage. Her only prior offences, for which she had been convicted, were for using indecent language and insulting words some two years before this offence for which she was discharged without penalty.

In substance, therefore, she was a first offender. I do not think in the case of the crime of burglary, where **[6]** no violence was alleged or suggested, that it is appropriate that she should be put in prison. I think the Judge failed to take into account the alternatives to imprisonment, and I agree that the appropriate alternative is that she be directed to be detained in a youth training centre for a period of eighteen months.

MURRAY J: The order of the Court is that the application be granted, the appeal treated as being heard instanter and allowed. The sentence passed below will be quashed and, in lieu thereof, it is ordered that the applicant be committed to a youth training centre for a period of eighteen months.
