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SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v POYNER

Street CJ, Finlay and Grove JJ

12 February 1986 — (1986) 17 A Crim R 162

CRIMINAL LAW – SENTENCING – POSSESSION OF PROHIBITED IMPORTS – COCAINE – OFFENDER WITH NO PRIOR CONVICTIONS – RELEVANCE OF IN DRUG-RELATED OFFENCES.

Where drug trafficking is concerned, the fact that the accused person has no previous convictions has less significance as a sentencing factor than in other fields of crime.

R v Leroy 75 FLR 162; (1984) 55 ALR 338; (1984) 13 A Crim R 469; [1984] 2 NSWLR 441, endorsed.

STREET CJ: *[After setting out the facts and dealing with a matter not relevant to this Report, His Honour continued]: ... [A Crim R 163]* The other basis of challenge is that the sentence and minimum term are markedly greater than what is said to be the established pattern for sentencing in connection with a *Customs Act* offence involving cocaine. The Court has been referred to a number of cases in the District Court in most of which sentences in the order of seven or eight years have been passed in respect of such offences upon persons who were not identified as principals but whose relationship to the prohibited import was either unexplained or in the role of a courier.

The present appellant is aged thirty-six. There was material showing that he has led an active working life. He has no criminal record and nothing is known to his discredit in his past. He was born in South Australia and served an apprenticeship as a motor mechanic, a trade in which he then worked for some time. He became involved with the manufacture and sale of surf and beach clothing, an activity that he has returned to in recent years, having carried on business in a number of different parts of the world and, in particular in Peru. He manufactures beach clothing and sells, amongst other outlets, to Australia. He said in his evidence at the trial that he would make an average of two return trips to Australia each year. The general pattern of his subjective background is one of a man who has been involved principally in his leisure clothing industry with manufacturing activities located outside Australia but travelling from time to time to this country in connection with that business.

Within this briefly stated objective account of the offence itself and of the appellant's background, it becomes necessary to evaluate the significance of the monetary error that was put before Judge Smyth and, in particular, the sentencing pattern that has been demonstrated by cases to which the Court [164] has been referred. Plainly enough, there is a distinction of some significance in the monetary value and equally plainly, this is a matter that the appellant is entitled to have weighed in his favour in his challenge to the sentence and minimum term. At the same time, it was a substantial quantity that the appellant brought in and this Court's appellate intervention, to which we consider that the appellant has established an entitlement, will not result in a significant diminution in either of the two periods.

The offence was committed by a man in his late thirties with a clear earlier record. His conviction followed after trial, there being no plea of guilty such as might attract an element of leniency. Likewise, there is no element of contrition to be found anywhere in the factual material. A clear earlier record, as Judge Smyth observed, will avail the appellant little in the context of a conviction for an offence of trafficking in drugs. As was said in the judgment of this Court in *Leroy* 75 FLR 162; (1984) 55 ALR 338; (1984) 13 A Crim R 469 at 474; [1984] 2 NSWLR 441:

"This Court and other criminal courts have said on many occasions that, in the drug traffic in particular, the circumstances that the accused person has a clear earlier record will have less significance than in other fields of crime. Very frequently, those selected to play some part in the chain of drug trafficking ... are selected because their records, their past and their lifestyles are not

such as to attract suspicion. It is this in particular which has led the courts to take in the case of drug trafficking a view which does not involve the same degree of leniency being extended to first offenders."

The appellant stands for sentence simply on the basis of being found in possession of this drug in the objective context that has been summarised, without any explanation being put forward for consideration by the sentencing court. His account in his sworn evidence at the trial of complete ignorance of the presence of this substance, in the two cans was, plainly enough, not regarded by the jury as of sufficient significance to introduce any element of doubt into the proof by the Crown of guilt of this offence. ...

[His Honour then dealt with the question of appropriate level of penalty]
