14/07; [2006] VSCA 274

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v BENNETT

Warren CJ, Nettle and Redlich JJ A

6 December 2006

PRACTICE AND PROCEDURE – SENTENCING – PLEA HEARING – SENTENCING ADJOURNED FOR PURPOSES OF OBTAINING A PSYCHIATRIC REPORT – REPORT OBTAINED – REPORT NOT MADE AVAILABLE TO ACCUSED OR COUNSEL – COUNSEL NOT AFFORDED THE OPPORTUNITY TO MAKE FURTHER SUBMISSIONS ON THE PLEA – RECOMMENDATION IN REPORT THAT NON-CUSTODIAL SENTENCE BE IMPOSED – ACCUSED SENTENCED TO A TERM OF IMMEDIATE IMPRISONMENT – NATURAL JUSTICE – *AUDI ALTERAM PARTEM* RULE – COURT TO HEAR BOTH SIDES – COURT REQUIRED BY *SENTENCING ACT* 1991 TO PROVIDE REPORT TO LEGAL REPRESENTATIVES – WHETHER ACCUSED DENIED PROCEDURAL FAIRNESS – WHETHER COURT IN ERROR: *SENTENCING ACT* 1991, S98(2)(b).

B. pleaded guilty to certain offences including aggravated burglary, false imprisonment and breach of an intervention order. During the plea, the presiding Judge decided that a psychiatric report would be useful and adjourned the hearing for that report to be obtained. On the further hearing, and without providing a copy of the report to B.s counsel nor giving counsel an opportunity to be heard, the judge disagreed with the non-custodial recommendation in the report and imprisoned B. for a number of years. Upon appeal—

HELD: Appeal allowed. Sentences quashed. Matter remitted for hearing and determination by a different judge.

1. The course followed by the sentencing judge was in breach of the *audi alteram partem* rule by not giving counsel an opportunity to address the issues raised in the report or to make submissions as to what sentence should be imposed in light of the content of the report. In those circumstances, the appellant was denied procedural fairness such as to vitiate the sentencing discretion.

2. Per Nettle JA: Section 98(2)(b) of the *Sentencing Act* 1991 requires that a report be provided to legal representatives, and s99 of the same Act permits the representatives to challenge any finding which is made in the report. It is unfortunate that those provisions were overlooked in the present case.

WARREN CJ:

1. I invite Redlich JA to deliver his reasons for judgment first.

REDLICH JA:

2. The appellant pleaded guilty to one count of aggravated burglary, one count of false imprisonment, one count of intentionally causing injury, one count of unlawful imprisonment and one count of breach of an intervention order, and was sentenced, on 25 November 2005 in the County Court, to a total effective sentence of four years and three months' imprisonment. A minimum term was fixed of two years and nine months before the appellant would be eligible for parole. In light of the grounds of appeal, it is unnecessary to recite the circumstances of the appellant's offending.

3. During the course of the plea in the County Court, his Honour interrupted the plea to ascertain from counsel for the appellant what disposition was being sought. It is clear from an exchange which then followed that his Honour did not accept the submission that a five-month pre-sentence detention would be an appropriate punishment having regard to the circumstances of the offending. His Honour indicated that he proposed to order a report pursuant to s96(1) of the *Sentencing Act* 1991. Counsel for the appellant on the plea encouraged that course. It is conceded in the outlines of submissions of both parties that counsel for the appellant expected that the report, once it was obtained, would provide some useful insight into the causal basis of the appellant's offending. It is also clear that counsel for the appellant on the plea anticipated that after the report was obtained there would be a further plea hearing.

4. On the plea, counsel had drawn attention to the personal circumstances of the appellant and the disputed history of events between the appellant and the victim. In particular, reference had been made to earlier family violence and other abuse suffered by the appellant in his youth. It was for that reason that the judge indicated that a psychiatric report would be useful. Once the report was obtained, it appears that it was not provided to counsel for the appellant. His Honour, upon resuming the hearing, immediately proceeded to sentence the appellant. During the sentencing remarks, the learned sentencing judge read out large portions of the report into his reasons, but ultimately disagreed with the essential conclusion contained within the report that a community-based sentence would be of value.

5. As can be seen from the appellant's Full Statement of Grounds that particularised the sentencing process adopted by the learned sentencing judge, the course followed by his Honour was in breach of the *audi alteram partem* rule. The learned sentencing judge did not give counsel an opportunity to address the issues raised in the report or to make submissions as to what sentence should be imposed in light of the content of the report.

6. It is conceded by counsel for the respondent that, in those circumstances, the appellant was denied procedural fairness such as to vitiate the sentencing discretion. On the basis that clear error has been demonstrated, the only matter which has been raised in oral argument this morning is whether or not this Court should proceed to re-sentence the appellant or whether the matter should be remitted to the County Court for further hearing and a re-sentencing of the appellant.

7. The respondent, in its outline of submissions to this Court, has submitted that, if the Court proceeds under s468(4) of the *Crimes Act* 1958 to re-sentence, the same total effective sentence and non-parole period should be imposed. In my view, it is neither appropriate nor conducive to consistency for this Court to undertake the process of re-sentencing the appellant in light of the circumstances which gave rise to error. In the decision of *R v Roberts*,[1] this Court held, in circumstances similar to those to which I have referred in the present case, that the appropriate course is to remit the matter for sentence to the County Court. There being no sound basis for distinguishing the approach adopted on that occasion from the present circumstances, in my view we should adopt the same approach.

WARREN CJ:

8. I agree with the reasons stated by Redlich JA. I would add that the circumstances of the conduct and hearing of the plea and the eventual sentence of the appellant without the sentencing judge providing counsel for the appellant with an opportunity to make further submissions on the plea was entirely inappropriate. As Redlich JA has highlighted, it was apparent that counsel on both sides left the court with an expectation, after the first hearing, that there would be a further opportunity for submissions. So much was apparent, furthermore, by the calling of the sentencing judge for a psychiatric report. The circumstances of the sentencing of the appellant were compounded and exacerbated by the recommendation contained in the psychiatric report of a non-custodial order. As is apparent from the reasons of the sentencing judge, his Honour disregarded or discounted the recommendations contained in the psychiatric report and adopted a different course. As a matter of fundamental procedural fairness, the appellant ought have been given the opportunity to make further submissions on that matter alone.

9. In all the circumstances, as already indicated, I agree with the disposition proposed by Redlich JA.

NETTLE JA:

10. I agree. It is surprising and regrettable that a judge of the County Court should receive and act upon a pre-sentence report without affording an opportunity to those to whom it relates to consider it and make submissions upon it. Section 98(2)(b) of the *Sentencing Act* 1991 requires that a report be provided to legal representatives, and s99 of the same Act permits the representatives to challenge any finding which is made in the report. It is unfortunate that those provisions were overlooked.

WARREN CJ:

11. The orders of the Court are as follows:

1. The appeal is allowed.
2. The sentences of imprisonment below are quashed.
3. The re-sentence of the appellant is remitted to the County Court for hearing and determination by a different judge to the judge at first instance.

The Court further directs that a certificate be issued in this matter to the appellant.

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[1] [2000] VSCA 46.

APPEARANCES: For the Crown: Ms GT Cannon, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the appellant Bennett: Mr PS Kilduff, counsel. Ronald V Tait, solicitors.
