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SUPREME COURT OF VICTORIA — FULL COURT

R v MORAN

Crockett ACJ, Gobbo and Nathan JJ

23 June 1988

CRIMINAL LAW – SENTENCING – CAUSING INJURY TO ANOTHER – INJURY RECKLESSLY CAUSED – WHETHER LESS HEINOUS THAN INJURY DELIBERATELY CAUSED – WHETHER LESSER SENTENCE APPROPRIATE: *CRIMES ACT* 1958, S18.

Section 18 of the *Crimes Act* 1958 provides:

> "A person who, without lawful excuse, intentionally or recklessly causes injury to another person is guilty of an indictable offence."

When it comes to the question of sentencing in respect of an offence under s18, action which is the product of recklessness carries with it a lesser degree of heinousness than when deliberately undertaken with the object of causing and in fact does cause the victim injury.

CROCKETT ACJ: [with whom Gobbo & Nathan JJ agreed] **[1]** The applicant seeks leave to appeal against the sentence imposed upon him in the County Court upon his plea of guilty's being entered to a charge of recklessly causing injury. The applicant had originally been charged with the intentional causing of serious injury, and apparently as a result of a bargain, the Crown agreed to accept a plea for the lesser offence, which as I say is that which was entered by the applicant. After hearing a plea for leniency, the Judge sentenced the applicant to a term of fifteen months' imprisonment and fixed a minimum of nine months as that to be served before the applicant should be eligible for parole.

The applicant's present application is grounded upon the single complaint that the sentence is excessive in all the circumstances. However, his counsel wished to develop a number of arguments which could be accommodated only by reliance upon grounds other than that to be found in the application. The Court indicated that it would permit **[2]** submissions to be made in relation to two matters that were not to be found covered by the application. The Court reserved its decision as to whether or not leave to amend would ultimately be given.

In conformity with that ruling, applicant's counsel has submitted a number of reasons as to why the application should succeed. In the view I take of the matter it is unnecessary with one exception to refer to them or to discuss them. I content myself with saying that I am of the view that there is little or no substance in many of them.

However, one complaint which requires some consideration is based upon the proposition that, whilst the sentencing Judge must find the facts to be used for the purpose of selecting what seems to him to be an appropriate sentence to pass, he must not in that fact finding process, of course, find facts which are inconsistent with the offence to which the applicant has pleaded guilty. To put it another way, the Judge cannot use the material, consisting as it usually does of the depositions, to draw inferences as to the existence of facts that go beyond the offence of which the applicant has been found guilty or to which he has pleaded guilty.

A corollary of that proposition is that the sentence imposed must be based upon considerations that relate to the offence with which the applicant has been found guilty, and not to a possible more serious offence. In the present case it has been pointed out that the Judge used a number of expressions in the course of his reasons for sentence which strongly suggest that he had formed the view that, rather than merely acting recklessly so as to **[3]** have caused injury to his victim, the applicant had proceeded intentionally to cause that injury.

It might be, as counsel for the Crown has said, that having regard to the state of the legislation, it is one offence that is created by that legislation. The provision is to be found in s18 of the *Crimes Act*, which says:

> "A person who, without lawful excuse, intentionally or recklessly causes injury to another person is guilty of an indictable offence."

However, it appears to me that, even if it is proper to treat the offence of recklessly causing injury as no different from the offence of intentionally causing injury, when it comes to the question of selecting an appropriate sentence, action which is the product of recklessness carries with it a lesser degree of heinousness than does action which is deliberately undertaken with the object of causing and in fact does cause the victim injury. In consequence, when determining upon the appropriate sentence to pass, it does seem to me that it was necessary for the Judge to have confined his mind strictly to circumstances that amounted to no more than reckless conduct on the part of the applicant and which did not involve deliberateness on his part. It is clear enough, I think, that this the Judge did not do, and in consequence I am of the opinion that the sentencing discretion miscarried. I conclude therefore that it is necessary for this Court to re-sentence the offender.

If the view I have expressed finds acceptance with the Court, I would propose that the sentence passed be quashed, and in lieu that the applicant be sentenced to a term of **[4]** twelve months' imprisonment, and that a term of eight months be fixed as the term to be served before the applicant is eligible for parole.

GOBBO J: I agree with the reasons given by the Acting Chief Justice as to why the application should succeed, and with the proposed sentence.

NATHAN J: I also agree.

CROCKETT ACJ: The application for leave to appeal against sentence is granted. The appeal is treated as instituted and heard instanter and allowed. The sentence below is quashed; in lieu thereof the applicant is sentenced to a term of twelve months' imprisonment, and a period of eight months is fixed as the term to be served before the applicant is eligible for parole.
