01/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BIANCO

Crockett, Fullagar and Hampel JJ

29 October 1990

CRIMINAL LAW – SENTENCING – HANDLING STOLEN MOTOR VEHICLE – STOLEN AT OFFENDER'S REQUEST – PLEA OF GUILTY/REMORSE/NO PRIORS – WHETHER TWO YEARS' IMPRISONMENT EXCESSIVE.

B. commissioned another person to steal a motor vehicle for the purposes of removing certain parts. When the stolen vehicle (valued at $26,900) was delivered, B. decided to retain possession of it until he was apprehended by police in relation to the commission of offences involving drugs of dependence. On the plea in the County Court, B. pleaded guilty, had no prior convictions, was aged 32 years and had a stable family life. In addition to a sentence of 3 years' imprisonment for the drug offences, B. was sentenced to 2 years' imprisonment in respect of the handling of the stolen vehicle to be served cumulatively upon the sentence imposed in the drug offences. Upon application for leave to appeal against sentence—

HELD: Application granted.
Per Crockett and Hampel JJ, Fullagar J dissenting. Having regard to the offender's antecedents, his plea of guilty, remorse, unlikelihood of re-offending, his personal circumstances and the sentence imposed in respect of the drug offences, the sentence of 2 years' imprisonment was excessive and should be reduced to one year's imprisonment.

CROCKETT J: **[1]** The applicant was arraigned in the County Court at Melbourne on a presentment which charged him in the case of count 1 with trafficking in a drug of dependence, namely amphetamine, and in count 3 in trafficking in a drug of dependence, namely ephedrine. In addition, by count 10 he was charged with having received stolen goods, namely a Commodore motor vehicle. The applicant was presented together with a number of other offenders who were charged with various drug offences by the remaining counts in the presentment. The applicant, as did indeed his fellow offenders, pleaded guilty to each of the offences with which each was respectively charged. After hearing a plea for leniency on the part of the applicant, the Judge sentenced him on count 1 to a term of imprisonment of three years and on count 3 to a term of imprisonment of one year. With regard to the offence of handling stolen goods, he was imprisoned for a term of two years. The Judge directed that the term of imprisonment imposed on count 10 was to be served cumulatively upon the term of imprisonment imposed on count 1, making an effective term of imprisonment of five years. He fixed a non-parole period of three years.

At the same hearing the Judge heard pleas for leniency on behalf of the other offenders charged with offences on the same presentment. At the conclusion of hearing those pleas His Honour imposed what he considered to be appropriate sentences in respect of each of the offences the subject of pleas of guilty, and made, in cases where he thought it was proper to do so, cumulation orders. **[2]** The applicant now seeks leave to appeal against the sentence imposed upon him. His application rests upon two grounds which to a large extent, although not entirely so, are discrete grounds. In the first place, he has contended that standing alone, without regard to the other offences, the sentence of two years' imprisonment for handling the stolen motor car was manifestly excessive. The other ground upon which he has sought to support his application is that the sentence imposed with respect to the drug offences (which having regard to the operation in law of concurrency) amounts to one of three years' imprisonment, was disparate to the sentences imposed on the other offenders.

The argument in support of that particular ground in effect confined itself ultimately to a comparison with the penalties imposed in the case of a co-offender named Farrell. Farrell was sentenced with respect to the offences concerning him to an effective head sentence of five years with respect to which a minimum term of three years was fixed. That is to say he was sentenced to

precisely the same sentence as was the applicant. However, as I have already shown, a component of the applicant's sentence related to the two years' cumulative service of a term of imprisonment imposed in relation to the offence of handling stolen goods.

The applicant's counsel presented to the Court, in support of the second of the grounds to which I have referred, a comprehensive and detailed analysis of all the factors relating to the sentencing process so far as **[3]** Farrell was concerned on the one hand and so far as his client was concerned on the other. This was designed to demonstrate that there was an unacceptable disparity in the drug offence penalties as between the two men which could not be explained by the two year sentence relating to the quite discrete offence of handling. All that could possibly be said in this connection was, I think, said by the applicant's counsel. However, I remain of the opinion that it has not been established that there is such a disparity in the drug offence sentences of the two men as to call for interference with the sentence imposed on the applicant.

With regard to the first of the two grounds upon which reliance was placed, a number of matters were put forward as demonstrating that in all the circumstances it should be said that the two year sentence imposed with respect to the receiving of stolen goods was manifestly excessive. In the first place, it was an offence totally unrelated to the commission of the drug offences. It is true that on a raid of the applicant's home for the purpose of detecting whether drugs could be found there, fortuitously, as it were, the car in question was seen by the police and then recognised as one which had very recently been reported as having been stolen from the yard of a motor car dealer. The applicant was interrogated about his possession of the stolen car. He immediately admitted that it was stolen and that he knew that to be so, and that his possession of it was dishonest. He came into **[4]** possession of it as a result of having commissioned some other individual, whose whereabouts have not since been discovered, to steal the car with the object of removing from it certain parts which were then in turn to be supplied to the applicant. In the event, the thief considered that it was simpler, once the car had been stolen, to hand it over as a complete entity to the applicant for him to do with it as he wished. Having gained possession of the car, he in turn elected to retain it and use it rather than to remove from it such components as he had originally wished to have. The result is that it was received back by its rightful owner in an undamaged condition. The car in question was a Holden Commodore said to have been of the value of some $26,900.

The Court was told, and the assertion was not contradicted by the prosecution, that in the vast majority of cases involving offences that touch upon the use of a motor car, such offences are dealt with in the Magistrates' Court. It was suggested that that was not done in this case because of the necessity to present the applicant in the County Court on the indictable drug offences. Accordingly, the appropriate course to follow would have been to add to the presentment relating to the drug offences a count dealing with the handling of the motor vehicle. But for that fortuitous circumstance, it was said, the charge in question would undoubtedly have come before a Magistrates' Court, where it would confidently be expected that the sentence imposed would be substantially less than a term of imprisonment for two years. That **[5]** assertion rested upon these propositions: first, that the maximum penalty open to a Magistrate to impose upon an offender was in fact two years. Secondly, that the statistical information which was provided to the Court shows that offences of this kind, when dealt with in the Magistrates' Court, are visited with sentences considerably less than the maximum permitted to be imposed in that jurisdiction.

Then it was said that if in the Magistrates' Court the applicant were being dealt with for this particular offence alone, there was very strong mitigatory material to be urged on his behalf so as to lead the Court to extend to him considerable mercy. In the first place, there was his plea of guilty, which would have entitled him, pursuant to s4 of the *Penalties and Sentences Act* 1985, to a real measure of leniency in the form of a reduction in the penalty which might otherwise have been thought appropriate. There was no question but that he had shown considerable contrition from the time of his apprehension, and he had in fact admitted his complicity from the outset and been helpful to the authorities in the detection of the offences charged against him, and in particular the offence of handling stolen goods. It was said in all the circumstances it was unlikely that the applicant would offend again. That was a view which the Judge took in dealing with the matter in the County Court. The applicant had never offended against the criminal law previously. He was aged 32 years, had a stable family life and had always been an excellent provider for his **[6]** family. Finally, it was strongly contended that it would not be inappropriate to consider the

question of whether this particular sentence was excessive or not in conjunction with the fact that he has, in any event – if the other ground of the application should fail – to serve a head term of three years in respect of the drug offences.

In the end, having regard to all of these considerations, I have been persuaded that the sentence of two years was excessive in relation to the offence in count 10, and, accordingly, I would be prepared to grant the application to allow the appeal to the extent of reducing the sentence on count 10, which reduction I would propose as being one of two years to one year, and that the period of one year be served cumulatively upon the sentence on count 1 so as to reduce the effective term from five years to four years, in respect of which I would propose fixing a non-parole period of two and a half years.

FULLAGAR J: I agree with the learned presiding Judge as to the fate of the parity argument, but I disagree as to the argument in relation to the count of receiving stolen goods. Section 88 of the *Crimes Act* provides that the maximum penalty for receiving stolen goods – in this case dishonestly receiving a motor car knowing or believing it to be stolen – is imprisonment for a term of fourteen years. For some reason most cases concerning motor cars come before Magistrates' Courts, probably for the significant reason that it is a prevalent offence, and a Magistrate has no power to imprison a person for more than **[7]** two years. It is said that one should infer that this particular charge, for receiving a stolen car, would have come before a Magistrate had it not been for the fact that the defendant would have to be tried on drug-trafficking charges before the County Court. It is said that one should infer that it was simply to save public expense that the authorities tacked on to the County Court presentment the handling charge, although the facts relating to that charge have nothing to do with the charges for drug trafficking.

Assuming that that is the proper inference to be made, the applicant seems to me to be contending, by the able argument of his Counsel Mr Heliotis, substantially as follows:

> "If handling the car had been my only offence I would have been dealt with by a magistrate. He would have awarded me less than a magistrate's maximum of 2 years' imprisonment because of my plea of guilty and my status as a first offender. One year's imprisonment could have been likely. The only reason that I was arraigned in the County Court, where the maximum for handling is 14 years, was the fact that I am also a drug-trafficker. Therefore the separate and cumulative sentence of 2 years for handling the stolen car is manifestly, on its face, excessive."

In my opinion the last sentence is a *non sequitur*, and if the sole reason for the availability of a longer sentence of imprisonment was due to other criminal conduct I do not think the applicant can complain. But there are two other points at which I would join issue with this logic. In the first place this is in my opinion a very serious case of handling stolen goods. The applicant not only received the car, but he is the person who caused the car to be stolen. Needing an **[8]** automobile transmission he was not able or prepared to obtain one by lawful means, so he simply – one might say brazenly or matter-of-factly – employed for a fee a professional thief, or professional car thief, to steal any car in a requisite range and from it provide a transmission. The stealing was a contract stealing and the applicant was the instigator of the stealing. A motor car is, with the exception of a house, probably the most expensive and most valuable item of property owned by most people. In the circumstances of this case I am not prepared to infer that this, to me, exceptional case of "car-handling" would have been sent in any event to a Magistrates' Court. I simply do not know.

Secondly, it is of course for *this* Court and not the Magistrates' Court to set the sentencing standards in the courts for handling stolen goods, and I am not satisfied that a sentence of two years' imprisonment for the particular offence in this case can be said to be outside the range of sentencing properly available to the learned County Court Judge. I do not think it should be. I do not think the legislature intended it to be. As to statistics, this is in my view a somewhat exceptional case of handling a stolen motor car, and as indicated I do not think the proper range of sentencing was exceeded. However, it is my understanding that I am in a minority of the Court on this occasion.

HAMPEL J: In addition to what was said by the learned presiding Judge, I am impressed by the fact that such **[9]** statistics as there are over the last two years approximately of cases which in fact did come before the County Court in relation to handling of motor cars, that is nineteen of them, only one received a sentence of two years, others considerably less and many received

non-custodial sentences. Apart from that matter, I agree with the proposed orders announced by the learned presiding Judge for reasons he advanced.

CROCKETT J: The application is granted. The appeal is treated as instituted and heard instanter and allowed. The sentence on count 10 is quashed. The applicant is sentenced to one year's imprisonment on count 10. It is directed that that sentence be served cumulatively upon the sentence on count 1. Otherwise the sentences are affirmed. The effective term will thus be one of four years. It is directed that a non-parole period of two years and six months be fixed.

APPEARANCES: For the Crown: Mr N Papas, counsel. JM Buckley, Solicitor for the DPP. For the applicant Bianco: Mr C Heliotis, counsel. Rockman & Rockman, solicitors.
