17/95

SUPREME COURT OF VICTORIA

SAGDIC v GOWING and ANOR

McDonald J

21, 22 August, 20 October 1995 — (1995) 82 A Crim R 26

CRIMINAL LAW – SENTENCING – PLEA OF GUILTY TO UNLAWFUL POSSESSION CHARGE – CHARGES OF HANDLING STOLEN GOODS WITHDRAWN – PROCEDURE ON PLEA WHERE FACTS DISPUTED – WHETHER COURT MUST ACCEPT STATEMENTS FROM BAR TABLE – WHETHER COURT MUST FIRST WARN PRACTITIONER OF REFUSAL TO ACCEPT SUCH STATEMENTS – IN SENTENCING MAGISTRATE TOOK INTO ACCOUNT FACTS WHICH WARRANTED CONVICTION FOR MORE SERIOUS OFFENCE – WHETHER SENTENCE VITIATED.

S. was charged with 3 counts of handling stolen motor cars and one count of unlawful possession of the cars. At the contest mention hearing, the police prosecutor agreed to withdraw the 3 counts of handling and S. then pleaded guilty to the unlawful possession charge. A summary was read to the court and a plea made in mitigation. On the plea, S's practitioner said that S. (who had been minding his father's wrecking business) did not know that the cars were stolen when he bought them. Further, that the vehicles were not entered in the business dealings register because of S's inexperience. The magistrate rejected these statements and indicated in his sentencing remarks that he was satisfied that S. "knew or suspected the cars were stolen." He then convicted S. and fined him $5000. Upon appeal—

HELD: Appeal allowed. Conviction and fine set aside. Remitted for re-sentencing by another magistrate.
1. By his plea of guilty, S. admitted that he could not satisfy the court that he came by the vehicles honestly. In sentencing, it was necessary for the magistrate to have regard to and consider facts which were relevant to the exercise of discretion and not to take into account circumstances of aggravation which would warrant conviction for a more serious offence.
***R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383; 35 ALR 265; 5 A Crim R 329; 55 ALJR 469, followed.**

2. In his sentencing remarks, the magistrate took into account the fact that when S. came into possession of the cars he knew they were stolen. This fact would have warranted conviction for the more serious offence of handling stolen goods. Accordingly, the magistrate was in error in taking into account a fact not relevant to the offence to which S. pleaded guilty thereby vitiating the sentence.

3. On the hearing of a plea, the court can be informed of the relevant facts from the police summary or witness statements. If the accused wishes to dispute such facts, the prosecutor should be notified and evidence may be given on either side.
***R v Halden* (1983) 9 A Crim R 30, followed.**

4. Where statements of fact put in mitigation are not able to be challenged by the prosecution, it is not incumbent upon the magistrate to accept all such statements.

5. In the present case, it was open to the magistrate to reject that S. did not have any suspicion when the cars were brought to his yard and that his inexperience was the reason why the cars were not entered in the register. Further, the failure by the magistrate to forewarn the practitioner of the rejection did not amount to procedural unfairness so as to vitiate the sentencing procedure.

McDONALD J: *[After setting out the facts, the provisions of s26 of the* Summary Offences Act *1966, the police summary, the magistrate's sentencing remarks and the questions of law raised by the appeal, His Honour continued]…* **[8]** The offence in respect of which the appellant pleaded guilty under s26 of the *Summary Offences Act*, in the circumstances of this case was the failure to give the Magistrate a satisfactory account as to how he came by the cars which he had in his possession when the first respondent reasonably suspected them of being stolen or unlawfully obtained – *Pendlebury v Kakouris* [1971] VicRp 20; [1971] VR 177 at 181. The onus is on a defendant charged with an offence under that section to satisfy the Magistrate that he or she came by the goods honestly – *Ethell v Tobin* [1927] VicLawRp 51; [1927] VLR 371; 33 ALR 293; 49 ALT 27; *Willis v Burnes* [1921] HCA 43; (1921) 29 CLR 511.

A plea of guilty is "an admission of all the essential facts necessary to constitute the offence with which the person is charged": *R v Inglis* [1917] VicLawRp 99; [1917] VLR 672; 23 ALR 378; Madden CJ at 674; *R v Hill* [1979] VicRp 33; [1979] VR 311. By his plea of guilty the appellant admitted that he could not satisfy the Magistrate that he had come by the cars honestly and that he was guilty of the offence charged. It then became necessary **[9]** for the Magistrate to have regard to and consider facts put before him which were relevant to the exercise of his sentencing discretion being matters relevant to aggravation and mitigation.

The facts relevant to the commission of the offence were put before the Magistrate, as referred to, by the prosecuting police officer reading a summary of the charge. That summary was not only not challenged but was agreed to by the solicitor for the appellant. The Magistrate was entitled to act on the facts so stated for the purpose of sentencing the appellant. Had the appellant wished to challenge any of the facts stated at this time by the prosecutor, being relevant to the commission of the offence, that fact could have been communicated to the prosecuting officer. If that had been done and the prosecutor still sought to rely on such fact, it would have been necessary for evidence on oath as to that fact to have been called before the Court. There is no general requirement that material put before a Court on a sentence hearing should be material on oath. In *R v Halden* (1983) 9 A Crim R 30, the Court of Criminal Appeal had before it an appeal from a sentence passed in the County Court following a plea of guilty. On the hearing it was argued that the sentencing Judge was not entitled to use against the applicant any material which was unsworn or any material which the applicant had had no opportunity to cross-examine. At 33-4 Lush J, with whom Fullagar J agreed, said -

> "It is the standard practice of this Court, and has been for many years, that, where an accused person pleads guilty on first arraignment, the depositions at committal and any related exhibits will be the basic material used upon sentence. Necessarily, an ex officio presentment, the witnesses' statements **[10]** delivered to the accused will play the same role. In either case it is open to the accused to inform the Crown that matters appearing in the depositions or statements are disputed, and evidence may then be given on either side. There is, however, no requirement that the evidence should all have been given on oath, or that there should have been a prior opportunity for cross-examination."

Such authoritative statement has application to proceedings in a Magistrates' Court following a plea of guilty to the offence charged. The Magistrate can be informed of the facts relevant from witness statements in the possession of the prosecution or as in this case from a summary of the charge. If the accused wishes to dispute such facts it is open to him or her to inform the prosecutor of that matter and evidence may be given on either side. In his judgment Lush J further referred to the decision of Moffitt ACJ in *O'Neill* (1979) 2 NSWLR 582, at 588-9; (1979) 1 A Crim R 59 where his Honour said (NSWLR) –

> "In summary at least, [the authorities cited] provide authority for the following propositions, which I think should be accepted. Where there are depositions and these are tendered before the judge and admitted, he is entitled to determine the nature of the offence by reference to the depositions. Where the accused disputes the facts, the appropriate course is for the accused to give evidence on oath and for the Crown to call before the judge any contrary evidence, except so far as he properly has before him admissions of the accused or evidence given on some other occasion, eg. depositions sufficient to enable him to resolve the disputed facts. Where the Crown relies on matters which are disputed, and are not the subject of evidence given on oath before the judge or of depositions on oath admitted before the judge, they should not be brought to account, unless the subject of further evidence on oath. Practices at times adopted in sentencing are capable of leading to misunderstandings. Such can occur where counsel inform the Court that there are mitigating circumstances and is allowed to debate them, but the Court is minded to reject them in the absence of supporting evidence. In such a case, if the circumstances, if proved, could affect the sentence, it will usually be best not to reject the submission without inviting counsel to lead evidence to support **[11]** it."

Lush J in his statement said that the propositions in the passage quoted did not seriously depart from Victorian practice except possibly in one respect. As to that aspect his Honour said at 35 that the –

> "Victorian practice appears to differ from his Honour's description, it is not the Victorian practice to distinguish as rigidly as his Honour distinguishes between material in depositions which is sworn, and materials which do not represent evidence which has been given on oath."

I do not read his Honour's judgment as stating a rule of practice or law that if a Court has

been informed of mitigating circumstances by the accused's solicitor or counsel but is minded to reject them in the absence of supporting evidence the Court must not reject the submission without inviting counsel to lead evidence to support it. In *Halden* Murphy J at 42 said that a sentencing Judge –

> "may, on a plea, suggest to counsel that if counsel desires him to take a particular view of the facts as the basis upon which to sentence the prisoner, counsel will have to call evidence to support that view. But I know of no rule of law that can be laid down, to the effect that a Judge must or should inform counsel if he is disinclined to accept a version of the facts proposed by counsel from the Bar table, but unsupported by evidence."

Whether in the circumstances of a case it is appropriate for the sentencing Judge or Magistrate to inform the barrister or solicitor making a plea on behalf of an accused that if it is desired that the Court should take a particular view of facts on sentencing, evidence will need to be called, will depend upon the circumstances of the case. However it does not follow that in every case the failure of the sentencing Judge or Magistrate to inform the solicitor or counsel making the plea, that he or she is disinclined to **[12]** accept a version of facts put from the Bar table but unsupported by evidence results in procedural unfairness to the accused vitiating the sentencing procedure when facts so put before the Court are not accepted. As was done in this case, it is common practice that facts and circumstances put to a Court following a plea of guilty and relevant to the question of mitigation are put in the form of statements made to the Court by the appellant's legal representative.

It is common and convenient when a plea of guilty has been made for facts relevant to the question of sentence to be made from the Bar table. If facts or circumstances as stated on behalf of a defendant are disputed and the defendant wishes to rely on the same it would then be necessary to call evidence relevant to the fact or circumstances in order to satisfy the evidentiary onus – *R v Tait* (1979) 46 FLR 386; (1979) 24 ALR 473 at 483. In respect of some statements of fact put in mitigation the prosecution may not be in a position to challenge them. In such circumstances it is not incumbent upon the sentencing Judge or Magistrate to accept all statements put to him or her in mitigation. In *R v Hoppner* (unreported CCA of Vic 7 October 1980) the primary sentencing Judge had not been satisfied as to the existence of circumstances put on behalf of a defendant in mitigation and in support of a plea for a non-custodial sentence. McGarvie J with whose judgment Young CJ and McInerney, J agreed at p6 said –

> "It would be artificial to approach the finding of facts for the purpose of sentencing, on the basis that every mitigating fact asserted on behalf of the applicant had to be treated as established unless there was evidence which established the contrary, or unless the assertion was beyond the bounds of **[13]** reasonable possibility.
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> In *Weaver v Samuels* [1971] SASR 116 at 119 Bray CJ stated: '...if the defendant alleges circumstances of mitigation peculiarly within his knowledge which the prosecution is not in the position to negative ... his version must be accepted, 'within the bounds of reasonable possibility ...'.
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> With the greatest respect which I have for any opinion of that learned and distinguished Judge, that evidentiary approach to mitigating circumstances does not seem to me to be a practical one. I consider that the correct basic approach is that stated by McInerney J with the agreement of Murray and Jenkinson JJ in *R v Moss*, a decision of the Court of Criminal Appeal, unreported given on 7 August 1980. At p18 his Honour said:
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> > 'I add one last observation that if or insofar as it is suggested that it is a rule of law that a sentencing Judge must, in determining the question of the appropriate sentence, act on a view of the facts which he does not hold, I would always be sceptical of the existence of a rule of law of that character. I would be sceptical that such a rule was indeed a rule of law. The Court is not, in my view, bound to proceed on a view of facts which it does not hold and would only adopt artificially in deference to some supposed rigid rule of law. In my view a Court must be free at all times to act on the view of the facts which, having regard to the offence and the circumstances proved or admitted, is the view which the Court has formed.'
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> In my opinion, when for the purpose of sentencing a convicted person relies on mitigating circumstances, the Court is to treat that mitigating circumstance as present only when reasonably satisfied upon the preponderance of probability of its existence."

The statement of Murphy J in *Halden*, as previously referred to, is to be distinguished from the particular circumstances in *Lester* (1975) 63 Cr App R 144 where it was held by the Criminal Division of the Court of Appeal that where under the *Trade Descriptions Act* 1968 a person was convicted of an offence of strict liability he should not be sentenced on the basis of an inference of actual knowledge or recklessness to be drawn from what counsel had put to the Judge in **[14]** mitigation without indicating to counsel what was provisionally in his mind and to offer to counsel the opportunity to call his client to give evidence about the matter. Further, I am of the opinion stated by Murphy J in *Halden* is to be distinguished from the statement of principle by Coldrey J in *Brand v Parson* [1994] VicRp 17; [1994] 1 VR 252; (1993) 68 A Crim R 147. In that case his Honour held that when a Judge of the County Court was sitting on appeal from an order of the Magistrates' Court which imposed a term of imprisonment, the principles of procedural fairness required the Judge to alert the appellant that he or she was at jeopardy of having the sentence imposed below increased. At 257 he said –

> "Where the most severe sanction known to the criminal law is contemplated, namely the deprivation of personal liberty, (and here the deprivation of personal liberty for an increased period of time) a requirement of procedural fairness which alerts an appellant to his or her situation of jeopardy and enables the formulation of a response to it is easily to be implied into the relevant legislation. It is fundamental that a person who stands in danger of an increased prison term be given the opportunity to make submissions to a Court as to the appropriateness of such a course of action. There is a clear distinction to be drawn between the presentation of a case directed to the substitution of a non-custodial sentencing option for a custodial sentence and submissions directed to dissuading a judge from increasing a sentence by addressing factors, including applicable sentencing principles, which may be relevant to the exercise by that judge of the sentencing discretion."

In this case and having regard to the material put before the Court in the summary of the charge it was open to the Magistrate to reject the explanation of the appellant put by his solicitor from the Bar table. It was open to the Magistrate to reject on the plea that the appellant did not have any suspicion when the cars were brought to the yard and **[15]** that it was his inexperience, that the cars were not entered into the book, without first informing the solicitor that he was inclined to do so so as to enable evidence to be called. The Magistrate's failure to so inform the appellant's solicitor in the circumstances of this case did not result in procedural unfairness to the appellant so as to vitiate the sentencing process.

I turn next to consider the submissions raised by questions (b) and (c) which may be conveniently dealt with together having regard to the submissions made. It was submitted that the sentencing remarks of the Magistrate reveal that in sentencing the appellant he took into account his conclusion of fact that at the time that the cars were brought into the yard the appellant knew that they were stolen. It was submitted that insofar as the Magistrate concluded that fact, it was not a relevant fact with respect to the offence to which the appellant had pleaded guilty and consequently the appellant had been sentenced for a more serious offence than under s26 of the *Summary Offences Act* of having possession of property reasonably suspected of being stolen or unlawfully obtained.

It was submitted that this conclusion is to be reached from considering the sentencing remarks of the Magistrate and in particular his statements – "I reject he did not have any suspicion when the cars were brought to the yard" and "I am satisfied you were in charge of the yard at the time, that you thought it was a good opportunity to make some extra cash and that you knew or suspected the cars were stolen". On behalf of the appellant it was argued that the latter finding must have related to the time that the appellant first obtained **[16]** possession of the cars. This was not contested by counsel for the first respondent. On a fair reading of the Magistrate's sentencing remarks I conclude that the finding that the appellant "knew or suspected the cars were stolen" does relate in time to the time that the appellant first received possession of the goods.

The offence to which the appellant pleaded guilty, being that under s26 of the *Summary Offences Act*, in the circumstances of this case was the failure to give the Magistrate a satisfactory account as to how he came by the cars which he had in his possession when the first respondent reasonably suspected them of being stolen or unlawfully obtained.

As previously referred to by the appellant pleading guilty he admitted that he could not satisfy the Magistrate that he came by the goods honestly and further that he was guilty of the

offence charged. S26 of the *Summary Offences Act* however does not provide a Magistrate with jurisdiction over cases of larceny or "handling stolen goods" by receiving stolen goods knowing or believing them to be stolen. It may be that on the hearing of an information brought under s26 of the *Summary Offences Act*, evidence before the Magistrate indicates that the defendant stole the goods or "handled" stolen goods. In such circumstances the jurisdiction of the Magistrate is not ousted under s26 of the *Summary Offences Act – Meikle v Le Sueur* [1932] VicLawRp 30; [1932] VLR 190; 38 ALR 182.

Further during the hearing of a charge brought under s26 of the *Summary Offences Act* it may appear that the evidence may be sufficient to support a charge of larceny or "handling stolen **[17]** goods" but that provides no reason why the charge under s26 should be dismissed – *Fisher v McGee* [1947] VicLawRp 46; [1947] VLR 324; [1947] ALR 356. However in such circumstances, as was indicated in *Meikle v Le Sueur* the Magistrate exercising jurisdiction under s26 of the *Summary Offences Act* should not use that section "as a cloak" to exercise jurisdiction over a larceny case. Equally so a Magistrate exercising jurisdiction under s26 should not use it as "a cloak" to exercise jurisdiction over the offence of "handling stolen goods". In appropriate cases the provisions of s60 of the *Summary Offences Act* may be availed of, but that was not the circumstances here. The more serious offences of "handling stolen goods" had been withdrawn on the application of the prosecuting officer on the appellant pleading guilty to the lesser offence under s26 of the *Summary Offences Act* and the Magistrate proceeded to hear the plea as to penalty in relation to that lesser offence. It therefore became incumbent upon the Magistrate to ensure that in sentencing the appellant he did not take account of an aggravating factor beyond the offence to which the appellant had pleaded guilty.

The offences charged, but withdrawn, of "handling stolen goods" alleged that the appellant had handled the stolen goods in that he received the motor cars "knowing or believing" that each of them was stolen. To have sustained a conviction for such offences as charged it would have been necessary for the prosecution to prove that the goods were stolen (by a person other than the accused) and that when the accused received them he knew or believed them to be stolen. A mere suspicion that the goods were stolen would not have been **[18]** sufficient – *R v Grainge* (1974) 1 All ER 928; (1974) 59 Cr App R 3.

On the material before the Magistrate put on the plea it was a relevant matter for him to consider whether at the time that the appellant first came by the motor cars, as against some later time, he suspected that they were stolen. That was a relevant aggravating factor and went to the appellant's criminality but at that point in the sentencing process the Magistrate needed to take care that he did not take account as an aggravating factor a fact or matter relevant to a more serious crime. In *R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383; 35 ALR 265; 5 A Crim R 329; 55 ALJR 469 Gibbs CJ with whom Mason and Murphy JJ agreed said at 389 –

> "[T]he general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. ... The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

In *R v Wyllie* [1989] VicRp 3; [1989] VR 21; (1988) 36 A Crim R 34 Tadgell J at VR p31 and after citing the above statement of principle of Gibbs CJ said –

> "The second principle to which Gibbs CJ referred is an ancient doctrine of the common law, several examples of the application of which may be found in decisions of this Court. Hence while the circumstances surrounding an offence must surely be regarded by the judge when formulating his sentence, he cannot penalise the offender as though he has committed an offence with which he has not been charged: *R v Hill* [1979] VicRp 33; [1979] VR 311; *Pecora v R* [1980] VicRp 47; [1980] VR 499 at 504; (1979) 1 A Crim R 293..."

In *R v Newman* ([1995] VSC 177 SC of Vic - C of A 17 July 1995) Winneke P at p8 said –

[19] "The common law principle that a person cannot be sentenced for an offence with which he has neither been charged nor convicted is a venerable one, but it is one which has created a tension with another equally

venerable principle of sentencing; namely, that a sentencing Judge is entitled, and indeed bound, to take into account all the circumstances which are relevant to the commission of the offence with which the prisoner has been charged. The latter principle however must, in the appropriate circumstance give way to the former because it could never be consistent with fairness and justice to sentence a person for an offence with which he has not been charged or convicted."

On the facts stated to the Magistrate relevant to the commission of the offence in respect of which the appellant pleaded guilty it was stated that the motor cars found in the possession of the appellant were stolen cars. From those facts previously referred to it appears that the appellant had received the cars when he had purchased them from the person said to have brought them to the wrecking yard on a trailer. On the facts and circumstances put before the Magistrate, if at the time the appellant received the cars he had knowledge that they were stolen he would have been liable to conviction on the informations that were withdrawn. The question then is whether on a fair reading of the Magistrate's sentencing remarks it is to be concluded that he took into account as an aggravating factor that the appellant had knowledge that the cars were stolen at the relevant time, which if he did, it would have warranted conviction for the more serious offence of handling stolen goods.

It was submitted on behalf of the first respondent that the finding of the Magistrate that the appellant "knew or suspected" that the cars were stolen should be read as the Magistrate expressing his view and satisfaction that at the time that the appellant came by the cars he suspected that they **[20]** were stolen. Clearly the Magistrate was entitled to take into account that at the time that the appellant came by the cars he suspected them of being stolen. If the Magistrate had so intended to limit his finding to the state of mind of the appellant to that of suspecting that the cars were stolen, that can not account for the use of the expression "knew or suspected the cars were stolen". Even though the word "knew" is used in the alternative to "suspected" I have reached the conclusion that in sentencing the appellant the Magistrate did take into account as an aggravating factor a fact which on the material put before him would have warranted the appellant being convicted of the more serious offence of "handling stolen goods". Accordingly the sentence of the Magistrate cannot stand and the appeal should be allowed.

Insofar as it was within the sentencing discretion of the Magistrate to decide whether or not the appellant should be convicted of the offence in respect of which he pleaded guilty it is appropriate that the sentence of the Magistrate whereby he convicted the appellant and fined him $5,000 should be set aside entirely and the matter should be remitted to the Magistrates' Court at Broadmeadows for re-sentencing according to law.

On the matter being remitted to that Court in the circumstances it would be appropriate for the Magistrate who re-sentences the appellant to be other than the Magistrate who constituted the Court and by whom the appellant was previously sentenced. Although stating that I do not propose to make it a term of the order. Having so concluded it is not necessary for me to consider the further questions raised on this appeal. **[21]** For these reasons the Court orders _

1. That the appeal be allowed.

2. That the sentence passed on the appellant on 12 April 1995 whereby he was convicted and fined $5,000 for the offence that he did on 2 November 1994 commit a breach of s26(1) of the *Summary Offences Act*, be set aside and that the proceedings be remitted to the Magistrates' Court of Victoria at Broadmeadows for the appellant to be re-sentenced according to law.

APPEARANCES: For the Appellant (Sagdic): Mr D Perkins, counsel. Solicitors for the Appellant: Kuek and Associates. For the First and Second Respondents: Mr R Barry, counsel. Solicitor for First and Second Respondents: Office of Public Prosecutions.
