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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v MARSHALL

Young CJ, McInerney and McGarvie JJ

18 December 1980 — [1981] VicRp 69; [1981] VR 725; noted 7 QL 71

SENTENCING – SENTENCE INDICATION – WHETHER APPROPRIATE FOR JUDGE TO INDICATE LIKELY SENTENCE IN THE EVENT OF A PLEA OF GUILTY – PLEA BARGAINING – WHETHER APPROPRIATE FOR JUDGE TO DISCUSS POSSIBLE SENTENCE WITH COUNSEL IN THE JUDGE'S CHAMBERS.

M. was presented in the County Court on a charge of rape. Before the jury was empanelled, M's counsel addressed the judge with reference to M's antecedents and the sentences the M. was then serving and that he sought His Honour's guidance as to what the likely sentence might be. The judge indicated that it would be no more than an extra 18 months or two years. M. then pleaded guilty and a plea was made on his behalf. The judge sentenced M. to 4 years' imprisonment with a minimum of 2 years and nine months. Upon appeal against sentence—

HELD: Appeal dismissed.

1. The course taken by the judge was one which, although undesirable, involved no disadvantage to M. and no miscarriage of justice. In view of the infinitely variable circumstances that may occur or exist in relation to a criminal trial, it is both unwise and undesirable to lay down a proposition of universal application that a trial judge must never give any indication before he/she pronounces sentence of the sentence that is likely to be pronounced.

2. Plea bargaining discussed.

THE COURT: *[After setting out the facts and the Grounds of Appeal, the Court continued]* ... Mr Kennan who appeared for the applicant in this Court argued grounds 1 and 3 of the Grounds of Appeal. ... Looking at all the circumstances of the offence we are quite unable to say that the term of four years was manifestly excessive. In comparison with the sentence imposed on the other offenders it may be said to be on the high side but that is a long way from saying that the sentence was outside the range of sentences open to the learned Judge in the proper exercise of his discretion. The minimum term was not itself attacked but when it was pointed out to Mr Kennan that the effective increase in the time the applicant will have to serve in prison was almost exactly the term which the learned Judge had indicated as the likely increase when His Honour was asked, before plea, to give an indication. Mr Kennan submitted that those facts did not preclude the applicant from seeking leave to appeal. ...

The second ground of appeal alleges that the learned Judge, in contravention of principles laid down in cases such as *R v Douglas* [1959] VicRp 28; (1959) VR 182 paid attention to what was conceived to be the period which the Applicant would be likely to be confined in gaol rather than to the consideration that the Applicant might have to serve every day of the term imposed.

... It is always the duty of a sentencing judge to fix as a maximum or head sentence that term of imprisonment which in all the circumstances he considers to be the appropriate sentence for the offence and for the offender, bearing in mind that the prisoner may have to serve every day of it. Then he should in an appropriate case consider whether a minimum term should be fixed, and if so, for how long: see *R v Governor of Her Majesty's Gaol at Pentridge, ex parte Cusmano* [1966] VicRp 78; (1966) VR 583 at p587; *R v Currey* [1975] VicRp 63; (1975) VR 647; *Power v The R* [1974] HCA 26; (1974) 131 CLR 623; 3 ALR 553; 48 ALJR 297.

... The course taken by the learned Judge may be said to be entirely justified by the state of the authorities and as there has been no pronouncement by this Court which suggests otherwise no possible criticism can attach to the learned Judge for what was done, particularly since what was done was done in open Court. Nevertheless we think that the propriety of the course taken is a question of great importance and after the fullest consideration, during which we have had the opportunity of discussing the question with almost all the other members of the Court, we have

decided that, having heard a full argument, we should express the views that we have formed. In so deciding we recognise to the full the dangers involved in a Court's going beyond the question to be decided, but we think that it is nevertheless right to do so because it is unlikely that the question whether a judge should give an indication, before arraignment, of the sentence which he has in mind, would ever arise *inter partes* for decision. We, therefore, think that it is important that the guidance of an appellate tribunal should be available to trial judges.

Much has been written in recent years and a number of cases have been reported dealing with what is often loosely called "plea bargaining". It is, in our opinion, an ambiguous expression which is better avoided. It is a misnomer of most situations it is used to cover. It is frequently used without sufficient indication of what precisely is being referred to, but since it is used, we shall indicate briefly what we understand the expression to cover for the purpose of limiting the matters upon which we propose to express any views. The expression "plea bargaining" is sometimes used to cover discussions between the Crown and an accused's advisers concerning the charges upon which an accused will be presented for trial and including indications that the accused is prepared to plead guilty to certain offences. Since, in Victoria, the decision as to the charges upon which a person is presented rests with the Crown and does not involve the Court (see *Crimes Act*, s353 and *R v Parker* [1977] VicRp 3; (1977) VR 22) we shall say nothing about any such discussions.

Another sense in which the term "plea bargaining" is sometimes used covers discussions in which the trial judge takes part. Counsel for an accused and counsel for the Crown attend the judge in his private chambers and discuss an arrangement whereby, upon the judge indicating the probable sentence and the Crown indicating that it will accept a plea of guilty to a particular charge, the accused through his counsel indicates that he will plead guilty. We do not know that such discussions are common in Victoria, but we are clearly of the opinion that any such discussions should not take place. Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice.

We are reminded that some such course was taken in *R v Bruce* (not reported, Full Court, judgment delivered 19th December 1975) and since much has since been written about that case we wish to say something about it. In that case Bruce had pleaded guilty in the County Court to charges of forging and uttering after having received an indication from the judge that he would probably not be given a custodial sentence. The indication was obtained at consultation in the judge's chambers at which the accused's counsel and the prosecutor were present. He was fined and placed on a bond. A fortnight later he was presented for trial before another judge on a charge of conspiracy to cheat and defraud. The charge was related to the circumstances which gave rise to the charges of forging and uttering.

The trial judge was again consulted in chambers. The judge indicated that he wanted to hear the Crown's opening address before coming to any conclusion. Bruce pleaded not guilty and the trial began, but after the learned judge had heard the prosecutor's opening address another conference took place in the judge's chambers. The judge indicated that, in the event of the accused changing his plea, a non-custodial sentence would be imposed. Bruce changed his plea and was placed on a bond. The Attorney General appealed to this Court under s557A of the *Crimes Act*. This Court allowed the appeal and imposed a custodial sentence.

It is clear that the giving of an indication such as that given by the trial Judge in *Bruce's Case* or in the present case cannot preclude the Crown from subsequently exercising its right of appeal against the sentence imposed. Nor, as Mr Kennan contended in the present case, can an indication given by a trial judge preclude an accused from applying to this Court for leave to appeal against the sentence imposed whether that sentence be in accordance with the prior indication or not.

In the present case, of course, nothing took place in private. There was nothing involved which could be described as a bargain, except in a colloquial sense. Moreover, everything was done

in public and this removed certain of the objections applicable to an indication of the likely sentence given by a judge in private. Nothing would be more likely to undermine public confidence in the administration of justice than the knowledge that it was possible to "negotiate" with the Court in private as to the sentence to be imposed. It would be worse still if the public came to believe that a lesser sentence would be imposed merely because a plea of guilty was entered rather than upon conviction after a plea of not guilty. (See as to the significance of a plea of guilty, *R v Gray* [1977] VicRp 27; (1977) VR 225.) Further, in considering what sentence to pass a judge is not entitled to impose a heavier sentence than he otherwise would because an accused's sworn evidence has not been accepted by the jury: *R v Richmond* [1920] VicLawRp 3; (1920) VLR 9; 26 ALR 47; 41 ALT 176. If negotiations in private become common it would, to borrow a phrase used by Barwick CJ in the course of the argument in *Bruce's Case*, be "clearing the lists at too great a price." But the objections to negotiations concerning the likely sentence are not confined to negotiations which take place in private. They include objections that are also available in the present case. If a judge is asked to give an indication of the sentence which is likely to be imposed following a plea of guilty he is likely to feel inhibited from subsequently passing a more severe sentence. If he succumbed to the inhibition, he would fail to pass the appropriate sentence. If he did pass a sentence more severe than he had previously indicated, the accused would undoubtedly, and in most cases with justification, harbour a feeling of injustice.

The procedure adopted in the present case would, if it became common, rapidly lead to a belief and perhaps more than a belief that an accused pleading guilty will receive a lesser sentence than one who defends himself by pleading not guilty. We have already pointed out that this is a fundamental error. (*R v Gray* (*supra*); *R v Richmond* (*supra*)). Further, if the procedure became hardened into a practice, and a judge in a given case indicated upon a plea of guilty that he might impose, say, a term of four years' imprisonment, it seems likely that sooner or later public negotiations for a lesser sentence would occur. Not only might such negotiations be thought to be inconsistent with the integrity of the Court; they would be thoroughly unseemly in the administration of justice. If an accused thought that the sentence indicated by the judge as likely was unacceptable, the arraignment would have to be postponed or the trial would have to proceed in an incorrect atmosphere. The integrity of the Court is of the greatest importance to public confidence in the administration of justice. In the end, the successful administration of justice depends to a considerable extent upon public confidence in it and it is thus vital that that confidence be maintained.

... In view of the infinitely various circumstances that may exist or occur in relation to a criminal trial it is both unwise and undesirable to lay down as a proposition of universal application that a trial judge must never give any indication before he pronounces sentence of the sentence he is likely to pronounce. It is, for instance, often convenient in the course of a plea, for a trial judge with a view to shortening the proceedings, to stop counsel pursuing a particular line upon the ground that it is unnecessary to do so.

We should add that nothing we have said in this judgment should be understood as meaning that it is to be regarded as improper for counsel to have access to the trial judge during a trial for purposes other than discussing the likely sentence. It is not infrequently necessary to discuss some matter that is better not discussed in open Court, but it will, of course, be avoided if possible. They invariably, of course, take place in the presence of both counsel. The course taken by the learned Judge was one which, although undesirable, involved in this case no disadvantage to the applicant and no miscarriage of justice. This Court not being of the opinion that a different sentence should have been passed, the application must be dismissed.
