44/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v MICELI

Winneke P, Tadgell & Charles JJA

23 June 1997 — [1998] 4 VR 588; (1997) 94 A Crim R 327; (1997) 139 FLR 309

SENTENCING – DELAY – WHETHER RELEVANT IN FIXING SENTENCE – WHETHER MERCY IS A RELEVANT CONCEPT IN EXERCISE OF THE SENTENCING DISCRETION.

HELD: 1. Proper sentencing principles dictate that undue delay in the disposition of a charge should work in favour of a prisoner being sentenced. Accordingly, a sentencer was in error in failing to take into account in the determination of the disposition of the case a delay of 26 months – none of it attributable to the prisoner – between admission of the offences and determination of sentence.

2. An element of mercy has always been regarded as running hand in hand with the sentencing discretion. There must always be a place for the exercise of mercy where the sentencer's sympathies are reasonably excited by the circumstances of the case. Whilst a sentencer is there to dispense justice, the sentencer is also there to consider whether on the evidence a reasonable basis exists in well-balanced judgment for adopting a course which might bear less heavily on the offender than if he were to receive his just deserts.

TADGELL JA: "... **[6]** The learned judge was invited on the plea to take account of the delay in formulating the sentence. There is no doubt that proper sentencing principles dictate that undue delay in the disposition of a charge should work in favour of a prisoner being sentenced. The remarks of Sir Laurence Street in *R v Todd* (1982) 2 NSWLR 517 at pp519 and 520 have not infrequently been adopted by this court upon the point. Again, remarks to a similar effect of the Court of Criminal Appeal in *R v Kane* [1974] VicRp 90; [1974] VR 759 at 767 have not infrequently been applied. Most particularly is the matter of delay between commission of offence and the imposition of a sentence for it to be taken into account when rehabilitation is a real prospect; and it is no less so when the person to be dealt with has been at large and has ordered his affairs during the period of delay with a view to reorganizing his life. That is what happened here.

Prosecuting counsel before the judge made the point that here the delay had not been inordinate. There is, in my opinion, no requirement that a delay should be **[7]** inordinate before it deserves to be taken into account in accordance with the principles adopted in the cases I have mentioned. The learned judge at page 63 of his sentencing remarks simply asseverated that there had not been any such delay as should bring about any diminution or lessening of an otherwise appropriate sentence. His Honour gave no explanation of that statement and attempted no investigation of the circumstances upon which the applicant had relied for the application of the relevant principle. That, in my opinion, reveals error. There was a year of unexplained delay between the time the applicant made a clean breast of it to the Commonwealth authorities and the time he was charged on summons. A subsequent delay of some further 14 months before he was dealt with may or may not have been attributable to the pressure of the County Court's business, but none of the 26 months delay, it must be said, was attributable to the applicant himself. He was entitled to have the delay overall taken into account in the determination of the disposition of his case and he was denied it. That is enough to entitle the applicant to have the sentence set aside and a fresh sentence imposed by this court.

Strictly, it is unnecessary to consider the other grounds, but I shall say something shortly about them. Counsel for the applicant before the judge evidently irritated his Honour in the way he dealt with the matter of mercy. Counsel led into the point saying, after enumerating a number of extenuating circumstances, and in particular referring to the anguish which his client had already been through in his attempts to save the farm, provoking his Honour to remind him that he was not a jury, **[8]** to which counsel, perhaps unwisely, retorted, "No, but you are a human being, with respect, Your Honour", and he went on to say that he urged the judge in this case, in addition to all the matters he had just enumerated, "To exercise the judicial discretion of mercy". The mention of

mercy, and the submission or suggestion that the judge should in his discretion show it, appears to have stung the judge. At all events, it provoked his Honour to say, "When counsel say that I always say to counsel, 'I am not here to dispense mercy, I am here to dispense justice'". I am not at all sure, with the benefit we now have of hindsight, that the exchanges between the judge and counsel which followed, centering upon the concept of mercy, did not serve to divert attention from the matters which it was incumbent on the judge to balance in determining the appropriate sentence. At all events, I regret to say that the exchanges were scarcely edifying. A more accurate way of putting counsel's point, and perhaps a more attractive way of putting it as a matter of advocacy, was to say that a proper consideration and evaluation of all the relevant extenuating circumstances conduced to clemency such that a merciful sentence should be imposed. That has the ready authority of *R v Gherge* (10 October 1990) in which Murphy J, speaking for the Court of Criminal Appeal, said:

> "Oftentimes the fact that a person has had some compelling extenuating motive for the acquisition of money has been seen by the court as a good reason for tempering justice with mercy, mercy perhaps which may not have been appreciated by the applicant, nor indeed perhaps by the public generally".

Counsel for the applicant relied before us this morning on the statement of Windeyer J in *Cobiac v Liddy* **[9]** [1969] HCA 26; 119 CLR 257 at 269; [1969] ALR 637; (1969) 43 ALJR 257 where his Honour, speaking of mercy, said, it was not that

> "...mercy, in Portia's sense, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice".

His Honour there was considering a case in which a statute fell to be interpreted which said, in effect, that the penalties which it provided for motor offences "shall not be reduced or mitigated in any way" except as was provided. The context, therefore, was not quite the same as the context in which the concept of mercy was raised here, but it cannot be doubted that an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion (see *R v Osenkofski* (1982) 30 SASR 212; (1982) 5 A Crim R 394; *R v Parker*, Court of Criminal Appeal, 22 June 1988; *R v Carter*, Court of Appeal, 14 February 1997). ... It may be, as the judge said, that when he is invited to exercise mercy he always says to counsel, "I am here to dispense justice, not to dispense mercy".

If it be so, I would suggest, with due respect, that his Honour give consideration to ceasing the practice. It may be an aphorism or apothegm that trips readily enough off the tongue. It is, however, if not strictly inaccurate, apt to mislead, and to mislead in particular anyone not versed in the law who happens to hear it. Moreover, it is in no way helpful in an intelligent understanding of the sentencing task. That the judge felt obliged to explain himself in a report to this Court seems to me in itself to amount to an indictment of the practice. A judge following sound practice in hearing a plea for leniency should not find it necessary to say what his thrice repeated, emphatically stated, non-technical words were intended to convey ..."

CHARLES JA: "... **[12]** The relevance of mercy to an exercise of sentencing discretion reflects the Coronation Oath taken by the Sovereign **[13]** on 4 November 1952. Her Majesty was asked by the Archbishop of Canterbury:

> "Will you to your power cause law and justice in mercy to be executed in all your judgments?".

I do not think Her Majesty's acceptance of this Oath was merely an undertaking to exercise the Royal Prerogative; rather the Oath recognises that, as counsel for the applicant submitted, mercy is but an aspect of the exercise of the sentencing discretion. ...

The learned judge was indeed, as he said, there to dispense justice. His Honour was also there to consider whether, on the evidence before him, a reasonable basis existed in well-balanced judgment for adopting a course which might bear less heavily on the applicant than if he were to receive his just deserts. It would be quite wrong for anyone to have thought that our system of justice did not entitle the prisoner standing for sentence to receive proper consideration of any claim he may legitimately have had to the exercise of clemency."