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SUPREME COURT OF SOUTH AUSTRALIA (IN BANCO)

R v REINER

Bray CJ, Hogarth and Wells JJ

18 March, 30 April, 10, 24 May 1974 — (1974) 8 SASR 102

SENTENCING – TAKING OTHER OFFENCES INTO ACCOUNT – SUSPENDED SENTENCE – VALUE OF – VENGEANCE AS OBJECT OF PUNISHMENT – EVIDENCE – EXPERT MEDICAL EVIDENCE BASED ON HEARSAY INFORMATION – WHETHER ADMISSIBLE – WHETHER ANY WEIGHT SHOULD BE ATTACHED TO LETTERS OF EXPERT.

The defendant pleaded guilty to a charge of having indecently assaulted a female, namely his daughter. He admitted having committed acts of physical interference with the girl for a period of almost two years; but he was charged on only one count of indecent assault and did not specifically ask that any other offences should be taken in to account for the purpose of his sentence. He was sentenced to four years' imprisonment with hard labour. Upon appeal—

HELD:

1. The sentencing Judge was not entitled to punish the applicant for any of the crimes for which he was not charged. Whilst he may still be charged with them and the normal procedure adopted when it is desired that offences not charged should be taken into account, namely the handing-up of a precise list of such offences signed by the accused was not followed.

2. On the other hand the Judge was entitled to take into account the context and the surrounding circumstances of the crime and in particular it was permissible, relevant and important for him to know whether the act charged was an isolated offence or whether it was only, to use the metaphor often adopted, the tip of an iceberg. The surrounding circumstances of the crime may be taken into account in considering whether or not to extend leniency so as to reduce what would otherwise be a proper sentence but the commission of other crimes not asked to be taken into account under the procedure just mentioned cannot be used in order to increase what would otherwise be a proper sentence.

3. In relation to the purpose of punishment, the demand for vengeance is not a legitimate retributive element in sentencing. It must be the retribution of the community as a whole and not the individuals wronged.

4. In relation to the value of suspended sentences, statistics show that in the case of first offenders at least, the device of the suspended sentence has amply justified itself. If a man can be restored as a useful member of the work force of the community, and if the chances of his repeating his offence are slight, it is obviously to the advantage of everyone, and certainly to the advantage of himself and those dependant on him, that he should be at liberty. If he offends again, or if he breaks any of the terms of the bond, the suspended sentence or so much of it as has not already been served will automatically be put into effect on the application of the Crown. Nor in a case the deterrent effect of punishment on others is not of major significance. This type of crime by this type of man proceeds from a distortion of the personality due to psychological factors and those in that condition, if not deterred by conscience and the shame and guilt of detection, are not likely to be deterred by the difference between three years' imprisonment without suspension and three years' imprisonment suspended.

5. In relation to evidence admitted of medical evidence by way of letter, it is extremely unsatisfactory that expert evidence should be put before the court in this indirect way. The first is the hearsay nature of the second letter. Whilst it may be useful to psychiatrists to obtain information from the relations of their patients, clearly they cannot give evidence as against the patient of what was said at such interviews if the patient was not present. Since it was tendered by the defence it can hardly be said that it was inadmissible but no weight should have been attached to it in the absence of any specific admissions by the applicant of its truth.

BRAY CJ: *[In relation to a sentencing judge taking into account surrounding circumstances, His Honour said:]*... (a) I should refer to the topic which Mr Elliott QC for the applicant, placed in the forefront of his argument: That is that his client was in effect sentenced for other offences with which he

was not charged. He could conceivably have been guilty of a number of offences in relation to the other man, in particular aiding and abetting him to have carnal knowledge of the girl while she was under the age of consent, besides possible breaches of ss57 and 64 of the *Criminal Law Consolidation Act* 1935-1972. And it may well be that his activities in connection with the bundle of documents to which I have referred might have involved him in offences against the provisions of s33 of the *Police Offences Act* 1953-1973.

The learned Judge of course was not entitled to punish applicant for any of these crimes; cf *R v Smith* (1946) 63 WN (NSW) 231. He was not charged with them, he may still be charged with them and the normal procedure adopted when it is desired that offences not charged should be taken into account, namely the handing-up of a precise list of such offences signed by the accused was not followed.

On the other hand the learned Judge was entitled to take into account the context and the surrounding circumstances of the crime and in particular it was permissible, relevant and important for him to know whether the act charged was an isolated offence or whether it was only, to use the metaphor often adopted, the tip of an iceberg. The surrounding circumstances of the crime may be taken into account in considering whether or not to extend leniency so as to reduce what would otherwise be a proper sentence but the commission of other crimes not asked to be taken into account under the procedure just mentioned cannot be used in order to increase what would otherwise be a proper sentence. As I have said on another occasion, the distinction between refraining from taking something off and adding something on when there is no fixed normal penalty may seem, in some cases, to approach the metaphysical. But it is a recognised and time-honoured distinction for all that.

If the learned Judge did punish the applicant not only for the one indecent assault admitted, but for his other indecent assaults in relation to this girl, or for his conduct in relation to the other man or the bundle of documents, he was wrong in doing so unless the conduct of the defendant can be regarded as containing some sort of implied invitation to do so equivalent to the practice to which I have previously referred. According to his second report to us the learned Judge seems to have so regarded it. I think that he was mistaken here. I refer to this later. I think the learned Judge did take into account those other matters to which I have referred as matters which justified an addition to the applicant's sentence and not merely as matters which justified a refusal of leniency."

[As to the purpose of punishment, His Honour stated:] (b) Secondly, if it be true – and from what Mr Elliott told us it is no longer true even if it once was – that the demand for vengeance by the applicant's family in general, or by his wife in particular, would be satisfied by his imprisonment, the gratification of the desire for vengeance on the part of the relations of the victim is not, in my view, a legitimate end of criminal punishment, the purpose of which is to protect society. There might still be a legitimate retributive element in sentencing. As to that I express no opinion now. But if such an element survives it must be the retribution of the community as a whole and not of the individuals wronged.

[On the value of suspended sentences, in a joint judgment of the Court (Bray CJ and Hogarth J) at pp117-118 stated:] (c) Section 4(2a) of the *Offenders Probation Act* 1913-1971 empowers a court, if it thinks it expedient to do so, to suspend a sentence, having regard to the character, antecedents, age, health or mental condition of the defendant, or the trivial nature of the offence or any other extenuating circumstances. The majority of us thought that it was expedient to exercise those powers, because many of the qualifying circumstances are present. The appellant is a first offender, he has a meritorious work record, he is fifty-one years of age, he is suffering from a neurotic state of depression, and the three months imprisonment he has suffered is having a deleterious effect upon his personality and his mental stability. The offence is certainly not trivial, but some explanation for it may be found in the circumstances of his sexual and and matrimonial life to which reference has been made in the judgments of the members of the court. His job is open to him and we have taken steps in the drafting of the bond to see that he is removed from any association with the girl close enough to facilitate a repetition of the offence. In fact we think there is little chance of repetition.

In view of comments which have recently appeared in the press about suspended sentences,

it may not be remiss to say that statistics show that in the case of first offenders at least, the device of the suspended sentence has amply justified itself. If a man can be restored as a useful member of the work force of the community, and if the chances of his repeating his offence are slight, it is obviously to the advantage of everyone, and certainly to the advantage of himself and those dependant on him, that he should be at liberty. If he offends again, or if he breaks any of the terms of the bond, the suspended sentence or so much of it as has not already been served will automatically be put into effect on the application of the Crown. Nor in a case like this do we think that the deterrent effect of punishment on others is of major significance. This type of crime by this type of man proceeds from a distortion of the personality due to psychological factors and those in that condition, if not deterred by conscience and the shame and guilt of detection, are not likely to be deterred by the difference between three years' imprisonment without suspension and three years imprisonment suspended.

[On the questions of the expert medical evidence Bray CJ stated:]— (d) The final ground relates to the opinion of the psychiatrist. I think this deserves some detailed examination. Unfortunately, as it seems to me, the doctor did not give oral evidence. But two letters from him were tendered by the defence with the consent of the Crown dated 31st October 1973 and 5th December 1973 respectively. In the first of these the doctor summed up the history given to him by the applicant and his final opinion was:

> 'In my opinion this is the classical situation of a man who finds increasing impotency threatening to a rather inadequate personality. As not infrequently happens, such a person approaches a child or adolescent, and because of his inability to relate to people outside of the family, he involved his own daughter. He was almost certain to be detected and his actions were at the same time a protest against his situation for which he holds his wife to some extent, responsible; and an attempt to draw attention to his problem. It is extremely unlikely that he will ever offend again and he may well need help in resuming a compatible relationship with the other members of his family.'

The second letter I regard as important and I set out in full:

> 'Further to my report of 31st October 1973, regarding Mr Kurt Ludwig Reiner:—
> I interviewed his wife and gained the following information:
> 1. Reiner had been warned before about his sexual relationship with his daughter and had promised to discontinue this.
> 2. He continued to have this relationship and apparently wrote her obscene letters.
> 3. He is supposed to have taken her to a workmate's home where he encouraged her to have sexual intercourse with the workmate in his presence.
>
> In view of these facts I feel that the psychopathic element in Reiner's personality is much stronger than was originally understood. In view of this the need for punishment is much greater and the place of therapy, less.
>
> In my opinion, in fact if Reiner is to rehabilitate at all with his wife, a term of imprisonment would be of benefit as she is most hostile towards both him and her daughter'.

Not unnaturally Mr Hodge appears to have been somewhat dismayed by this letter. In his oral submission he said that the doctor was unable to be present in court but that he had had a subsequent telephone conversation with him the substance of which he related without objection. He said that further material had been put before the doctor and that his present opinion was that though the applicant needed to be punished — by which I understand him to mean needed for his own psychological satisfaction — that could be adequately achieved by a suspended sentence which would sufficiently convey to him the disapprobation of society. He then said:

> 'The principal recommendation he has to put before the court is that the man must be, within terms that he understands, punished, but the form of that punishment need not necessarily be imprisonment, but provided the punishment is meaningful it is unlikely that he would offend again. From the point of view of the family imprisonment would be desirable to satisfy their own sense of vengeance in other words.'

I need not pause to stress how extremely unsatisfactory it is that expert evidence should be put before the court in this indirect way. Two things, however, cause me considerable concern. The first is the hearsay nature of the second letter. I can understand how useful it may be to psychiatrists to obtain information from the relations of their patients, but clearly, in my view, they cannot

give evidence as against the patient of what was said at such interviews if the patient was not present. I refer to my remarks on this topic in *Sych and Sych v Hunter* (1974) 8 SASR 118. The information said in the letter of the 5 December to have been supplied to the doctor by Mrs Reiner was highly damaging. Since it was tendered by the defence it can hardly be said, I suppose, that it was inadmissible but, in my view, no weight should have been attached to it in the absence of any specific admissions by the applicant of its truth.

[The case of Sych & Sych v Hunter *(1974) 8 SASR at p118 (note) is included as a note to the case and is reproduced in full:]*

(e) 'This was an action in which the plaintiffs (a father and his daughter) claimed damages in respect of a road accident in which the daughter was injured. The daughter sued for damages for her injuries and the father sued for medical and other expenses incurred by him in relation to the daughter's treatment. Liability was admitted and the action came on for hearing before Bray CJ for assessment of the daughter's damages. The daughter was aged thirteen years at the date of the accident and sixteen years at the date of hearing. One of the questions to be resolved was the psychological effects of the accident upon her. Medical practitioners called to give evidence on her behalf included Dr Blakemore, and in dealing with his evidence his Honour, in his reasons for judgment delivered on 18th January 1974, made the following remarks:

> 'Dr Blakemore saw her once on 19th November 1973. He saw her both alone and in the company of her mother and he saw her mother alone. I excluded any opinion based on what he had learned from the mother in the absence of the girl. This was clearly inadmissible: cf. *Steffan v Ruban* (1966) 84 WN Pt.1 (NSW) 264. In the circumstances of this case it would also have been most unjust to the plaintiff to admit any evidence of what her mother said when alone with the psychiatrist or of any opinion formed by him on the interview with the mother alone, since the salient argument for the defence was that the mother, in a bid for heavy damages, had endeavoured to instill into the girl's mind fears about the effect of the accident on her future which were not naturally there. I can understand how desirable it may be in a scientific sense for the psychiatrist to acquaint himself with the opinions, the attitudes and the personalities of the patient's close relatives and friends, but it cannot be too clearly emphasized that from the point of view of the law all this, if it takes place in the parties' absence, is hearsay or opinion founded on hearsay and has to be excluded in justice to those who have had no opportunity of testing it.'
