07/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

DPP v VIRGO

Young CJ, King and Tadgell JJ

3 November 1988

CRIMINAL LAW – SENTENCING – MULTIPLE COUNTS OF THEFT – NUMEROUS PREVIOUS CONVICTIONS – MITIGATING FACTORS – WHETHER GOOD BEHAVIOUR BOND APPROPRIATE – OFFENDER RE-SENTENCED – CUSTODIAL SENTENCE IMPOSED – SENTENCES LESS THAN TWELVE MONTHS' IMPRISONMENT IMPOSED ON EACH COUNT – WHETHER OPEN TO COURT TO FIX A MINIMUM TERM.

V. pleaded guilty to 16 counts of theft. Using another person's credit card, V. obtained a number of loads of petrol from a fuel depot to the value of $11,000. On the plea, it was said that V., aged 29 years, had 11 previous convictions for dishonesty, that he was progressing favourably under a community-based order and was also undergoing treatment for a knee injury and an existing drug problem. The sentencing judge released V. upon a $1,000 common law bond to be of good behaviour for four years and to attend the Pleasant View Centre after 3 months. On appeal by the DPP against inadequacy of sentence—

HELD: Appeal allowed. Sentence quashed.
1. In view of the substantial amount of property stolen, the serious nature of the offences and the offender's previous convictions, a more severe punishment than a bond was called for.

2. Accordingly, the appropriate sentence was 2 months' imprisonment on each count tailored so as to produce a total effective sentence of 22 months' imprisonment with a minimum of 9 months' imprisonment before being eligible for release on parole.

YOUNG CJ: (with whom King and Tadgell JJ, agreed) **[1]** The Court has before it an appeal by the Director of Public Prosecutions against a sentence imposed in the County Court upon Gary Noel Virgo, who pleaded guilty in that Court to sixteen counts of theft. After hearing a plea by counsel on the respondent's behalf, the learned trial Judge sentenced him by releasing him upon a common law bond to be of good behaviour for four years and to come up for sentence if and when called upon. The amount of the bond was $1,000 and it was a special condition that he should attend Pleasant View after three months.

The offences to which the respondent pleaded guilty were sixteen counts of theft. The thefts were committed between 3rd November 1986 and 27th November 1986. The subject of the thefts was petrol taken from a petrol depot to which the respondent had access. The depot was **[2]** situated in Dandenong and for some time a Mr and Mrs Jamieson had been account holders at that depot. The respondent had worked for Mr Jamieson for a number of years from 1974 onwards, and had been with Mr Jamieson in July 1986 when he had obtained some petrol from the petrol depot using a Fuel Card. The thefts to which the respondent pleaded guilty involved the taking of petrol from that depot using Mr Jamieson's Fuel Card.

The respondent is not charged with stealing the card, and the evidence is conflicting as to how that card came into his possession. Ultimately it is not necessary to resolve that question, because it is clear that the respondent knew the personal identification, or PIN number as it is called, for that particular card, and having obtained possession of it he used it in order to take a number of loads of petrol in various forms from the depot, the total amount which he stole in that way being over $11,000-worth. When he was first apprehended the respondent said that he did not know what the police were talking about, but ultimately he made full admissions, and as I have already indicated, pleaded guilty to the charges.

During the course of the interviews the respondent sought to assign the major role in the thefts to two co-accused, one by the name of Lesson, sometimes called Leeson. But Leeson's evidence was that the respondent was the organiser of the operation and that he, Leeson, had never had possession of the card and did not know the PIN number. The other co-accused was

one Bright, and he and Leeson were both dealt with in the Magistrates' Court. **[3]** It is clear, I think, that they each played minor roles, and in any event they were presented on fewer charges than the present respondent; indeed, on many fewer charges. The respondent is aged twenty-nine years, and he has a substantial record of prior offences. He admitted sixteen prior convictions from eight court appearances, eleven of them being for offences of dishonesty. In addition, the respondent was placed in June 1988 upon a community-based order for an offence of attempted burglary and later still, this year, was on a second community-based order for a social security fraud. By that is meant that he was drawing the dole when he was actually employed and working.

During the course of the plea it was revealed that the respondent had developed some emotional reactions to events that had occurred and had had something perhaps close to a nervous breakdown, although there was no evidence given to that effect. He appears to have been unusually affected by the death of a grandmother and he was also affected by the fact that his de facto wife, with whom he had been living for some time, and child, had recently left him.

In addition to that, I think the only other relevant factor is that in March of last year, whilst running, he put one foot into a pothole and seriously injured his left knee joint. He was admitted to the Dandenong and District Hospital and had an operation for a ruptured anterior cruciate ligament of his left knee, with reconstruction of his left knee joint, and is still **[4]** undergoing post-operative management of his knee, and it is said proper management of it will involve a further operation.

At some unspecified time the respondent appears to have become addicted to tranquillizer drugs, and it was for that reason that the learned sentencing Judge imposed on the bond a condition that he should report to Pleasant View in three months' time. The Director of Public Prosecutions appeals to the Court upon the ground that the sentence which the learned Judge imposed was manifestly inadequate.

It is not easy, I think, to discover from the remarks made by the learned Judge when passing sentence exactly what considerations induced His Honour to pass the sentence which he did pass. There were, I think, three considerations that spoke in the respondent's favour. One, that he had pleaded guilty; two, that there was a favourable report from the Community Corrections Officer about his progress under the community-based order and thirdly, that he suffered substantial injury which was requiring current treatment.

The last of those three excites some sympathy. It is not suggested that the addiction to tranquillizers was in any way responsible for the commission of those offences. The nervous reaction which the respondent suffered as a result of the death of his grandmother was not suggested as a significant factor, but what was said on the plea was that it could be seen from the report of the Community Corrections Officer that the respondent had, after many years **[5]** of criminal offences, offences of dishonesty, turned the corner and started a new life.

It seems plain from observations made by the learned Judge that he had some scepticism in relation to the last submission, for His Honour said that a bond to be of good behaviour for four years would be very onerous for the respondent. By that I take His Honour to mean that it would be very difficult for the respondent to adhere to the conditions of the bond.

The suggestion that the respondent should be released on a bond was made during the course of the plea, without any elaboration by His Honour, and when His Honour passed sentence he did no more than indicate that he would release him on a four year bond. His Honour added that he understood that the respondent would be mobile by October of this year, that is to say he would be free of crutches, I think, by that time, and accordingly he directed that a condition of the bond be that the respondent attend at Pleasant View in Preston for examination and treatment for the existing drug problem, and in His Honour's report to this Court he added that he considered that the respondent's addiction problem was worth dealing with in the hope that ultimately he might be clear of the criminal law.

Whilst I would join in His Honour's hope, I think it is unnecessary for the Court to deal with the drug problem. The respondent had shown before that he was prepared to make his own arrangements for obtaining medical assistance to get rid of his drug problem, and if he is genuine

in that I think that it can properly be left to him. **[6]** The problem for this Court is whether it is appropriate to release this offender of twenty-nine years with eleven previous convictions for dishonesty on a bond to be of good behaviour. The offences are very serious offences. The total amount of petrol stolen was substantial, and although there is a restitution order for the payment of $2,500, that is not part of the punishment. A person who commits serious crimes of this kind must expect to receive substantial punishment from the Courts.

I find myself unable to support the view that this respondent should be released on a bond. There is not, in the material, anything that I can see that justifies that course. The previous convictions and the serious nature of the offences I think required a more severe punishment than was imposed. The one factor that seems to me to excite some sympathy is the accident which the respondent suffered when he put his foot into a pothole. But sympathy for the injury so suffered can be sufficiently dealt with, I consider, in the sentence which I shall propose to the Court which should be served in substitution for the bond which the learned trial Judge gave to him.

I think that the Court must mark the seriousness of these offences by a custodial sentence. I would propose to the Court that the respondent be sentenced to two months' imprisonment on each of the sixteen counts to which he pleaded guilty. If no special orders were made, that would mean a total sentence of thirty-two months, but I think that some tailoring of the sentence would be appropriate, and I would propose that the sentences should be tailored **[7]** so as to produce the result that the respondent will be sentenced to a total effective sentence of twenty-two months and that that should be achieved by making the sentences on counts 1, 2 and 3 concurrent with one another but cumulative upon the other sentences imposed; that the sentences on counts 4 and 5 be concurrent with one another but cumulative upon the other sentences imposed; that the sentences on counts 6, 7, 8, and 9 be served cumulatively; that the sentences on counts 10 and 11 be served concurrently with one another but cumulatively upon the other sentences imposed; that the sentences on counts 12, 13 and 14 be served cumulatively; that the sentences on counts 15 and 16 be served concurrently with one another but cumulatively upon the other sentences imposed.

The sentences so imposed reflect, I think, the appropriate sentences for these offences having regard to the fact that the respondent pleaded guilty. Had it not been for that plea, I think that a more severe sentence would have been required. I think further that the present position of the respondent which, as I have said, excites some sympathy, should be reflected in the minimum term, and I would impose a minimum term which is less than might ordinarily be expected. The minimum term I propose is a term of nine months' imprisonment.

APPEARANCES: For the appellant DPP: Ms C Douglas, counsel. JM Buckley, Solicitor to the DPP. For the respondent Virgo: Mr I Crisp, counsel. Legal Aid Commission Victoria.
