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SUPREME COURT OF VICTORIA — FULL COURT

R v GRAY

Gillard, McInerney and Crockett JJ

4, 5 November, 17 December 1976 — [1977] VicRp 27; [1977] VR 225

SENTENCING – PUNISHMENT – GROUNDS FOR MITIGATION BY "GUILTY" PLEA – OFFENCES COMMITTED WHILST ON BAIL AND PROBATION – SENTENCING CONSIDERATIONS.

G. was sentenced to a total of 15 years' imprisonment with a minimum of 10 years. On appeal, the defence argued *inter alia* that the trial judge had placed too much weight on the fact that 7 of the 9 counts were committed whilst the accused was on bail and probation, and that insufficient weight had been attached to the defendant's ready admissions and pleas of guilty.

HELD:

1. It is impossible to say that a sentencing Judge is not entitled to take into account the circumstance that an offence has been committed whilst the accused was on probation. The very fact that offences were committed while the accused was on probation showed that he had violated the condition of his probation order. Such an order is always conditioned upon the abstaining from any violation of the law.

2. As to the circumstances that offences were committed whilst the applicant was on bail, it is permissible for a sentencing Judge to take this into account at least to the extent of assessing the prospects of the applicant's reformation. The circumstance that an applicant has committed offences while on bail is a circumstance justifying a Court in making an order for revocation of that bail

3. It is proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty. It is beyond argument that contrition is a factor properly to be considered in determining what measure of clemency should be extended to an accused person. In one sense it forms an aspect of the reformation component in the sentence. But that is not to say that repentance cannot be present when, or because, the accused has chosen to contest the charge made against him; although remorse will, doubtless, be more readily established in cases where a plea of guilty has been entered.

The Full Court: A question of more general importance arises in relation to Ground 3. In our view it is impossible to say that a sentencing Judge is not entitled to take into account the circumstance that an offence has been committed whilst the accused was on probation. The very fact that offences were committed while the accused was on probation showed that he had violated the condition of his probation order. Such an order is always conditioned upon the abstaining from any violation of the law – see the form prescribed by Regulation 16 and the Fourth Schedule to Division VI of the *Social Welfare Regulations* 1962 (as amended) pursuant to s542 of the *Crimes Act* 1958. We do not think it is proper that the sentencing Judge charged with the task of sentencing the offender for the offences in respect of which the probation order has been made should increase the sentence in respect of that offence by reference to the conduct constituting the breach of probation. Such a course would, we consider, be wrong for reasons discussed in *R v Hansen* (1961) 79 WN (NSW) 148; [1961] NSWR 929 at p931 per Evatt CJ and Ferguson J. The fact that offences have been committed while on probation is, however, relevant to the question whether the offender has reformed or is likely to reform in the future, and the Judge charged with the task of sentencing the offender for the offence in respect of which the probation order was made is entitled, indeed we would say bound, to take that circumstance into account in determining whether he should extend further leniency to the offender.

Here, of course, the problem was a different one: it was the task of sentencing the applicant in respect of offences which constituted a breach of the probation. Commission of an offence whilst on probation suggests, on the face of it, that the offender had at the time of the commission of the offence no great regard for the law or for his obligations under the probation order, and casts

doubt on the likelihood of his being of good behaviour in the future or of his taking advantage of any similar leniency extended to him in respect of the offence constituting the breach of probation. The sentencing Judge is entitled, indeed bound, to take these circumstances into account. We do not think it is permissible for him to increase the sentence which he would otherwise have imposed, but it is permissible for him to take that circumstance in account in determining whether he should impose a custodial sentence as against releasing the offender on probation or on a common law bond. It may also have some bearing in determining the minimum sentence.

In passing sentence, the learned Judge observed that the fact that all the offences except the first two had been committed whilst the applicant was on probation as justifying 'a more serious view being taken than would otherwise be the case'. We do not, however, discern that he gave effect to this view in imposing sentences he did on Counts 3, 4, 5, 6, and 7 as compared with those imposed on Counts 1 and 2. In those circumstances we are not satisfied that if he erred in the view he expressed that the error was reflected in the sentences he passed.

As to the circumstances that offences were committed whilst the applicant was on bail, it is, we think, permissible for a sentencing Judge to take this into account at least to the extent of assessing the prospects of the applicant's reformation. The circumstance that an applicant has committed offences while on bail is of course a circumstance justifying a Court in making an order for revocation of that bail — see *R v Hill* [1967] VicRp 59; [1967] VR 556. Bail is granted on the supposition that the applicant will answer to his bail and is most certainly not granted to enable the offender to commit further offences whilst on bail. Indeed it has often been said that the commission of offences whilst on bail is an abuse of the privilege of bail. Whether or not bail is to be regarded as a privilege or as a right need not here be determined, though the weight of history is (we consider) in favour of the first view. The real point is that the commission of the offences whilst on bail indicates contempt for or disregard of the system of law under which bail was granted to the offender; it suggests that the offender has small regard for the law and little intention of obeying its commands.

Furthermore, it may be said that the person who commits an offence on bail has abused or betrayed the confidence, reposed in him by the tribunal which granted him bail. The fact that a crime has involved a breach of the confidence or trust, e.g. by a solicitor or bank manager or member of the police force, has always been regarded as a matter relevant to the question of sentence — cp *R v Wright (No. 2)* [1968] VicRp 17; (1968) VR 174 at p181. *Prima facie* the quantum of sentence is dependant on the circumstances of the commission of the crime and its immediate consequences, and should not be increased by reference to events occurring after the offence has been committed. But just as conduct subsequent to the commission of the offence which indicates a clear intention to reform is a matter which the offender is entitled to have taken into account in his favour, so also conduct tending in the other direction, i.e. showing that the offender is unlikely to reform or has at least not yet reformed, is a matter relevant to the sentencing discretion, if or in so far as it suggests that to extend clemency would serve no useful purpose or that leniency is likely to be abused.

It follows, we consider, that the sentencing Judge was entitled to take into account the fact that all the offences except those the subject of Counts 1 and 2 were committed whilst the applicant was on bail or on probation, That weight the sentencing Judge was to assign to that circumstance was a matter for him. But whether he was entitled to increase the sentence which he would otherwise have awarded by reference to the circumstances that the applicant was on probation or on bail is a matter which we find unnecessary to decide on this application. It must not be overlooked that breach of a recognisance for bail exposes the accused to proceedings under s5 of the *Crown Proceedings Act* 1958 (as amended by Acts number 7900 and 8124) with the possibility of imprisonment if the amount of the recognisance be not paid — cf *Re Baker* [1971] VicRp 87; (1971) VR 717, *Re Condon* [1973] VicRp 40; (1973) VR 427. However it must be borne in mind that such consequences follow not from commission of an offence whilst on bail but from the failure to answer to bail".

As to ground 4, it is desirable to set out the discussion which took place between applicant's counsel and the learned Judge:—

Mr DUNN:...I of course rely upon the fact that he has pleaded guilty to these charges and your

Honour will see that he has made record of interview with the police. Certainly he absconded, and there is a reason for this which your Honour will hear in a moment, but it is a matter I will ask your Honour to take into account, that at twenty-four years of age, with the certainty of gaol ahead of him...

HIS HONOUR: I have never been persuaded entirely why it should not be taken into account, although all the statements in this State are against it, are they not?

Mr DUNN: I suppose a judge is entitled to draw his own views.

HIS HONOUR: They do in England, it is quite clear they do. But it has never been the accepted practice in this State, has it? In fact, it has been frowned on.

Mr DUNN: Your Honour, first of all a judge is entitled to take his own view, however, favourable or unfavourable, to any circumstance relating to the plea. In relation to the guilty plea, it would be my submission that it is a matter entirely for your Honour, but it is a matter to be taken into account, and a relevant matter.

HIS HONOUR: It is a matter, and if it is permissible to take it into account, of course it is a relevant matter. I suppose it is relevant that he is only pleading to some of the charges upon which he stood presented."

Regrettably, the state of indecision in which the Judge seems at the time of that exchange to have been was not apparently resolved by him. At all events, there is nothing in his reasons for sentence to indicate any such resolution. When passing sentence the question of whether any, and if so what, weight had been given to the guilty pleas was left unmentioned.

The matter was ventilated in the cases of *R v Harper* [1968] 2 QB 108; [1967] 3 All ER 619 n; [1968] 2 WLR 626 and *R v De Haan* [1968] 2 QB 108; [1967] 3 All ER 618; [1968] 2 WLR 626, which reached two differently constituted divisions of the Court of Appeal within three days of each other. In the former it was held that the nature of the defence presented and, still less, a mere plea of not guilty cannot serve to render a sentence more severe than it might otherwise have been. In the latter case (followed by the Court of Criminal Appeal in Queensland in *R v Perry*, [1969] QWN 17) it was said that a confession of guilty should tell in favour of an accused person, "for that is clearly in the public interest".

Despite a certain illogicality that this juxtaposition involves, the conclusion expressed in *Harper's Case* is now firmly entrenched. It is impermissible to increase what is a proper sentence for the offence committed in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence. This has long been recognized as the proper view in Victoria – see per Cussen J, *R v Richmond* [1920] VicLawRp 3; [1920] VLR 9, at p12; 26 ALR 47; 41 ALT 176.

But in what circumstances may a plea of guilty operate in mitigation? In *Harper's Case* the Court observed that, "It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty." Indeed, in *R v Alcock* [1967] Crim LR 66 sentences imposed for manslaughter were halved because, in the view of the Court of Appeal, the accused had by their actions, including a plea of guilty, demonstrated "genuine remorse".

It is, of course, beyond argument that contrition is a factor properly to be considered in determining what measure of clemency should be extended to an accused person. In one sense it forms an aspect of the reformation component in the sentence. But that is not to say that repentance cannot be present when, or because, the accused has chosen to contest the charge made against him; although remorse will, doubtless, be more readily established in cases where a plea of guilty has been entered.

On the other hand, a simple confession of guilt cannot, by its own force, operate so as to command that the sentence be less than that which it would have been had there been no such confession. In so far as *De Haan's Case* suggests the contrary, the proposition is, we think, too

broadly stated. Cf. the commentary upon *R v Ramsey* [1969] Crim LR 668. Nor, in our opinion, is the reduction of a sentence following upon a plea of guilty necessarily to be dependent upon that plea being the product of remorse – either wholly or in part.

The sentencing judge possesses a discretion of great width. It would be improper to seek to define or prescribe the area in which that discretion is to operate. It is for the judge to interpret the quality and implications of the plea. If it is one calculated to serve the public interest it would be proper to consider whether to allow the plea to act in mitigation, but not necessary to do so. For example, the plea may be evidence of remorse, that is, regret as to participation in the crime. If the Court of Criminal Appeal in Queensland in *R v Cox* [1972] QWN 54 held that a plea of guilty could operate in mitigation only in so far as it evidenced genuine remorse, that, in our opinion, would be a too restrictive view. There are other factors that operate in the public interest. The plea may operate, and may have been so intended, to save a prosecutrix the ordeal of giving evidence in a sexual case. The plea may serve, and may have been so intended, to save the State a lengthy and expensive trial. Yet in neither of such cases might the accused feel genuine remorse.

There may be cases in which the only sorrow felt by him is in the fact that he has been detected. But, having been detected, he has had to do the best he can for himself. Weighing the strength of a possible defence against the likely penalty upon conviction he may elect deliberately to adopt a course which involves a measure of public utility in the belief that his own ultimate interest is best served by doing so. The judge may (not shall) take such circumstance into account in the accused's favour. If such action be tainted overmuch by self-interest it probably will not avail the accused. Professor Sir Rupert Cross in his book *The English Sentencing System* (1971), p153 suggests that it is in the interest of the present judicial system that provided they are in fact guilty, accused persons should plead guilty. No doubt great cost to the community in time, convenience and money is thereby saved. However expedient this may be from the point of view of the executive, it is not a matter which requires the sentencing judge to reduce the sentence below that which he otherwise believes to be proper in the circumstances.

On the other hand, there may be pleas of guilty which are not designed to serve the public interest--or may do so only marginally or incidentally. That is to say, the accused's self-interest is completely predominant in the decision reached by him. One such case will be when the accused is quite unrepentant and confesses his guilt simply because the case against him is overwhelming and, in a practical sense, unanswerable. Another may be a case of "plea bargaining" between the accused or his advisers and the Crown, as, for instance, where the Crown accepts an offer by the accused to plead guilty to a lesser offence. The entry of the "guilty" plea is then merely a manifestation of an exchange of an advantage for a disadvantage by both the accused and the Crown. In such a case it will ordinarily be much more difficult to persuade the court that the plea has that degree of spontaneity or sincerity expected to be the product of true repentance. But, of course, a plea bargain and remorse are not mutually exclusive. A remorseful accused ought not to be prevented from seeking the benefit of any arrangement that he can advantageously make with the Crown nor penalized on that account if he does.

We would add that contrary to the view apparently held by the learned sentencing Judge we do not understand it to have been the accepted practice in this State that no account should be taken of the fact that an accused person has pleaded guilty or that for a judge to take account of that fact has been "frowned on".

We would, however, condemn as entirely improper the holding out to an accused person having a genuine defence of any inducement to plead guilty in the hope of attracting leniency in punishment. The choice as to what course he follows is and must always remain that of the accused. He may wish to make amends for his conduct. If he does he is entitled to know that any act of atonement may (but not necessarily will) be taken favourably into account in the assessment of penalty. But no promise can properly be held out to him.

It was said that the present pleas were entered pursuant to a "bargain" made. So they were. Counsel for the applicant urged this Court to treat the value to the applicant of the pleas as being unweakened by what had occurred. It was argued that the *nolle prosequi* entered in respect of two counts could not be an advantage as there had been no committal proceedings and the strength of the Crown case and, therefore, the possibility of convictions following a trial could only be conjectured.

Then, finally, it was said that any such surmise was impermissible and the presumption of innocence operated so as to require an assumption of non-guilt. This argument misses the point. The applicant had been charged. The strength of the case against him is immaterial. He was in jeopardy. The course he took gave him immunity or release from that jeopardy. Thus, he had an inducement of a highly personal (as distinct from public) nature to adopt the course he did.

On the other hand, the Crown submitted that any inference of remorse that might otherwise have been drawn from the pleas of guilty had been negatived by the fact that two of the offences (counts 8 and 9) were committed by the accused after he had been granted bail and had then absconded. These, it was said, were not the actions of a penitent.

All these factors were relevant to be considered by the Judge in the manner we have attempted to explain. However, it is by no means clear that the Judge did so consider them. To make no mention in the course of his reasons for sentence of the pleas of guilty does not necessarily mean that the question was not considered and such weight (if any) given to the pleas as it was thought they deserved. But the passage set out above indicates that the Judge entertained doubt as to whether pleas of guilty could, when he was sentencing, be taken into account. Indeed, he seems to have thought they could not. Certainly, if they could the circumstances in which the pleas could operate so as to induce clemency seem not to have been present to the mind of the Judge. Accordingly, we consider that ground 4 has been made out and as a result the sentencing discretion of the learned Judge has miscarried. It thus becomes necessary to examine what sentence ought to have been passed. ...
