42/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v DUNCAN

Phillips CJ, Callaway and Batt JJA

26 May 1997 — [1998] 3 VR 208

SENTENCING – PLEA OF GUILTY – SUBSTANTIAL ASSISTANCE GIVEN TO AUTHORITIES – SENTENCING PRINCIPLES APPLICABLE – MITIGATION OF PUNISHMENT OR "DISCOUNT" JUSTIFIED.

CALLAWAY JA: "... **[13]** There is one other aspect of the case on which I wish to add some observations of my own. Mr Holdenson stressed that the applicant had both pleaded guilty and offered, and subsequently given, substantial assistance to the authorities and submitted that those matters were not adequately reflected in the sentencing disposition below. It has therefore been necessary to recall the principles applicable to such a submission, especially as I take a serious view of the offences the subject of Counts 3 and 4 and agree with the learned sentencing judge that general deterrence was an important consideration. I mention some of them without any pretence of being exhaustive or any attempt at detail.

1. Both a plea of guilty and significant assistance to the **[14]** authorities usually justify some mitigation of punishment in the exercise of the wide discretion conferred on a sentencing judge. It is referred to as a "discount" to make it clear that a sentence is never increased or made more severe because an accused person puts the Crown to its proof or declines to give such assistance.

2. The distinction to which I have just adverted is practical, whether or not it is logical or easily understood. It serves to inhibit a wrong approach to sentencing. In that respect it is like the proposition that, whilst remorse is a circumstance of mitigation, its absence is not an aggravating factor.

3. In the case of a suspended or partially suspended sentence ... the discount applies to the sentence itself, because of s27(3) of the *Sentencing Act*, and also in deciding upon the extent of its suspension.

4. In other cases of imprisonment the discount applies in the first instance to the head sentence, because the latter is imposed on the hypothesis that the prisoner may have to serve every day of it. That is the common law, soon to be reinforced by statute. See the proposed s5(2AA) of the *Sentencing Act*.

5. Having affected the head sentence, the discount will inevitably affect the non-parole period. The plea or the assistance may even be entitled to additional weight at that stage, for example if it evidences enhanced prospects of rehabilitation.

6. In appropriate circumstances the discount for assistance may be very considerable indeed. Even where **[15]** it does not evidence repentance or foreshadow amendment of life, a large reduction may be made for purely utilitarian reasons dictated by the public interest.

7. In the case of a plea of guilty it is necessary to distinguish between the plea as indicating contrition or some other quality or attribute that is relevant to sentencing and the plea in its own right, but again the public interest is important.

8. A plea that evidences genuine remorse and prospects of rehabilitation, that is entered at the earliest practical opportunity and that saves the State a trial and the witnesses both trauma and inconvenience normally justifies a high discount.

9. An early plea that does nothing except save time and expense is still entitled to consideration,

and should usually attract a significant discount, for the reasons explained by Hunt CJ at CL in *R v Winchester* (1992) 58 A Crim R 345 at p350 and by King CJ in *R v Shannon* (1979) 21 SASR 442 at p451. See also *R v Morton* [1986] VicRp 82; [1986] VR 863 at pp866-868; (1986) 23 A Crim R 433.

10. In a time of rising sentences, in conformity with community concerns to which Parliament has given expression in legislation, the discount for pleading guilty should be more rather than less. Compare *R v Bolton and Barker* (Court of Appeal, [1998] 1 VR 692, 14 March 1997) at pp8-9 of my judgment, in which Charles JA concurred.

Except in the last two propositions, I have deliberately refrained from citing authority, because I did not want it to distract attention from what I was saying. The starting point in this Court in respect of **[16]** each topic would be a judgment of Charles JA. See *R v Rostom* [1996] VicRp 60; [1996] 2 VR 97; (1995) 83 A Crim R 58 and *R v Donnelly* (Court of Appeal, [1998] 1 VR 645; (1997) 91 A Crim R 550, 12 March 1997). Valuable guidance is also to be found in other jurisdictions. See, for example, in Queensland *R v Bulger* [1990] 2 Qd R 559; (1990) 48 A Crim R 239, in Western Australia *R v Tan* (1993) 117 FLR 38 and in Tasmania *Pavlic v R* [1995] TASSC 96; (1995) 83 A Crim R 13; (1995) 5 Tas R 186 ..."
