04/08; [2007] VSCA 220

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v SHOAN

Buchanan and Nettle JJ A and Curtain AJA

3, 15 October 2007 — (2007) 176 A Crim R 457

SENTENCING – OFFENDER CONVICTED OF CRIMINAL DAMAGE OVER A PERIOD OF YEARS BY WAY OF GRAFFITI ON PUBLIC PROPERTY SUCH AS RAILWAY CARRIAGES, TRAMS AND A CITY BUILDING – SENTENCING INDICATION GIVEN BY MAGISTRATE - POLICE PROSECUTOR AGREED WITH INDICATION – OFFENDER RELEASED ON A COMMUNITY-BASED ORDER WITHOUT CONVICTION – APPEAL TO COUNTY COURT BY DPP AGAINST SENTENCE – SENTENCE OF IMPRISONMENT IMPOSED BY COUNTY COURT JUDGE – FAILURE BY JUDGE TO INFORM OFFENDER THAT SUCH SENTENCE CONTEMPLATED – WHETHER DENIAL OF NATURAL JUSTICE – WHETHER SENTENCE APPROPRIATE IN THE CIRCUMSTANCES: *SENTENCING ACT* 1991, S8.

S. (aged 26 years) was charged with 42 counts of criminal damage by painting graffiti mainly on trains, buildings and railway infrastructure over a period of some 5 years. The total cost of rectifying the damage amounted to almost $53,000. S. had no prior convictions and had good prospects of rehabilitation. At the hearing, S. pleaded guilty after being given a sentence indication by the presiding magistrate. When asked by the magistrate, the police prosecutor said that a CBO was within the range of sentencing options open and whether a conviction was imposed was a matter for the magistrate. The magistrate then found the charges proven and placed S. on a CBO without conviction.

The DPP appealed to the County Court against the sentence imposed. At the hearing of the appeal, after discussion with the judge, the parties assumed that the appeal was limited to the question whether a conviction should be recorded. Without alerting counsel to the possibility that he might depart from the common assumption shared by counsel, the judge allowed the appeal and sentenced S. to a term of 3 months' imprisonment. Upon appeal—

HELD: Appeal allowed. S. convicted and sentenced to be imprisoned for a term of 3 months all suspended for a period of 6 months except for the 43 days' imprisonment already served.

1. Fair procedure requires, at least for important decisions and those critical to the determination of a case, that considerations of importance to the judicial officer's conclusions should be drawn to the notice of the parties affected or their representatives so that a fair opportunity is presented for contrary argument to persuade the judicial decision-maker to a different view.

***Parker v DPP* (1992) 28 NSWLR 282; (1992) 65 A Crim R 209, applied.**

2. As the judge failed sufficiently to alert S.s counsel that the Court was considering the imposition of a sentence of actual imprisonment, S. was thereby denied procedural fairness and accordingly, the sentencing discretion miscarried. That failure deprived the judge of the assistance of submissions from S. concerning alternative sentencing avenues available to him short of a custodial sentence.

3. The damage inflicted by S. on publicly owned property and property in the public view was considerable. It could be said he defaced and rendered ugly a great deal of the scenery that people pass by. At the very least, he unilaterally imposed his notions of art and decoration on the rest of the world and he did so persistently over a period of some five years. On the other hand, S. could pray in aid significant mitigating circumstances including his lack of prior convictions, the pleas of guilty and the evidence of relations and those who knew the applicant and his family, which convinced the sentencing judge that the applicant showed 'good prospects of rehabilitation.'

4. Per Nettle JA. Given the nature and extent of S.s offending, and other things being equal, an immediate term of 3 months' imprisonment would be well within the range.

BUCHANAN JA:

1. The applicant is 26 years old. Upon leaving school the applicant attended at the College of the Arts where he obtained a degree in art. He then worked as a graphic designer.

2. Unfortunately, his work was not a sufficient outlet for his artistic energy. The applicant joined a group of graffiti artists with whom, over a period of some five years, he painted graffiti, principally on trains, buildings and railway infrastructure. Some of the graffiti arguably had artistic merit; other examples had none, being merely the applicant's graffiti tag name.

3. The work of the group attracted the attention of the police. Three policemen investigated over a period of some 12 months and eventually identified and arrested the applicant. The applicant was charged with 42 counts of criminal damage alleged to have been committed between November 2001 and January 2006. It was alleged that the applicant painted graffiti on railway carriages at 19 places in the suburbs and also painted graffiti on a tram, railway bridges and a city building. The total cost of rectifying the damage amounted to almost $53,000.

4. The charges were heard in the Magistrates' Court at Melbourne. A magistrate found the offences proven, but did not record any convictions and placed the applicant on a community-based order for a period of 12 months.

5. Section 83 of the *Magistrates' Court Act* 1989 ("the Act") confers a right of appeal to the County Court upon a person sentenced in the Magistrates' Court. Section 84 confers a right of appeal to the County Court upon the Director against a sentence imposed in the Magistrates' Court. In the present case the Director of Public Prosecutions appealed pursuant to s84 against the orders made in the Magistrates' Court on the ground that the punishment was inadequate. A County Court judge allowed the appeal and sentenced the applicant to a term of three months' imprisonment.

6. The applicant now seeks leave to appeal against this sentence pursuant to the provisions of s91(2) of the Act.

7. The respondent contends that the Act does not confer any right upon the applicant to seek leave to appeal.

8. Section 91(2) provides:

> (2) If—
> (a) under section 86(1) the County Court orders that the appellant be sentenced to a term of imprisonment; and
>
> (b) the Magistrates' Court in the proceeding that is the subject of the appeal had not ordered that the appellant be imprisoned—
>
> the person sentenced to be imprisoned may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the sentence.

The Director submits that the section in terms only confers a right to seek leave to appeal upon a person who was the appellant in the County Court.

9. The result for which the Director contends is anomalous. He could advance no reason why an offender sentenced to be imprisoned after appealing to the County Court was permitted to seek leave to appeal to the Court of Appeal while an offender who was sentenced to be imprisoned after an appeal by the Director had no such entitlement. In a sense the former is the architect of his or her own misfortune, but, while that might serve to deny the offender an opportunity to appeal, it is no reason to deny the respondent to an appeal the same opportunity.

10. There are possible interpretations of the section which avoid the anomaly. One is to construe the word 'appellant' in s91(2) as referring to the person seeking to appeal from the County Court to the Court of Appeal. The difficulty with this construction is that a person who invokes s91(2) is an applicant, not an appellant. Perhaps a more promising approach is to construe to word 'appellant' in the section as equivalent to 'offender'.

11. Under the preceding Act, the *Magistrates' Court Act* 1971, it was clear that, whether or not he had appealed to the County Court, an offender imprisoned for the first time in the County Court was entitled to appeal to the Full Court. Section 77(1) of that Act, the precursor to s91(2) of the Act, conferred a right to seek leave to appeal to the Full Court of the Supreme Court, not upon the person described as the appellant, but upon 'the person sentenced to be imprisoned.'[1]

12. Other provisions in the subdivision of the Act in which s91 appears use the word 'appellant' to refer to the offender. Sub-sections 3(A) and 3(B) of s86 provide:

> (3A) If an appellant fails to appear at the time listed for the hearing of the appeal, the County Court may—
>
> (a) proceed to hear and determine the appeal in the appellant's absence without prejudice, if the appellant has been released on bail under clause 4 of Schedule 6, to any right of action arising out of the breach of the bail undertaking; or
>
> (b) strike out the appeal; or
>
> (c) adjourn the proceeding on any terms it thinks fit.
>
> (3B) If the County Court proceeds under sub-section (3A)(a) to hear and determine an appeal in the appellant's absence, it may do so on the basis of—
>
> (a) any statement, or exhibit or document referred to in a statement, a copy of which was served on the appellant in a brief of evidence in accordance with s 37; or
>
> (b) evidence on oath given by or on behalf of the respondent.

Section 86 is concerned with both appeals by offenders and by the Director. See sub-s (1). Similarly, s85, which also deals with appeals under ss83 and 84, treats the 'appellant' as the offender. The section provides:

> An appeal under sections 83 or 84 must be conducted as a rehearing and the appellant is not bound by the plea entered in the Magistrates' Court.

In my view, s91(2) reflects the same approach. The legislature has used the word 'appellant' in a way which could only mean the offender in provisions applying to appeals to the County Court by either the offender or the Director.

13. Elsewhere in the Act, when the legislature has intended to limit the application of a provision to an appeal under s83, it has done so explicitly. Thus s86(1AA) provides:

> (1AA) Despite any rule of law or practice to the contrary, the County Court is not required, on the hearing of an appeal under s83, to warn the appellant before making a sentencing order of the possibility of a sentencing order being made, or its intention to make a sentencing order, that is more severe than that made by the Magistrates' Court.

Section 88AA(1) contains a like limitation.

14. Accordingly, I would not construe s91(2) as expressing an intention to limit applications for leave to appeal to cases in which the offender was the appellant in the County Court. In my opinion the applicant is entitled to seek leave to appeal pursuant to s91(2) of the Act.

15. Ground 5 of the application is as follows:

> It is incompatible with the proper administration of criminal justice that a defendant in a Magistrates' Court proceeding can legitimately be given a sentencing indication from the bench, that the police prosecutor agree with such sentencing indication as within the range of sentencing options available, that the defendant then act upon these matters and enter his pleas of guilty, can be sentenced in accordance with the sentencing indication and then that the Director of Public Prosecutions institute an appeal and at the prosecution of the appeal contend that the sentence imposed at first instance was not open to the learned sentencing magistrate.

16. Counsel for the applicant relied upon an affidavit sworn by the barrister who appeared for the applicant in the Magistrates' Court. The barrister deposed that a magistrate said that a plea of guilty would lead her to obtain an assessment of the applicant's suitability either for an intensive corrections order or a community-based order. The prosecutor in an affidavit said that he told the magistrate that the prosecution took the view that a community-based order was within the range of sentencing options that was open. When asked as to the prosecution's attitude to a non-conviction community-based order, he said that was a matter for the magistrate. The applicant's barrister deposed that the applicant instructed him that, on the basis of the indication given by the magistrate, he would plead guilty.

17. In this Court counsel for the applicant invoked the principles governing appeals by the Crown to the Court of Appeal pursuant to the provisions of s567A of the *Crimes Act* 1958, including the principle that manifest inadequacy of the sentence passed below is insufficient to warrant appellate intervention. The inadequacy of the sentence must be clear and egregious, the sentence being so disproportionate to the seriousness of the crime as to shock the public conscience and undermine public confidence in the ability of the courts to play their part in deterring the commission of crime.[2] Further, there is a general discretion which enables a court to refuse to intervene, even if satisfied that there was a manifestly inadequate sentence passed below. The fact that the Crown has already accepted or acquiesced in a particular disposition in the Court at first instance, is to be weighed in the exercise of the Court's discretion.[3]

18. It was submitted that the foregoing principles applied to appeals pursuant to s84 of the Act. Counsel for the applicant acknowledged that s85 of the Act provided that an appeal under s84 must be conducted as a rehearing, but maintained that the principles relating to appeals under s567A applied to the appeal. Consequently, it was submitted, the Crown ought to have been precluded from submitting that a non-conviction disposition was inadequate.

19. In so far as the submission was based on the principle that the success of a Crown appeal under s84 of the Act depended upon the identification of error on the part of the Magistrates' Court, or that a County Court judge hearing an appeal is constrained in some way by the conduct of the case before the Magistrates' Court, I reject it.

20. By reason of the provisions of s85 of the Act, an appeal under s84 is conducted as a rehearing. In an appeal by way of hearing *de novo*, the successful party at first instance derives no advantage from the victory and must win the case a second time.[4] Such an appeal is to be contrasted with an appeal *stricto sensu*, where an appellant must demonstrate error on the part of the court or tribunal below.[5] It is settled that the nature of an appeal under ss83 or 84 of the Act is that of a hearing *de novo*.[6] Once an appeal has commenced, the County Court must set aside the orders of the Magistrates' Court.[7] It is as if the order of the Magistrates' Court has disappeared.

21. I think it is unfortunate that the Director appealed against the sentence after the prosecutor in the Magistrates' Court played an active role in the process that led to the sentence and acquiesced in its propriety. Having regard to the provisions of s85, however, I do not think that the appeal was incompetent or bound to fail. The existence of the sentence attracted the jurisdiction to entertain the appeal, but the County Court was not concerned with the form or substance of the sentencing orders made in the Magistrates' Court. Further, the applicant was able to decide afresh whether to plead guilty or contest the charges.

22. The fact that the prosecutor had adopted a particular position in the Magistrates' Court should have been taken into account by the County Court judge as, I think, a significant matter, but was not to dictate the result of the appeal. In fact the County Court judge appears to have been ignorant of the events that produced the sentence in the Magistrates' Court. As the next ground of the application reveals, that was because counsel for both the applicant and the Crown thought there was only one issue in the appeal, and the resolution of that issue did not turn upon the events that led to the sentence in the Magistrates' Court.

23. Ground 2 of the application is as follows:

> The learned sentencing judge erred in failing or failing sufficiently to alert counsel for the appellant that the Court was considering imposing a sentence of actual imprisonment during the hearing of the appeal by the Director of Public Prosecutions. The appellant was thereby denied procedural fairness.

24. In order to evaluate this ground, it is necessary to canvas the exchanges between the County Court judge and counsel.

25. At the outset of the appeal in the County Court counsel for the Director said that 'the Director sees the fact of a non-conviction disposition as being the true inadequacy of the sentencing order.' When he began his plea, counsel for the applicant sought to define the ambit of debate. He said:

> I am happy to argue the issue simply of conviction or non-conviction if that is all that your Honour is ending up considering, but on the other hand, if your Honour takes the view that we start from the ground floor, then obviously I have to approach it in a different fashion.

After further discussion his Honour said that he understood that the Crown's position was whether a conviction should be recorded. He also said, 'I can't be pre-empted' and 'I am not going to commit myself like an auctioneer at the start of the appeal.' His Honour went on, however, to say that he had to consider s8 of the *Sentencing Act*, which is concerned with the discretion of the Court whether or not to record a conviction. Later, he said:

> If the ground is narrowed down to the appropriateness or otherwise of a non-conviction, then I am governed by s8 of the *Sentencing Act*. So the evidence will have to go to those issues.

Nothing appears from the transcript of the later discussions to alter that position,[8] and counsel on both sides addressed only the question whether a conviction should be recorded. Other sentencing options were ignored.

26. In my opinion it was reasonable for counsel for the applicant to assume the appeal was limited to the question whether a conviction was to be recorded and to conduct the case on this basis. The County Court judge failed to alert counsel to the possibility that he might depart from the common assumption shared by counsel. That failure deprived him of the assistance of submissions from the applicant concerning alternative sentencing avenues available to him short of a custodial sentence, and, in my view, amounted to a departure from the requirements of procedural fairness. As Kirby P said in *Parker v DPP*:

> Fair procedure requires, at least for important decisions and those critical to the determination of a case, that considerations of importance to the judicial officer's conclusions should be drawn to the notice of the parties affected or their representatives so that a fair opportunity is presented for contrary argument to persuade the judicial decision-maker to a different view.[9]

27. For the foregoing reasons I am of the opinion that the sentencing discretion has been reopened.

28. The damage inflicted by the applicant on publicly owned property and property in the public view was considerable. It could be said he defaced and rendered ugly a great deal of the scenery that people pass by. At the very least, he unilaterally imposed his notions of art and decoration on the rest of the world. He did so persistently over a period of some five years.

29. On the other hand, the applicant could pray in aid significant mitigating circumstances. Perhaps the most significant were the applicant's lack of prior convictions, the pleas of guilty and the evidence of relations and those who knew the applicant and his family, which convinced the sentencing judge that the applicant showed 'good prospects of rehabilitation.' When those powerful considerations are set in the context of the events attending the sentencing in the Magistrates' Court and the County Court, I consider that there is no utility in requiring the applicant to serve any further term of imprisonment.

30. Accordingly, I would grant the application for leave to appeal, institute the appeal instanter and allow it, convict the applicant and sentence him to be imprisoned for a term of three months. I would suspend all but the 43 days imprisonment which the applicant has already served for a period of six months.

NETTLE JA:

31. I have had the considerable advantage of reading in draft the reasons for judgment of Buchanan JA.

32. I agree with his Honour that word "appellant" in s91(2) of the *Magistrates' Court Act* 1989 should be taken to mean the "person sentenced to be imprisoned", in the same way that it does in sections 85 and 86(3A) of the Act. Consequently, where the Director of Public Prosecutions appeals to the County Court under s84 of the Act against a non-custodial sentence imposed in the Magistrates' Court, and the County Court orders that the offender be sentenced to a term of imprisonment, the person so sentenced to imprisonment has the right to seek leave to appeal to this court under s91(2) of the Act.

33. Admittedly, the drafting is careless, and it is capable of causing confusion. It is apparent that the drafter and Parliament have by inadvertence overlooked and so omitted to deal with the need to provide separately for cases in which the Director is responsible for taking the initial appeal to the County Court. But it is apparent that the purpose of s91(2) is to afford the person sentenced with imprisonment a right to seek leave to appeal to this court (regardless of whether he or she or the Director is responsible for taking the initial appeal from the Magistrates' Court to the County Court); and it is possible to state with certainty where the words "person sentenced to be imprisoned" would have been substituted by the drafter and approved by Parliament if their attention had been drawn to the problem.[10]

34. Given that the police prosecutor in this case encouraged the Magistrate to the view that a community based order without conviction was in order, it is to say the least unfortunate that the Director chose thereafter to appeal from the Magistrates' order to the County Court. One may wonder how the police prosecutor could have thought that such a sentence was appropriate[11] and, as Buchanan, JA says, since an appeal to the Magistrates' Court is by way of hearing *de novo* and the person sentenced is not bound by his or her plea below, the Director was not prevented from taking a different approach to the police prosecutor. But the point was well made in argument that the sentence indication scheme which operates in the Magistrates' Court is unlikely to go far if the Director continues to make a practice of having a second go in cases where a sentencing indication is given and acted upon with the express or tacit approval of the prosecutor.

35. Counsel for the Crown properly and fairly conceded, the result in this case was a miscarriage of the sentencing discretion. The judge was not informed, and he should have been, of what occurred below and, because both counsel proceeded in error on the basis that the only matter in issue was whether a conviction should be entered, his Honour was not addressed and therefore did not consider sentencing options other than an immediate term of imprisonment. Thus the discretion is re-opened.

36. Given the nature and extent of the appellant's offending, and other things being equal, I should think that an immediate term of three months' imprisonment would be well within the range. But, in the particular circumstances of this case, I agree with Buchanan JA in the sentence which he proposes.

CURTAIN AJA:

37. I also agree with Buchanan JA that the application for leave to appeal and the appeal should be allowed and that the appellant should be re-sentenced as he proposes.

---

[1] Section 77 was derived from s142B of the *Justices Act* 1958. See *R v Latka* [1973] VicRp 39; [1973] VR 423 at 425 (Smith ACJ, Newton and Norris JJ).

[2] *DPP v Bright* [2006] VSCA 147; (2006) 163 A Crim R 538 at 542 (Redlich JA).

[3] See *Malvaso v R* [1989] HCA 58; (1989) 168 CLR 227 at 240-241; 89 ALR 34; (1989) 64 ALJR 44; 43 A Crim R 451; *Everett v R* [1994] HCA 49; (1984) 181 CLR 295 at 300-5, 306-8; (1994) 124 ALR 529; (1994) 68 ALJR 875; 74 A Crim R 241.

[4] *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-8 (Glass JA).

[5] *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at 180 (Gaudron, McHugh, Gummow and Hayne JJ); (2000) 173 ALR 648; [2000] FLC 93-033; (2000) 26 Fam LR 237; (2000) 74 ALJR 1206.

[6] *DPP v Fricke* [1993] 1 VR 367 at 374; *Sweeney v Fitzhardinge* [1906] HCA 73; (1906) 4 CLR 716; *Mr and Mrs X v Secretary to the Department of Human Services* [2003] VSC 140 at [6] (Gillard J).

[7] Section 86(1) of the Act. See *Helfenbaum v Sattler* [1999] VSC 548; [1999] 3 VR 583; (1999) 109 A Crim R 134.

[8] Part of the plea was not transcribed. Counsel for the respondent accepted that the possibility of imprisonment was not raised during any part of the plea.

[9] (1992) 28 NSWLR 282, 296; (1992) 65 A Crim R 209. See also *Brand v Parson* [1994] VicRp 17; [1994] 1 VR 252, 257; (1993) 68 A Crim R 147, 257 (Coldrey J); *R v Duong* [1998] 4 VR 68 at 77-8; (1997) 99 A Crim R 218 (Kenny JA).

[10] *Wentworth Securities Ltd v Jones* [1980] AC 74, 105-6; [1979] 1 All ER 286; *Newcastle City Council v GIO General Ltd* [1997] HCA 53; (1997) 191 CLR 85, 113; (1997) 149 ALR 623; (1997) 72 ALJR 97; (1997) 9 ANZ Insurance Cases 61-380; (1997) 19 Leg Rep 2; *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687-8; 107 A Crim R 1.

[11] Although it may be that there were problems of proof of which we do not know.

APPEARANCES: For the Crown: Mr JD McArdle QC, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the respondent Shoan: Mr TM Forrest QC with Mr LC Carter, counsel. White Cleland Pty, solicitors.