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SUPREME COURT OF VICTORIA — FULL COURT

R v RUMPF

Young CJ, Murray and McGarvie JJ

24 June, 26 August, 2 October 1987

[1988] VicRp 55; [1988] VR 466; (1987) 29 A Crim R 252

CRIMINAL LAW – SENTENCE – DUTY OF COUNSEL ON PLEA – WHETHER COUNSEL REQUIRED TO DISCLOSE CLIENT'S ANTECEDENTS – IF COUNSEL MISLEADS COURT WHETHER DUTY ON PROSECUTION TO CORRECT – FIXING MINIMUM TERM – COURT TO HAVE REGARD TO OFFENDER'S ANTECEDENTS – MEANING OF "ANTECEDENTS": *PENALTIES AND SENTENCES ACT* 1985, S17.

1. On a plea on sentence, the court needs to be given a balanced view of the relevant facts to enable the imposition of a sentence which is fair and appropriate having regard to the interests of the person being sentenced and the community. In this regard, the prosecution has a duty fairly to test the material led by the defendant. Counsel has no duty to disclose to the court prior convictions or detrimental aspects of an offender's antecedents or character; however, counsel has a duty not knowingly to mislead the court either by words used or by omitting to say what is necessary to be said. Where a court made a reparation order in respect of a person who was bankrupt, a defence submission which implied that the bankrupt had the means and ability to pay reparation would have knowingly misled the court if defence counsel knew of the bankruptcy. Accordingly, there was a duty on the prosecution to correct the misleading statement.

2. Where a court has a discretion to fix a minimum term, it is obliged to have regard to the offender's antecedents, that is, the offender's history as it exists at the time when the sentence is imposed. Defence counsel is ordinarily under no obligation to provide to the court any information as to prior convictions or subsequent conduct; this is a duty on the prosecution. However, where defence counsel relied on an offender's absence of prior convictions and failed to disclose the offender's subsequent committals to prison for contempt of court, the court was misled and accordingly, the prosecution had a duty to correct the misleading submission.

McGARVIE J: [with whom the Chief Justice and Murray J agreed] *[After setting out the nature of the appeal and certain aspects of evidence before the trial judge, continued] ...* **[9]** Mr Redlich, as he was entitled to do, objected to all inadmissible evidence. In a plea on sentence if an assertion or evidence of a fact on behalf of a party is challenged by the opposite party it can only be established by admissible evidence. *Sargeant* (1974) 60 Cr App R 74; *Young* (1976) 63 Cr App R 33 at p39; Thomas, *Principles of Sentencing*, 2nd ed, p373. The duty of the prosecution with regard to placing facts before a court which is considering the imposition of a sentence was stated concisely by Brennan, Deane and Gallop JJ:

> "The Crown has a duty to the Court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principle of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it." *R v Tait and Bartley* (1979) 46 FLR 386; (1979) 24 ALR 473 at p477.

[10] What is an adequate presentation of the facts depends on what is fair, reasonable and practical in the circumstances of the particular case. Within those parameters the Court should be placed in a position where it is able to impose a sentence which is fair and appropriate having regard to the interests of both the person being sentenced and the community. It needs to be given a balanced view of the relevant facts. The interest of the community in there being an adequate sentence is recognised by provisions such as s567A of the *Crimes Act* 1958 (Victoria) which gives the Director of Public Prosecutions a right to appeal against a sentence when satisfied that an appeal should be brought in the public interest.

In my opinion the facts which the prosecution has a duty adequately to present to the court are not limited to the facts of the offence. Many facts beyond those are taken into consideration in passing sentence. For example, as stated by Fox and Freiberg:

> "The behaviour of the defendant after he has offended is considered a proper matter to be taken into account at sentencing. His voluntary desistance from further wrongdoing, preparedness to make restitution, willingness to assist police, and efforts to rehabilitate himself all may tell to his advantage when he is sentenced. First because such conduct may indicate remorse and secondly, because it may be seen as an effort to mitigate the harm caused to the victim or to society."
> *Sentencing; State and Federal Law in Victoria*, 1985, para 11.501.

It is the duty of a defence lawyer upon a plea on sentence not knowingly to mislead the Court. *Meek v Fleming* [1961] 2 QB 366; [1961] 3 All ER 148; *Rondel v Worsley* [1967] UKHL 5, [1967] 3 WLR 1666, [1967] 3 All ER 993, [1969] 1 AC 191 **[11]** at pp227-8. Gowans, *The Victorian Bar: Professional Conduct Practice and Etiquette*, 1979, p78; Boulton, *Conduct and Etiquette at the Bar*, 6th ed, p75; Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 1985, para 2.211; Law Society London, *The Professional Conduct of Solicitors*, 3rd ed, para 12.01; Lewis and Kyrou, *Handy Hints on Legal Practice*, 1985, pp92-3; Vol. 3, *Halsbury's Laws of England*, 4th ed, para 1137.

Counsel and solicitors for the defence must not knowingly mislead the court either by words used or by omitting to say what is necessary to be said in order to prevent literally true words which have been used from misleading. In another context Lord Chelmsford observed:

> "It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood;"

Peek v Gurney (1873) LR 6 HL 377 at p392. See also *Arkwright v Newbold* (1881) 17 Ch D 301 at p318 and *The Professional Conduct of Solicitors*, above, para 12.14.

So long as what is put before the court on behalf of the convicted person is not misleading, it is not the duty of a defence lawyer to disclose to the court detrimental facts such as prior convictions or detrimental aspects of the client's antecedents or character. Fox and Freiberg, above, paras 2.102 and 2.311; *Boulton*, above, pp76-7; *The Professional Conduct of Solicitors*, above, para 12.14; Vol 3, *Halsbury's Laws of England*, above, para 1195.

I first consider the provision of information to the sentencing judge regarding the respondent's bankruptcy. **[12]** The agreed statement of facts outlined the way in which the offences had been committed and their financial results. Upon the plea counsel for Rumpf relied on the fact that, in respect of some of the transactions the subject of offences, amounts had been recovered from vendor shareholders under the *Taxation (Unpaid Company) Taxation Assessment Act* 1982. Counsel submitted that although that may have nothing to do with the desire of the accused, the fact that the victim is not out of pocket or has been compensated in whole or in part is a factor relevant in assessing penalty. Counsel added:

> "The compensation orders that Your Honour will make if my learned friend is successful, in relation to Hoare Bros and N.N.J will add up to another 1.8 million."

Later he told the judge that it was possible to make a restitution order in relation to the N.N.J matter, the third offence taken into account.

As counsel for Rumpf had advanced as a mitigating factor the compensatory effect of the reparation order which the judge could make, he should, in my view have informed the judge of Rumpf's bankruptcy if he knew of it. That would have fallen within the obligation of not knowingly misleading the Court. Reliance on the compensatory effect of an order for up to $1.8m, in the absence of qualification implies means and ability in Rumpf to pay that amount.

This implication confirmed the indication to a similar effect which was given by the agreed facts that in respect of the transactions pursuant to the conspiracy charged in count 1, Rumpf and two other promoters had **[13]** received commission of about $626,000; from the transaction charged in count 2 Rumpf had received commission of $386,750; from the transactions pursuant to the conspiracy which constituted the first offence taken into account, Rumpf and three other

conspirators received an unascertained amount of commission not exceeding $1m; from the transactions the subject of the conspiracy which constituted the second offence taken into account, companies controlled by Rumpf received commission of about $3m.; and from the transaction the subject of the third offence taken into account Rumpf received commission of $31,971.

The reparation order which the learned judge made was for $418,721. As it was made after the bankruptcy it is not a debt provable in the bankrupt estate, *Bankruptcy Act* 1966, s82(1), and therefore could still be enforced after discharge from bankruptcy, s153(1). It is open to the respondent to petition for a second bankruptcy during the currency of his existing bankruptcy, ss55 and 59, and this must be regarded as highly likely to occur. A man who had become bankrupt five months earlier with sworn assets of about $10,000 and liabilities of about $8m. could hardly be regarded as having the means and ability which had been implied. That position is not significantly altered by the fact that undisclosed assets of almost $2m. have now been vested in the Official Trustee.

I assume that senior counsel for Rumpf at the plea either was unaware of Rumpf's bankruptcy or overlooked the implications of his submission. **[14]** As the defence submission on the compensatory effect of a reparation order was one which would, however innocently made, be likely to mislead the learned sentencing judge, the prosecution came under a duty to correct it. This was part of the duty fairly to test the defendant's case so far as it appeared to require it. Compare *R v Travers* (1983) 34 SASR 112 at p116; Fox and Freiberg, above, para 2.204.

I turn to the provision of information to the sentencing judge that Rumpf was committed to prison for contempt of court. When a person is already undergoing sentence, although for a conviction which is not a previous (or prior) conviction within s376 of the *Crimes Act* 1958, the sentencing court in my experience is always informed. The information is needed to decide whether the sentence to be imposed will be served concurrently or otherwise with the sentence already being served. Compare *R v Poulton* [1974] VicRp 85; [1974] VR 716 at p720. The Court needs the same information where, as here, the prisoner at the time of sentence is committed to prison for contempt by courts in the exercise of civil jurisdiction. In deciding on the appropriate sentence the Court is entitled to consider whether any period of imprisonment it imposes would, unless it orders otherwise, be served concurrently with or cumulatively upon, the period being served for contempt of court. If the sentences would be served concurrently, it may consider whether it has power to order otherwise. If it has not such power it may consider whether it is appropriate to take into account the period of concurrency **[15]** by imposing a longer sentence. It might be thought to undermine the sanction imposed by the orders committing Rumpf to prison for contempt of court if, from the imposition of the sentences by Hampel J, he has been serving time under those sentences and also under the committals for contempt. If it appears that the sentences would, in the ordinary course of events, be served cumulatively, considerations of a similar nature arise.

Neither party submitted anything to the sentencing judge or this Court as to the concurrency or otherwise of the sentences the subject of appeal with the imprisonment already being undergone by the respondent, so nothing is said about it. On the plea senior counsel who then appeared for Rumpf told Hampel J that he was instructed not to call any character evidence but that his client had no prior convictions. He outlined the main events of his client's career until the time of the offences. At the conclusion of the plea his Honour announced that he would consider the matter and inquired, in effect, whether bail was sought. The following exchange took place:

> Defence Counsel: I do not think anything Your Honour can do will materially affect the position of the accused. He is being held as a prisoner of the Sheriff.
> His Honour: Not in relation to this matter directly?
> Defence Counsel: I should perhaps turn my mind to that. If it was Your Honour's intention – because this man is on bail – to remand him in custody pending sentence, Your Honour should do so now, because his **[16]** current status is that he is a prisoner of the Sheriff for a contempt matter and a prisoner of the Federal Court – I do not know whether that is the Sheriff or not – for a contempt matter as well. We urge these matters on Your Honour because in Your Honour's view of what should happen to him, it might be frustrated and it would be safe if Your Honour made such an order.

His Honour remanded Rumpf in custody and the Court adjourned. No other information about Rumpf's committal for contempt was given to the learned sentencing judge. In the absence of statements by defence counsel which imposed the duty, the defence would have had no duty

to disclose anything to the learned sentencing judge regarding Rumpf's committals for contempt. There would have been no duty to disclose that even if the judge had asked defence counsel the position. Fox and Freiberg, above, para 2.311; *Boulton*, above, pp76-7. In my opinion the duty of defence counsel altered in this case once he relied on Rumpf's absence of prior convictions. This reliance operated to show that Rumpf's character and conduct were such as to be deserving of mitigation of sentence and as to justify the fixing of a satisfactory minimum term. The reliance was not diminished or qualified by counsel's statement that he was instructed not to call any character evidence. In a case such as this, where the Court has a discretion to fix a minimum term, it is obliged to have regard to the antecedents of the respondent – *Penalties and Sentences Act* 1985 (Victoria) s17. The word "antecedents" **[17]** is used in the section in the sense of the offender's past history. Referring to the similar provision then in s534 of the *Crimes Act* 1958 this Court in *R v Poulton* [1974] VicRp 85; [1974] VR 716 at p720 said:

> ...the section requires the court to take into account the 'antecedents' of the offender. In referring to this provision in *R v Bruce* [1971] VicRp 80; [1971] VR 656, Smith J, in this Court said this at p657:
>
> 'the antecedents of the offender may, as the statute implies, be such as to persuade the court that the prisoner is not a suitable person to be dealt with under the parole system.
>
> We see no reason for limiting the width of the term 'antecedents' so as to exclude criminal conduct subsequent to the committal of the offence for which sentence is being imposed. That conduct may be decisive in determining whether he is a suitable person for release on parole.
>
> The language used in s534 is such that we are of opinion that s376 does not exclude evidence of subsequent offences (i.e. subsequent to the offence charged) for the purpose of fixing the minimum term under s534, whether prescribing such a term or its duration."

See *Commonwealth Prisoners Act* 1967, s4(2).

In this case the Court in considering a minimum term is to have regard to the respondent's past history as it exists at the time when sentence is imposed, whether at first instance or on appeal. The Court is to have regard to the whole of the offender's past history not merely to his history up to the time of offending. While the Court has regard to the whole of the offender's antecedents in making decisions in respect of a minimum term it is not entitled to use convictions occurring later than the relevant offence, for the purpose **[18]** of increasing the length of the head sentence which would otherwise be imposed. *R v Wilson* [1956] VicLawRp 31; [1956] VLR 199; [1956] ALR 503; *R v Poulton* [1974] VicRp 85; [1974] VR 716 at p720. While convictions later than the offence can not be used positively to increase the head sentence which would, in the absence of considerations personal to the offender, otherwise be imposed, they may be used, in my opinion, to negate, reduce or qualify an inference as to the offender's later conduct which would otherwise arise and operate in mitigation of sentence. In this way they may prevent a reduction of the sentence which would be imposed in the absence of the mitigating inference.

In deciding whether the respondent is a suitable person to be released on parole, the conduct found by the courts to have been in breach of injunctions for which the respondent has been committed to prison for contempt of court could be as important as the finding of criminal conduct involved in a conviction. In my view to rely on the respondent's conduct up to the time of the offences so far as shown by the absence of convictions, without disclosing the conduct shown by his committals for contempt, was to mislead the Court as to his antecedents as they existed at the time of sentence.

It could not be said that the mention by defence counsel after the judge had announced he would reserve his decision, that Rumpf was in custody for contempt of two courts, sufficiently informed the judge with regard to the committals. In my opinion, in this case the duty of the prosecution to make an adequate presentation of the facts **[19]** to the sentencing judge would include a duty to provide information as to Rumpf's antecedents to the extent that they were shown by the decisions of courts in criminal proceedings or in the penal proceedings for contempt which gave rise to the orders for Rumpf's committals. This information is important whenever a court has to make decisions as to the fixing of a minimum term. The defence is ordinarily under no obligation to provide any information as to prior convictions or later court decisions showing subsequent conduct. Just as the prosecution customarily alleges and proves prior convictions it should in my view prove later convictions and contempt orders such as those applying to Rumpf, whenever it is open to the court to exercise a discretion to fix a minimum term. Such a course is well within what has long been regarded as the province of the prosecution. See *R v Withers* [1789]

EngR 2086; (1789) 3 TR 428; 100 ER 657 at pp660-1; Nash, *Bourke's Criminal Law in Victoria*, 3rd ed., para. 7883. For similar reasons the prosecution should have provided the information that Rumpf was undergoing imprisonment for contempt. Unless one party is ordinarily obliged to provide this basic information a court cannot satisfactorily perform its sentencing function. In this case the reliance by the defence on the absence of prior convictions without informing the judge of the committals for contempt, also brought into existence a duty on the prosecution to place the information as to the committals before the judge.

[His Honour then dealt with matters concerning proceedings on appeal and the question of sentence].
