28/86

SUPREME COURT OF VICTORIA — FULL COURT

DPP v COUSENS

Young CJ, Kaye and Tadgell JJ

5 June 1985

CRIMINAL LAW – SENTENCING – AGGRAVATED BURGLARY – OFFENDER HAD NO PRIOR CONVICTIONS – REHABILITATED SINCE COMMISSION OF OFFENCE – RELEASED ON BOND – WHETHER SUCH SENTENCE MANIFESTLY INADEQUATE – SEVERITY OF OFFENCE – WHETHER ORDER TO PERFORM UNPAID COMMUNITY WORK APPROPRIATE: *CRIMES ACT* 1958, SS77, 567A.

C. pleaded guilty to a charge of aggravated burglary. Whilst having a high blood/alcohol concentration, C. entered his neighbour's house at night disguised and carrying a knife and threatened his neighbour's wife in an aggressive manner, knowing that the woman's husband was away at the time. The plea material included C's having given up consumption of alcohol; having no prior convictions; having resumed the marital relationship and having made substantial efforts at rehabilitation. The Judge released C. upon entering a 5-year $2000 good behaviour Bond to abstain from the consumption of alcohol. Upon appeal by the DPP against the sentence as being manifestly inadequate—

HELD: Appeal allowed.
(1) The circumstances of the offence called for condign punishment and merited a substantial gaol sentence.

(2) However, the very strong plea made on C.'s behalf including lack of prior convictions and the success of his rehabilitation justified the Court's releasing C. upon his agreeing to perform 200 hours of unpaid community service.

YOUNG CJ: [1] The Court has before it an appeal by the Director of Public Prosecutions pursuant to s567A of the *Crimes Act* against a sentence imposed in the Bairnsdale County Court on 26th March of this year. The sentence was imposed upon William David Cousens, who was presented on a charge of aggravated burglary. The respondent pleaded guilty to the charge and a plea was made by counsel on his behalf. After hearing that plea the learned trial Judge released the respondent upon a bond to be of good behaviour for five years and upon the condition that he abstain for that period from the consumption of alcohol. The bond was in the sum of $2,000. It is against the sentence so imposed that the Director of Public Prosecutions now appeals to this Court. In substance the Director says that the sentence so imposed was manifestly inadequate.

[2] The offence took place on 24th January last year when a Mrs Martin, who lived at 6 Hamill Court, Orbost, was at home with her three children. Her husband was away at work, it being a Tuesday evening, and he, who was an employee of Telecom, as was the respondent, was away working in Sale. The husband in fact only came home at weekends. At about 10.30 pm. Mrs Martin was sitting in her house watching television when she heard the handle of the flywire door at the front of the house open. A man entered with a stocking mask pulled down over his face, and she noticed that he was carrying a large carving knife. He came rushing towards her from the front door. Mrs Martin ran into the kitchen and as she did so she knocked three chairs off a table to stop the man from following her. She heard the man say, "I'm going to get you, woman". She ran back into the loungeroom and turned to face the man, who was a short distance away and coming towards her with a knife raised above his shoulder. She was forced back into the corner of the loungeroom and she called for help a number of times as she said that she was petrified for her life. The man grabbed her by the throat. Mrs Martin fell over between two chairs and the man got on top of her straddling her body and facing her, sitting on her thighs. He then brought the knife down to her throat, but she managed to grab hold of the blade with both hands and attempted to push it away. The man then began to choke her with his left hand, using a lot of force. She started to gasp for air, and he said, "Are you going to give in?" Mrs Martin then let go of the knife because, as she said, she just couldn't fight him any more, and answered, "Yes, whatever you want, David". She **[3]** had evidently whilst she was on the floor and heard the man

speak recognised him as her next-door-neighbour, William David Cousens. She said that she had known the respondent for 10 years and that he and his wife and children had lived next door for seven years, and that she knew that his wife had left him a few days earlier. As soon as Mrs Martin spoke the respondent's name he stopped his assault, got up off her body and walked slowly to the front door. He was then seen to return to his own property. Mrs Martin summoned assistance and was found to be in an injured condition. She suffered a bruised, stiff neck, sore upper arms and chest, cuts to both hands as well as bruises to the left forearm, both shins, and a sore back. She was also bleeding from the mouth.

Half and hour later the police went to the respondent's house next door. The respondent denied any knowledge of an attack on Mrs Martin. He told the police that he had been to the Men's Club and had got drunk, and driven his car home whilst he was drunk, and that he had then gone to sleep and only woken up when the police knocked on the door. During this conversation with the police the respondent appeared to be unsteady on his feet. Upon searching the premises the police found, amongst other things, a pair of pantyhose in a dressing table drawer, but the respondent denied that he had had anything out of that drawer that evening. During the search one of the police removed a wooden-handled carving knife from the cutlery drawer and observed several spots of water still on the blade.

The respondent was taken to the police station where a breath analysis test was made. That showed a blood-alcohol **[4]** concentration of .165 per cent. The respondent was then interviewed formally and a record was made. He answered most of the questions by saying, "No comment", and finally he said, "There's a lot that I wish to say but I will not say it at this stage". I think that is a sufficient account of the incident for an assessment to be made of the gravity of the offence which the respondent committed.

In passing sentence the learned trial Judge took the view that the case was a highly exceptional case of aggravated burglary, and said that he was satisfied that there was no ordinary criminal motive in the circumstances of the offence. His Honour then, as I have indicated, released the respondent upon a bond.

The plea was undoubtedly a strong one. The respondent was 34 years of age and had no prior convictions. He was a married man with children, and so far as appears, except for relatively recent times, it was a stable marriage. As earlier indicated, the respondent's wife had left him shortly before the commission of the offence, and it seems clear enough from the material before the Court that the principal problem which the respondent suffered was an addiction to alcohol. Evidence was called on the plea, however, which established, and was accepted by the trial Judge, that the respondent had given up alcohol from the time of or shortly after the commission of the offence. Evidence was also adduced of the respondent's good character and of the considerable improvement in his behaviour that had occurred since the offence. It is clear that the respondent **[5]** had made substantial efforts at rehabilitation and that he had indeed been successful in that process. Indeed, it was said that the respondent was not drinking and recognises that he cannot drink ever again.

The respondent himself gave evidence on the plea, but when asked why he committed the offence to which he pleaded guilty, he said he had got no idea. One of the witnesses called on the plea was the President of the Orbost Golf Club, and he explained the striking change that had come over the respondent between the commission of the offence and the time of his arraignment. He said that prior to 1983 the respondent had been a difficult member of the Golf Club and had given the witness a hard time as President. Since the commission of the offence, however, he has turned into an agreeable member and has even been elected to the committee of the Club.

It thus appears that the plea was indeed a strong one, and in those circumstances it is not surprising that the learned trial Judge described the case as a highly exceptional case amongst aggravated burglaries. In releasing the respondent upon a bond, however, I think that the learned Judge went too far and failed to impose a sentence that was appropriate to the very serious offence to which the respondent had pleaded guilty. That offence, as I have **[6]** related, involved the invasion of a woman's house at night when it was known by the respondent that the woman's husband was away. He was carrying a knife, he was disguised, and he threatened her in an aggressive manner. It is not surprising that she said that she was petrified for her life. Such

an offence calls, I think, for condign punishment. But for the very strong plea that was made on the respondent's behalf, and his freedom from any previous conviction, I think that the offence would merit a substantial gaol sentence, but the success of the respondent's rehabilitation I think justifies the Court in taking a different course. In my view the sentence imposed by the learned trial Judge can in all the circumstances be described as manifestly inadequate, requiring this Court to pass the sentence which it considers in all the circumstances to be appropriate. Having given this matter very careful consideration, I am of the opinion that the appropriate order to make is a community service order. Accordingly I formally propose to the Court that the respondent having indicated his agreement to a community service order being made, such an order should be made requiring him to fulfil 200 hours of community service as laid down in the *Penalties and Sentences Act*.

KAYE J: I agree that the appeal should be upheld and with the order proposed by the Chief Justice.

TADGELL J: Looked at abstractly, the crime to which the respondent pleaded guilty might well be thought to have merited a sentence of imprisonment. The respondent's behaviour **[7]** towards his next door neighbour was such, I think, as to outrage any decent citizen. I dare say that many a member of the community would regard a gaol term as a natural and necessary punishment for the respondent. In the sentencing process, however, the Court must look at the whole of the circumstances including those personal to the man to be sentenced. These can seldom be known to the general public as they are on a plea made known to the Court. It is trite to say that these circumstances may and often do temper the severity of the sentence. That is not to say, of course, that the Court will consider matters personal to the offender at the expense of considering matters personal to his victim in a case like this. The sentencing process, however, is not regarded nowadays merely as an act of retribution. Nor is it designed to give any sense of satisfaction to the victim of a crime such as that to which the respondent's neighbour was subjected. Part of the process is no doubt to mark the disapproval of the community of criminal conduct which earns the sentence. I agree with the learned Chief Justice that the sentence that was imposed here does not adequately do that.

Nevertheless, I consider that no useful purpose would be served by imposing any sentence of imprisonment on the respondent here. The reverse, I think, would be the case, both as to himself, his family and the community – the small country community of which he is a member. It seems to me that this is an ideal case where the provisions of the *Penalties and Sentences Act* as to community service might be invoked. By invoking it the Court will seek to demonstrate **[8]** to the community its attitude towards the crime which the respondent committed. At the same time it might, I would hope, help to demonstrate to the small community and to the respondent himself that if required to do so, he can perform a really useful service within that country community. I agree with what has been proposed.
