

2345/A

Heard: 5th April, 1978.

Delivered: 9th May, 1978.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

COURT OF CRIMINAL APPEAL

CORAM: LAVAN S.P.J., WICKHAM J., SMITH J.

C.C.A. No. 10 of 1978

B E T W E E N :

THE QUEEN

Appellant

- and -

CALLO CARLO

Respondent

JUDGMENT -

LAVAN S.P.J.

In my opinion, this appeal should be dismissed and
I publish my reasons.

WICKHAM J.

I agree and I publish my reasons.

SMITH J.

I agree with the reasons published by Mr. Justice
Wickham and that the appeal should be dismissed.

Heard: 5th April, 1978.
Delivered: 9th May, 1978.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

COURT OF CRIMINAL APPEAL

CORAM: LAVAN S.P.J., WICKHAM J., SMITH J.

C.C.A. No. 10 of 1978

B E T W E E N :

THE QUEEN

Appellant

- and -

CARLO CALLO

Respondent

Mr. K.H. Parker Q.C. and with him Mr. D.G. Rodway
appeared for the Crown (instructed by State Crown
Solicitor).

Mr. R.W. Cannon appeared for the respondent (instructed
by Cannon & Co.).

Authorities Cited:

R. v. Lawlor (1975) W.A. Sup. Ct. C.C.A. unreported No. 63/75.
R. v. Dole (1975) V.R. 754.
R. v. Radich (1954) N.Z.L.R. 86.
R. v. Cook, R. v. Woolmington (1955) 72 W.N. N.S.W. 132.
R. v. King & Ramsay (1971) 51, 52 & 53 of 1971.

LAVAN S.P.J.

The respondent was convicted after trial of having on
the 21st August 1977 committed rape upon a young girl.

The motive which prompted the offence was unusual and
is accurately summarised by the trial Judge in the following
terms:

"The rape was carried out in cold blood and its
motivation and purpose was not to satisfy a sexual
desire but to punish the girl for not responding to
advances....made to her on a previous occasion."

The respondent was born on September 8th, 1959 and his
offence was therefore committed a few weeks prior to his eighteenth

birthday. The girl upon whom the offence was committed was a casual acquaintance of the respondent and although at the time merely fifteen years of age was not a virgin. On the only previous occasion on which the respondent had been alone in her company, although it appears that she gave him some slight encouragement, his attempts to persuade her to have intercourse with him had been rebuffed which in some way left the respondent with a feeling of resentment towards her. On the night of the offence he enticed her into his car on the pretence of taking her home, took her to a secluded locality where without any encouragement on her part and without her consent, he had intercourse with her in order - as he informed the Police - to teach her a lesson.

On the conviction of the respondent the trial Judge ordered a pre-sentence report. From this it emerged that the respondent was the product of a closely knit migrant family which had come to Australia from Italy when the respondent was four years of age. Subsequently his parents had established a successful business and as the respondent and his brother left school they joined the family partnership. Although the respondent worked well and had an entirely satisfactory relationship with his parents, unknown to them he sought the company of other youths whose standards and values were completely at variance with those of his parents as well as those of the community at large. However, his only offence prior to his arrest on the subject charge was of a minor nature and the complaint was dismissed under a provision of the Child Welfare Act.

Prior to sentencing the accused, his Honour after referring to the nature and the circumstances of the respondent's offence and to his reasons for rejecting the propriety of a non-custodial sentence, stated:

"The time at which the offence was committed you were a child within the meaning of the Child Welfare Act and in sentencing you today I have not overlooked the provisions of that Act which provide that 'the Court in dealing with a child shall have regard to the future welfare of the child'. I recognise that the Court of which the Act speaks is the Childrens Court and I think the philosophy of the provision which is reflected in many other sections within the Child Welfare Act, is equally applicable to this sentence. "

After dealing with the respondent's motivation in raping the complainant and an apparent lack of appreciation on his part of the gravity of his conduct, his Honour as a prelude to sentencing him stated:

"In fixing the term.....I have been very much influenced by your age and by the philosophy of the Child Welfare Act and the term I am about to impose upon you is very, very much less than it would have been had you been an adult. "

The respondent was sentenced to three years imprisonment and ordered to serve 18 months of that term before becoming eligible for parole.

The factors which induced the learned trial Judge to sentence the respondent as he did are summarised in his report to this Court as follows:

"I was influenced by the fact that he came from a stable home, he had for all practical purposes no previous convictions and he was a good worker and in particular I was influenced by the fact that as at the date of the offence he was a child within the meaning of the Child Welfare Act. In this respect I regarded the date of the commission of the offence to be the relevant date - see section 20(1a) of the Act - and that being so I applied to the case the philosophy of section 25 of it."

In concluding that for the purposes of sentencing the relevant date was the date of the offence and that in consequence for all practical purposes the respondent was a "child", his Honour was clearly correct. His interpretation of the philosophy of s.25 was explained to the accused in the following terms:

"The philosophy of the law in this area and in its application to juveniles is that the paramount consideration controlling the discretion to be exercised in the disposition of the case is the rehabilitation of the prisoner. That is not to say that all other considerations are to be elbowed out but it is to say that they are of far less importance than in a case where the person to be sentenced ^s in an adult. "

There are, of course, cogent reasons why the youthful offender should receive different treatment from an adult offender, but the concept that regard must be had to the future welfare of an offender, be he a juvenile or an adult, does not require legislative sanction; it is a factor which is required to be considered by courts of every jurisdiction and in my opinion it was perfectly proper for the learned trial Judge to give it full weight. The crime of rape however, whether committed by an adult or a juvenile is an extremely serious offence, which save in the most exceptional circumstances demands a substantial custodial sentence. In the present appeal the Crown submits that not only was the sentence imposed manifestly inadequate but that his misinterpretation of the provisions of s.25 of the Child Welfare Act, led the learned trial Judge to impose a sentence which was quite disproportionate to the gravity of the offence.

The learned trial Judge in his report, conceded that he regarded rehabilitation as being the dominant consideration in assessing the respondent's sentence and that in consequence he

he placed "only so much weight on the retributive and deterrent aspects of the sentencing process as he considered that the respondent, consistently with his rehabilitation or reformation, could bear. His Honour in reaching this conclusion was clearly influenced by the dictum expressed in H. v. C. 15 S.A.S.R. 252 by Zelling J. with reference to the principles to be applied in sentencing a juvenile convicted of an offence committed in the company of an adult that:

"A juvenile is to be treated as a juvenile and an adult as an adult and the disparity in sentencing is in fact due to two different policies. The juvenile is dealt with under a system of rehabilitation whereas the adult is dealt with under the general principles of the criminal law."

It may well be that this comment is valid in certain circumstances but in my opinion it is too widely stated to be regarded as being of universal application. There may well be cases where the factor of rehabilitation will have to yield to the factors of retribution or deterrence; whether in a particular case it should do lies in the discretion of the sentencing Judge. In the subject case his Honour considered that the rehabilitation of the respondent was a dominating factor for consideration and he was entitled to do so. It may be that faced with the same problem I would have imposed a different sentence, but that is not to the point. The learned trial Judge in sentencing the respondent was exercising a judicial discretion and as was stated in House v. The King 1936 C.L.R. 499 by Starke J. at p. 504:

"It is not enough that the judges comprising the appellate court consider that if they had been in the position of the primary judge they would have taken a different course. It must appear that some error has been made in exercising the discretion. "

In my opinion no such error has been demonstrated in the present case. I consider that the appeal should be dismissed.

Heard: 5th April, 1978.

Delivered: 9-5-78.

2345/B

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

COURT OF CRIMINAL APPEAL

CORAM: LAVAN S.P.J., WICKHAM J., SMITH J.

C.C.A. No. 10 of 1978

B E T W E E N :

THE QUEEN

Appellant

- and -

CARLO CALLO

Respondent

Mr. K.H. Parker Q.C. & Mr. D.G. Rodway appeared for the appellant (instructed by Crown Law Department).
Mr. R.W. Cannon appeared for the respondent (instructed by Cannon & Co.).

Authorities Cited:

R. v. Lawlor (1975) W.A. Sup. Ct. C.C.A. unreported No. 63/75.
R. v. Dole (1975) V.R. 754.
R. v. Radich (1954) N.Z.L.R. 86.
R. v. Cook, R. v. Woolmington (1955) 72 W.N. N.S.W. 132.
H. v. C. (1977) 15 S.A.S.R. 271.

WICKHAM J.

This is an appeal by the Crown against a sentence imposed by the Supreme Court upon the respondent for the crime of rape. The sentence was one of imprisonment for three years of which the respondent was to serve eighteen months before becoming eligible for parole.

The task of the Crown, as with any other appellant, is to persuade the Court of Criminal Appeal that the sentence pronounced was wrong.

The respondent was a youth of nearly eighteen years

of age. He was acquainted with the victim, a girl of fifteen years of age. He raped her in his motor car. The respondent's motive for the rape was not lust but to teach her a lesson for what he considered to be the allowing by her of familiarities on a previous occasion but her refusal of intercourse, and otherwise being provocative to him in the presence of other girls with whom he might be. It was, as the jury decided, a clear case of rape and, as it seems, by a rather nasty youth. There were no extenuating circumstances.

Apart from the age of the victim, there were no aggravating circumstances; there was no actual violence apart from the necessary struggle, it was not in company, it did not involve unlawfully entering a dwelling, it was not repeated, it was not associated with other indecent assaults, the girl was not left but was driven to a friend's place, certain features which might further aggravate an offence against a girl of this age were not present.

Having examined the case, this is not a case where I am not persuaded that the sentence was wrong. It is a case where I am positively persuaded that the sentence was right.

That disposes of the appeal which should be dismissed.

The grounds of appeal included grounds critical of certain passages of his Honour's remarks on sentence.

These remarks were addressed to the offender orally after his Honour had considered a pre-sentence report and heard counsel. The Crown, I assume, is concerned that some of the remarks and the approach apparently taken by his Honour might

constitute a precedent which could lead a Court to err on another occasion. If this is so, it is a mistake. Remarks on sentence are addressed to the accused and have a different purpose from reasons for judgment. They are often loosely framed and colloquial and, as in this case, contain an element of homily. A Judge is not making rulings on matters of principle, or even necessarily saying what his view of the case and of the offender is, but rather trying to get across to the offender how the offender should see the case and himself.

In some cases it may be seen that the Judge is giving reasons for judgment and these cases will normally be recognised by his Honour speaking in the indicative, rather than in the vocative mood, but, even so, the value of the dicta is negligible unless he is deciding an issue fairly joined and argued on both sides.

However, although this practice is not to be encouraged, I think that a short comment upon some of his Honour's remarks might usefully be made.

His Honour considered that he was bound by the idea expressed in s.25(1) of the Child Welfare Act which provides that:

"The Court in dealing with a child shall have regard to the future welfare of the child".

As it happened, the offender had turned eighteen when he came to be tried, but it is clear from s.20 of the Act that the relevant date is the date of the offence. When the matter is before the Supreme Court this Court has powers additional to that of a Children's Court. Literally I do not think the section to be binding upon a Supreme Court when exercising the jurisdiction of the Supreme Court, but of course any Court will have regard to

the future welfare of any young offender whether he be an old child or a young adult.

As we heard something about that rather nebulous word "rehabilitation", I mention that "welfare" is not necessarily co-extensive in meaning with the word "rehabilitation". To take one example it may be necessary in the case of a young offender to impose a retaliatory term of imprisonment to avoid someone taking the law into his own hands and, even though such a course might be contra-indicated for the purpose of rehabilitation, the sentence would nevertheless be for the offender's "future welfare".

In respect to dealing with young offenders, the only difference between the approach of the Children's Court and that of any other Court will be that by virtue of the provisions of s.25 of the Child Welfare Act the Children's Court must have regard to the future welfare of the offender, whereas another Court should and usually will have such regard. In practice it would be surprising to find any difference in result between a youth who offends on his eighteenth birthday, rather than the day before. Difficulties, of course, can and have arisen in the case of co-offenders where one is an old child and another is a young adult and each is sentenced by different Courts, but there is no reason to discuss this problem in this case.

The offender was a child and I think that his Honour was right in taking the view that the Supreme Court should look upon the matter in much the same way as the Children's Court would have done if it were exercising jurisdiction, but with the extended powers of the Supreme Court. I do not however, see any practical difference between this and the application of the usual approach to the sentencing of young offenders in superior courts.

His Honour did allow himself the generalisation:

"the philosophy of the law in this area and in its application to juveniles is that the paramount consideration controlling the discretion to be exercised in the disposition of the case is the rehabilitation of the prisoner. "

As I have said, a remark like this does not constitute a precedent or lay down a principle and it is otiose to comment upon it, other than to take the liberty of saying that I think that the word "paramount" tends to unnecessarily qualify the discretion of the Courts in cases of this kind and that the word "rehabilitation" is unnecessarily restrictive. It is important not to allow the broad considerations required in correctional procedures to become fragmented by generalisations and locked into doctrinaire categories euphemistically called "principles" with the aid of the harmful jargon which is beginning to suffocate this discipline.