R V MORGAN

Supreme Court of Victoria, Court of Appeal (Maxwell P and Buchanan JA)
19 February 2010
[2010] VSCA 15

Criminal Law – appeal against sentence – assault – intentionally causing injury – threat to kill – false imprisonment – whether participation in Koori Court process a mitigating factor – whether sentence manifestly excessive – *County Court Act 1958* (Vic), ss 4A-4G – concessions by Crown – resentenced

Facts:

On 3 July 2009, Morgan pleaded guilty to eight counts of intentionally causing injury, two counts of common law assault, and single counts of false imprisonment and making a threat to kill. Morgan committed all of these offences against a 15 year old girl with whom he had a sexual relationship. During the sentencing process, Morgan participated in a 'sentencing conversation' pursuant to s 4G of the *County Court Act 1958* (Vic) where he was 'shamed' by community elders. The Koori Court sentenced the offender to three years and six months imprisonment.

The two issues that arose in this appeal against sentence were whether the sentence imposed by the Koori Court was manifestly excessive, and whether the offender's participation in the 'sentencing conversation' could be considered as a mitigating factor in sentencing. While the Crown conceded on both grounds, the Court of Appeal deliberated on the functions of the Koori Court and the participation of Indigenous offenders in this process.

Held, accepting the Crown's concessions and resentencing the offender to two years, per Maxwell P and Buchanan JA:

1. The Crown conceded that the sentence imposed by the Koori Court fell outside the sentencing range and was excessive having regard to the particular circumstances of the case: [7].

2. Rehabilitation should prevail as a dominant sentencing consideration when an offender is relatively youthful, has displayed genuine remorse for the crime/s committed, and has made a significant effort to subsequently lead a law-abiding life: [11]–[14]; *R v Mills* [1998] 4 VR 235, applied.

3. Participation in the Koori Court process can be a mitigating factor in sentencing, but it depends upon the circumstances of each particular case: [33], [40]; *R v Engert* (1995) 84 A Crim R 67, per Gleeson CJ, cited.

4. The 'sentencing conversation' is aimed to further the reformation of an Aboriginal offender through a unique mix of Aboriginal customary law and the English common law. Participation in the process is more burdensome than appearing at a mainstream plea hearing, particularly in circumstances where the offender has 'sought reconciliation with his indigenous heritage': [36].

5. While race itself is not a permissible consideration in sentencing, the sentencing court is bound to take into account social, economic and other disadvantages which may be associated with, or related to, a particular offender's membership of the Aboriginal race: [38]–[39]; *Neal v The Queen* (1982) 149 CLR 305 per *Brennan J, Rogers and Murray v The Queen* (1989) 44 A Criminal R 301 per Malcolm CJ, cited.