SUPREME COURT OF VICTORIA

APPEAL DIVISION

COURT OF CRIMINAL APPEAL

No. 85 of 1992
No. 86 of 1992

THE QUEEN

v.

PATRICK McLEOD
and
NASSER DANIAL MASHNI

JUDGES: CROCKETT, BEACH and COLDREY, JJ.

WHERE HELD: Melbourne

DATE OF HEARING: 11th August 1992

DATE OF JUDGMENT: 12th August 1992

APPEARANCES:	Counsel	Solicitors
For the Crown	T. Gyorffy	J.M. Buckley, Solicitor for D.P.P.
For the Applicant McLeod	D. Salek	Piesse Clarebrough
For the Applicant Mashni	C. Heliotis	Pryles & Defteros

.SMW:VGRS

CROCKETT, J.: Mr. Justice Beach will deliver the first judgment.

BEACH, J.: On 5th June 1992 the applicant Patrick McLeod pleaded guilty in the County Court at Melbourne to one count of false imprisonment. McLeod was then aged 21 and had no previous criminal history. On the same day Nasser Danial Mashni pleaded guilty to one count of false imprisonment, one count of intentionally or recklessly causing injury and one count of threatening to inflict serious injury. Mashni was aged 22 and also had no previous criminal history. Following a plea made on their behalf by counsel, the learned sentencing judge sentenced McLeod to a term of six months' imprisonment and Mashni to a total term of 23 months' imprisonment. His Honour ordered that Mashni serve a minimum term of twelve months' imprisonment before becoming eligible to be released upon parole. The Court now has before it applications on behalf both applicants for leave to appeal against sentence.

The circumstances giving rise to these offences may be summarised as follows.

Mashni's family owns and operates a milk bar in Brady Road, North Dandenong. Mashni regularly works in the milk bar. On the afternoon of 16th June 1991 Benjamin Tavao, a young boy then aged fifteen, entered the milk bar while Mashni was on duty behind the counter. Tavao requested two packets of cigarettes. When Mashni handed over the two packets of cigarettes Tavao took them and ran out of the shop without paying. Because there was no-one else available to mind the shop and serve the other customers then present in the shop, Mashni was unable to

leave and chase Tavao. Soon afterwards the applicant McLeod, who was a friend of Mashni, entered the shop. Mashni asked McLeod to mind the shop while he went out to pursue Tavao. Mashni left the shop and drove off in his motor car looking for Tavao. Mashni was unsuccessful in finding Tavao and returned to the shop. When he returned to the shop he telephoned his mother who arrived at the shop about ten minutes later and took over minding the shop. Mashni and McLeod then left in Mashni's car to look for Tavao. A short time later the applicant saw Tavao in First Avenue, Dandenong. Tavao was seen by them to run into a house at No. 21 First Avenue. Mashni and McLeod got out of the car and went in pursuit of Tavao. At the time Mashni had with him a wooden axe handle. They entered the front yard of 21 First Avenue and found Tavao crouching in the garden. Mashni approached Tavao who shouted, "Don't hit me, don't hit me." At that Mashni grabbed Tavao by the shoulder and hit him once on the leg with the stick. That incident was the subject of count 1 on the presentment; that is the count of intentionally or recklessly causing injury. The applicants then dragged Tavao back to the car. McLeod opened the boot of the car and at that Tavao shouted, "I will give them to you." Tavao then removed some cigarette packets from his pocket and threw them into the boot of the car. However, the applicants forced Tavao into the boot of the car and closed the lid of the boot. The applicants then got into the car and Mashni drove away. Mashni drove the car in what was described as a rough fashion with a considerable amount of swerving. During this time Tavao was screaming from inside the boot. After driving around the area for

some time the applicants then drove out to the Dandenong Police Paddocks. After entering the paddocks the car hit a tree, causing damage to the car. Mashni stopped the car and both applicants got out. They then opened the boot and took Tavao out of the boot. Mashni told Tavao that he was going to beat him up. Mashni at that time was still holding the axe handle. Tavao pleaded with Mashni not to hurt him. Mashni blamed Tavao for the damage to his car and demanded that it be paid for. Tavao, who by then was distressed and in tears, said that he would work in Mashni's shop or in his house for nothing in any capacity whatever to repay the damage. In answer to questions about where he lived, Tavao explained that he had run away from home. Tavao then asked Mashni to take him home. Mashni said that before he did that he would break Tavao's legs. It was that threat which was the subject of count 3 on the presentment; that is the threat to inflict serious injury. Tavao was then placed in the back seat of the car. Before they drove away Mashni said to him, "The last guy who stole from me, I broke his arms here. Why should I let you off the hook? You're just the same." Mashni drove back to the milk bar where he dropped off the applicant McLeod. Mashni then drove Tavao to various premises in the Dandenong-Clayton area and on one occasion stopped in the car park of the Sandown Hotel where he again threatened to injure Tavao. Eventually Mashni dropped Tavao off at the Dandenong railway station. In due course Tavao's family reported the matter to the police.

On 5th July 1991 both applicants were interviewed by the police and made full and frank admissions to them in relation to the various offences.

The primary ground relied upon by the applicants in support of their applications is that the sentences imposed upon them by the learned sentencing judge were manifestly excessive. In support of that contention counsel for both applicants stressed the fact that the applicants are young men without previous convictions of any kind. McLeod is now in the final year of his apprenticeship as a glazier and is a person who is highly regarded by his employer. Mashni, on the other hand, has completed two years of a degree course in applied physics and his future in that regard would be severely jeopardised if he is required to serve the term of imprisonment imposed by the sentencing judge. It was stressed by counsel that both men fully co-operated with the police when questioned in relation to the offences and at the earliest opportunity indicated their intention to plead guilty to the offence, and ultimately did so.

As to the offences themselves, it was submitted that they were committed on the spur of the moment and in the final analysis caused little physical or psychological harm to the victim. Further, the applicants have shown genuine remorse in relation to the matter and are persons who are unlikely to re-offend in the future. In that situation it is submitted that it is totally inappropriate that they be required to serve the terms of imprisonment imposed upon them by the sentencing judge.

Having given careful consideration to the matter, I am of the opinion that there is merit in that contention.

In my view, it should only be as a last resort that a young offender without previous convictions be sentenced to a term of imprisonment. This aspect of the matter was considered by the Court of Criminal Appeal in The Queen v. Paul Thomas Joseph Smith (1988) 33 A.Crim.R. 95. At p.87 the Chief Justice, Sir John Young, said:

> " ... there were, I think, a number of factors which entitled his Honour to impose the sentence which he did impose. The first is the youth of the offender, it being a general principle of sentencing that a youthful offender is not, if it can be avoided, to be sent to gaol for a first offence. That is by no means to say that a youthful offender who commits this offence will inevitably escape gaol, for there are many cases where young offenders guilty of culpable driving causing death have been sent to gaol. Nevertheless the youth of the offender is a prime consideration for a sentencing judge, and not only the fact that he is a young man, but also that he is a young man without any previous convictions of any kind."

I entirely agree with that view. That a Court should only require an offender to serve a term of imprisonment as a last resort is also, in my opinion, consistent with the views of the legislature as expressed in sub-s.4 of s.5 of the Sentencing Act 1991, which reads:

> "The court must not impose a sentence that envisages confinement of the offender unless it considers that the purpose of purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender."

In my opinion, the sentences imposed on the applicants in the present case are manifestly excessive. When one has regard to their youth, their antecedents and the other matters relied upon by their counsel and to which I have adverted, this is not a case which calls for their confinement in prison. In my opinion, justice can

be done by imposing a sentence which does not produce that result.

Having arrived at that conclusion, I find it unnecessary to deal with the remaining grounds of appeal.

I would allow each application for leave to appeal against sentence. I would vary the sentences imposed by the sentencing judge by ordering that each sentence be wholly suspended. Pursuant to the provisions of sub-s.6 of s.27 of the Sentencing Act, I would specify a period of twelve months as the period during which each applicant must not commit another offence punishable by imprisonment.

CROCKETT, J.: I agree.

COLDREY, J.: I also agree.

CROCKETT, J.: In each case the application is granted, the appeal is treated as instituted and heard instanter and allowed. In each case the sentence will be varied in the terms pronounced by Beach, J.

CERTIFICATE

I certify that this and the five preceding pages are a true copy of the reasons for judgment of the Appeal Division, Court of Criminal Appeal (Crockett, Beach and Coldrey, JJ.) of the Supreme Court of Victoria delivered on 12th August 1992.

DATED this 20th day of August 1992.

S. Vaucarrow
Associate

Associate to
The Honourable
Mr. Justice Crockett