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SUPREME COURT OF VICTORIA

DIRECTOR GENERAL of CORRECTIONS v SWEENEY and ANOR

Gobbo J

21 August 1992

SENTENCING – POWERS OF SUSPENSION OF SENTENCES – WHETHER SENTENCE MAY BE SUSPENDED AND MINIMUM TERM FIXED: *SENTENCING ACT* 1991, SS11, 27.

When the words of s11(1) of the *Sentencing Act* 1991 ('Act') are read in the context of the Act as a whole, in respect of sentences of 2 years or less it is inappropriate for a Court to fix a minimum period before release on parole where the Court decides to apply the powers relating to the suspension of sentences under s27 of the Act.

GOBBO J: [1] In this matter there are two summonses on originating motions which have been brought on by the Director General of the Office of Corrections against two defendants, namely, Terry Ann Sweeney and Neil Ashley McGrath. They seek orders under s104 of the *Sentencing Act* 1991. That section provides that if a person is being sentenced and it is made to appear that application is made for relief in the nature of *certiorari* and the Court determines that the sentence imposed was beyond the power of the sentencing Court, this Court may, instead of quashing the conviction, amend the conviction by substituting for the sentence imposed the sentence which the sentencing Court had power to impose. The background to the two sentences in question is as follows. In the case of Terry Ann Sweeney, the prisoner had pleaded guilty to one count of armed robbery. The learned sentencing Judge was satisfied that a head sentence of two years was an appropriate one, and he ordered that she be sentenced to be imprisoned for two years and then went on to direct she serve a minimum term of 16 months before becoming eligible for parole.

On turning to the question of suspension, he then found that the circumstances did not warrant total suspension but that there should be a portion of the sentence served and only part suspended, and he directed that three quarters of the sentence be suspended for a period of two years. Finally, he indicated that he intended that the prisoner serve the minimum term of 4 months and that the balance of both the head sentence and the minimum term be suspended.

[2] In the case of Neil Ashley McGrath, who pleaded guilty to 14 counts of theft, a count of attempted armed robbery and a count of going equipped for a burglary, the learned sentencing Judge sentenced the prisoner to two years imprisonment on the principal charge of attempted armed robbery and imposed other sentences which were to be served concurrently, making an effective sentence of two years. He directed under s27 of the *Sentencing Act* that 18 months of the head sentence be suspended and fixed two years as the period under s27(6). After some discussion, he indicated that although it originally appeared to be his view he was only to suspend the head sentence, he in fact, after being so invited by both Counsel, went on to direct that 18 months of the head sentence be suspended and 12 months of the non-parole period be suspended.

It has been submitted that there was a sentencing error in each case in that the suspension of the minimum period was inconsistent with the powers of suspension provided for under the *Sentencing Act*. It was also submitted that the resulting sentences would create anomalies and would be out of kilter with the thrust of the provisions, particularly the contrast between the sentencing provisions, which were limited to sentences of two years and less, and the provisions for fixing of minimum periods. It was submitted that having regard to the presence of the sentencing error, it was therefore open to this Court to impose a fresh sentence and that the appropriate course to adopt was one that recognised the substance of **[3]** the sentencing approaches other than the final result adopted by the sentencing Judges in each case, which reflected the evidence before them and the nature of the offences and the nature of the background of each prisoner.

On this basis it was proposed that the correct way to resolve the error upon a sentence

fixed in this Court would be to impose a sentence in the case of the defendant Sweeney of two years imprisonment, with an order that 20 months of that sentence be suspended, so that the period of 20 months operate from the date of sentence. In the case of the defendant McGrath, the proposal was that there be a sentence of two years' imprisonment, as had been the case, of course, before the sentencing Judge, with a direction that 18 months of that sentence be suspended, resulting again in the effective time actually served being six months. Since those non-suspended periods have almost been served, if I give effect to that course it will mean that the defendants in question will very soon be able to secure their freedom. It has been put that the contrary arguments are that there is no inconsistency between the suspension provisions and the suspension of a minimum term and that s11(1) contemplates the fixing of a minimum term as a matter of course in relation to a term of 24 months, which was the head sentence in each of the present cases.

It is also put that the result of the view that there is no minimum to be fixed at this point of time would mean that if the prisoners re-offended during the period of the term of the balance of the suspended **[4]** sentence, then under s31 it would be obligatory that the Court make an order that they serve the entire term of the balance of the sentence remaining to be served, whereas if there was a period of minimum term, then they would have the benefit of that minimum term so far as possible release was concerned. I have come to the conclusion that the principal argument is correct and that there is an inconsistency between the suspension provisions and the imposition of non-parole periods in respect of sentences of two years or less. I understand the force of the argument founded on s11(1) but it seems to be that when the words of s11(1) are read in the context of the whole of the Act, then a Court which reaches the view that there ought to be a suspension of sentence is necessarily, in my view, reaching a conclusion that the nature of the offence or the past history of the offender which led to a view as to the suspension of the sentence carried with it the conclusion that the fixing of a minimum period is inappropriate. In other words, although the language is not really elegantly phrased to achieve that result, it is possible in my view to arrive at that result and so not have any inconsistency in the case of a term which is exactly one for 24 months.

I am further of the view that when the suspension powers are considered as a whole, they do not contemplate several suspensions, and that is really what would be involved in contemplating first a suspension of the head sentence and then a suspension of the minimum sentence. In my view, it is a single process. It is not by any means clear that is so on the legislation but, doing the **[5]** best one can with new legislation and with the limited time I have in this Practice Court to consider the matter, I have come to the conclusion that the suspending power is not one that operated in a multiplicity of ways or in a multiple fashion. That is not inconsistent with s11(1) which, although it provides for fixing of a minimum period as part of the sentence, in my view, is considering it only as part of the sentence. The word "sentence" in s11(1) is one that is more akin to referring to the sentencing process rather than to the actual sentence which is the terminology used in the suspending powers. **[6]** As to the consideration based upon s31(5) it is, of course, a matter of concern that s31(7) should have a somewhat Draconic operation in that it appears to direct the Court to make an order under subs.5(a) unless it is of the opinion that it would be unjust to do so in certain circumstances. I am troubled as to whether or not, if the Court did feel compelled to exercise the direction and to restore the sentence held in suspension and order the offender to serve it, that it would then have the power thereafter to fix a minimum. That is by no means clear, but the circumstances contemplated would not, in my view, be likely to arise very often.

If the Court was of the view that it was appropriate that the sentence that was suspended should be served out, then it would presumably do so because of the subsequent circumstances, because the two things are not unrelated. It is not an automatic imposition of a direction that the suspended sentence be served out for the Court must take into account what has occurred because there is an obligation on the Court to form an opinion. If the sentencing Court was of the view that the subsequent circumstances were such that the whole of the sentence should not be served out, then, of course, there is that discretion under s31(7). I therefore do not see that the operation of s31 brings about any serious anomaly.

For all of those reasons, in my view, the plaintiff's arguments that there has been sentencing error and that there should be the intervention of this Court succeed. In my view the appropriate course in the case of the prisoner, Sweeney, is to impose a term of imprisonment of two years with

an order that 20 months of that term be **[7]** suspended to operate from the date of the original sentence. In the case of the prisoner, McGrath, the substitute sentence of the Court is that there be an order for a term of imprisonment of two years with an order that 18 months of that sentence be suspended again with effect from the original date of sentence.

APPEARANCES: For the plaintiff the Director-General of Corrections: Mr D Maguire, counsel. Victorian Government Solicitor (Mr Teather). For the defendants Sweeney & McGrath: Mr J Dickinson, counsel. Slades solicitors (Sweeney) and S English solicitor (McGrath). For the defendant Quinton: Mr D Cosgriff, counsel. Legal Aid Commission Victoria.
