

35/84

SUPREME COURT OF VICTORIA — FULL COURT

R v PEARCE

Young CJ, Kaye and Brooking JJ

13 May 1983 — [1983] 9 A Crim R 146

CRIMINAL LAW – SENTENCE – APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE PASSED ON CONVICTION FOR TWO OFFENCES – TERMS OF IMPRISONMENT IMPOSED ON BOTH OFFENCES – WHETHER ON APPEAL IMPRISONMENT AND PROBATION MAY BE IMPOSED/ORDERED – WHETHER COMMENCEMENT OF PROBATION PERIOD MAY BE POSTPONED: *CRIMES ACT*, S508.

P. pleaded guilty in the County Court to charges of unlawful assembly and malicious wounding, and was sentenced to a minimum term of 18 months' imprisonment before being eligible for parole. He appealed on the grounds that the sentence was manifestly excessive. In the course of his appeal, P's counsel submitted that the appropriate sentence was a short sentence of imprisonment on the malicious wounding count coupled with the making of a probation order in respect of the unlawful assembly count.

HELD: Application Granted.

(1) Minimum term reduced to six months.

(2) Where a court is required to sentence a person for two or more offences, it is not open to the Court to admit the offender to Probation in respect of one offence and sentence him to a term of imprisonment in respect of the other.

R v Evans [1958] 43 Cr App R 66, applied.

(3) It is not open to a court to fix a probation period that is to commence, not upon the making of the order, but on some date which the order either specifies or enables to be ascertained.

BROOKING J: (with whom Young CJ and Kaye J concurred) [*set out the facts, and continued*]: ... [5] In support of his submission that the sentence was manifestly excessive, Mr Weinberg relied principally on the age and disadvantaged background of the applicant, the existence of only one previous conviction, the character evidence called on the plea, the behaviour of the victim himself shortly before the shooting and the circumstances in which the applicant and his companions had been asked to leave the party.

He invited this Court initially, if it were satisfied that the sentence imposed was manifestly excessive, to consider the making of an Attendance Centre order, but when that matter was enquired into it was found that the applicant was not regarded by the Superintendent of the appropriate Attendance Centre as a fit person to undergo attendance at an Attendance Centre. In the alternative, Mr Weinberg submitted that an appropriate sentence was a short sentence of imprisonment on the count of malicious wounding coupled with the making of a probation order in respect of the count of unlawful assembly.

It has been laid down by the Full Court that where a Court is called upon to sentence an offender in respect of a single offence the court cannot both make a punitive order and admit the offender to probation: *R v Wright and Pope* [1980] VicRp 5; [1980] VR 41. But the question whether a court may, in sentencing a person for two or more offences, at the same time place him on probation in respect of one offence and sentence him to imprisonment in respect of another does not appear to have been decided by this Court. Section 508(1) of the *Crimes Act* 1958 defines a probation order as an order requiring the offender to be under the supervision of a probation officer for such period, being not less than one year and not more than five years, as is specified in the order; [6] this period is in the Act called the probation period.

In my opinion it is impossible for an offender to be at the same time both under the supervision of a probation officer, to use the language of s508(1), and serving a sentence of imprisonment. Moreover, most of the five general conditions in the prescribed form of probation

order are inconsistent with the position of a person undergoing a sentence of imprisonment. That prescribed form is to be found in the Fourth Schedule to Division VI of the *Social Welfare Regulations* 1962. Clause 17 of Division VI of the Regulations does not authorise the omission of any of the five general conditions. It was accepted by the Court of Criminal Appeal in *R v Evans* [1958] 43 Cr App R 66 at p73 that it was not possible for a person at the same time to undergo a sentence of imprisonment and comply with the terms of a probation order: the Court spoke of the probation order's falling into abeyance or of its coming into operation being in effect postponed and described a custodial sentence and a probation order as wholly inconsistent.

The question then arises whether it is possible for a probation order to be made fixing a probation period that is to commence, not upon the making of the order, but on some date which the order either specifies or enables to be ascertained. This question received only passing consideration from the Court of Criminal Appeal in *R v Evans* (*supra*) at p72. If the only applicable provisions had been those of the *Crimes Act* itself, I should have been disposed to the view that a probation order could not fix a probation period that was to commence at some time in the future specified in the order. The matter is, however, made clear enough by the prescribed form of [7] probation order. By clause 15 of Division VI of the Regulations a probation order must be in the form or to the effect of the prescribed form.

The operative part of the prescribed form directs that the offender "be admitted to probation for a period of ... years from this date on the following conditions". The use of the words "from this date" shows that the probation period cannot commence at some date later than that on which the order is made; the order would not in my judgment be to the effect of the prescribed form if it departed from the form in this regard. In addition, the prescribed form requires the probationer – and I refer here to the second general condition – to report to the appropriate officer "within forty-eight hours after this date"; again, the immediate commencement of the probation period is contemplated.

In my view, then, it was not open to the learned Judge and is not open to this Court, in the event that the sentencing discretion falls to be re-exercised, to admit the applicant to probation in respect of one offence and sentence him to a term of imprisonment in respect of the other. This is because a probation order cannot postpone the commencement of the probation period and because the position of the probationer during the probation period is inconsistent with the position of a person undergoing a sentence of imprisonment.

[His Honour then considered whether or not the sentence was manifestly excessive in the circumstances].
