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SUPREME COURT OF VICTORIA — COURT OF APPEAL CRIMINAL DIVISION

R v LOWE

Crockett, Marks and Hampel JJ

14 December 1993

SENTENCING – SENTENCE OF IMPRISONMENT IMPOSED – PARTLY SUSPENDED – WHETHER COURT REQUIRED TO FIX A NON-PAROLE PERIOD: *SENTENCING ACT* 1991, SS11(1), 27.

Section 11(1) of the *Sentencing Act* 1991 ("Act") provides:

> "If a court sentences an offender to be imprisoned in respect of an offence for—
>
> …
>
> (b) a term of 24 months or more—
>
> the court must, as part of the sentence, fix a period during which the offender is not eligible to be released on parole..."

1. The words of s11(1) "If a court sentences an offender to be imprisoned" are to be given their literal meaning so that "imprisonment" means pursuant to a sentence that requires actual confinement of the prisoner.

2. Accordingly, where an order for suspension of a sentence of imprisonment is made under s27 of the Act, it is not necessary to fix a non-parole period under s11(1) of the Act.

[Note: In ***R v Hatch*** [1998] 3 VR 693; (1997) 95 A Crim R 46, Court of Appeal, 24 July 1997, Callaway JA (with whom Batt JA agreed) said that a non-parole period cannot be combined with a partly suspended sentence at the time when the sentence is imposed. However, where a court when dealing with a breach of a suspended sentence decides to restore the whole or part of a sentence, the court has a discretion to fix a non-parole period under s11(2) of the Act or, if the term restored be 24 months, an obligation to do so under s11(1) unless considered inappropriate. Ed.]

CROCKETT J: **[1]** The applicant pleaded guilty in the County Court at Warrnambool to a presentment which contained one count of causing serious injury intentionally. The applicant, who is aged 28 years, admitted four previous convictions. It is to be noted that not any of them is related to offences of violence. After hearing a plea for leniency, the judge sentenced the applicant to two years' imprisonment and directed that twelve months of that sentence be suspended for two years.

The applicant now seeks leave to appeal against that sentence. He has done so on two grounds. Each of the two grounds alleges identifiable error on the part of the judge in the course of the exercise of his sentencing discretion. Any suggestion that the sentence should be found manifestly excessive was specifically disavowed. It was, however, said that, by reason of either one or other of the alleged identifiable errors, this Court was required to assess for itself the sentence which ought to be passed upon the applicant.

[His Honour then referred to the facts, the nature and circumstances of the offence and, although concluding that the sentencing judge had fallen into error, was not satisfied that a different sentence should have been passed. His Honour continued]…**[5]** This conclusion means that in my opinion the Court is without power to quash the sentence. The application should be dismissed.

It is thus unnecessary to consider the second alleged identifiable error. However, as the question was the subject of some argument, I think I should express a view of the matter, with which view I understand the other members of the Court agree. The point was expressed by the applicant's counsel as follows: "His Honour also erred in failing to set a minimum term as required by s11 of the *Sentencing Act* once he has determined to impose a sentence of imprisonment of 24 months or more". The sentence imposed by the judge was, at one and the same **[6]** time, a sentence of "not more than 24 months" (cf. s27(1)) so the judge had a discretion to suspend part of the sentence

(which he did), and a sentence of "24 months" (cf. s11(1)(b)). But if it were 24 months or more it was said to be mandatory to fix a non-parole period. Obviously, this would be inconsistent with a sentence wholly (or even only partly) suspended. These sections of the Act must, however, be read together and interpreted so as to allow them to operate in harmony. This can be achieved in relation to the apparent conflict to which I have referred if the opening words of s11(1), "If a court sentences an offender to be imprisoned", are given their literal meaning so that "imprisonment" means pursuant to a sentence that requires actual confinement of the prisoner. That is to say, s27(8), which reads: "A partly suspended sentence of imprisonment must be taken for all purposes to be a sentence of imprisonment for the whole term stated by the court", is not to be construed so as to give a contrary meaning to the opening words of s11. If this is done, the difficulties referred to in argument, I think, are resolved. For the reasons that I have given, I would dismiss the application.

MARKS J: *[After dealing with the first ground of appeal, His Honour continued]*...**[7]** As to the second ground, I am also of opinion that, where an order for suspension is made under s27, it is not necessary to fix a non-parole period under s11. In **[8]** other words, s11 does not apply where a sentence of imprisonment is suspended by an order under s27. This is so, in my opinion, for the reasons stated by the learned presiding judge based on the meaning of the opening words of s11(1), and also, I think, by necessary implication of the terms of s27 and of the purpose and object of that section in the context of the sentencing scheme represented by the Act as a whole. To hold otherwise would produce an irreconcilable and clearly unintended inconsistency between s11 and s27, the latter being a sentencing alternative in relation to which the fixing of a non-parole period is entirely incongruous and inappropriate. I would, as I have said, also dismiss the application.

HAMPEL J: I agree with the view expressed by the learned presiding judge that a sentencing error occurred by reason of the reference to the inappropriate maximum sentence. That error requires the reconsideration of this sentence. I also agree that the scheme of the *Sentencing Act* is such that the fixing of a non-parole period under s11(1)(b) is not required when a sentence of 24 months is imposed but is partially suspended pursuant to s27....

APPEARANCES: For the Crown: Ms C Douglas, counsel. JM Buckley, Solicitor to the DPP. For the Appellant: Mr N Clelland, Counsel. Solicitors: VG Peters & Co.
