52/93

SUPREME COURT OF VICTORIA

WRIGHT v MARTEN and ANOR

Beach J

11, 25 November 1993

SENTENCING – OFFENDER HELD IN CUSTODY ON OFFENCES – PAROLE CANCELLED WHILST OFFENDER IN CUSTODY – PERIOD DEEMED TO BE SERVED – WHETHER WHOLE PERIOD WHILST IN CUSTODY OR UP TO DATE OF CANCELLATION OF PAROLE: *SENTENCING ACT* 1991, S18.

1. Pursuant to the provisions of s18(1) of the *Sentencing Act* 1991 ('Act'), the time spent by an offender in custody must relate to the offence with which the offender has been charged and in respect of which has been held in custody.

2. Where an offender's parole is cancelled whilst in custody awaiting determination of further offences, the provisions of s18 of the Act do not apply to the period of time spent in custody after the date of cancellation of the parole. In such circumstances, the offender is being held in custody in respect of the proceedings which gave rise to the parole order rather than the offences yet to be determined.

BEACH J: [1] On 25 November, 1991 the second named defendant, Toni Lee Marten, was convicted of a number of offences of dishonesty and was sentenced to a term of 45 months' imprisonment with a minimum term of 24 months to be served before she should be eligible to be released on parole. On appeal a period of three years was substituted for the original term of imprisonment of 45 months and a new minimum term of 18 months was fixed. On 22 March 1992 Marten was again convicted of offences of dishonesty. On this occasion she was sentenced to a term of 4 months' imprisonment. By order of the Adult Parole Board dated 16 October 1992 Marten was released on parole on 18 October 1992.

On 25 November 1992 Marten was re-arrested and remanded in custody in relation to further offences committed by her between 30 October 1992 and 23 November 1992. Marten remained in custody until she was brought before the Williamstown Magistrates' Court on 20 April 1993. However, on 13 January 1993 her parole in relation to the earlier offences was cancelled by order of the Adult Parole Board and from that day she was required to serve the balance of the sentences, the subject of the parole cancellation order. At the Williamstown Magistrates' Court on 20 April 1993 Marten was sentenced to a further effective term of 12 months' imprisonment. The Magistrate then declared that 110 days of the time spent by Marten in custody since 25 November 1992 should be reckoned as time already served by Marten in relation to what I shall describe as the April 1993 offences. On 6 August 1993 an application was made to the **[2]** Williamstown Magistrates' Court by the plaintiff, Senior Constable Robert Geoffrey Wright, pursuant to the provisions of s18 of the *Sentencing Act* 1992 to amend the period of imprisonment declared by the court to have already been served by Marten.

The following are the sub-sections of s18 which are relevant for present purposes:

> (1) If an offender is sentenced to a term of imprisonment in respect of an offence, any period of time during which he or she was held in custody in relation to proceedings for that offence or proceedings arising from those proceedings and for no other reason must, unless the sentencing court or the court fixing a non-parole period in respect of the sentence otherwise orders, be reckoned as a period of imprisonment already served under the sentence.
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> (4) If an offender was held in custody in circumstances to which sub-section (1) applies, then the court must declare the period to be reckoned as already served under the sentence and cause to be noted in the records of the court—
> (a) the fact that the declaration was made and its details; and
> (b) the fact that the declared period was taken into account by it in passing sentence.
>
> (7) If on an application under this sub-section the sentencing court is satisfied that the period

declared under sub-section (4) was not correct it may declare the correct period and amend the sentence accordingly.

(8) An application under sub-section (7) may be made by—
(a) the offender; or
(b) the Director of Public Prosecutions, if the sentencing court was the Supreme Court or the County Court; or
(c) the informant or police prosecutor, if the sentencing court was the Magistrates' Court.

The contention of the plaintiff was that an error had been made by the court concerning the time spent by Marten in custody in that the correct period of time in respect of which the declaration should have been made was 51 days being the time Marten spent in custody from the **[3]** date of her arrest on 25 November 1992 until her parole in respect of the earlier offences was cancelled on 13 January 1993. What was said in support of that contention was that thereafter Marten was not being held in custody in relation to the proceedings dealt with by the court on 20 April 1993 or proceedings arising from those proceedings, but was being held in custody in relation to the earlier proceedings in respect of which she had been sentenced to terms of imprisonment of three years and 4 months respectively. The argument to the contrary put to the court by Marten's counsel was that had it not been for the charges dealt with by the court on 20 April 1993 the Parole Board would not have cancelled Marten's parole and in that situation the hearing before the Parole Board was a proceeding arising from the original proceeding.

At the conclusion of the debate in relation to the matter the Magistrate said:

"The section is ambiguous and I cannot decide one way or the other. As this is a penal statute the person held in custody is entitled to the most advantageous disposition. Therefore the period between 14 January and 20 April should be included."

The Magistrate then declared the period to be reckoned as already served under the sentence imposed on 20 April 1993 to be 148 days. On 4 October 1993 the plaintiff issued an originating motion pursuant to the provisions of Order 45.05 of the Rules naming as defendants Marten and the Magistrate constituting the Williamstown Magistrates' Court. By the originating motion the plaintiff seeks an order in the nature of *certiorari* pursuant to s104 of the **[4]** *Sentencing Act* 1991 to remove the sentence (orders) made by the second named defendant concerning the first named defendant in the Williamstown Magistrates' Court on 23 April 1993 into the jurisdiction of the Supreme Court to enable the Supreme Court to amend the sentence (orders) and substitute a sentence which the second named defendant had the power to impose.

Sub-section 1 of s104 of the Act states:

(1) If—
(a) a person has been sentenced (whether at first instance or on appeal) by a court (including the Supreme Court) for an offence: and

(b) if the sentencing court was the County Court or the Magistrates' Court, application is made to the Supreme Court for relief or remedy in the nature of *certiorari* to remove the proceeding into the Supreme Court: and

(c) the Supreme Court determines that the sentence imposed was beyond the power of the sentencing court or its own power, if it was the sentencing court—

the Supreme Court may, instead of quashing the conviction, amend the conviction by substituting for the sentence imposed a sentence which the sentencing court had power to impose.

In my opinion, there can be no doubt but that the Magistrate was in error in declaring that the period of time Marten had already served under the sentence imposed on 20 April was 148 days. From the date of cancellation of her parole on 13 January 1993 Marten was not being held in custody in relation to proceedings in respect of the offences which were before the Magistrates' Court on 20 April, she was being held in custody in respect of the offences which had been dealt with by the courts on 25 November 1991 and 11 March 1992 and for which she had been sentenced to terms of imprisonment of three years and 4 months respectively. Nor can it be said that from the date of cancellation of her parole to 20 April Marten was **[5]** being held in custody

in relation to proceedings arising from the proceedings dealt with by the court on 20 April. The proceeding before the Parole Board on 16 October 1992 was a proceeding which arose out of the proceedings which were before the courts on 25 November 1991 and 11 March 1992. It was in respect of those proceedings that Marten was sentenced to the terms of imprisonment of three years and 4 months and in respect of which she was released on parole on 18 October 1992. The hearing before the Parole Board on 13 January 1993 may well have been convened by reason of the fact that on 25 November 1992 Marten was charged with further criminal offences, although there is no evidence before me to suggest that that was the reason, but that hearing cannot be said to be a proceeding arising from the proceedings in respect of the April 1993 offences. The Parole Board was only dealing with questions of parole in relation to the November 1991 and March 1992 proceedings and the proceeding before it was a proceeding arising from those proceedings. If Marten had not been sentenced to terms of imprisonment on 25 November 1991 and 11 March 1992 there could not have been any proceeding before the Parole Board on 16 October 1992 and 13 January 1993. The proceedings before the Parole Board on each of those occasions arose from the proceedings which were before the courts on 25 November 1991 and 11 March 1992. That was their origin.

In my opinion the whole purpose of the sub-section in question is to ensure that a person who is arrested and charged with an offence, and who is then held in custody pending the hearing and disposition of that charge, gets **[6]** the benefit of that time in custody if subsequently sentenced to a term of imprisonment in respect of that charge. The time in custody must relate to the offence with which the person has been charged and in respect of which the person has been held in custody. Between 13 January 1993 and 20 April 1993 Marten was not held in custody in respect of the April 1993 offences, she was held in custody in respect of the November 1991 and March 1992 offences. In that situation the Magistrate should have declared that the period to be reckoned as already served by Marten under the sentence imposed on 20 April 1993 was 51 days, not 148 days.

Having determined that the Magistrate was in error in the matter, the question now arises as to the appropriate course to be followed by this court. I say that for the reason that the court has a discretion as to whether or not it will grant a remedy in the nature of *certiorari* and although the court will generally do so if a sentence imposed by a Magistrate was beyond power, it is not inevitably the case. The court will look at all the circumstances, and if in the final analysis it concludes that it would not be in the interests of justice to interfere with the Magistrate's order it will not do so.

In the present case Marten has had a legitimate expectation on two occasions that the litigation in relation to the April 1993 offences was behind her, first when she appeared before the court on 20 April 1993, and later when she appeared before the court on 6 August 1993. That she was justified in having that expectation was reinforced by the fact that on neither occasion following the hearings before the Magistrates' Court did the DPP or **[7]** the informant give notice of appeal to the County Court pursuant to the provisions of s84 of the *Magistrates' Court Act* 1989 and Schedule 6 of that Act. Had the DPP done so the notice of appeal would have to have been given within 30 days of the order of the Magistrates' Court and within sufficient time for Marten to cross-appeal had she been so minded.

By adopting the course he has in the matter the Director has denied Marten that opportunity. Had the Director appealed to the County Court and that appeal been allowed on the basis that the correct declaration was 51 days not 148 days, Marten would have had an opportunity to persuade the court that in that situation, i.e, that she was only to be given credit for 51 of the days she spent in custody, not 148, the penalty imposed in respect of the April 1993 offences should be reduced from 12 months to something of the order of 9 months.

In the circumstances of the case, I do not consider that the interests of justice require this court's further intervention in the matter. The originating motion will be dismissed. I will give the defendant, Marten, an indemnity certificate pursuant to s13 of the *Appeal Costs Act*.

APPEARANCES: For the plaintiff Wright: Mr B Halpin, counsel. Victorian Government Solicitor. For the defendant Marten: Mr D Grace (Sol): Grace Partners, solicitors.
