**43/88**

## SUPREME COURT OF VICTORIA — FULL COURT

# *R v DE ZYLVA*

**Young CJ, Crockett and Marks JJ**

**26 February, 2 June 1988 — (1988) 38 A Crim R 207**

**CRIMINAL LAW – SENTENCE – INCONSISTENCY IN PRONOUNCEMENT OF ORDER – ORDER PASSED INTO RECORD – WHETHER ERROR IN ORDER CAN BE CORRECTED – WHETHER APPROPRIATE TO MAKE A SUPPLEMENTAL ORDER.**

**Where a Court's order or judgment (which has passed into record) does not give effect to the Court's intention, the Court has an inherent power to make a supplemental order to correct the error.**

**THE COURT: [1]** In February this year the Court heard an application by Errol Dexter De Zylva for leave to appeal against the sentences imposed upon him for a number of offences. On 26th February 1988, we delivered judgment in the matter and granted the application, allowing the appeal to the extent necessary to correct what we had been led by counsel for the Commonwealth Director of Public Prosecutions to believe was an error by the sentencing judge in that His Honour's order did not give effect to his obvious intention. This error occurred although His Honour had specifically asked counsel who appeared before him for the Commonwealth Director of Public Prosecutions (who was not the same counsel as appeared before us) whether his order gave effect to his stated intention. He was assured that it did.

**[2]** Reference to the reasons for judgment which we delivered on 26th February 1988, will show that although we granted the application for the purpose referred to, we did not accede to the only ground of appeal in the notice of application, which was that the sentences were manifestly excessive. Nor did we accede to the other grounds which emerged during the argument, save that we thought that the learned judge should not have directed that the prisoner should not be eligible for early release. We came to the conclusion that there was no basis upon which we could or should interfere with the total effective sentence of 16 years with a minimum term of 13 years. The order which was accordingly pronounced to give effect to these conclusions was as follows:

> "The order of the Court is: The application is granted, the appeal treated as instituted and heard instanter and allowed to the extent that on the second indictment the sentences imposed are set aside and in lieu the applicant is sentenced to a term of imprisonment of four years, and three years is fixed as the minimum to be served before the applicant shall be eligible for release on parole. It is further ordered that such sentences be served concurrently with the sentence passed on the first indictment and cumulatively with the total of twelve years' imprisonment imposed on the State presentments, making a total effective sentence of sixteen years' imprisonment with a minimum term of thirteen years. It is further ordered that the order that the applicant not be eligible for pre-release be set aside."

When that order was pronounced no word was heard from counsel for the Director of Public Prosecutions to suggest that the Court might have made a slip in the order, although it is fair to say that counsel would have had little opportunity of appreciating, when the order was pronounced, that a slip had been made. We are now told **[3]** that what was pronounced contained an internal inconsistency in that the expression "making a total effective sentence of sixteen years' imprisonment with a minimum term of thirteen years" did not correctly reflect the effect of the operative part of the order.

No order was made regarding the commencement of the sentences on the first indictment. The direction that the substituted sentence on the second indictment is to be served concurrently with the sentences on the first indictment might be construed as meaning that we had by implication allowed the appeal in relation to the sentences imposed on count 1 at least so far as their commencement is concerned. On this view the Federal sentences would commence at the expiration of the effective head sentence on the State presentments. This would result in a total

effective sentence of 18 years with a minimum of 16. Further the direction that the sentence on the second indictment be served cumulatively upon the State head sentence of 12 years rather than upon the minimum term would produce the situation of which the Court disapproved in *Kidd v R* [1972] VicRp 84; (1972) VR 728.

It has been held on many occasions that a court may recall an order before it has passed into record: see *R v Billington* [1980] VicRp 58; (1980) VR 625; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* [1982] HCA 51; (1981) 150 CLR 29; 42 ALR 289; 56 ALJR 800. We have accordingly enquired of the appropriate Court officers and have been informed that the judgment of the Court has passed into record in that it has been entered in the records of the trial court in accordance with Rule 35(b) of the *Criminal Appeal Rules*.

**[4]** We should not therefore recall the order which we pronounced or vacate it. But any court has an inherent jurisdiction to correct any judgment or order which owing to error does not give effect to what the Court intended to do. It is a power which is essential to ensure that justice is done. It is not possible pursuant to the power to vary an order which the Court intended to make but an error in an order can be corrected so as to do justice and to give effect to the Court's intention. This case is a clear case for the exercise of the power. The operative part of the order does not give effect to the Court's intention and the failure was due to error.

Since we cannot recall the order which has passed into record, the appropriate course is for us to make a supplemental order. Before doing so, however, there are two observations we wish to make. The first is that the complexities of the situation with which the court was confronted show the necessity of the court's obtaining assistance from counsel for the Director of Public Prosecutions in these difficult situations. The learned trial Judge, as I have said, was not assisted as he might have been. But notwithstanding these observations, the Court is indebted to the office of the Director of Public Prosecutions for drawing the error to the Court's attention, albeit after the lapse of some considerable time. Secondly, we would repeat the observation made by this Court as long ago as 1972 as to the necessity for **[5]** provision to be made for the order of service of sentences where a prisoner is sentenced to imprisonment under both Commonwealth and State legislation in respect of any of which a minimum term is fixed: see *Kidd's Case* (*supra*) at p731. The learned trial Judge in this case also reiterated that request.

In the circumstances, the order which we shall make is as follows: this order is supplemental to the order made herein on the 26th February, 1988. In addition to that order the appeal herein is allowed to the extent necessary to reduce the minimum term on the first indictment to three years and it is directed that the sentences imposed on both the first and second indictments are to commence at the expiration of the service of the minimum term of ten years imposed on the State presentments.

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