

10/89

SUPREME COURT OF VICTORIA

KENNELLY v CARROLL

Gobbo J

7 September 1988

PROCEDURE – SUSPENDED SENTENCE OF IMPRISONMENT – SUSPENDED SENTENCE BREACHED – POWERS AVAILABLE TO COURT ON BREACH – WHETHER IMPRISONMENT MAY BE REPLACED BY YTC DETENTION ORDER: *PENALTIES AND SENTENCES ACT 1985*, SS21, 23.

Where a court is satisfied that an offence has been committed during the operational period of a suspended sentence of imprisonment, the court (being limited by the provisions of s23(2) of the *Penalties and Sentences Act 1985*) has no power to restore the sentence of imprisonment in some other guise such as an order for detention in a Youth Training Centre.

GOBBO J: [1] This is an application seeking to review the decision of a magistrate in relation to the manner in which the respondent was dealt with for a conviction during the period of a suspended sentence. The background to the matter was as follows. The respondent was convicted at Heidelberg Magistrates' Court on 12 March 1987, of five counts of theft of motor cars and five counts of unlicensed driving. He was sentenced to 12 months' imprisonment which was suspended for a period of 12 months. He was subsequently convicted at the same court on 17 August 1987 of one count of burglary, one count of theft, [2] five counts of theft of a motor car, five counts of unlicensed driving, escaping from the youth training centre. On the burglary-theft charges he was convicted and sentenced to 12 months' detention in a youth training centre, he also received similar sentences in relation to the other offences. On that occasion, that is on 17 August 1987, the court had before it, necessarily of course, the information that the defendant had received a suspended sentence of 12 months' imprisonment from the same court in March 1987. The magistrate, on 17 August 1987, then said this:

"Concerning suspended sentence of 12 months' imprisonment of this court on 12 March 1987, in view of the defendant currently serving two years youth training centre, pursuant to *Penalties and Sentences Act*, I hereby order that the suspended sentence of 12 March 1987 shall now operate for a period of 12 months from this date and shall be cumulative on any other sentence or order of any parole board."

On 2 October 1987, the defendant was brought before the Magistrates' Court at Melbourne upon an information for an offence and a warrant to apprehend, the information being that the defendant had escaped from lawful custody on 2 September 1987. The learned magistrate convicted the defendant and sentenced him in respect of the escape from custody to six months detention in a youth training centre. The learned magistrate then went on to provide as follows:

[3] The 12 months suspended sentence imposed at Heidelberg on 17 August 1987 is activated and is to be served by means of detention in a youth training centre. Each sentence is cumulative upon any sentence now being served.

It is now sought to have this decision of the learned magistrate set aside upon the basis that there being a suspended sentence of imprisonment, it was not open to the learned magistrate to convert that sentence of imprisonment into a direction that it be served in a youth training centre.

I first of all deal with the nature of suspended sentences. It is clear that the power to pass a suspended sentence is one that relates to a sentence of imprisonment. In the *Penalties and Sentences Act 1985* s21 under the heading "power to pass suspended sentences", sub-s1 provides as follows:

"If for an offence a court passes a sentence of imprisonment for a term of not more than one year, the

court may, if satisfied that in the circumstances it is desirable to do so, make an order suspending—
(a) the whole; or

(b) not more than three quarters and not less than one quarter—
of the sentence of imprisonment passed by it."

Sub-s2 of s21 contains a direction to the court that the sentence is not to be suspended unless it is appropriate in the terms of that subsection, and sub-s3 provides that any suspended sentence must be **[4]** one that has specified in the order an operational period. S23 then deals with the consequences of committing an offence whilst a suspended sentence order is in force. S23(1) and 23(2) read as follows:

23(1) Where an offender is convicted by a court of an offence for which a sentence of imprisonment may be imposed and the court is satisfied that the offence was committed during the operational period of a suspended sentence, the convicting court must—

(a) if—

(i) it is the court by which the suspended sentence was passed; or

(ii) it is a Magistrates' Court and the suspended sentence was passed by another Magistrates' Court—

deal with the offender in respect of the suspended sentence; or

(b) in any other case, commit the offender to custody or release the offender on bail (with or without sureties) to be brought or to appear before the court by which the suspended sentence was passed to be dealt with in respect of the suspended sentence.

(2) The court that has power under sub-section (1) to deal with an offender in respect of a suspended sentence must consider the offender's case and deal with the offender by one of the following methods:

(a) Restore the sentence or part sentence held in suspense and order the offender to serve it;

[5] (b) Restore part of the sentence or part sentence held in suspense and order the offender to serve it;

(c) In the case of a wholly suspended sentence, extend the operational period to a date not later than one year from the date of the order;

(d) Make no order with respect to the suspended sentence.

In the present case, the learned magistrate at the hearing in August, had to deal with the matter of the suspended sentence because the court was satisfied that the offence was committed during the operational period of the suspended sentence. He dealt with the matter by extending the operational period for 12 months from the August hearing date, a course that was plainly open to the learned magistrate under s23(2). The result was that when the defendant came before the court again in October 1987, there was a new operational period for the suspended sentence, namely one that ran from August 1987 for a period of 12 months. Plainly, the offence of escaping from lawful custody had occurred during that operational period.

When one goes to s23(2), one sees what are the precise powers that are open to a court to deal with an offender in respect of a suspended sentence. The sub-section requires the court to consider the offender's case and deal with the offender by one of four methods. The first method is to restore the sentence or part-sentence held in suspense and order the offender to serve it; the second method is to restore part of **[6]** the sentence or part-sentence held in suspense and order the offender to serve it; the third method is to extend the operational period; and the fourth method is to make no order at all. The same section goes on to require that, if no order is made the proper officer of the court must record that fact.

Here, it is clear in my view, that the learned magistrate was confined to the methods set out in sub-s2. It was not open to him to replace a sentence of imprisonment with an order for detention in a youth training centre. The original sentence was plainly a sentence of imprisonment, as it had to be if it was to be the subject of a suspended sentence. The power given under sub-s2 was to restore the sentence or part of the sentence, it was not a power to restore the sentence in some other guise, either by youth training centre detention or by probation or by a community-based order, or some other method. The ambit of the discretion open to the learned magistrate was, in my view confined to the provisions of s23 and in particular sub-s2. It follows that it was

not within the power of the magistrate to convert the sentence into an order for detention in a youth training centre. In those circumstances, the order nisi must be made absolute. I direct that the matter be remitted to the learned magistrate to be dealt with in accordance with these reasons.
