32/99; [1999] VSCA 149

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v BROAD

Brooking, Tadgell and Chernov JJ A

9 September 1999 — [1999] 3 VR 31; (1999) 107 A Crim R 146

SENTENCING – PRE-SENTENCE DETENTION – DECLARATION OF – OFFENDER SENTENCED TO PERIOD OF DETENTION AND REMANDED ON OTHER CHARGES – LATER PLEADED GUILTY TO OTHER CHARGES – CALCULATION OF PRE-SENTENCE DETENTION – WHETHER PERIOD RUNS FROM DATE OF REMAND UNTIL PLEA – WHETHER PERIOD RUNS FROM DATE OF REMAND UNTIL IMPOSITION OF FIRST SENTENCE OF DETENTION: *SENTENCING ACT* 1991, SS18(1), 35(1).

B. was arrested and remanded in custody on 25 January 1999. Eight days later B. was ordered to be detained in a Youth Training Centre in respect of offences committed in October 1998. In relation to the January 1999 offences, an order was made under s49 of the *Magistrates' Court Act* 1989 directing that B. be returned to the custody of the Department of Human Services. When B. subsequently pleaded guilty to the January 1999 offences, the judge, in imposing a sentence of detention, declared that whole period that B. had been in detention be reckoned as time served. Later, upon application made, the judge amended the period of pre-sentence detention to reflect only the period between the remand on the January 1999 offences and the date of the imposition of the first sentence of detention. Upon appeal—

HELD: Application for leave to appeal dismissed.
Sections 18(1) and 35(1) of the *Sentencing Act* 1991 ("Act") are inapplicable to periods of detention during which the person being sentenced was serving a sentence. When sections 18(1) and 35(1) of the Act were amended in 1997, the object of the amendment was to allow a declaration to be made where there were two remand warrants authorising the detention in order to ensure that credit was not given twice for doubly warranted detention. It was not intended by the amendment to stand the system of pre-sentence detention on its head by allowing sentenced prisoners to treat the time they spend in custody in serving their sentence not only as the punishment they are undergoing in consequence of their conviction but also as a period in which they are held in custody pending their trial on undisposed of charges. Accordingly, the judge was correct in making the amendment in respect of the period of B's pre-sentence detention.

BROOKING JA:

1. On 25 January 1999, Simon Broad was arrested, charged with armed robbery and other offences committed six days earlier, on 19 January, and remanded in custody. I shall call these "the January offences". At the time of his arrest he was on bail in respect of numerous other offences (including two burglaries and three thefts). These were committed on 14 October 1998. I shall call them "the October offences". On 2 February 1999 he came before the Magistrates' Court at Dandenong in respect of both sets of offences. The October offences were dealt with summarily and he was sentenced to a total effective period of eight months' detention in a youth training centre and also fined. As regards the January offences, the Magistrates' Court in effect remanded him in custody by making an order under s49 of the *Magistrates' Court Act* 1989, directing that he be returned to the custody of the Secretary to the Department of Human Services as mentioned in the section. About ten weeks later, that is on 15 April 1999, Broad was committed for trial in the Magistrates' Court at Melbourne on the January offences. He was presented accordingly on 25 May 1999 in the County Court and pleaded guilty to those offences. In the course of the plea, on the same day, the judge was told by the Crown Prosecutor that the prisoner, having been taken into custody on 25 January 1999, was entitled to be credited with 120 days' pre-sentence detention. On the same day Broad was sentenced to a total effective period of ten months' detention in a youth training centre, which was expressly directed to be served concurrently with any sentences of detention currently being served by him in a youth training centre. A declaration of 120 days' pre-sentence detention was made.

2. Two days after the passing of this sentence the Department of Human Services, being of opinion that the correct period of pre-sentence detention was not 120 but eight days, asked that an application be made under s35(7) of the *Sentencing Act* 1991 that the declaration be amended.

Application was made accordingly and heard on 8 June 1999. It was opposed by counsel for Broad, who submitted, first and principally, that the declaration already made was correct, and secondly, and in the alternative, that the judge had a discretion under s35(7), which he should exercise against the making of the correction sought by the Crown.

3. The judge was against counsel on both points. He made a declaration under s35(7) that the correct period of pre-sentence detention was eight days and ordered that the sentence be amended to show that eight days was reckoned as time served under the sentence instead of 120 days. When the judge was dealing with the application, it was common ground that the order made by the Magistrates' Court under s49 of the *Magistrates' Court Act* 1989 had had the effect of remanding Broad in custody pending trial. It may be that some subsequent order had been made under that section at the time of committal, but the application was conducted before the judge upon the basis that the order made on 2 February 1999 had effect up to the time of trial.

4. Broad, who was evidently released on parole on 19 July, now applies for leave to appeal against what was done on 8 June. Again the submission put on his behalf is, primarily, that the judge's original declaration was correct and in the alternative, briefly argued, that the judge erred in not declining, as a matter of discretion, to make the new declaration sought.

5. Section 35 is the provision dealing with pre-sentence detention as part of the group of sections dealing with sentences of detention imposed on young offenders. It corresponds to the much more familiar s18, dealing with pre-sentence detention in relation to offenders sentenced to a term of imprisonment (and offenders the subject of a hospital security order).

6. I shall assume that what was done by the judge on 8 June fell within the definition of "sentence" in s566 of the *Crimes Act* 1958 as an order made under Part 3 of the *Sentencing Act* 1991. As to this, there would seem to be no reason for excluding from the expression "order" in that definition declaratory orders and, as regards the making of a correction under s18(7) or the corresponding s35(7), it is perhaps worth noting that each provision empowers the court to "declare the correct period and amend the sentence accordingly".

7. The main point in this case arises because of the repeal of the much discussed words formerly contained in s18(1) and s35(1), "and for no other reason". Those words formerly qualified the immediately preceding words "during which he or she was held in custody in relation to proceedings for that offence or proceedings arising from those proceedings". The phrase "and for no other reason" was deleted by s11(1) and (4) of the *Sentencing and Other Acts (Amendment) Act* 1997. On the applicant's behalf it was said below, and is said now, that this case falls within the literal meaning of s35(1), both as regards the eight days up to and including 2 February 1999 (the period between arrest and the order made by the Magistrates' Court at Dandenong) and as regards the additional 112 days (the period from 2 February 1999 until the passing of sentence on 25 May 1999). It is said on the applicant's behalf – correctly – that the present case does not fall within any of the exceptions set out in s35(2) and it is further submitted that the Court is not warranted in departing from the ordinary meaning of s35(1) as it stands after the amendment made in 1997.

8. If ss18(1) and 35(1) are to be given their literal meaning in this regard, the consequences will be startling. A person like the applicant, who has been remanded in custody while awaiting trial and who has in respect of the period in question been serving a sentence of imprisonment or detention for offences which may be in no way related to those with which the committal is concerned, will be entitled to have the time spent in custody credited not only as time served for the purposes of the pre-existing sentence but also as time served for the purposes of the sentence which is later passed. The present case concerns a sentence which intervenes between the commission of the January offences and the passing of sentence in respect of those offences. But if ss18(1) and 35(1) are to be given the literal interpretation for which the applicant contends, the person serving a sentence of imprisonment who escapes and commits another offence while at large will, upon recapture, be entitled to claim that the portion of the sentence served between recapture and the passing of sentence for the offence committed while at large is to be credited as pre-sentence detention for the purposes of that offence. Such a result is manifestly unreasonable and contrary to the public interest. And of course a person in custody does not have to escape in order to commit an offence. A prisoner, whether a remand or a sentenced prisoner, may commit an offence in prison. If a prisoner on remand on a charge of robbery assaults a fellow prisoner

or a correctional officer and is convicted and sentenced to imprisonment while still awaiting trial on the robbery charge, does the service of the assault sentence count as pre-sentence detention? The suggestion is remarkable. I do not regard as a satisfactory answer to these difficulties the presence in ss18(1) and 35(1) of the power of the court to order otherwise.

9. The legislation dealing with pre-sentence detention has always been concerned, as one would expect, to secure to prisoners or detainees an appropriate credit for time in custody pending trial and pending any appeal. The lawyer and lawgiver entitled to be regarded as the author of this reform, the Hon JW Galbally, QC, made it clear in 1971, in the second reading speech in support of his *Crimes (Sentences) Bill*, that his concern was to achieve this aim: *Hansard*, vol 303, pp464-5. That measure never became law, but his efforts led in the end to the enactment of s202A of the *Social Welfare Act* 1970, which was introduced by the *Social Welfare (Amendment) Act* 1975 in consequence of the report made by the Statute Law Revision Committee on clause 4 of the private member's Bill initiated in 1971: *Hansard* vol 321, p4279. That report makes it clear that the Committee was recommending that credit be given for time spent in custody pending trial and pending appeal.

Section 202A(1) was expressly concerned with custody "on arrest, remand, committal for trial, or awaiting the determination of an appeal" and paragraph (b) of s202A(2) made it clear that subs(1) did not apply in respect of a period when held in custody "for some cause not connected with the proceedings for the offence in respect of which" sentence was being passed. The history of the legislation dealing with pre-sentence detention was considered in *R v Renzella* [1997] 2 VR 88; (1996) 88 A Crim R 65 and *R v Jennings* [1998] VSCA 69; [1999] 1 VR 352. The successor to s202A, s16 of the *Penalties & Sentences Act* 1985, reproduced in subs(2)(b) the exception created by subs(2)(b) of s202A. Section 16 did not reproduce the references found in s202A to various places of detention and various states or statuses of the detainee. The object of these changes was the achievement of brevity and the second reading speech contains nothing to suggest that s16 was intended to alter the law. See *R v Jennings* at 359-360. When the present section, s18 of the *Sentencing Act* 1991, was enacted, the exception created by subs.(2)(b) of the former s202A and the former s16 was not reproduced. Instead, s18(1) itself used the words "and for no other reason", the words the repeal of which in ss18(1) and 35(1) gives rise to this application.

10. The reason for the repeal of those words is well known, and indeed it is mentioned in the *Explanatory Memorandum* concerning the Bill for the Act which effected the repeal and in the corresponding notes to that Act and to the current reprint of the *Sentencing Act* 1991 itself. The phrase "and for no other reason" was removed from ss18(1) and 35(1) because of decisions of the Court of Appeal which showed that it had the result that the subsections were inapplicable where the person being sentenced had been in custody by virtue of two remand warrants both operating at the same time, one relating to the offence or offences for which sentence was being passed and the other relating to some other offence or offences. It is enough to refer to *R v Heaney* (unreported, 27 March 1996) and *R v Renzella* [1997] 2 VR 88; (1996) 88 A Crim R 65. The object of the amendment was to allow a declaration to be made under the section where there were two remand warrants authorising the detention, and, consistently with this, the amending Act introduced para (d) into s18(2) and para (c) into s35(2) in order to ensure that credit was not given twice for doubly warranted detention. I have no doubt that it was not intended by the amendment to stand the system of pre-sentence detention on its head by allowing sentenced prisoners to treat the time they spend in custody in serving their sentence not only as the punishment they are undergoing in consequence of their conviction but also as a period in which they are held in custody pending their trial on undisposed of charges, a period which fairness requires be brought to account if they are ultimately sentenced on those charges. Such persons are of course treated by the correctional authorities as sentenced prisoners, not as remand prisoners, and the only reason why a remand warrant is superimposed upon the existing sentence as an additional warrant for their detention is the possibility that, for one reason or another, the sentence may cease to be an operative ground of their detention before they come to stand their trial on the other charges.

11. It cannot, however, be simply said that ss18(1) and 35(1) are inapplicable to periods of detention where a sentence is being served, for it is accepted that, where a prisoner is re-sentenced by the Court of Appeal, time served under the quashed sentence is to be treated as pre-sentence detention for the purposes of the substituted sentence by reason of the words in ss18(1) and 35(1) "in relation to ... proceedings arising from those proceedings": *R v Jennings* [1998] VSCA

69; [1999] 1 VR 352. But, subject to this, it may be said that ss18(1) and 35(1) are inapplicable to periods of detention during which the person being sentenced was serving a sentence.

12. It follows that in my view the judge was right in concluding that the number of days that should have been declared under s35(1) was not 120 but eight.

13. Little need be said about the discretion point. The Crown does not suggest that ss18(7) and 35(7) do not confer a discretion. The judge accepted that they did and exercised it in favour of making the correction, saying that he could see no injustice in correcting the declaration. There is no ground for interfering with this exercise of discretion, and so this application should be dismissed.

TADGELL JA: I concur.

CHERNOV JA: I also concur.

BROOKING JA: The application is dismissed.

APPEARANCES: For the Crown: Mrs CM Quin, counsel. PC Wood, Solicitor for Public Prosecutions. For the applicant: Ms KE Judd, counsel. Mr A Waters, Youth Advocacy Legal Service.
