18/97

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v SQUILLACE

Southwell, Ormiston and Coldrey JJ

10 March 1994

CRIMINAL LAW – SENTENCING – PRE-SENTENCE DETENTION – WHOLLY SUSPENDED SENTENCE IMPOSED – LATER BREACHED – SENTENCE RESTORED – WHETHER PRE-SENTENCE DETENTION TO BE DEDUCTED FROM SENTENCE: *SENTENCING ACT* 1991, S18(1)(2).

Section 18(2)(c) of the *Sentencing Act* 1991 ('Act') in its terms provides that subs(1) will not apply to a sentence that has been wholly suspended. Where a court, in dealing with a breach of a suspended sentence, decides to restore the suspended sentence, such sentence is a sentence to a term of imprisonment within the meaning of s18(1) of the Act and is not a sentence to which s18(2)(c) applies. Accordingly, the offender should be credited with the amount of time, if any, spent in custody prior to sentencing.

SOUTHWELL J: **[1]** This is an application for leave to appeal against sentence. The applicant, who is now aged 32, was on 15 May 1992 presented in the County Court at Melbourne, when he pleaded guilty to one count of armed robbery and one count of causing serious injury recklessly. He admitted 33 prior convictions from twelve court appearances for various offences of dishonesty and in relation to drugs. The sentencing judge obtained a pre-sentence report and a report by a medical officer as to the appellant's suitability in a treatment centre, and on 18 September 1992 the applicant was sentenced to be imprisoned for 3 years on Count 1 and for 12 months on Count 2, and his Honour directed that the applicant serve a minimum period of 18 months before he was eligible to be released on parole. Thereupon the judge wholly suspended the sentence under s28 of the *Sentencing Act* 1991 ('Act') and imposed several conditions. The judge in passing sentence had referred to not only the circumstances of the case but to the requirement to take into account the provisions of s10 of the Act, and thereupon passed the sentences set out above. In concluding his remarks and having made the order suspending the sentence, the judge said: "I should note for the record that the period during which you have been in custody in relation to these proceedings is a period of 266 days, and that may well be relevant to take into account should you come back before the court having breached the conditions attached to the suspension of the sentence". In fact the applicant did **[2]** breach those conditions, and he was brought back before the court pursuant to s31 of the Act.

In the remarks he passed immediately prior to sentence the judge referred to the fact that the applicant had been in custody for a long time previously, and told the applicant that he had practically no alternative but to pass a sentence of imprisonment. The judge ultimately made the order in the form which is said to be a restoration of part of that sentence. His Honour said: "You were sentenced to 36 months and 12 months. I will restore 26 months of the first sentence and 2 months of the second." In other words, his Honour said he was "taking 10 months off what you got"; and his Honour said, "The 36 months is reduced to 26 months. Those sentences will be served concurrently", and then he said, "You must serve a minimum of 15 months." The formal order of the court was in the form as follows: "Count 1 - restore 26 months of the original sentence imposed; and the court ordered that the prisoner serve a minimum period of 15 months' imprisonment before being eligible for parole." It was declared that "no period should be deducted administratively from the sentences passed". Having regard to the proposed resolution of this matter, it is not necessary to refer to the facts which give rise to the original sentence, one reason being that those sentences are now not under attack. In other words, I am proceeding upon the basis that in the first place the sentences were proper in all the circumstances.

[3] The applicant, by application dated 16 December 1993, applies for leave to appeal from the latter order of the County Court on these grounds:

"1. That the learned judge erred in that, when restoring the sentence herein, he did not make a

declaration pursuant to s18(1) of the Act of the periods of time the applicant was held in custody in relation to the proceedings.

2. That the learned judge erred in that he fixed a minimum term which was effectively greater than the term set when he passed the sentence herein.

3. That the learned judge erred in the restoration of the sentence herein."

For the applicant it was said that the judge erred in his interpretation of or his failure correctly to apply s18 of the Act. That section provides:

"18(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.

(2) Sub-section (1) does not apply—
(a) to a period of custody of less than one day; or

(b) to a sentence of imprisonment of less than one day; or

(c) to a sentence of imprisonment that has been wholly suspended or to the suspended part of a partly suspended sentence of imprisonment."

It was pointed out that, as a result of the sentence now imposed, the applicant would serve about six months longer that he would have served had the original sentence stood. That follows by reason of the fact that the 18-month minimum term then imposed would in fact have resulted in the applicant serving that term less the period of 266 days. By reason of the further period in **[4]** custody of some 27 days between 11 February and 10 March 1992, it is agreed that the appropriate period is now 293 days. The effect of the sentence last passed is that the applicant will not be released after approximately nine months. He would have to serve the whole of the minimum term of 15 months which was fixed as the period before which he would not be eligible to be released upon parole. It is difficult, I think, to accept that the judge intended to bring about a result that, merely by reason of a breach of a condition in relation to the suspension of sentence, the applicant will ultimately spend approximately 6 months longer in imprisonment that he would have spent under the original sentence. However, that result would follow if this Court did not interfere. It would appear that the judge may have thought that no declaration needed to be made under s18(4) of the Act, by reason of the fact that his Honour was dealing with what had been a suspended sentence.

Section 18(2)(c) in its terms provides that subs(1) will not apply to a sentence that has been wholly suspended. It would appear that his Honour approached the task of re-sentencing upon the basis that he was again dealing with a suspended sentence. If that were his Honour's reasoning, I am of the view that he fell into error and that the sentence secondly imposed was a sentence to a term of imprisonment within the meaning of s18(1) and was not a sentence to which s18(2)(c) applies; and it follows, by the operation of that **[5]** section, that a declaration should have been made, the result being that the applicant would be credited with the time that he had already spent in custody. That result seems to me to accord not only with the ordinary meaning of the legislation but with the justice of the case. I am unable to see that the breach by the applicant of a condition imposed pursuant to s28 should have the result that he would spend longer in custody than he would have spent if the sentence had never in the first place been suspended.

For those reasons, I propose that the application be granted and that the Court make the appropriate orders. Those orders would, as was conceded by counsel for the applicant, involve a restoration of the original sentence. I should add that the submissions of the applicant were not opposed by counsel for the Crown, who conceded that error had occurred and that this Court should interfere. The orders that I would propose, apart from the formal preamble, are that the applicant be sentenced on Count 1 to 3 years' imprisonment and on Count 2 to 12 months' imprisonment, the terms to be served concurrently; that the Court should fix a period of 18 months as the period during which the applicant is not eligible to be released on parole; and that the Court should declare that the period of 293 days is the period to be reckoned as already served under this sentence and direct that this declaration be entered in the records of the Court.

ORMISTON J: I agree with the order proposed by the presiding Judge for the reasons that he has stated.

COLDREY J: I also agree.

APPEARANCES: For the Crown: Mr J Dickson QC, counsel. Solicitor: Mr JM Buckley, Solicitor to the DPP. For the Applicant: Mr A Lewis, counsel. Solicitor: Anthony Isaacs.
