

65/87

HIGH COURT OF AUSTRALIA

POWCH v R

Mason CJ, Wilson, Brennan, Deane and Dawson JJ

9, 10 September 1987

[1987] HCA 41; (1987) 163 CLR 496; 75 ALR 13; [1987] 61 ALJR 611

CRIMINAL LAW – ESCAPING FROM LAWFUL CUSTODY – PRISONER REMOVED FROM ONE PRISON TO ANOTHER – PROOF REQUIRED OF LAWFULNESS OF CUSTODY – WHAT IS LAWFUL CUSTODY – WHETHER PROOF REQUIRED OF CONTINUOUS LAWFUL CUSTODY.

1. Where, by administrative order, a prisoner is removed from one prison to another and escapes from the custody to which he is removed, the prosecution is not required to prove that at all times from the date of sentence to the date of escape the accused was lawfully detained.

R v Templeton [1956] VicLawRp 102; [1956] VLR 709; [1956] ALR 706, not followed;

Day v R [1984] HCA 3; [1984] 153 CLR 475; 51 ALR 353; 58 ALJR 53, referred to.

2. What must be proved is the lawfulness of the custody from which the accused is alleged to have escaped and this will depend on the terms of the sentence, of any warrant of commitment and on the relevant statutory provisions and administrative steps taken.

THE COURT: [ALR 13] The applicant was convicted before the District Court of New South Wales of an offence of escape from lawful custody. The indictment charged that the applicant on 25 May 1980 at Cessnock in the State of New South Wales, "then being a prisoner in the lawful custody of George Phillip Cornford, the superintendent of Her Majesty's Prison at Cessnock, did escape from such custody". The applicant claims that it was not shown that the custody from which he had escaped was lawful custody. He had been sentenced to a term of imprisonment, the relevant sentence having been imposed by the Court of Criminal Appeal in New South Wales on 29 September 1972. The term of his imprisonment had not expired on 25 May 1980. Prior to that day he had been removed from the prison at Parramatta to the prison at Cessnock pursuant to an order made under s27 of the *Prisons Act* 1952 (NSW). That section provides:

"Any prisoner may be removed from one prison to another prison by order of the Commission
 (a) where the prison in which such prisoner is detained is to be repaired, altered, enlarged or rebuilt;
 (b) in case of an outbreak or threatened outbreak of contagious or infectious disease in a prison;
 (c) when any prison has ceased to be a prison pursuant to section 5;
 (d) when any prison is overcrowded;
 (e) for the purpose of carrying the provisions of section 15 into effect; or
 (f) for any other cause specified in such order."

The term "prisoner" includes, *inter alia*, a person under sentence of imprisonment imposed by any court: see the definitions of "prisoner" and "convicted prisoner" in s4. A prisoner who is removed pursuant to an order made under s27 from one prison to another is deemed to be in the custody of the Governor of the prison to which he is removed whilst he is detained there: s39. It follows that unless the order pursuant to which he [14] was removed was invalid, the applicant was deemed to be in the custody of the Governor of the prison at Cessnock at the time of his escape.

Prior to his removal to the prison at Cessnock, the applicant was detained in the prison at Parramatta, but there was no evidence showing whether he had been committed or removed to that prison. The ground of this application is that it was necessary for the Crown to establish, and the Crown did not establish, that the applicant's detention in the prison at Parramatta was lawful. In the absence of proof of his lawful custody at Parramatta, so the argument runs, his custody at Cessnock cannot be shown to be lawful. This submission was founded on the decision in *R v Templeton* [1956] VicLawRp 102; [1956] VLR 709; [1956] ALR 706 which was said to require proof

of the lawfulness of the detention of a prisoner at all times from his first imprisonment under the sentence, until the time of his escape. That proposition is too wide, as the judgments in *Day v R* [1984] HCA 3; (1984) 153 CLR 475; 51 ALR 353; 58 ALJR 53 show. What must be proved is the lawfulness of the custody from which the accused is alleged to have escaped. The lawfulness of the custody stated in the charge depends upon the terms of the sentence, the warrant of commitment (if any), the statutory provisions governing the custody of prisoners and, when there is a statute which authorises administrative steps to be taken to place a prisoner in that custody, the steps actually taken. Day shows that the particular statutory provisions are of critical importance. The *Prisons Act* (NSW) contains provisions different from the provisions of the *Prisons Act* 1903 (WA) on which *Day* was decided as Lee J and the Court of Criminal Appeal pointed out in *Kelleher v Corrective Services Commission* (unreported).

In the present case, the lawfulness of the custody of the applicant by the Governor of the prison at Cessnock rests on the sentence of imprisonment imposed by the Court of Criminal Appeal on 29 September 1972, coupled with the order for removal made under s27 of the *Prisons Act*. The power to make that order under s27 was not contingent on the lawfulness of the custody of the prisoner in the particular prison in which he was held when the order was made. The power was available simply by reason of his status as a prisoner and his being detained in a prison. It was immaterial to consider how and in what circumstances the applicant had come to be in the custody of the Governor of the prison at Parramatta. Being a prisoner detained in a prison, he was subject to removal and, upon removal to the prison at Cessnock pursuant to an order under s27, he came into the lawful custody of the Governor of that prison. The application for special leave is therefore, refused.
