43/79

SUPREME COURT OF VICTORIA

R v HARROP

Gobbo J

9 May 1979 — [1979] VicRp 54; [1979] VR 549

PRACTICE AND PROCEDURE – SERVICE OF SENTENCE – PERSON SENTENCED TO DETENTION IN A YOUTH TRAINING CENTRE – PERSON NOT TAKEN TO A YOUTH TRAINING CENTRE BUT TO PRISON DUE TO ANTECEDENT REMAND WARRANT – TIME WHEN DETENTION SENTENCE COMMENCES – CONSIDERATION OF "ANTECEDENTS" – COMMENCEMENT OF AMENDING ACT OF PARLIAMENT – WHETHER AMENDING ACT APPLIES WHERE THERE IS NO AMBIGUITY IN THE PREVIOUS ACT – DUTY OF CROWN TO PROVIDE INFORMATION TO SENTENCING COURT: *CRIMES ACT* 1958, S476A; *SOCIAL WELFARE ACT* 1970, S173.

1. In relation to amending Acts, the primary rule is that the legislature must be recognised as speaking by means of its later legislation. In the present case the later Act did not on one view in terms purport to amend or alter the earlier Act, but it did in substance amend the earlier Act by overcoming the operation of the sentence forthwith upon sentence. Whatever the limits of the principle, it is clear that it is not to apply where there is no ambiguity in the previous Act. There is no real ambiguity in meaning in s173(1) of the *Social Welfare Act* 1970. Accordingly, the later Act is not to be treated as decisive in interpreting s173(1).

***Ormond Investment Co Ltd v Betts* (1928) AC 143, applied.**

2. In relation to the youth training centre sentence imposed on the 17th November 1978 it commenced and was to be reckoned from that date. Subsequent to the sentence of that date it appeared that a number of warrants of commitment for non-payment of fines were executed on the applicant. As the full details of these matters were not before the court, the court's decision was not intended to affect any proper operation of those warrants.

3. It is somewhat disturbing that the sentences of a Judge and Magistrate are in effect set aside by reason, not of new matters, but of matters that were in existence at the time of sentence and presumably were considered by the sentencing body. If it is said that the Judge and Magistrate erred on the material before them and should have chosen prison instead, it is surprising that they can be in effect reversed, not by appeal but by administrative act. If, however, such material was not before them, then that raises the question as to whether it is not highly desirable that the Crown should assist the Court by providing such material. It was said in argument by the Senior Crown Prosecutor that it was not the practice for Crown Prosecutors to do this and that in any event some Judges discouraged this. Insofar as this is said to be based on a rule excluding reference to anything but strictly prior convictions, I do not understand there to be any such rule. Where the Act requires the character and antecedents to be taken into account, it speaks up to the moment of sentencing. Notions of what are technically prior convictions are irrelevant in the context of particular exercises of the sentencing discretion such as suitability for parole, minimum terms and where as here, the statute provides for youth training centre sentences in the light of expressly stated factors such as the antecedents of the prisoner.

GOBBO J: This is the return of an order nisi for mandamus granted on 19th December 1978 by McInerney J. The order was in sufficiently wide terms to sustain a claim for declaratory relief. The matter arose as follows. The applicant was on 25th October 1978 remanded in custody by Broadmeadows Magistrates' Court to appear on charges of burglary and other offences. By a further remand warrant dated 13th November 1978 the applicant was remanded to prison to appear at Broadmeadows Magistrates' Court on 20th November 1978. On 14th November 1978 the applicant appeared before Judge Southwell in the County Court on charges of aggravated burglary, common assault and robbery. He was, as the sentence record indicates, remanded in custody on that date for sentence at 10am on 17th November 1978. On that date he was sentenced to a total of 2½ years' detention in a youth training centre.

After being so sentenced, the applicant was not taken to a youth training centre but was returned to Pentridge. It was said that this was because of the antecedent remand warrant of the

Broadmeadows Magistrates' Court, But as the sentence record of the County Court produced after argument had concluded indicates, it may be that the applicant was in custody on 17th November at the County Court pursuant to the order of that Court. On 20th November 1978 the applicant was remanded to prison to appear at the Preston Magistrates' Court on 8th February 1979 to answer a charge of conspiring to commit armed robbery. As the warrant of that date shows on its face, the applicant was refused bail on the grounds that "the defendant is probably undergoing sentence".

On 20th November 1978 the applicant was convicted at the Broadmeadows Magistrates' Court on three counts of burglary and one count of theft and sentenced to six weeks' detention on each count. The warrant of commitment issued on that date called on the police to convey the applicant to the youth training centre at Turana. In fact he was conveyed to Pentridge, again, it was said, because of the warrant of 20th November 1978 which was presumably executed by the police in preference to the warrant of the same date ordering that the applicant be conveyed to the youth training centre at Turana.

On 15th, 18th and 19th December 1978 the applicant was heard in this Court on an application for bail. His Honour McInerney J refused bail on the ground that he had no power to grant bail by reason of the provisions of s4(2)(b) of the *Bail Act* 1977 on the ground that the applicant was in custody pursuant to the sentence of Judge Southwell pronounced on 17th November 1978 and the sentence of the Broadmeadows Magistrates' Court imposed on 20th November 1978. At the same time His Honour McInerney J granted an order nisi calling upon the Director-General of Social Welfare to show cause why a writ of mandamus should not issue commanding him to give effect to the sentence imposed by His Honour Judge Southwell.

It had at all times up to the return of the order nisi been contended that the applicant had not commenced to serve any part of his two youth training centre detention sentences. The result was that the applicant was being held in prison on remand in circumstances where he could not legally secure bail because he was said to be undergoing a sentence and yet that sentence had not commenced and time spent in the remand yard at Pentridge would not count towards this detention.

On the return of the order nisi, affidavit material was put before me on behalf of the Director-General that narrated that on 20th December 1978 he had by warrant under s96 of the *Social Welfare Act* caused the applicant to be removed from Pentridge to a youth training centre. On the same day, following a recommendation by him pursuant to s197(1) of the Act to the Acting Minister for Social Welfare, the Minister directed that the applicant be transferred from a youth training centre to Pentridge. The applicant was apparently taken to Turana long enough to sign an appropriate register and then returned the same evening to Pentridge. The result was that the applicant was thereafter serving the two sentences of 2½ years and 24 weeks imposed by Judge Southwell and the Broadmeadows Magistrates' Court respectively but he was doing so in prison and not in a youth training centre.

The matter originally came before me during the vacation. As the transfer of the applicant pursuant to the combined operation of s96 and s177(1) took place on the eve of the hearing and as this procedure was attacked as being a fraud and not *bona fide*, I adjourned the further hearing to enable the respondent to meet these criticisms and also to table legislation said to have been passed on 19th December 1978. The legislation is Act No. 9248 known as the *Community Welfare Services Act* 1978. By that Act an amendment was made to cover the apparent anomaly that confinement in prison on remand did not count towards a youth training centre detention. The applicant still pursued his application, however, for two reasons. In the first place, it was still sought to show that the applicant had been serving his youth training centre detention since that sentence had first been imposed on 17th November 1978. If this claim succeeded, the applicant might receive credit for this period. Secondly, it was argued that the transfer under s177(1) was invalid and accordingly the applicant should be able to serve his sentence in a youth training centre rather than a prison.

The first question turns on the construction of s173 of the *Community Welfare Services Act* 1978 as the *Social Welfare Act* 1970 is now known. This section reads:-

> "173(1) Subject to the provisions of this section and section 174 and section 202A sentences of detention in a youth training centre shall commence upon and be reckoned from the days following, namely—
> (a) where the young person who is so sentenced is forthwith detained in custody pursuant to the sentence — the day the sentence is imposed;
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> (b) where the young person is serving a sentence of imprisonment — the day he is transferred to a youth training centre; or
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> (c) in any other case — the day he is apprehended in pursuance of a warrant of commitment issued in respect of that sentence."

Section 173 first came into being in the *Social Welfare Act* 1970. It was not in the *Gaols Act* 1958 or the *Social Welfare Act* 1960 both of which acts were replaced by the *Social Welfare Act* 1970. The *Gaols Act* 1958 only applied to sentences of imprisonment. By the *Social Welfare Act* 1960, the *Crimes Act* 1958 was amended by the enactment of s476A to provide for detention in a youth training centre for a maximum of 3 years. By s202A of the *Social Welfare Act* 1970, where a person is convicted for an offence and sentenced to a term of imprisonment or detention for that offence, time spent in custody before trial in relation to proceedings for that offence was to be reckoned as a period already served under that sentence. In the present case this provision did not assist the applicant because he was said to be held in custody in relation to offences other than those the subject of the youth training centre detention sentences. This position was said to have been sought to be remedied by s46 of the *Community Welfare Services Act* 1978 which added sub-section 4 to s173 in these terms:-

> "(4) Where a young person who is sentenced to detention in a youth training centre is at that time being held in custody in a prison, lock-up, police gaol or other place not a youth training centre he shall, subject to sub-section (2) be deemed to be serving that sentence of detention notwithstanding that he is being held in custody otherwise than in a youth training centre."

Section 173 sets out a commencement time for sentences of detention that differs somewhat from the provisions applicable to sentences of imprisonment. These provisions, formerly in ss18 and 19 of the *Gaols Act* 1958 and later in s122 of the *Social Welfare Act* 1970, make sentences run from the first day of the sitting where the sentence is imposed at a sitting of the Supreme Court or the County Court. These provisions were considered by the Full Court in *R v Judge Frederico* [1971] VicRp 51; (1971) VR 425. Section 173 does not relate commencement to the sitting date, however. It therefore falls to be determined whether on the imposition of the detention sentence by Judge Southwell the applicant was "detained in custody pursuant to the sentence". The respondent contended that the existence of a pre-existing warrant of remand meant that the applicant was not after the sentence in custody pursuant to the detention sentence. It was further argued that the present case fell within sub-clause (c) as “any other case". This seemed to have the consequence that the applicant would not have commenced his detention unless and until he was apprehended in pursuance of a warrant of commitment in respect of that sentence. The ordinary practice at sentence is that the sentencing judge immediately after sentence orders that the prisoner be removed. It is difficult to see why the applicant should not precisely fit the description of a person "forthwith detained in custody pursuant to the sentence".

Even if one recognises the existence of a constable or prison officer armed with a competing warrant in each hand, the custody in which the prisoner is forthwith detained is that of the court through the officers then in court. It is the Judge's direction to take the prisoner into custody that is then being given effect to; it is not any warrant of another court – even if that warrant was in existence before and during the sentence in question. There the prisoner is in custody by reason of another sentence, then the Act expressly suspends commencement of the detention until actual transfer to the youth training centre. On this basis, for a person in custody and not held pursuant to another sentence, the detention sentence would commence on the day of the sentence. The alternative view propounded on behalf of the respondent involves sentence not commencing until apprehension following a warrant of commitment. This is a somewhat incongruous result since it involves apprehending a person already in custody.

In the present ease there is no specific evidence as to what was said at the time of the sentence by Judge Southwell. I am prepared to assume, however, that the usual practice prevailed and that the prisoner was removed by direction of the Judge immediately after sentence. It is

also to be noted, so far as reliance on the continuing warrant issued out of the Magistrates' Court is concerned, that the sentence record shows that when the applicant came before the County Court there was then in operation an order of the County Court of 14th November remanding the applicant in custody for sentence This supports the analysis that the applicant was upon such sentence detained in custody pursuant to that sentence. It can also be said that where a prisoner is either serving a sentence of punishment imposed by the court or simply being held in prison it is more logical to treat him as serving out his punishment.

There does not appear to be much relevant authority that canvasses the question as to when a sentence is deemed to commence. There has been consideration on a number of occasions of commencement of sentence in relation to the date of the sittings or ante-dating of sentence. See *R v Judge Frederico* [1971] VicRp 51; (1971) VR 425, and the cases there referred to. See also *R v Brattoli* [1971] VicRp 55; (1971) VR 446; *Hirsch v Anderson* (1930) 2 DLR 576; *R v Gilbert* (1975) 1 All ER 742; [1975] 1 WLR 1012. In the absence of any relevant authority I propose to give effect to the construction of the statute I have described.

It was put in argument that the very recent amendment to s173 provides a form of legislative recognition of the argument put on behalf of the respondent. Certainly the amendment in s46 of Act 9248 assumes that, in the absence of legislative intervention a person held in custody in a prison, otherwise than serving a prison sentence, may not be serving a youth training centre detention sentence. But this amendment, which came into force as from 24th January 1979, does not in terms direct itself to the present situation. Assuming it proceeds on the basis that a youth training centre sentence on a person in custody does not take effect forthwith where a remand warrant is in existence, it appears to me that the legislature has proceeded on a mistaken view of the law. In this situation, the primary rule is that the legislature must be recognized as speaking by means of its later legislation. See the discussion in *Grain Elevators Board (Victoria) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70; [1946] ALR 273. But this rule need not apply where the later Act proceeds upon an erroneous view of an earlier Act but does not amend that Act. Thus as was said by Lord Buckmaster in *Ormond Investment Co Ltd v Betts* (1928) AC 143 at 154 —

> "I do not think that, in the circumstances of this ease, the subsequent statute can properly be referred to for the purpose of interpreting the earlier. It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so, even though their declaration offended the plain language of the earlier Act. It would be an unnecessary step to take, unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the Courts would desire to do, and it is also possible that, where a statute has created a crime or imposed penalty, a subsequent Act showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which the penalty attached, would be used for the purpose of giving effect to the well known principle of construction to which I referred at an earlier stage. But I find myself unable to accept what Sargant LJ said, that the principles in certain cases are applicable to the construction of successive Acts of Parliament."

See also *Deputy Commissioner of Taxes SA v Elders Trustee and Executor Co Ltd* [1936] HCA 64; (1936) 57 CLR 610 at 625; [1937] ALR 27; 4 ATD 135.

In the present case the later Act did not on one view in terms purport to amend or alter the earlier Act, but it did in substance amend the earlier Act by overcoming the operation of the sentence forthwith upon sentence. Whatever the limits of the principle, it is clear in my opinion that it is not to apply where there is no ambiguity in the previous Act. There is in my opinion no real ambiguity in meaning in s173(1). I am therefore of the view, adopting the approach expounded by Lord Buckmaster, that the later Act is not to be treated as decisive in interpreting s173(1). I have therefore come to the view that the youth training centre sentence imposed on the 17th November 1978 commenced and is to be reckoned from that date. The respondent has accordingly been wrongly contending to the contrary. I therefore am prepared to declare and I so declare that the sentence of detention in a youth training centre imposed on the applicant commenced upon and is to be reckoned from 17th November 1978. Subsequent to the sentence of that date it appears that a number of warrants of commitment for non-payment of fines have been executed on the

applicant. The full details of these matters are not before me and my decision is not intended to affect any proper operation of those warrants.

The second main matter falling for determination is the validity of the order transferring the applicant from a youth training centre to prison on 20th December 1978. The relevant provision is s177(1) which reads:-

> "Upon the recommendation of the Youth Parole Board or the Director-General that it is appropriate, having regard to the antecedents and behaviour of a young person of or over the age of sixteen years sentenced to be detained in a youth training centre, that he should be transferred to a prison to serve the unexpired portion of the period of his detention as imprisonment the Minister may direct that the young person be transferred to a prison to serve the unexpired portion of the period of his detention as imprisonment and thereupon such young person shall be so transferred."

It was put on behalf of the applicant that the circumstances of the rapid removal to a youth training centre and the equally rapid removal into prison were not *bona fide*. I am satisfied in the light of the further material filed on behalf of the respondent that there is no evidence of *mala fides* or impropriety. There had for some time been consideration given to the transfer of the applicant into prison on the basis that it was not appropriate that he should be in a youth training centre. It was unfortunate that this was not disclosed earlier but I see nothing sinister in this.

A further attack made on the transfer order was that the phrase "antecedents and behaviour of a young person" referred to antecedents and behaviour at the youth training centre. As the applicant had only in effect been moments in the centre, there was no basis for the operation of the section.

In my opinion the words are not limited in the manner suggested. There is no reason why behaviour during a preceding prison sentence should not be relevant. As to antecedents, that is a word that by its nature comprehends the whole history and background of the young person in question. Such a person would have some antecedents even before he arrived at the training centre.

I am therefore unable to see on what basis I am properly able to afford the applicant relief, whether declaratory or otherwise, that invalidates the transfer order. I note that as a result a young person, who was on two occasions within three days found a suitable candidate for a youth training centre, first by a County Court Judge and then by a Magistrate, is transferred from a centre to prison by administrative direction without any obvious relevant act or event in the interval. The applicant's antecedents were presumably still the same on 20th December as they had been on the 17th and 20th November. As to behaviour, again the same consideration seems to apply.

It is also to be noted that in imposing a sentence of detention in a youth training centre the Court is required by s476A of the *Crimes Act* 1958 to consider the age character and antecedents of the offender. That section provides;

> "476A. Whenever imprisonment may by law be awarded for any indictable offence and the offender is a person under the age of twenty-one years at the date of his conviction, the Court may, having regard to the nature of the offence and to the age character and antecedents of the offender, in lieu of any sentence of imprisonment direct that the offender be detained in a youth training centre for a period of not more than three years;
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> Provided that where the offender has been convicted in the same proceedings of more than one such offence the Court may direct that he be detained for an aggregate period of not more than three years in respect of all such offences."

It is somewhat disturbing that the sentences of a Judge and Magistrate are in effect set aside by reason, not of new matters, but of matters that were in existence at the time of sentence and presumably were considered by the sentencing body. If it is said that the Judge and Magistrate erred on the material before them and should have chosen prison instead, it is surprising that they can be in effect reversed, not by appeal but by administrative act. If, however, such material was not before them, then that raises the question as to whether it is not highly desirable that

the Crown should assist the Court by providing such material. It was said in argument by the Senior Crown Prosecutor that it was not the practice for Crown Prosecutors to do this and that in any event some Judges discouraged this. Insofar as this is said to be based on a rule excluding reference to anything but strictly prior convictions, I do not understand there to be any such rule. Where the Act requires the character and antecedents to be taken into account, I am of the view that it speaks up to the moment of sentencing. Notions of what are technically prior convictions are in my opinion irrelevant in the context of particular exercises of the sentencing discretion such as suitability for parole, minimum terms and where as here, the statute provides for youth training centre sentences in the light of expressly stated factors such as the antecedents of the prisoner. See *R v Poulton* [1974] VicRp 85; (1974) VR 716 at 720. Indeed a wider view would seem to be supported by the observations of the Full Court in *R v Gray* [1977] VicRp 27; (1977) VR 225 at 250. See too *R v Crabtree* (1952) 2 All ER 974.

The situation highlighted by the present case is not merely one of disquiet that a Court's order may be so readily set aside by administrative act. The legislature plainly authorizes this. But a real injustice may nevertheless result as the Judge or Magistrate may decide on a particular length of sentence in a youth training centre where, had he decided to impose a prison sentence, he would have imposed a shorter term. Once the young person is transferred to prison by direction of the Minister, as happened here to the applicant, the prisoner has to serve the same length of term in prison. All of this highlights the desirability of the Crown providing particular assistance to the Courts in those cases where sentences in youth training centres may be considered and the concomitant undesirability of the Director-General reversing a Court order for matters that could have been, but were not put forward, by the Crown to the sentencing tribunal.

The order of the Court is that I declare that the sentence of detention in a youth training centre imposed upon the applicant on 17th November 1978 commenced on and is to be reckoned from 17th November 1978. I otherwise discharge the order nisi.
