14/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v RENZELLA

Winneke P, Charles and Callaway JJA

17-18 July 1996, 6 September 1996 — [1997] 2 VR 88; (1996) 88 A Crim R 65

SENTENCING – PRE-SENTENCE DETENTION – WHETHER S18 OF *SENTENCING ACT* 1991 "COVERS THE FIELD" – EXTENT OF OPERATION OF S18 – WHETHER SENTENCING COURT MAY TAKE PRE-SENTENCE DETENTION INTO ACCOUNT WHERE S18 DOES NOT APPLY: *SENTENCING ACT* 1991, S18.

Section 18 of the *Sentencing Act* 1991 is not an exhaustive statement of the extent to which pre-sentence detention might be taken into account. S18 applies only where an offender is sentenced to a term of imprisonment and there is a period of time during which the offender was held in custody in relation to proceedings for that offence or proceedings arising from them and for no other reason. In other cases the section is silent and a court is not only empowered but obliged as a matter of justice to take pre-sentence detention into account.

WINNEKE P, CHARLES and CALLAWAY JJA: *[After dealing with a matter not relevant for the purposes of this Report, the Court continued]...***[13] Pre-sentence Detention**
In turning to the Director's appeal, it will be convenient to continue to refer to Renzella as the applicant, although he is of course the respondent to that appeal. The ground on which it is expedient that we should express an opinion reads:

> "1. The learned sentencing judge erred in that he took into account time which the [applicant] had spent in custody prior to the trial –
> **[14]** (a) after ruling that section 18(1) of the *Sentencing Act* 1991 was inapplicable; and
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> (b) in reduction of both the head sentence and minimum term."

On 11th December 1992 the applicant had been charged with the theft of a number of vehicles and released on bail. Those charges were later subsumed in the conspiracy count. On 4th November 1993 he was charged with unrelated offences and bail was refused. When he was committed for trial on the conspiracy count no application for bail was made, because he was then in custody in relation to the other matters. On 13th September 1994 the applicant was granted bail by a judge of the Supreme Court. He had spent 314 days in custody since 4th November 1993 but, even if the correct view was that he had been held in custody partly in relation to the conspiracy, it could not be said to have been "for no other reason" within the meaning of s18(1) of the *Sentencing Act* because he had been in custody for the unrelated matters as well. It was in those circumstances that his Honour deducted 45 weeks from the head sentence and the non-parole period that he would otherwise have imposed and fixed. Mr Gyorffy's submission was that it was the intention of Parliament in s18 to "cover the field" in so far as credit was to be given to a convicted person for time spent in custody awaiting trial or sentence. That was said to be clear from the legislative history. The *Social Welfare Act* 1970 had been silent as to how pre-sentence detention was to be treated but the practice of many judges and magistrates had been to reduce the sentence imposed by taking it into account. On 6th October 1971 a private member's Bill was referred to the Statute Law Revision Committee for its consideration. The Committee **[15]** reported on 12th March 1974, recommending among other things "that it be mandatory that time spent in custody be counted as time already served rather than have the sentence treated as reduced by the time spent in custody." That report led to the insertion of s202A into the *Social Welfare Act*.

Section 202A was re-enacted, without any change that bears upon counsel's argument, as s16 of the *Penalties and Sentences Act* 1985, sub-ss(1) and (2) of which read:

> "**16.**(1) If a person is convicted of an offence and sentenced to a term of imprisonment or detention in respect of that offence, any period of time during which that person was held in custody in relation to proceedings for that offence or proceedings from which those proceedings arose shall, unless the court otherwise orders, be reckoned as a period of imprisonment or detention already served by that person under the sentence.

(2) The provisions of sub-section (1) do not apply—
(a) where the person convicted was released on probation or upon a bond to come up for sentence if and when called upon in respect of the offence for which convicted but has failed to observe the conditions of the probation or release; or

(b) in respect of any period referred to in sub-section (1) during which the person convicted was committed to prison, youth training centre, or reception centre for some cause not connected with the proceedings for the offence in respect of which that person is presently being sentenced; or

(c) in relation to a period of custody of less than one day; or

(d) in relation to a sentence of imprisonment or detention for less than one day."

[16] Section 18(1) and (2) of the *Sentencing Act* 1991 provide:

"(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 will be noticed that the exception in s16(2)(b) in respect of any period during which the person convicted was committed to prison, youth training centre or reception centre for some cause not connected with the instant proceedings has been omitted from s18(2) and that the words "and for no other reason" have been inserted in s18(1). The difficulty to which those words give rise is illustrated by reference to the decision of this Court in *R v Heaney* (unreported, 27th March 1996). In that case the applicant was arrested on 2nd February 1995 for a trafficking offence. She was in custody on remand until 5th May 1995, when she was released on bail. She thus accumulated a period of 93 days pre-sentence detention. In the latter part of August 1995 she was charged with murder and remanded in custody. On 15th **[17]** September 1995 she was committed for trial on the charge of trafficking. She did not seek bail and was again remanded in custody, so that a second remand warrant came into existence.

When she was sentenced for trafficking the judge declared the period of pre-sentence detention to be 93 days, taking the view that between 15th September 1995 and the date of sentence, 21st November 1995, the applicant was not, as regards the trafficking offence, "held in custody in relation to proceedings for that offence or proceedings arising from those proceedings and for no other reason". Accordingly she was not given the benefit of the period between the date of her committal for trial and the date of sentence. Moreover, if the charge of murder resulted in her conviction, it would then be said that, between 15th September 1995 and the date on which she was re-sentenced by the Court of Appeal, she was not held in custody in relation to proceedings for the crime of murder and for no other reason.

Brooking JA, in whose judgment Winneke P and Hampel AJA concurred, said that the judge was right in holding that from 15th September on, when she was committed for trial, the applicant was not held in custody "for no other reason" as required by s18(1). That was so notwithstanding s18(6), which we have not thought it necessary to set out. Her detention in custody was warranted twice over, the facts being similar to those in *R v Brock* (Court of Appeal, unreported, 22nd February 1996). His Honour said that regard must nevertheless be had in re-sentencing to the period during which the applicant's detention in custody was doubly warranted. That could be done by this Court's adopting the declaration concerning 93 days pre-sentence detention that had already been **[18]** made and by reducing by six months, to allow in a broad way for the period from September to March, the head sentence and the non-parole period upon which it would otherwise have determined.

Mr Gyorffy contended that there was no "common law" discretion to take account of pre-sentence detention in that way. Moreover, as already indicated, he contended that Parliament had intended s18 to be an exhaustive statement of the extent to which pre-sentence detention might be taken into account. We do not accept either branch of that submission. In *R v Judge Frederico* [1971] VicRp 51; [1971] VR 425 at p430 Gowans J, with whom Winneke CJ agreed, said that, where an offender had been in custody during part of a trial, that could be taken into account in fixing the term of imprisonment and that that was "ordinarily done". His Honour continued, "The penalty is, after all, determined for the circumstances of the offender as well as for the circumstances of the offence". In our respectful opinion those observations are applicable by analogy to other kinds of pre-sentence detention. Section 18 does not exclude the discretion that this Court exercised in *Heaney's Case*. It applies only where an offender is sentenced to a term of imprisonment and there is a period of time during which the offender was held in custody in relation to proceedings for that offence or proceedings arising from them and for no other reason. In other cases the section is silent and a court is not only empowered but obliged as a matter of justice to take pre-sentence detention into account.

It is true that the legislative history reveals an intention that that should be done by declaration rather than by adjusting the sentence, and it might well be thought desirable to amend s18 so that that may be done in all or a greater **[19]** number of cases. There is, however, nothing in the extrinsic material to suggest that pre-sentence detention should not be taken into account as it was in *Heaney's Case*. That is apparent from paragraphs 24 to 28 of the report of the Statute Law Revision Committee:

> "24. A second problem arose because the proposed clause referred to being in custody only in relation to 'that sentence or the offence'. The Committee was advised that many persons are charged with a number of offences and therefore would not be in custody only in relation to 'that sentence or the offence'. Consequently, they would not benefit from the proposed amendment.
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> The example of a person committed for trial on one charge and, shortly afterwards, in quite a different magistrates' court unconnected with the earlier proceedings, committed for trial on another charge, was quoted to the Committee. When the accused comes for trial on the first charge, he is acquitted, but shortly after, he appears for trial on the second charge and is convicted. In this example, the accused would not have been in custody by reason only of having been committed to custody by an order of the court made in connexion with any proceedings relating to that offence, because he would have also been in custody because of an order of a court relating to a completely different charge.
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> 25. In cases such as this, it appears proper to the Committee for offenders to have the time spent in custody counted as time already served but the Committee stresses that this should only apply in cases where the offender is charged with a second offence before the first charge is heard and dismissed by a court. If the offender is convicted of the first charge then the time spent in custody must be disregarded in respect of the second charge.
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> 26. The Committee recommends that the proposal be redrafted to provide for a person to have the time spent in custody counted as time served in cases where an offender is further detained on a second charge before the first charge is heard and dismissed by a court.
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> **[20]** 27. In recommending that the time spent in custody be counted as time already served, the Committee does not intend that an offender can under any circumstances receive double credits for time spent in custody.
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> 28. Where a person is charged with a number of offences simultaneously or where a person is remanded in custody on a charge and is subsequently charged on various occasions with several different offences, the time spent in prison on remand or in custody should only be taken into account in relation to the first sentence imposed and disregarded in respect of any subsequent sentence imposed. The certificate of custody summary should indicate whether the time has already been recognized in relation to a sentence."

Mr Grace submitted that the words "and for no other reason" in s18(1) should be interpreted to exclude only a period of time during which the offender was held in custody by reason of having been convicted of another offence. Alternatively he submitted that they should be interpreted to exclude no more than had been excepted by s16(2)(b) of the *Penalties and Sentences Act*. We are clearly of opinion that to adopt either of those courses would amount to re-writing the sub-section. Cf. *Smith v R* [1994] HCA 60; (1994) 181 CLR 338 at p346; (1994) 125 ALR 385; 69 ALJR 24; 76

A Crim R 32. Counsel contended that, if that were our view, there was nevertheless a discretion to take pre-sentence detention into account in cases not covered by s18. He referred to ss1(c) and (d)(iv) and 5(1)(a) and (b), (2)(g) and (3) of the *Sentencing Act*. He also pointed out that, because pre-sentence detention is necessarily cumulative, Mr Gyorffy's submission would defeat *pro tanto* the operation of s16(1), whereby most terms of imprisonment are served concurrently unless otherwise directed. We accept that contention.

It follows that the law expounded by Brooking JA in *Heaney's Case* is, unsurprisingly, correct in principle and consistent with s18. Where that section applies, pre-sentence **[21]** detention is to be reckoned as a period of imprisonment already served under the sentence, and a declaration made to that effect, unless the sentencing court or the court fixing a non-parole period in respect of the sentence otherwise orders. Pre-sentence detention to which s18 does not apply is to be taken into account in the exercise of the court's discretion. It should ordinarily be taken into account at the first opportunity, as it was in *Heaney's Case*, and not left to the court imposing a later sentence. Cf. *R v Birnie* (Full Court, unreported, 17th November 1994).

The Court will therefore grant the application for leave to appeal against conviction, treat the appeal as instituted and heard instanter, allow the appeal, quash the conviction and direct a new trial to be had. Mr Grace applied for an indemnity certificate under s13(3A) of the *Appeal Costs Act* 1964. Strictly speaking the Director's appeal did not have to be dealt with, but one of his grounds of appeal would have failed. The other substantial ground was manifest inadequacy, on which it is inappropriate in the event for us to express an opinion. In all the circumstances, even if we have power to grant a certificate, we consider that it should be refused.

APPEARANCES: For the Crown: Mr T Gyorffy and Mr KT Armstrong, counsel. Solicitor: PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr D Grace, QC and Mr CF Thomson, counsel. Solicitors: Stary & George.
