70/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v COSTA

Young CJ, Crockett and Marks JJ

17 November 1989

SENTENCING – TIME SPENT BY ACCUSED IN CUSTODY BEFORE TRIAL – TO BE DEDUCTED FROM SENTENCE UNLESS COURT OTHERWISE ORDERS – WHETHER COURT MAY OTHERWISE ORDER IN THE ABSENCE OF SWORN INFORMATION AS TO PERIOD OF RELEVANT TIME – PRACTICE AND PROCEDURE – ACCUSED REPRESENTED ON PLEA BY COUNSEL – EXAMINATION OF ACCUSED BY COURT – NATURE OF COUNSEL'S DUTY - WHETHER APPROPRIATE PROCEDURE FOR COURT: *PENALTIES AND SENTENCES ACT* 1985, SS4, 16.

1. Section 16(1) of the *Penalties and Sentences Act* 1985 provides that unless a court otherwise orders, the period of time spent by a person in custody before trial is to be deducted from the sentence. A court should not otherwise order where it is not satisfied by information on oath as to the relevant period of time spent by the person in custody.

2. Where a litigant is represented on a plea by counsel, such counsel is in charge of the litigant's affairs and case, and unless the retainer is determined—

(a) it is impermissible to surrender counsel's responsibility to the presiding judicial officer; and

(b) it is irregular for the presiding judicial officer to undertake an examination of the litigant in order to extract information.

YOUNG CJ: *[After setting out the nature of the charge and the facts briefly, His Honour continued]* … **[4]** In passing sentence on the applicant the learned trial Judge said that he took into account the fact that the applicant had pleaded guilty and that enabled him to set a lesser term than he would otherwise have done. It is not clear from what His Honour said that he gave full effect to the amended s4 of the *Penalties and Sentences Act*, which since 1st July of this year has provided that effect may be given to the time at which an applicant pleads guilty or indicates an intention to plead guilty. In the present case the applicant at all times cooperated with the police, agreed to a hand-up brief, and at no time indicated any intention except to plead guilty to the offence charged. His Honour went on to say:

> "I also take into account the five months you have spent in prison awaiting trial."

It is not clear from that statement exactly what His Honour intended. But the position is more complicated than that, because so far as the endorsement on the presentment is concerned it should, of course, contain the full **[5]** order of the Court. No reference is made to the time served in prison awaiting trial. The presentment records simply: "Sentenced to seven years' imprisonment, a minimum term of five years to be served before eligible for parole." However, when our attention was directed to the triplicate, it appears that there is added to that order for imprisonment the following direction: "This sentence is to commence the date it was imposed, namely 14 August, 1989, the period previously held in custody having already been taken into account." That order does, I think, plainly amount to an order under s16(1) of the *Penalties and Sentences Act* and prevents the period served in custody awaiting sentence from being deducted from the sentence imposed.

However, the order which His Honour so made appears to have been made without adherence to the procedure which is prescribed by s16(3) and subsequent sub-sections. Those sub-sections require a court or judge sentencing a prisoner to be satisfied by information on oath as to the amount of time spent in gaol pending trial, and it must follow that, if that procedure is not adhered to, the court should not under s16(1) otherwise order.

It is, therefore, difficult to be satisfied as to the course which the learned trial Judge intended, but it is possible that His Honour had in mind s14 of the *Penalties and Sentences*

Act, which **[6]** provides in sub-s (1) that, subject to the section and to ss15 and 16, sentences of imprisonment shall commence: (a) if the offender is in custody at the time the sentence is imposed, the day the sentence is imposed.

However that may be, the effect of the order His Honour made is to add a substantial period to the term of the sentence. We were informed that the applicant had spent five months in prison awaiting trial, and that was the time that His Honour referred to. When to that is added the remissions that would have been deducted from any sentence imposed had the ordinary course been followed, and also the possibility of an insufficient deduction having been made for an early plea of guilty, I think it is clear that the period of seven years' imprisonment imposed would have to be substantially increased to arrive at the sentence from which the learned Judge might have commenced his calculations.

The factors to which I have referred tend to indicate that His Honour might have had a sentence of something of the order of nine years in mind as the starting point for the sentence from which he made certain deductions. The failure, however, to adhere to the proper procedure can, I think, only be regarded as an error in the sentencing process which requires the intervention of this Court.

There is another ground upon which intervention is also called for, and that ground is **[7]** that the total effective sentence, approached in the way in which I have approached it, is, I think, manifestly excessive in all the circumstances.

Before I turn, however, to what I think this Court should impose by way of sentence, there is another matter to which I wish to refer. During the course of the plea, the learned Judge asked counsel whether he intended to call the applicant to give evidence. Counsel, who was not the counsel who appeared before us, replied, "No, I don't, but he wants to say something, because he thinks that nobody, including lawyers, ever understood him, and far be it for me to put myself on a pedestal because I'm no better than others." After some discussion of that proposition, the learned Judge turned to the applicant and said, "I understand you want to say things to me", to which the applicant replied through an interpreter, "There are many things I would like to tell you." The applicant was then asked to come forward, and there followed a long process of interrogation and answers in which the learned Judge asked the questions and the applicant gave a number of answers.

This course was, in my view, highly irregular. Counsel for the applicant ought not to have allowed it to occur and, if he assented to what his client sought, the learned Judge should, in my **[8]** view, not have acceded to counsel's request. When a litigant is represented by counsel in this Court, counsel is in charge of the litigant's affairs and of his case, and it is impossible for the conduct of the case to be divided between counsel and his client. This case illustrates, I think, the wisdom of that rule and the danger of what can occur, if it is departed from. It places the Judge who assumes the role of interrogator in a very difficult and invidious position. The transcript illustrates the learned Judge asking a series of inquisitorial questions such as, "Do you think you may be deported after this prison sentence?", "What is your state of mind?" "Do you want to be deported?" And, further, a very critical question: His Honour said to the applicant at one stage, "Go back and tell me why you did this to your wife," to which the applicant replied, "I have explained." When the learned Judge came to pass sentence on the applicant, this passage occurs in his sentencing remarks:

> "Similarly, I gave you time in this Court this morning to explain and justify what you had done. You spent many minutes telling me about events in 1983, some five years prior to this attack. I asked you five times as to why you had done this on 17 March 1989 and you told me of the matrimonial disputes. There was not a syllable relating to sorrow, remorse, contrition or apology."

I need not go any further. The system of the administration of justice which is adopted in these courts is designed to **[9]** prevent, amongst other things, a litigant represented by counsel from being placed in such a position as the position in which this applicant found himself. It is the task of counsel to protect his client against such a situation developing.

In the result, I am clearly of the opinion that the sentence imposed by the learned trial Judge was manifestly excessive. It was, of course, a very serious offence. But the applicant is a

man of 43 years of age and, apart from the obviously difficult and unsatisfactory relationship with his wife over recent years, was a person of good character and hard-working. It is not easy, of course, to understand the whole of the factors which led to the commission of the offence, but the parties having been divorced I think it can be safely inferred that the applicant is unlikely to be a danger to society. I think that in any sentence passed the applicant should be given full credit for having surrendered himself to the police, for having co-operated fully with them, for having accepted a hand-up-brief committal and for having pleaded guilty to the charge.

In all the circumstances I would propose to the Court that we should impose a sentence of five years' imprisonment and that we should fix a minimum term of three years to be served before the applicant should be eligible to be released on parole. And so that there should be no doubt in the matter, I would **[10]** simply add that no order should be made under s16(1) of the *Penalties and Sentences Act*.

CROCKETT J: The procedural course that was adopted and to which the Chief Justice has referred was irregular and unfortunate. As the sentence is, in my opinion, manifestly excessive, intervention by this Court is called for. In consequence it is unnecessary to determine whether the irregularity in the conduct of the hearing served to vitiate the proceedings so as to require the setting aside of the sentence. However, I wish to emphasise what I consider is the necessity in curial proceedings to adhere faithfully to rules which are fundamental to the proper conduct of such proceedings. If counsel is retained to present his client's plea, then it is for him to do it, and it is impermissible to surrender that responsibility to the Judge. If the client refuses to accept that position or insists on addressing the Court directly, it must be at the cost of losing the aid or protection his advocate is expected to provide by his representation. That is to say, counsel has to determine his retainer. What occurred led to the invidious position whereby the Judge undertook the examination of the applicant in order to extract information, regardless of whether it assisted or harmed the applicant's interests. The Judge was thus, in effect, in the position of a conflict of interest and certainly compromised the objectivity and dispassionate role a Judge is expected to **[11]** possess. There exists, too, the risk that the Judge might inadvertently open up a line of enquiry that counsel would not consider helpful or relevant but with respect to which he was powerless in the circumstances to assist his client. I agree with all that the Chief Justice has said, and I agree in the imposition of the sentences which he has proposed.

MARKS J: I agree, for the reasons given by the learned Chief Justice, that the application should be granted. I also agree in the observations of the other members of the Court as to the procedure which was followed. I also agree with the sentence proposed.

YOUNG CJ: The order of the Court is that the application is granted. The appeal is treated as instituted and heard instanter and allowed. The sentence is quashed. In lieu thereof the applicant is sentenced to be imprisoned for a term of five years and a minimum term of three years is fixed before he is eligible to be released on parole.

APPEARANCES: For the Crown: Mr I Heath, counsel. JM Buckley, Solicitor for the DPP. For the applicant Costa: Mr C Heliotis, counsel. Pryles & Defteros, solicitors.
