

PARTIES: DIRECTOR OF PUBLIC PROSECUTIONS
v
JOHN LOWNDES and ROBERT JAMES HART

TITLE OF COURT: In the Supreme Court of the Northern Territory of Australia

JURISDICTION: Supreme Court of the Northern Territory of Australia exercising Territory Jurisdiction

FILE NO: SC. NO. 139 of 1995

DELIVERED: 18 AUGUST 1995

HEARING DATES: 17 AUGUST 1995

JUDGMENT OF: MILDREN J

CATCHWORDS:

CRIMINAL LAW - Jurisdiction, practice and procedure - Judgment and punishment - Sentencing - Unlawful entry and stealing - Respondent convicted of unlawful entry and stealing while on parole for previous offence - Sentence suspended upon entering home detention order - Parole order revoked by subsequent conviction - Magistrate had no power to impose non-custodial sentence - Respondent having already served 4 months for home detention - Crown undertaking not to oppose fully suspended sentence should matter be remitted - Sentence quashed and matter remitted to Court of Summary Jurisdiction for sentencing according to law

CRIMINAL LAW - Jurisdiction, practice and procedure - Limitation of time for prosecution - Extension of time sought to commence proceedings - Delay by crown not unreasonable - Interests of justice require that persons be sentenced according to law - Crown seeking to quash sentence by certiorari

Criminal Law (Conditional Release of Offenders) Act 1971 (NT)
ss 5(1)(b), 19A

Parole of Prisoners Act 1971 (NT) ss 5(8), 8A, 12(2)

Supreme Court Rules 1987 (NT) 056

Cooper v Pryce (1984) 28 NTR 10, approved
Meehan v Lawrence (1974) 3 ALR 44, approved

REPRESENTATION:

Counsel:

Applicant:	Mr Cato
First Respondent:	Mr Tiffin
Second Respondent:	Mr Cornish

Solicitor:

Applicant:	DPP
First Respondent:	
Second Respondent:	

JUDGEMENT CATEGORY:	CAT
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

SC. No 139 of 1995

BETWEEN:
DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

AND:
JOHN LOWNDES First Respondent
AND:
ROBERT JAMES HART Second Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT
(Delivered 18 August 1995)

This is an application by Originating Motion Between Parties by the Director of Public Prosecutions against John Lowndes SM and Robert James Hart.

Mr Lowndes has appeared by counsel who has indicated that he will abide the orders of the court. Mr Hart appears by counsel, Mr Corish, and the Director of Public Prosecutions appears as represented by Mr Cato.

The relief which the plaintiff seeks in the summons is, firstly, an order granting leave to extend the time of the commencement of the proceedings, and, secondly, a remedy in the nature of a certiorari pursuant to order 56 of the Supreme Court Rules quashing the sentences of imprisonment imposed on the second defendant on the 11 April 1995 in relation to unlawful entry and stealing, the respective sentences in relation to those offences being five months and two months, which were ordered to be served concurrently but suspended

upon the second defendant entering into a home detention order for a period of five months and during that order to reside and remain at 25 Melastoma Drive, Moulden.

At the time those orders were made the second defendant had been released on parole having been sentenced on the 30 September 1992 to a term of imprisonment for four years in relation to a conviction of aggravated sexual assault.

The question which the Director of Public Prosecutions wishes to raise relates to the interpretation to be given to section 5 (8) of the Parole of Prisoners Act. That section provides as follows: `Subject to subsections (8A) and (8B), where a person to whom a parole order relates is sentenced to a term of imprisonment in respect of an offence committed during the parole period (including an offence against a Commonwealth Act, regulations under a Commonwealth Act or a law of a State or another Territory), the parole order shall thereupon be deemed to have been revoked or, if the parole period has already expired, to have been revoked as from the time immediately before the expiration of the parole period.'

Subsection (8A) of section 5 of the Parole of Prisoners Act provides:

"Subject to subsection (8B) a parole order shall not be deemed to be revoked to where a person to whom it relates is sentenced to a term of imprisonment but is released forthwith in pursuance of a direction given under section 5 (1) (b) of the Criminal Law (Conditional Release of Offenders) Act."

Section 5 (8B) is irrelevant to the circumstances of this particular case. Section 12 (2) of the Parole of Prisoners Act provides as follows:

"Where - (a) a person has been sentenced or committed in the Territory to a term of imprisonment for an offence committed while a parole order is or was in force in relation to

him; and (b) that parole order is, by reason of that sentence or committal, deemed to have been revoked by virtue of section 5 (8), the court by which the person is sentenced or committed shall order the person to undergo imprisonment for the term that the person had not served at the time when he was released from prison in pursuance of the parole orders which term of imprisonment shall commence at the expiration of the term of imprisonment to which he sentenced or committed for the later offence."

The Director of Public Prosecutions submits that having regard to those provisions a home detention order made pursuant to section 19A of the Criminal Law (Conditional Release of Offenders) Act is not a sentencing option which was available to the magistrate in these circumstances.

Mr Corish, who appears for the prisoner, has directed my attention to the differences between an actual sentence of imprisonment and a suspended sentence of imprisonment and to the provisions of sections 19A to F of the Criminal Law (Conditional Release of Offenders) Act. Clearly, a home detention order does, in terms of section 19A(1), involve, by necessity, an order - to quote the section:

"... by order sentence that offender to a term of imprisonment but direct that the sentence be suspended on the offender entering into a home detention order."

Mr Corish's second submission was that, in view of the fact that his client had now served some four months of the five-months home detention order, I ought not, in the exercise of my discretion, grant to the Crown an extension of time to urge these matters as a matter of justice.

Dealing with the question of an extension of time first, counsel for the Director of Public Prosecutions, Mr Cato, submitted that an examination of the history of the matter shows that the Director of Public Prosecutions did commence

these proceedings reasonably quickly once the matter had come to his attention and the correct solution to the problem had been worked out, and that it was in the interests of justice that - indeed, it is paramount in the interests of justice that persons who are sentenced to terms of imprisonment, whether they are suspended sentences or not, be sentenced according to law.

I note the undertaking also given by Mr Cato on behalf of the Director of Public Prosecutions, that, should the sentence of Mr Lowndes SM be quashed and the matter be referred back to him, provided that the second defendant has not been in breach of the home detention order, the Director will not suggest to the learned magistrate that a fully-suspended sentence under section 5(1)(b) of the Criminal Law (Conditional Release of Offenders) Act would be an improper exercise of his discretion.

Having regard to those matters and to the fact that cancellation proceedings had been commenced before the last day before the commencement of the writ in these proceedings had expired, which is evidence of the fact that the relevant authorities had decided to take what action that they then thought was appropriate to have Mr Hart returned to Her Majesty's Prison, I consider that it is proper in this case to grant the appropriate extension of time which has been sought by the plaintiff. Accordingly, there will be an order, in terms of paragraph 1 of the summons, granting to the plaintiff leave - extending the time for the commencement of these proceedings until 4 August 1995.

The next matter then is to deal with the merits of the argument. I am grateful to both counsel for their submissions. I consider that it is clear, both by authority and by the words of subsection (8) of section 5, that the words 'sentenced to a term of imprisonment' mean what they say, and it is not necessary for there to be an order for committal to prison.

This is clear from two decisions of this court. Firstly, Meehan v Lawrence (1974) 3 ALR 44, a judgment of Foster J, as he was then, and to the judgment of Muirhead J in Cooper v Pryce (1984) 28 NTR 10. Although I am not bound by either of those decisions, I respectfully agree with them. The normal meaning to be given to the word 'sentenced to a term of imprisonment' would include a term which is wholly suspended. There is ample authority for the proposition that even a wholly-suspended sentence is still a term of imprisonment.

To make the matter even clearer, (8A) of section 5 specifically exempts from section 5 (8) a sentence where the person is released forthwith in pursuance of a direction given under section 5(1)(b) of the Criminal Law (Conditional Release of Offenders) Act. It is clear from that, for example, that a partially-suspended sentence is not exempted. Now, it seems to me to be clear really beyond argument that a home detention order under section 19A is not exempted from the provisions of subsection (8) of section 5.

Accordingly, I find and declare that the learned magistrate, had no power in the circumstances of this case, to suspend a sentence pursuant to section 19A of the Criminal Law (Conditional Release of Offenders) Act by ordering the second defendant to enter into a home detention order.

Accordingly, I grant the relief sought in paragraph 2 of the summons and order the quashing of the sentences of imprisonment imposed on the second defendant on 11 April 1995, and I order further that these matters be remitted to the Court of Summary Jurisdiction to be resentenced according to law.