IN THE COURT OF APPEAL [1993] QCA 079

SUPREME COURT OF QUEENSLAND

C.A. No. 16 of 1993

Brisbane

[R. v. Tallon]

T H E Q U E E N

- and -

MICHAEL WILLIAM TALLON

Respondent

ATTORNEY-GENERAL OF QUEENSLAND

Appellant

DAVIES J.A.
DERRINGTON J.
BYRNE J.

Judgment delivered 19/03/1993

REASONS FOR JUDGMENT - THE COURT

OBJECTION TO COMPETENCE OF THE APPEAL DISMISSED. APPEAL ALLOWED. SUBSTITUTE FOR THE RECOMMENDATION MADE BY THE LEARNED SENTENCING JUDGE A RECOMMENDATION THAT THE RESPONDENT BE ELIGIBLE FOR PAROLE AT THE EXPIRATION OF THREE YEARS OF HIS SENTENCE.

CATCHWORDS: **STATUTES - INTERPRETATION - Appeal by Attorney-General required to be "made" within 28 days - what constitutes "making" an appeal - Criminal Code, s. 671(2) - Criminal Practice Rules 1990, r. 19A**

CRIMINAL LAW - SENTENCE - Attorney-General's appeal against sentence of 10 years with 8 months' recommendation for armed robbery with personal violence - whether judge gave too much weight to offender's desperate financial situation and rehabilitation prospects and

insufficient weight to seriousness of offence and fact committed while on parole - 3 years' recommendation substituted

Counsel: B. Butler for the Appellant
K. Holmes for the Respondent

Solicitors: Director of Prosecutions for the Appellant
Legal Aid Office for the Respondent

Hearing Date(s): 26 February 1993

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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Before Mr Justice Davies
Mr Justice Derrington
Mr Justice Byrne

[R. v. Tallon ex p. Attorney-General]

T H E Q U E E N

- v -

MICHAEL WILLIAM TALLON

Respondent

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REASONS FOR JUDGMENT - THE COURT

Judgment delivered 19/03/1993

This is an appeal by the Attorney-General against a sentence imposed in the District Court on 11 December 1992. At the commencement of the hearing of the appeal the respondent objected to its competency on the ground that it was out of time. The notice of appeal was filed on 6 January 1993, within 28 days of the date of that sentence, but it was not served on the respondent, who was in jail, until 19 January 1993. This objection involved the construction of s. 671(2) of the Criminal

Code which provides that an appeal to the Court by the Attorney-General against sentence "shall be made within 28 days of the date of such sentence"; whether "made" in that sub-section means filed or filed and served or the commencement of the hearing of the appeal. In view of the importance of this question which has not previously been decided, and as neither party was in a position to argue it fully, we reserved our decision on it, proceeded to hear the appeal and allowed either party to make further written submissions. We received further written submissions from both the respondent and the Attorney.

The Attorney also in the alternative sought an extension of time under s. 671(3) of the Criminal Code. We reserved our decision on this question also and because the Attorney had no prior notice of the objection we gave him leave to file affidavit evidence in support of such application, which he has done.

Section 671 of the Criminal Code provides:

> "(1) Any person convicted desiring to appeal to the Court, or to obtain the leave of the Court to appeal from any conviction or sentence, shall give notice of appeal or notice of application for leave to appeal, in the prescribed manner, within twenty-eight days of the date of such conviction or sentence.
> (2) An appeal to the Court by the Attorney-General against sentence shall be made within twenty-eight days of the date of such sentence.
> (3) The time within which notice of appeal, or notice of an application for leave to appeal, may be given or within which the Attorney-General may appeal against sentence may be extended at any time by the Court."

Sub-section (2) was inserted and sub-s. (3) amended to include appeals by the Attorney-General by an amending Act of 29 March

1986. By the same amending Act sub-s. (1) was amended to substitute "twenty eight" for "fourteen".

The respondent's counsel submitted that "made" in sub-s. (2) means filed and served. She contrasted it with the phrase "shall give notice of appeal" in sub-s. (1) which, she said, requires only the filing of a notice of appeal. It is curious that the legislature should have chosen a different form of words in sub-s. (2) from that which already existed in sub-s. (1) if it did not intend a different meaning. However, we do not think that the making of an appeal is any more likely to include both the filing and serving of a notice of appeal than the giving of notice of appeal. On the contrary, we think that the latter phrase is more consistent with a requirement to notify the respondent than the former.

Alternatively the respondent submitted that "made" meant appearing to move the appeal and sought to derive support for that submission from a line of cases which hold that an application to a judge of the Supreme Court for an order to review a conviction or order of justices is made only when someone appears before a judge to make that application. See, for example, Donkin v. Donkin, ex parte Donkin [1963] Qd.R. 36; Cottle v. Hentzschel, ex parte Cottle [1982] Qd.R. 772. However, there is an important distinction between the provision considered in these cases and the one under consideration here. Section 209 of the Justices Act 1886, by providing that when an appellant "shows by affidavit to a Judge of the Supreme Court

sitting in Court or Chambers a prima facie case of error or mistake in law or fact on the part of such justices or justice ... the Judge may ... upon application made within twenty-eight days from the making of such conviction or order ... grant ... an order [to review]" makes it clear that the application is the application made to a judge in court or chambers. That is at least not clearly so here.

Notwithstanding the difference in wording between sub-ss. (1) and (2) of s. 671, we think that a notice of appeal or notice of application for leave to appeal by a convicted person is given and an appeal by the Attorney-General against sentence is made when the notice of appeal is filed. We think that the purpose of the 1986 amendments to s. 671 was to provide a uniform time limit for appeals by convicted persons and by the Attorney-General. Moreover the second reading speech of the Minister who introduced the Bill for the amending Act included the following:

> "A number of procedural matters are included in the Bill, including those dealing with appeals. It has been found desirable to increase the period in which an appeal may be lodged both by an accused person and an appeal on sentence on behalf of the Attorney-General."

Although that statement in incorrect - there was previously no period in which an appeal might be lodged by the Attorney-General - the reference to "lodged" in respect of both types of appeals supports the construction which we favour.

The respondent also relied upon rule 19A of the Criminal Practice Rules. Generally, delegated legislation may not be

used for the purpose of construing an Act. See Great Fingall Consolidated Ltd. v. Sheehan (1906) 3 C.L.R. 176; John Burke Ltd. v. Insurance Commission [1963] Qd.R. 587; Webster v. McIntosh (1980) 32 A.L.R. 603 at 606. But even if it could, it would not, we think, assist the respondent here. Both rule 17, which provides that appeals, other than those by the Attorney-General, against conviction or sentence, shall commence by sending to the Registrar a notice of appeal and rule 19A, which provides that the Attorney-General shall commence his appeal by filing with the Registrar a notice of appeal, use the word "commence". The only significance of these provisions, for present purposes, is that they use yet another term to describe the filing of a notice of appeal.

We therefore hold that the appeal was made within time by the filing within time of a notice of appeal. It is therefore unnecessary to consider the application for extension of time.

We turn now to the substance of the appeal. The respondent was convicted on one count of armed robbery with personal violence, one count of going armed in public so as to cause fear, and one count of dangerous driving. He was sentenced to 10 years' imprisonment on the first count, two years on the second, and two years on the third, with a recommendation that he be eligible for parole after serving only eight months. At the time of sentence he had served 39 days' imprisonment on remand.

The respondent is 30 years of age, having been born on 17 July 1962. He has a criminal history which includes two previous terms of imprisonment for armed robbery. On 7 September 1984 he was convicted on four charges of armed robbery and sentenced to a term of eight years' imprisonment with a non-parole period of three years six months. Then on 10 and 11 September 1986, apparently whilst he was on parole in respect of the above offences, he committed a further offence of armed robbery in company and one of unlawful use of a motor vehicle for the purpose of facilitating the commission of an indictable offence. On 14 April 1987 he was sentenced to imprisonment on the former of those offences for ten years with a recommendation that he be considered eligible for parole after four years. He was on parole in respect of that offence when he committed the offences the subject of this appeal.

The armed robbery the subject of this appeal occurred at a Fortitude Valley theatre restaurant at about 12.45 a.m. when it was closing. The respondent had concealed his face with a stocking and he was carrying a loaded .22 calibre pistol. He struck or pushed the female proprietor with his open hand, hustled her and other employees into a back room and threatened to shoot them. He took over $11,000 in cash, cheques and credit card vouchers, the cash component being approximately $1,500. He then ran from the restaurant after saying, "Don't follow me or I'll shoot you".

He was nevertheless chased down the street by some of the

employees, and one of them tackled him twice. After the second of these the respondent fired his pistol, though it was accepted that he deliberately fired away from his pursuers and merely in order to frighten them. He then drove off in his car and an employee of the restaurant gave chase. The respondent drove through a red light and subsequently lost control of his vehicle and crashed it after it had apparently come into contact with the pursuing vehicle. He fled leaving the pistol and the takings in the vehicle. The vehicle was his and there were documents in it which identified him.

The respondent was later apprehended in a phone box not far away, apparently attempting to ring his wife. Although at first he gave a false address and a false alibi to the police, it is generally accepted that within a short time he confessed and co-operated with the police and that later he pleaded guilty promptly.

Although the robbery was one not committed in company with others, nor of a financial institution, it was nevertheless of a very serious and frightening kind involving as it did the use and discharge of a firearm and threats to shoot the victims of the robbery. The seriousness of the offence and the prevalence of such offences requires the imposition of a substantial term of imprisonment as a deterrent to others. Were it not for some of the matters to which we are about to refer, we may have acceded to the submissions made on behalf of the Attorney-General that the term of imprisonment should be increased.

However, because of those matters and because there is something to be said for the view that, in any event, the sentence imposed was within the permissible range, albeit at the lower end of that range, we do not propose to interfere with that sentence. However, notwithstanding the matters to which we are about to refer, we think that the recommendation with respect to parole is much too lenient and we propose to alter that.

We have already mentioned the respondent's confession, his co-operation with the police, which extended to other matters beyond those the subject of this appeal, and his prompt plea of guilty. We have also mentioned the period already served in custody. All of these were mentioned by the learned sentencing judge and rightly taken into account by him. We also take them into account.

It seems plain however that it was the respondent's personal history which most influenced the learned sentencing judge in making the generous recommendation which he did and perhaps also in imposing a sentence which was at the low end of the permissible range. Like many who embark upon a life of crime, the respondent came from a broken home, had a poor relationship with his mother with whom he lived until he was about 14, and then left home, thereafter fending for himself. However, when he was released from prison after serving part of the sentence imposed on him in 1987, he married his present wife, obtained a job immediately and incurred the kind of debts which young couples ordinarily do. His wife was also in employment and

their joint incomes were sufficient to pay their continuing obligations. Unfortunately, he had an accident to his back at work, whilst engaged in heavy labouring work, which necessitated his going off work on compensation. Whilst he was on compensation and still recuperating from his injury his wife lost her job. He then attempted to return to work but was retrenched. Although she obtained employment again, the respondent was unable, despite his considerable efforts, to find work. They fell behind with their debts and their financial difficulties gradually increased. By this time the respondent's wife was pregnant and she had a difficult pregnancy which included illness.

The robbery the subject of this appeal was not planned. The respondent had sought money from some of his friends to help him with his financial difficulties. He was unable to obtain financial assistance but one of them, with whom the respondent had been drinking, suggested that he "do a job" and offered to lend him the firearm which he ultimately used. After sitting in his car for about an hour considering his situation, the respondent decided upon the course which he ultimately took. The relatively unpremeditated nature of the offence is reflected both in the respondent's choice of target - a restaurant at which he would be unlikely to find a substantial amount of cash - and in the fact that he used his own car, parked it nearby, and made no attempt to disguise the number plates. He was remorseful afterwards and in fact when apprehended was attempting to telephone his wife to explain to her what he had

done. There is some substance in the argument advanced on his behalf, and apparently accepted by the learned sentencing judge, that he was driven to this crime by desperation at his financial plight at a time when he appeared to be rehabilitating himself.

There was support for this conclusion in the medical reports tendered and in the pre-sentence report. There was also support in these documents for the view that there were still reasonable prospects of rehabilitation.

All of this we think entitled the learned sentencing judge to make a recommendation for eligibility for parole earlier than might otherwise be the case. Nevertheless we think that his recommendation failed to reflect the seriousness of the conduct and the fact that, for the second time, the respondent had committed the offence of armed robbery whilst on parole for an offence or offences of that kind; and gave too much weight to the factors to which we have referred. We would substitute a recommendation that the respondent be eligible for parole at the expiration of three years of his sentence.

The orders which we make therefore are:

1. Dismiss the objection to competence of the appeal.
2. Allow the appeal.
3. Substitute for the recommendation made by the learned sentencing judge a recommendation that the respondent be eligible for parole at the expiration of three years of his sentence.