IN THE COURT OF APPEAL [1994] QCA 326

SUPREME COURT OF QUEENSLAND

C.A. No. 181 of 1994

Brisbane

[R v. T]

T H E Q U E E N

v.

T

Applicant

McPherson J.A.
Pincus J.A.
Ambrose J.

Judgment delivered 05/09/1994

Separate reasons for judgment of each member of the Court; all concurring as to the orders to be made.

1.APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE GRANTED;

2.APPEAL ALLOWED;

3.THE SENTENCES IMPOSED BY THE PRIMARY JUDGE ARE SET ASIDE;

4.MATTER REMITTED TO THE DISTRICT COURT FOR A RE-SENTENCING OF THE APPLICANT.

CATCHWORDS: **CRIMINAL LAW - PRACTICE AND PROCEDURE - pre-sentence report under the Juvenile Justice Act s. 164 - whether must be a written report or merely oral - oral evidence given below considered not to fulfil requirements of s. 164.**

CRIMINAL LAW - APPEAL AND NEW TRIAL - whether Court of Appeal can remit a criminal case for re-sentencing to

court below, including the District Court - Criminal Code s. 671B, O 70 rr. 11, 12, 25 Supreme Court Rules.

Counsel: Mr S Hamlyn-Harris for the applicant.
Mr P Callaghan for the respondent.

Solicitors: Legal Aid Office for the applicant.
Director of Prosecutions for the respondent.

Date of hearing: 3 August 1994.

REASONS FOR JUDGMENT - MCPHERSON J.A.

Judgment delivered the Fifth day of September 1994

This application for leave to appeal raises the question whether the learned judge of District Courts sentenced the applicant, who is a child, to detention without first obtaining the pre-sentence report contemplated by s.164 of the *Juvenile Justice Act 1992*, and, if so, what is to be done about it.

I have read what Pincus J.A. has written on the subject of s.164, and I agree with it. Section 164, read with the provisions of ss.110 to 112, envisages a pre-sentence report that is in writing, whereas the report of Mrs Ryder, which consisted of her evidence given at the sentence hearing, was oral. Whether in this or any other case it might be possible to satisfy s.164 by having the witness sign a transcript of her oral evidence does not arise for decision here. Apart from other difficulties, what she said in evidence did not provide all of the information specified in reg.5 of *Juvenile Justice Regulations 1993*, to which his Honour was not referred.

It follows that the sentence cannot stand. It must be quashed in the exercise either of the appellate power of this Court, or of the power to issue certiorari under the general jurisdiction of the Court or s.28 of the *District Courts Act 1967*, or by making an order having the like effect pursuant to s.41 of the *Judicial Review Act 1991*. Once quashed, the problem is to decide what course may then be followed.

We do not have, any more than did the sentencing judge below, the necessary report under s.164. Without making the

same mistake again, this Court therefore cannot make a detention order against the applicant if that is what is called for in the circumstances of the case. The rational course is to remit the matter to a District Court to proceed to sentence the applicant, if appropriate by ordering detention, once a report under s.164 has been obtained. Sentence is the judgment of the court, which follows conviction after verdict or plea of guilty; at least that is so in the case of a court of record like the District Court. See the discussion by Windeyer J. in *Cobiac v. Liddy* (1969) 119 C.L.R. 257, 271-274. Conviction is the act of the court in accepting the verdict of the jury at trial, or the accused's plea of guilty: *R. v. Jerome and McMahon* [1964] Qd.R. 595, 602-603. It is the judgment or sentence, and not the conviction, which is called in question here. Where, as with an order made by a court of summary jurisdiction, conviction and sentence are not severable, the conviction may also have to be quashed in order to set aside an unauthorised penalty: *R. v. Arundel Justices, ex parte Jackson* [1959] 2 Q.B. 89, 91; cf. *Cobiac v. Liddy* (1969)119 C.L.R. 257, 271; but that is not the case here.

The next task is to identify a power in this Court to return the matter to the District Court to enable sentence (or judgment) to be given in due course of law. The High Court of Australia in exercising appellate jurisdiction has, in respect of a matter, extensive powers of remittal under s.44 of the *Judiciary Act 1903* (Cth). The term "matter" is defined in s.2 to include any proceeding in a Court and also any proceeding in

a cause or matter. "Cause" is in turn defined to mean any suit, and to include any criminal proceeding. It is my respectful opinion that the High Court's power to remit criminal proceedings derives from its statutory power under s.44 to remit further proceedings in a matter.

Until the enactment of the *Supreme Court of Queensland Act 1991*, there was no general statutory power exercisable on appeal to remit matters that came before the Full Court or Court of Criminal Appeal. Express power to do so is now conferred on this Court by ss.71(2) and 71(3) of that Act. The power so conferred is not confined to civil proceedings, but it is limited to remitting a proceeding, or a particular question in it, to the Trial Division of the Supreme Court. The possibility of remitter to the District Court is not mentioned in the Act.

Pincus J.A. has given reasons for thinking that the desired result can be achieved by a combination of the powers conferred by O.70, r.12 and r.25, or by O.70, r.11, which in criminal appeals are exercisable by virtue of s.671B of the Criminal Code. This Court is successor to the powers of the Full Court and also the Court of Criminal Appeal, which was simply the Supreme Court exercising appellate jurisdiction in criminal matters: *Stewart v. The King* (1921) 29 C.L.R. 234. With great respect, however, I am not altogether persuaded that the necessary power can be extracted from those provisions of O.70. Conviction having been recorded, what is needed now is not a new trial under O.70, r.12 in the District Court, but simply a new sentence or judgment of that Court. Likewise, I doubt whether O.70, r.11, or the concluding words of it, is

sufficient to authorise the taking of such a step in another court. Historically its purpose was to ensure, so far as possible, that the Full Court was able to arrive at a final judgment in that Court without imposing the expense and inconvenience of sending a cause or matter back for further trial or hearing. *Clark & Fauset v. Brisbane Municipality* (1895) 6 Q.L.J. 131, 142. Order 70, r.11 was designed not to enlarge the Court's powers to remit the cause or matter for it to be determined elsewhere and on another occasion, but to enable the Court then and there to do so itself. That is why its opening words are "The Court, upon hearing the appeal ...".

Under the general law a court on setting aside a judgment or conviction on an application for certiorari or other prerogative writ (such as habeas corpus) or prohibition would if necessary issue a writ of *procedendo* to return the proceeding to the inferior court or tribunal to be dealt with there. See 11 *Halsbury*, 3rd ed., para. 158, at 84. *R. v. Wallace, ex parte O'Keefe* [1918] V.L.R. 285, 306. In the United States, where *procedendo* continues to be extensively used as an adjunct both to appeals and proceedings by prerogative writ, it said that its function is to "hand back" jurisdiction to the trial court: *Donnell v. Wright* 97 S.W. 928, 931. Its purpose is not to dictate what the judgment should be, but simply to enable jurisdiction to be resumed and judgment to be entered in the court below. See, generally, *State ex rel. Jacobs v. Municipal Court of Franklin* 269 N.E. 2d 629, 631.

In Queensland the power of the Court to direct a writ of *procedendo* following prohibition was recognised in O.81, r.30.

According to that rule, the writ commanded the judicial tribunal to which a writ of prohibition had gone "to hear or determine the matter in question or otherwise proceed therein as if the writ of prohibition had not been issued". Order 81 was repealed by s.58(2) of the *Judicial Review Act*, although the writ of *procedendo* was not among the writs specifically abolished by that Act. In England, where the comparable legislation is the Administration of Justice (Miscellaneous Provisions) Act 1938, it is said that a proceeding removed by certiorari will now be returned to the inferior tribunal by simple order of the court made in the proceedings. See 11 *Halsbury*, 3rd ed., para. 158, at 84; 1(1) *Halsbury*, 4th ed., para. 281, at 376. The authority cited is *Great Western Ry. Co. v. West Midland Traffic Area Licensing Authority* [1936] A.C. 128, 140, where Lord Atkin questioned whether it was really necessary to use the writ of *procedendo* in a case like that. Such a conclusion would in Queensland be consistent with the policy of the *Judicial Review Act 1991* as exemplified in s.41(2) of that Act and expressed in s.47(4), which authorises the Court, in setting aside a decision on an application for what is called a certiorari order, to remit the matter to the court below for further consideration.

It follows in my opinion that the Court has jurisdiction, in the exercise of its appellate power or otherwise, to quash or set aside the sentence; and, having done so, in the exercise of its power under the general law or s.47(4) of the *Judicial Review Act*, to order that the matter be returned to the District Court for sentence to be given.

Hence, although for slightly different reasons, I agree that the orders proposed by Pincus J.A. should be made.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 05/09/1994

This is an application for leave to appeal against sentence. The applicant, a boy who was aged 14 at the time when most of the relevant offences were committed, was sentenced to 12 months detention in respect of a considerable number of offences of breaking and entering and other offences involving dishonesty, and 12 months detention was imposed cumulatively in respect of an offence of escaping from lawful custody. The applicant by his counsel asserted, amongst other contentions, that the punishment imposed in respect of escaping from lawful custody was too heavy and that the appropriate range was between a non-custodial sentence and 2 months' cumulative detention.

Ordinarily this Court would determine the correctness of the substantive contentions advanced, but a procedural point was taken which should be determined first. It was contended that the learned District Court judge who imposed the sentences failed to comply with s. 164 of the *Juvenile Justice Act* 1992 ("the Act"), which reads as follows:

"A court may make a detention order against a child only if it has first -

(a) ordered the chief executive to prepare a presentence report; and

(b) received and considered the report'"

The word "child" is defined in such a way as to include the applicant: see s. 5. The expression "chief executive" is

defined to mean "the chief executive of the department and a delegate of the chief executive".

A Ms Ryder gave some evidence below, which was treated as satisfying the requirements of s. 164 of the Act. There is no definition of "presentence report", but the nature of the required report is ascertainable from provisions of the Act and of the Juvenile Justice Regulation 1993. There is reference in ss. 110 to 112 of the Act to a presentence report; in my view it is likely that the expression "presentence report" is used in these sections in the same sense as in s. 164. Section 110(3) gives the court power to adjourn the proceeding pending the giving of a presentence report, and s. 110(5) requires the report to be prepared and given to the court "expeditiously and, in any case, no later than 15 working days of the department". There is a provision for extension of that time in s. 110(6). Section 111 empowers the court to request the author of the report or a person who gave a statement included in it to attend before the court. Section 112 provides that if a presentence report is given under s. 110 the court must give a copy of it as soon as practicable to the prosecution and others.

It appears to me that these provisions and particularly s. 112 provide a strong indication that it is intended, and I hold, that a presentence report must be written rather than oral. It has occurred to me that, particularly when sentencing is conducted on circuit, there may be practical difficulties in obtaining written presentence reports in time to allow the

proceedings to be completed; it may be that the court will have to adjust its administrative practices to ensure that avoidable delays do not occur. But whether the result be convenient or otherwise, it is plain that unless the requirements of paras. (a) and (b) of s. 164 are complied with, a court has no power to make a detention order against a child.

I have mentioned that the Juvenile Justice Regulation 1993 gives an indication of the nature of a presentence report. Regulation 5 requires that a presentence report about a child include certain specified information. It is unnecessary to set out the details, because it is plain that these requirements were not met in the instant case. For example, the circumstances of the offences to which the report related were not stated - item (c), nor did the report state the child's attitude to the offences and their victims - item (g). Further, there is no evidence of the making of any order that the chief executive prepare a report. Ms Ryder was no doubt asked by someone to give evidence, but there is nothing to suggest that she was a delegate of the chief executive, nor, in my view, does a request to give evidence about a child amount to an order to prepare a report on the child under s. 164.

The impression one gathers from the record is that the learned primary judge regarded the requirements of s. 164 as rather impractical, in the present case. If a statute restricts the power of a court to impose a detention order, as this one does, it must be carefully and fully complied with. That a

judge holds a view that the restriction is an inapposite one cannot justify such a course as was taken here. It was necessary to make the s. 164(a) order, and then to receive and consider the report.

Although the Court was asked, in effect, to rehear the matter, I think it inappropriate to do so. One possible course is to issue a prerogative writ, but there appears to me to be another power available, which could be used in cases of factual errors not founding jurisdiction to issue such a writ. Section 671B of the Criminal Code, dealing with the powers of this Court in hearing criminal appeals, gives this Court power to:

> "...exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters...".

Were this a civil matter, there would be power to order a new trial generally (O. 70 r. 12) or on any question (O. 70 r. 25). There is also a broadly stated power in O .70 r. 11, which reads in part as follows:

> "The Court, upon the hearing of an appeal, shall have power to draw inferences of fact, not inconsistent with the findings of the jury, if any, and to give any judgment and make any order which ought to have been given or made in the first instance, and to make such further or other order as the case may require".

It is presumably under the power "to make such further or other order as the case may require" that this Court sometimes remits a case before it to the court below, to enable that court to deal with it further.

The powers I have mentioned are exercisable, in civil

matters, on appeals from the District Court as well as those from the Supreme Court; this appears to me to follow from O. 70 r. 35.

There may be room for doubt on the question whether remitting a criminal case to the District Court to enable re-sentencing is ordering a "new trial" on a question and a more secure foundation for an order remitting a case to enable re-sentencing to occur is provided by O. 70 r. 11.

Although in saying so I intend no reflection upon the primary judge, I express the view that the proper course would be to have sentence re-determined by a judge other than the one whose sentence has been successfully challenged. I think the orders of the Court should be:

1. Application granted;
2. Appeal allowed;
3. The sentences imposed by the primary judge are set aside;
4. Matter remitted to the District Court for a re-sentencing of the applicant.

REASONS FOR JUDGMENT - AMBROSE J.

Judgment Delivered: 5/09/1994

In this matter I have had the benefit of reading the draft judgments of McPherson JA and Pincus JA. Those judgments sufficiently canvass the facts relevant to the issues debated upon the hearing of the application for leave to appeal against sentence. I will not therefore attempt to restate those facts.

It is clear upon the evidence and it was in effect conceded by the Crown that the sentence passed by the learned District Court Judge in this matter cannot stand because of his failure to obtain a pre-sentence report required by s.164 of the Juvenile Justice Act 1992 before imposing sentence.

I agree with what both McPherson JA and Pincus JA have said on this topic.

Although the matter of the failure of the learned sentencing Judge to obtain a pre-sentence report pursuant to s.164 of the Juvenile Justice Act 1992 was ventilated upon an application for leave to appeal against sentence on the grounds that "the sentence imposed was in all the circumstances manifestly excessive", the substantial point debated was whether the fact that the sentencing Judge proceeded to impose a sentence upon the applicant without first complying with the mandatory requirements of s.164 of the Juvenile Justice Act 1992, demonstrated that in fact he had no jurisdiction to impose any sentence.

In my view, the applicant has in essence sought an order of a prerogative nature quashing the sentence imposed upon the

applicant on the ground that the sentencing Judge had no power or jurisdiction to impose that sentence.

In my view, the relief sought by the applicant being in the nature of a certiorari order ought properly to have been sought upon application pursuant to ss.43 and 45 of the Judicial Review Act 1991.

Upon the facts of the present case, it is clear that this Court should, if possible, make an order quashing the sentence imposed upon the applicant and remitting back to the District Court the matter of sentence to be dealt with according to law on the basis that no lawful sentence has yet been imposed because the sentence purportedly imposed is disclosed upon the material placed before us to be void and of no effect.

Upon an application under the Judicial Review Act 1991, I would move the sentence purportedly imposed upon the applicant in the District Court on 22 April 1994 into this Court and quash it on the ground that it was imposed without power and/or jurisdiction.

Had an order to quash the sentence been made pursuant to Part 5 of the Judicial Review Act 1991, this Court, under s.47(3), may have not merely quashed the sentence but also remitted the matter of sentence to the District Court for further consideration.

No point was taken upon the hearing of this application for leave to appeal against sentence on the ground that it was manifestly excessive that the ground based upon non-compliance with the provisions of s.164 of the Juvenile Justice Act should properly be made in an application to this Court pursuant to

Part 5 of the Judicial Review Act 1991. In the circumstances I take the view that this Court ought make the orders that would have been made had application for judicial review by way of certiorari been made.

I would therefore quash the sentence and remit the matter of sentence back to the District Court to enable the sentencing process to proceed according to law.

In making this order I would proceed on the basis of the exercise of an inherent power exercised at the instigation of both the applicant and the Crown.

The method by which this Court in the circumstances of this case exercises its power to make a quashing order by way of certiorari ought not be treated as precedent for a method of seeking prerogative relief pursuant to Part 5 of the Judicial Review Act 1991.

I therefore agree with the orders proposed by McPherson JA and Pincus JA.