IN THE COURT OF APPEAL [1997] QCA 256

SUPREME COURT OF QUEENSLAND

C.A. No. 229 of 1997

Brisbane

Before McPherson J.A.
Davies J.A.
White J.

[R.v. Booth]

THE QUEEN

v.

MICHAEL WAYNE BOOTH
(Applicant)

McPherson J.A.
Davies J.A.
White J.

Judgment delivered 22 August 1997

Judgment of the Court

APPLICATION TO EXTEND TIME DISMISSED.

CATCHWORDS: CRIMINAL - *Penalties & Sentences Act 1992* ss.4, 155, 160, 182A - Whether default periods of imprisonment were cumulative - *R. v. Anderson* [1995] 1 Qd.R. 49 considered.

Counsel: Mr P. Alcorn for the applicant
Mr D. Bullock for the respondent

Solicitors: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

Hearing Date: 5 August 1997

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 22 August 1997

Michael Booth applies to extend the time for leave to appeal against sentences imposed on him for seven offences to which he pleaded guilty in the magistrates court at Biloela on 7 September 1994. In the case of each offence the sentence was a fine or penalty, and the results can be rendered in tabular form as follows:

	No.	Offence	Amount	Default

	No.	Offence	Amount	Default
1.	TP23462/94	Fail to wear bike helmet	$126.00	4 days
2.	577/93	Use vehicle without consent	$2,413.33	180 days
3.	636/93	Stealing	$458.33	80 days
4.	638/93	Break and enter	$558.33	80 days
5.	835/93	Stealing	$34.66	7 days
6.	637/93	Break and enter	$851.00	180 days
7.	639/93	Break and enter	$843.30	180 days

The original basis of the application to extend time was that, if the periods of imprisonment in default of payment of the penalties were accumulated, the resulting total was 731 days, which exceeded by one day, or so it was said, the maximum term of imprisonment, which is limited by s.160(b) of the *Penalties and Sentences Act 1992* to two years in the case of a conviction that is not on indictment.

The submission assumes that the default periods of imprisonment imposed in this instance were, or were intended to be, cumulative. The magistrate did not in terms say they were to be cumulative but that appears to be the effect of s.182A of the Act. Section 182A(1) is the provision that confers power to order that an offender who is

ordered to pay a penalty is to be imprisoned for a term if he fails to pay. Section 182A(2) goes on to provide that:

> "(2) The term of imprisonment -
>
> (a) ...
>
> (b) must be served cumulatively with any term of imprisonment the offender is serving, or has been sentenced to serve, unless the court orders otherwise."

As a general rule and unless otherwise provided by the Act, an offender sentenced to serve imprisonment for an offence and also sentenced to serve imprisonment for another offence, is by s.155 of the Act required to serve the imprisonment for that other offence concurrently with the imprisonment for the first offence. Section 182A(2) is therefore an instance in which, in the words of s.155, it is "otherwise provided by the Act".

The question then is whether it can be said that, upon being ordered to pay a penalty with a term of imprisonment to be served in default of payment, the offender "has been sentenced to serve" a term of imprisonment. There is said to be no authority in point, save perhaps for what was said by McPherson J.A. in *R. v. Anderson*

[1995] 1 Qd.R. 49, 53. That was to the effect that someone who had been sentenced to serve a term of imprisonment which had been suspended pursuant to s.144 was a person "who has been sentenced to serve imprisonment for an offence" within the meaning of s.156(1)(b) of the Act. However, in *R v Anderson* [1995] 1 Qd.R. 49,54, Mackenzie J. adopted the opposite view of that provision, and the third member of the Court (who was Fitzgerald P.) did not find it necessary to decide the point.

Whatever may be the ultimate resolution of that difference of judicial opinion, the question in the present case arises in the context of s.182A, which is a different, if similarly worded, provision from that considered in *R. v. Anderson*. In the case of 182A, it would be extraordinary if terms of imprisonment for default in payment of a series of penalties were to be served concurrently and not cumulatively. It would tend to operate as an inducement to an offender to default in payment of the fines imposed rather than to pay them, in order to bring about the result that the offender would then serve those terms concurrently, which would in effect limit the imprisonment in fact served to the duration of the longest of the individual terms imposed on default. It seems most unlikely that that was the intention of the legislature in inserting s.182A, as

it did by amendment in 1993, particularly when (as is the case) the duration of each of such terms of imprisonment is, under s.182A(2)(a)(ii), to be calculated by reference to the number of penalty units ordered to be paid.

The point at issue is really placed beyond doubt by the definition in s.4 of the Act of the expression "term of imprisonment", which means:

> "the duration of imprisonment imposed for a single offence, and includes the imprisonment an offender is serving, *or is liable to serve* -
>
> (a) for default in payment of a single fine ...".

In other words, the Act appears clearly enough to treat each such term of imprisonment in default of payment of a penalty as being imposed for a single offence and as being a "term of imprisonment" even if the offender is not serving but only "liable to serve" it. When that definition is read with the expression "term of imprisonment" in s.182A(2), there is little doubt that, by virtue of that provision, default terms of imprisonment are intended to be served cumulatively. Problems may continue to arise in relation to suspended sentences coupled with default terms of imprisonment; but they can safely be left for determination on another occasion.

Finally , it does not in any event seem possible to regard the default terms in this case as exceeding the maximum of two years permitted by or under s.160(b) of the Act. Section 160(b) plainly refers to two years as the maximum that may be imposed for or in respect of a single offence, and not to the maximum that may be imposed at a single hearing of charges against the same offender of a number of separate offences. In the present case, none of the terms of imprisonment imposed in respect of any particular offence for which the offender was sentenced on 7 September 1994 exceeded 2 years. The duration of the longest single term was 180 days, of which there were three in all.

There are, of course, other sentencing considerations or principles that militate against the imposition and accumulation of default terms of imprisonment. Some of those matters are mentioned in *R. v. Anderson* [1995] 1 Qd.R. 49. For the offences in question, a cumulative term of imprisonment for two years may not be a light sentence; but under s.166 (1) (d) of the *Corrective Services Act 1988* eligibility for parole will accrue after half of that period has been served. The applicant has some prior convictions for similar offences, and, on an application like this for the extension of

time, it is in all the circumstances not possible to say that the overall effect of the sentences imposed on 7 September was manifestly excessive. Indeed, when on 30 May 1997 the applicant came before a District Court for two offences of assault occasioning bodily harm in company and while armed, the sentence then imposed of imprisonment for six months was made concurrent with any other sentence the applicant was serving, which appears to refer to the sentences of imprisonment in default of payment of the penalties ordered to be paid in September 1994. The impact of the sentences imposed on that occasion has already to some extent been taken into account in favour of the applicant when he was later sentenced in the District Court.

All matters considered, including the interval since the subject sentences were imposed in 1994, there is no real prospect that the applicant would succeed in having those sentences reduced if the time for making an application for leave to appeal were now to be extended.

The application to extend time is dismissed.