IN THE SUPREME COURT)
)
OF THE TERRITORY OF)
)
PAPUA AND NEW GUINEA)

CORAM: MINOGUE, A.C.J.

WONG v. GANNON

1969

October 9th.
16th.

PORT MORESBY

Minogue, A.J.C.

The appellant was convicted of stealing at the District Court at Port Moresby on 21st August, 1969 and was on that day sentenced by the learned Resident Magistrate to one month's imprisonment with light labour. He thereupon signed a Warrant of Commitment and the appellant was taken into custody. Shortly thereafter a Notice of Appeal was given and duly served and the appellant purported to enter into a recognizance pursuant to Sec. 228 of the District Courts Ordinance 1963-1965 conditioned to prosecute the appeal and to abide the order of the Supreme Court thereon. She then made an application under Sec. 229 to be released from custody and an order was made so releasing her. I was informed from the bar table that she, in fact, was in custody for about 4 hours.

When this appeal came on for hearing before me Mr. Pratt for the appellant raised a preliminary question upon which he asked me to rule. This is whether the sentence imposed by the District Court has already expired. He referred me to a passage in the judgment of the Full Court in R. v. Holland (unreported) in which the Court drew the attention of the appropriate authority to the doubt whether because of the appellant's release on bail, in the absence of any provision in the legislation expressly providing that the time during which an appellant is liberated on bail shall not count as part of any term of imprisonment, the appellant could at the stage the matter was before the Court be required to undergo the sentence imposed upon her. The Court did not call for argument on the point having allowed the appeal on other grounds. In any event the appellant in that case had been allowed bail under the provisions of the Supreme Court (Full Court) Ordinance and the question debated before me could not there have arisen. It has since been sought to put the matter beyond doubt by the enactment of the Criminal Law

(Bail) Ordinance 1969.

To determine the preliminary question the Court must consider whether the execution of the sentence of imprisonment imposed by the Magistrate and put into effect at any rate initially by the issue of the Warrant of Commitment and the taking of the appellant into custody has in some way been stayed.

At common law an appeal does not operate as a stay of execution pending its determination - see Kendall v. Wilkinson (1) and at common law also the Court has no inherent power to release an offender on bail after conviction - see Ex parte Blyth (2). In the course of his reasons for judgment in re Blyth (2) (supra) Hallett, J. referred to a case of Sinnott in which the applicant for a Writ of certiorari to quash an order of conviction and sentence was granted bail pending the hearing of the motion. The Divisional Court dismissed the motion with costs and it was then decided by Humphreys, J. that the granting of bail had the unintended effect of cancelling the sentence. This of course is the effect that Mr. Pratt argued has been produced in this case. He urged upon me that there is no express provision suspending or staying the execution of the sentence pending the determination of the appeal nor is such a result achieved by necessary implication. To effect a stay of execution in his submission there must be some provision such as Sec. 671 G of the Criminal Code of Queensland which enacts that the time during which an appellant pending the determination of his appeal (i.e. to the Court of Criminal Appeal) is liberated on bail or recognizances shall not count as part of any term of imprisonment under his sentence and any imprisonment under such sentence shall be deemed to be resumed or to begin to run as the case requires as from the day on which the bail is determined and if the appellant is not in custody as from the day on which he is received into prison under the sentence.

Mr. Waight did not contest that the position at common law is as I have described it to be but he submitted that the combined

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(1) 4 El. and Bl. 680 per Lord Campbell, C. J. at p. 688
(2) (1944 K.B. 532)

operation of Secs. 228, 229 and 242 was to in effect stay the execution of the sentence during the appellant's release from custody and to enable her sentence to be resumed if the appeal went against her. By Sec. 228 an appellant is required to enter into a recognizance with a surety before a Magistrate in any such sum as the Magistrate thinks fit conditioned duly to prosecute the appeal and to abide the order of the Supreme Court thereon and to pay such costs as are awarded by the Supreme Court or the appellant may, instead of entering into a recognizance, deposit with the clerk of the court by which the conviction was made such sum or sums of money as a Magistrate in writing directs. I note in passing that the section does not, in fact, seem to have been complied with in that no surety joined the appellant in her recongizance but as Sec. 237 gives the Supreme Court power to dispense with conditions precedent I do not regard this omission as necessarily significant. By Sec. 229 where an appellant is in custody and is not detained for any other cause a Magistrate on the certificate of the clerk of the court by which the conviction order or adjudication was made that a copy of the Notice of Appeal has been served upon him and that the appellant has entered into a recognizance or deposited a sum of money in accordance with Sec. 228 may by order in writing release the appellant from custody. The release from custody under this section is clearly discretionary. Section 242 enacts that where a conviction order or adjudication has been affirmed, amended or made by the Supreme Court upon an appeal a Court or Magistrate has the same authority to enforce the conviction order or adjudication as if it had not been appealed from or had been made in the first instance. Somewhat similar provisions are found in the Justices Acts of South Australia. Sec. 242 of the Territory Ordinance finds its counterpart in Sec. 170. Until 1956 Sec. 168 made the release of the appellant from custody imperative if his recognizance to duly prosecute the appeal and to abide the order of the Supreme Court thereon was further conditioned for his appearance before the same justices or if that be impracticable before some other justice

or justices within 14 days after the decision of the appeal to abide the result of such decision unless the conviction or order were reversed. I refer to the South Australian legislation because Mr. Waight relied strongly on R. v. Sabine Ex parte Lenthall (3) a decision of the Full Court of that State. In that case an appellant had been released on a recognizance pending determination of his appeal consequent upon a conviction and sentence of imprisonment for two months. The appeal having been dismissed and the appellant not having surrendered pursuant to the terms of his recognizance an application was made to the Magistrate for the issue of a Warrant of Commitment. The Magistrate held that he had no power to issue such a warrant without a specific direction from the Supreme Court and the point that the Supreme Court had to consider was whether there being no power in the Court to commit to prison on the determination of an appeal the term directed by the original warrant had expired. The Court held that it had not and that the Magistrate had jurisdiction to issue a warrant committing the appellant to prison to serve the remainder of his sentence. The Court thought that it could never have been contemplated that an appellant who is discharged as of right upon entering his recongizance should by the mere act of appealing escape from the penalty imposed and it went on to state that there was no justification for any resort to necessary implication in order to supply a supposed deficiency in the Act if the language of Section 170 (our Section 242) was reasonably capable of an interpretation which provided a uniform and convenient procedure for the due execution of the conviction whether made or affirmed on appeal. The Court thought it a mere question of the proper procedure to be adopted for the execution of the judgment of a Court of competent jurisdiction. And it went on to hold it clear that the section meant that the justice has the same in the sense of the like authority to enforce the conviction as if it had not been appealed against.

(3) (1929 S.A.S.R. 123)

It is clear that the members of the Full Court were of the opinion that the effect of the relevant provisions in the South Australian Act was to effect a stay of execution. In re Blyth (4) (supra) Hallett, J. expressed the view that Section 3 of the Summary Jurisdiction Act 1857 (Eng.) was an express provision for granting bail pending the appeal and for ensuring that if the appeal should be unsuccessful the appellant would not be benefited by any remission of his sentence merely as a result of having made an unsuccessful appeal. The relevant part of that section reads - "and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice or justices, or, if that is impracticable, before some other justice or justices exercising the same jurisdiction who shall be then sitting, within ten days after the judgment of the superior court shall have been given to abide such judgment, unless the determination appealed against be reversed." However, in R. v. Sabine (5) (supra) the Court seems to have based its reasoning in part on the fact that the appellant was released as of right and on the form of the further condition of the recognizance neither of which requirements find their counterpart in the District Courts Ordinance. In re Blyth (4) (supra) also the release from custody was of right. In neither case does a provision such as Sec. 20 of the Criminal Code (Queensland, adopted) seem to have fallen for consideration.

The relevant part of that section reads - "A sentence of imprisonment with or without hard labour upon a summary conviction takes effect from the commencement of the offender's custody under the sentence." It seems to me difficult to import into that section words to the effect that if bail is granted the sentence is to be suspended pending the determination of an appeal. Were it not for the provision in the next paragraph of the section rendering a person who escapes from lawful custody while undergoing a sentence liable upon recapture to undergo the punishment which he was undergoing at the time of his escape for a term equal to that during

(4) (1944 K.B. 532)
(5) (1929 S.A.S.R. 123)

which he was absent from prison it is clear that at common law the sentence would still run notwithstanding the escapee's being at liberty - see Wilson v. Attorney-General (6) and I would expect some such provision in the Code if suspension of sentence whilst a prisoner was on bail was intended. Assuming that I were to dismiss the appellant's appeal against conviction I do not see that Sec. 242 assists the respondent. The Magistrate is empowered in such circumstances to enforce the conviction as if it had not been appealed from but he has already issued his warrant which by Section 20 has taken effect from the commencement of the appellant's custody. I find it difficult to see how without express authority he can issue another warrant. It appears to me that the South Australian legislature was not satisfied with the position despite the decision in R. v. Sabine (7) because in 1931 it added Subsec. 1(A) to Section 170 which provides that if a person convicted and committed to gaol appeals and is liberated upon recognizance on appeal and the Court of Appeal orders that the balance or some part of the balance of his sentence be served the justices from whose decision the appeal has been brought or any other justice may by warrant remand the appellant to his former custody there to serve the balance of the term to be served by him. This amendment puts beyond doubt the power of a justice to issue a second warrant - a power which I cannot see contained in the Territory legislation as it stood at the time when the appellant in this case was released from custody. Again in 1956 Sec. 168 of the South Australian Justices Act was repealed and another section enacted in its place. It is provided in the new section that if as a result of his appeal the appellant is required to serve a term of imprisonment, subject to the direction of the Supreme Court, the time during which the appellant is in custody and is specially treated (i.e. in the same manner as a person who is committed to trial and is in custody awaiting trial) shall count as part or the whole of that term. In

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(6) (1938 N.Z.L.R. 493)
(7) (1929 S.A.S.R. 123)

Victoria where an appeal is taken to General Sessions (now to the County Court) if or so far as it is decided in favour of the respondent the justices are authorised by Section 109 of the Justices Act 1958 to issue a fresh Warrant of Commitment.

Not without hesitation I have come to the conclusion that Sec. 242 is not effective on its proper construction to prevent the sentence which takes effect under Sec. 20 of the Criminal Code from running nor to suspend or stay the operation of that section. And so I hold that the sentence imposed by the learned Resident Magistrate has now expired and I determine the question raised accordingly.

Solicitor for the appellant : Craig Kirke & Pratt.

Solicitor for the respondent : P. J. Clay, Acting Crown Solicitor.