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RENZELLA TIME

R v Renzella [1996] VSC 58; [1996] VICSC 58

Section 18(1) of the Sentencing Act currently states that if an offender is sentenced to imprisonment, any time spent in custody for the proceedings for the offence (including appeals) must be reckoned as a period of imprisonment already served under the sentence unless the sentencing court otherwise orders.

When the appeal of R v Renzella [1996] VSC 58[1] was heard in 1996, s 18(1) was worded in a much more restrictive way and pre-sentence detention for an offence was to be taken as time in custody for "proceedings arising from those proceedings *and for no other reason*'.[2]

However, sometimes an accused is already serving a sentence of imprisonment and comes before the court for sentencing at a later date for a separate and unrelated offence.

This raises the question of how much time served in custody should be allocated to the current, unrelated matter. The pre-sentence detention attributed to the subsequent, unrelated matter is commonly referred to as 'Renzella time'[3] due to the common law discretion arising from the decision of Renzella.

In Renzella, the Crown argued that there was no "common law" discretion to take account of pre-sentence detention for a separate, unrelated offence; and that Parliament intended s 18 to be an exhaustive statement of the extent to which pre-sentence detention might be taken into account.[4]

Winneke P, Charles and Callaway JJA in their joint decision explicitly did not accept that submission.[5]

Their Honours stated in regards to s 18 that:

> "In other cases the section is silent and a court is not only empowered but obliged as a matter of justice to take pre-sentence detention into account."[6]

The above passage was emphasised and affirmed by the Victorian Court of appeal in *Wheldon v The Queen* [2011] VSCA 83 ("Wheldon") at [41].

In Renzella, Their Honours concluded:

> "Presentence detention to which s 18 does not apply is to be taken into account in the exercise of the court's discretion. It should ordinarily be taken into account at the first opportunity".[7]

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[1] R v Renzella [1996] VSC 58; [1996] VICSC 58
[2] *Wheldon v The Queen* [2011] VSCA 83 at [19].
[3] For example, Tate JA used the term 'Renzella Time' 4 times in Wheldon v The Queen [2011] VSCA 83 at [27] to [36].
[4] R v Renzella [1996] VSC 58 at [26].
[5] R v Renzella [1996] VSC 58 at [26].
[6] R v Renzella [1996] VSC 58 at [27].
[7] R v Renzella [1996] VSC 58 at [30].

Accordingly, there is a common law discretion for pre-sentence detention to be taken into account by the court for a subsequent, unrelated offence. The amount of time allocated for pre-sentence detention will depend upon the circumstances, submissions and judicial discretion.

When making submissions on Renzella time it is important to keep in mind both the s 16(1) presumption of concurrency and the principle of totality. These considerations strengthen a submission for a lower sentence because if the person had the benefit of being sentenced on the previous occasion it is likely he or she would have had the benefit of concurrency and/or totality.

Renzella time and concurrency

***Wheldon v The Queen* [2011] VSCA 83**

In *Wheldon*, both the prosecutor and defence counsel informed the sentencing judge to disregard the period in custody that would constitute Renzella time.

Tate JA (with Nettle and Neave JJA agreeing) criticised this as being wrong in law and noted at [17]:

> "It was unfortunate, in my opinion, that her Honour did not receive the assistance she deserved in relation to the sentence of one month imposed on appeal, by the County Court, for the unrelated offending of criminal damage."

Concurrency is a consideration when dealing with Renzella time

The accused in *Wheldon* was originally sentenced in the Magistrates' Court and then later sentenced for unrelated matters heard on appeal in the County Court. Tate JA stated at [36] that the accused:

> "[W]ould almost inevitably have been given a sentence by the Magistrates' Court to be served concurrently with the sentence imposed by her Honour. He has thus been denied the opportunity for concurrency, a consideration recognised by Redlich JA in R v Berry; R v Wenitong."

The above passage refers to the following consideration of concurrency by Redlich JA in R v Berry & Wenitong [2007] VSCA 202 at [117]:

> "I accept the applicant's submission that a similar approach should be taken, where an offender, who has been initially charged and is on remand, is subsequently convicted of other unrelated offences and serves the period of imprisonment for those sentences before falling to be sentenced for the initial charge. R v Ali was such a case. Counsel for Berry rightly submits, that had those sentences on unrelated matters not been imposed or completed, it is likely that an order for some concurrency would have been made. Thus an offender is entitled to have the court in a general way take into account the sentences that have been served. Thus the sentences which had been imposed on the applicant after the commission of the offence and which were served prior to being sentenced for the offence now before the Court and which could

not be included as pre-sentence detention, should have been taken into account in a general way as part of the applicant's background."

Sentencing judge has discretion to consider Renzella time in a "broad way"

Tate JA (with Nettle and Neave JJA agreeing) held in *Wheldon* at [32] that the sentencing judge had "a common law discretion … to have regard, in a broad way, to the month [of Renzella time]".

His Honour concluded at [39] that the entire month of Renzella time should be taken off both the head sentence and non-parole period, despite the authority of *Warwick v The Queen* {2010] VSCA 166, which states that there "would seem to be no logical necessity for the one [the non-parole period] to mirror the other [the head sentence]."[8]

Totality and Renzella

Court must take the unrelated detention into account "in a broad and practical way" and arrive at a sentence that is "just and appropriate"

In *Buddle v The Queen* [2014] VSCA 232 ("Buddle") the sentencing judge took presentence detention into account for unrelated offending "in accordance with the principles of totality"[9] but made no reference to the common law Renzella discretion. The appellant argued that judge erred by not taking into account the common law Renzella discretion.

Neave and Priest JJA rejected this submission at [44]:

> "[I]t does not much matter what label one affixes to her Honour's consideration of the detention which preceded the sentence for the current offences (whether it be the exercise of the Renzella discretion, or the application of the totality principle). The fact remains that, in a broad and practical way, the judge took the period of pre-sentence detention (so called) into account."

In *Buddle* Their Honours concluded at [50] – [51]:

> "Lying at the root of the Renzella discretion and the totality principle is fairness – the need to impose a sentence that is just and appropriate…
>
> [I]n a broad and practical way the judge took into account the periods of unrelated detention so as to arrive at a sentence which was just and appropriate."

Totality is important

In *The Queen v Sharp* [2015] VSC 116 ("Sharp") Priest JA took into account Renzella time when sentencing an offender. His Honour noted at [22] that "Totality is important" and ordered that the sentences imposed be served concurrently.

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[8] Warwick v The Queen [2010] VSCA 166 at [13]; affirmed by Tate JA in Wheldon v The Queen [2011] VSCA 83 at [39].

[9] See sentencing judge's reasons: Buddle v The Queen [2014] VSCA 232 at [43].