

32/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v NEWMAN

Winneke P, Brooking and Callaway JJA

24 April 1997 — [1998] 1 VR 715; (1997) 94 A Crim R 450

SENTENCING – BREACH OF SUSPENDED SENTENCE – GENERALLY THE SENTENCE SUSPENDED SHOULD BE RESTORED UNLESS UNJUST TO DO SO – FACTORS TO BE CONSIDERED: SENTENCING ACT 1991, S31(7).

1. Generally, a breach of a suspended sentence should result in the offender serving the sentence which was suspended. Otherwise, the system of suspended sentences and their effectiveness as a means of deterring future offenders will be undermined.

R v Buckman (1988) 47 SASR 303; and

R v Marston (1993) 60 SASR 320; (1993) 65 A Crim R 595, applied.

2. In deciding whether to restore a suspended sentence, an important factor to take into account is any marked disproportion between the seriousness of the breaching offence and the sentence of imprisonment that would be activated. Other factors include the circumstances of the offender, the period of time elapsed and the offender's behaviour since the imposition of the suspended sentence.

WINNEKE P: [1] I will invite Callaway JA to deliver the first judgment in this matter.

CALLAWAY JA: This is an application by the Director of Public Prosecutions pursuant to s31 of the *Sentencing Act* 1991. The background fully appears from the judgment of the President in *R v Newman & Turnbull* [1999] 1 VR 146; (1995) 81 A Crim R 195. Newman, the respondent to the present application, and one Turnbull had been jointly presented in the County Court at Bairnsdale on one count of aggravated burglary and one count of intentionally damaging property, contrary to ss77(1) and 197(1) of the *Crimes Act* 1958. They both pleaded guilty. The learned sentencing judge imposed sentences that were reduced on appeal by this Court. The total effective sentences resulting from the orders made on appeal on 17th July 1995 were sentences of 15 months' imprisonment, of which a period of ten months was suspended pursuant to s27 of the *Sentencing Act*. An operational period of two years was fixed.

On 6th March 1997 the respondent pleaded guilty in the Magistrates' Court at Lakes Entrance to a charge of intentionally damaging property contrary to s197(1) of the *Crimes Act*. He was convicted and fined \$300. That offence was committed on 11th November 1996 and therefore within the period during which the respondent would become liable to be dealt with under s31. The offence is punishable by imprisonment.

The circumstances of the breaching offence were that the respondent was at the home of his then girlfriend at about 11 o'clock in the morning. A domestic dispute erupted. It began inside the house and continued in the front yard. The respondent threw a rock into the front [2] windscreen of the car parked in the driveway. That car belonged to the mother of the other party to the dispute but, we were informed this morning without objection, was on almost permanent loan to her. The rock smashed the windscreen and the slivers of glass damaged the dashboard. The applicant accepts that the respondent committed that offence after his girlfriend had herself smashed the windscreen and punctured the bonnet of his car. When the respondent was asked his reasons for doing what he did, he told the police that the reason was "She did mine first". Unlike the facts of the earlier offences, no alcohol was involved on this occasion.

Section 31(5) of the *Sentencing Act* provides that this Court must first be satisfied, by evidence on oath or by affidavit or by admission, that the respondent has, during the relevant period, committed another offence punishable by imprisonment. That admission has been made and, as I have already mentioned, the offence was of the required character.

The Court is then given a number of options, of which I shall refer only to three. We may restore the part of the sentence held in suspense and order the respondent to serve it. We may restore only a portion of the part of the sentence held in suspense and order him to serve it. We may make no order with respect to the suspended sentence imposed on 17th July 1995. Section 31(7) provides that we must adopt the first of those three courses unless we are of opinion "that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence". If we are of that [3] opinion we are obliged to state our reasons.

Counsel for the respondent relies upon the following circumstances:

- (a) The penalty imposed by the Magistrates' Court for the breaching offence reasonably reflects, in counsel's submission, the seriousness of that offence.
- (b) The respondent co-operated with police investigators, admitted the offence at the earliest opportunity and pleaded guilty at the Magistrates' Court.
- (c) The offence arose from a domestic dispute in which the respondent retaliated against provocative acts of assault upon himself and criminal damage against his own property.
- (d) The respondent paid full compensation for the damage he caused before the breaching offence was reported to the police. It was not reported until some two months after its commission. He himself has received no compensation for the damage to his own vehicle.
- (e) The breaching offence was committed almost 16 months after the suspended sentence was imposed.
- (f) There is evidence, in the form of testimonials received without objection, that the portion of the sentence already served by the respondent has had a salutary effect upon him and that he has been in regular employment since his release from prison.

This is not a case in which we need to review the law relating to suspended sentences, but I shall refer briefly to some of the considerations that weigh with me. First, a court is not permitted to impose a suspended sentence at all unless the sentence of imprisonment itself, if unsuspended, would be appropriate [4] in the circumstances having regard to the provisions of the *Sentencing Act*: see s27(3), as well as *R v Arkle* (1972) 56 Cr App R 722, especially at p724, and *R v P* [1992] FCA 626; 39 FCR 276; (1992) 111 ALR 541; (1992) 64 A Crim R 381 at pp390-391. Secondly, there is the requirement of s31(7) to which I have already referred. That too reflects the sentencing jurisprudence of the courts. In *R v Buckman* (1988) 47 SASR 303 at p304, King CJ said, for example:

"There is a clear legislative policy that in general a breach of a condition of a recognisance upon which a sentence has been suspended, should result in the offender serving the sentence which was suspended. A sentence of imprisonment is imposed and suspended only where imprisonment is fully merited but the court considers it appropriate to give the offender a last chance to avoid imprisonment by leading a law-abiding life. It is intended to be a sanction suspended over the head of the offender which is to be activated if there is a lapse into non-law-abiding ways. The court will not lightly interfere with the ordinary consequence of a breach of the recognisance."

In *R v Marston* (1993) 60 SASR 320; (1993) 65 A Crim R 595 his Honour returned to this topic at p596 and, after setting out the passage that I have quoted, continued:

"It is of great importance that the courts adhere to that principle. Departure from it by the non-revocation of suspended sentences tends to undermine the integrity of the system of suspended sentences and their effectiveness as a means of deterring future offenders."

There are, nevertheless, examples of cases where courts have thought it just either not to restore the sentence or part of the sentence that was suspended or to restore it only in part. See, for example, *R v Cline* (1979) 1 Cr App R (S) 40; *R v Abrahams* (1980) 2 Cr App R (S) 10; *Marston's Case*; and, finally, *Stanitzki v Higgins* [1994] SASR 4600; (1994) 63 SASR 309; (1994) 72 A Crim R 445, where Olsson J collected and discussed a number of the relevant authorities. They show that an important factor [5] to take into account is any marked disproportion between the seriousness of the breaching offence and the sentence of imprisonment that would be activated. Many of the submissions made by counsel for the respondent, to which I have referred, should be

understood in that light. It is firmly to be borne in mind that we are not considering an appropriate punishment for the offence committed on 11th November 1996. The respondent has been dealt with for that offence. We are considering whether it would be unjust to restore the whole of that part of the sentence that was suspended by this Court.

This was another offence of damage to property; it was another offence of uncontrolled anger; and it was another offence of retaliation. The Court cannot condone the law being taken into the offender's own hands, even where there is provocation of the kind that I have briefly described. On the other hand, that provocation is of a mitigatory character; it was part and parcel of what happened; it was by no means an extraneous factor. It puts the breaching offence in perspective without denying either its seriousness for the owner of the property or the fact that this respondent was given a chance, which is ordinarily a last chance, when his sentence was suspended. I also give weight to the progress he has made, in settling down to steady employment and otherwise, and to the other submissions ably made on his behalf this morning.

It is a case of balancing the factors to which King CJ referred in the passages that I have read against the circumstances of the individual offender and the Court's desire, as in all cases, not to take a more severe course [6] than is warranted by all the relevant considerations, including the public interest. Should the other members of the Court agree, I would, for these reasons, propose that we restore three months only of the sentence held in suspense and order the respondent to serve it.

WINNEKE P: I agree, for the reasons which have been given by Callaway JA, that three months of the suspended sentence should be restored.

BROOKING JA: The facts of this case, including in particular those of the subsequent offence, appear from what Callaway JA has said. I am, for myself, content to dispose of this application by saying that, having regard to the circumstances in the widest sense of the subsequent offence, and especially the provocation offered to the respondent, and having regard to the period of time which had elapsed by the time of that offence since the passing of the suspended sentence by this Court, and the material concerning the respondent's behaviour since his release, it would be unjust to restore the whole of the part of the sentence held in suspense, and it will be enough to restore three months of the part sentence held in suspense.

WINNEKE P: Pursuant to s31(5) of the *Sentencing Act* 1991, this Court orders that three months of the suspended portion of the sentence imposed upon the respondent Newman on 17th July 1995 be restored, and we further order that he serve that portion of the suspended sentence.