14/00; [2000] VSC 98

SUPREME COURT OF VICTORIA

KENT v WILSON

Hedigan J

7, 24 March 2000

SENTENCING – COMBINED CUSTODY AND TREATMENT ORDER BREACHED – COURT TO ORDER RETURN TO PRISON UNLESS EXCEPTIONAL CIRCUMSTANCES EXIST – COURT DECLINED TO ORDER RETURN TO PRISON – ORDER CONFIRMED AND OFFENDER FINED – COURT REQUIRED TO GIVE WRITTEN REASONS – WHETHER ORAL REASONS SUFFICIENT – "EXCEPTIONAL CIRCUMSTANCES" – MEANING OF – WHETHER "EXCEPTIONAL CIRCUMSTANCES" EXISTED – WHETHER MAGISTRATE IN ERROR IN CONFIRMING ORDER: *SENTENCING ACT* 1991, S18Q, 18R, 18W.

W. pleaded guilty to a breach of a Combined Custody and Treatment Order (CCTO). It was alleged that upon his release from prison, W. failed to report to the community correctional service and attend for supervision as directed. Over a period of 9 weeks, W. accrued 8 missed attendances and attended for supervision twice. After hearing the plea, the magistrate imposed a fine of $600 for the breach and confirmed the CCTO. The magistrate orally delivered his reasons for so deciding. These reasons were tape-recorded and later transcribed. In his reasons, the magistrate said: "Exceptional circumstances found in that behaviour of defendant since release from custody is not typical (exceptional) of previous behaviour in that he is now in full-time employment, learning a trade as a plasterer, and working six days a week; he is now living independently and has entered into a new relationship. I accept that the progress made by the defendant in this case since his release from custody has been exceptional." Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for further determination.
1. Pursuant to the provisions of s18W(7) of the *Sentencing Act* 1991 ('Act'), if a court decides not to order that the offender serve in custody the whole part of the sentence that was to be served in the community, it must state in writing its reasons for so deciding. The oral statements delivered by the magistrate could not answer the description of stating reasons for decision, unless the court indicated at the time an intention to deliver written reasons.

2. The Act does not define "exceptional circumstances". By and large "exceptional" is defined as being "unusual, or an unusual instance or extraordinary". The magistrate selected an insupportable definition or construction of the meaning of the words "exceptional circumstances".

3. The facts stated by the magistrate and the progress made by the defendant since his release from custody were not exceptional but were no more than improvement in his behaviour in society. If the magistrate were correct, it would mean that a person released from custody to complete a CCTO would be free of the obligations imposed to co-operate with the authorities charged with the management of the released person and free of the obligations to be tested and treated and helped, so long as the post-release behaviour was a distinct improvement on previous behaviour. It could not have been intended by the legislature that the living of life in an ordinary way, neglecting the obligation to comply with the conditions, could constitute something exceptional, even though to do so may be considerably different from pre-sentence behaviour.

HEDIGAN J:
1. In this appeal the appellant appeals by way of s92 of the *Magistrates' Court Act* 1989 against an order of the Magistrates' Court at Geelong made on 17th August 1999.

2. The appellant was and is a community corrections officer employed by the Department of Justice of Victoria, in the Public Correctional Enterprise known as CORE. He performed his duties at Geelong as a community corrections officer and it was part of his duty from time to time to prosecute offenders who were in breach of Combined Custody Treatment Orders (CCTO or CCTO's) made under the *Sentencing Act* 1991 ("the Act"). I will in due course set out the relevant provisions of the Act.

3. On 3rd August 1999 the appellant made and filed a charge against the respondent alleging a breach by the respondent of s18W(1) of the Act, in that without reasonable excuse he had failed to comply with a CCTO made by the Magistrates' Court at Geelong on 27th November 1998. On the

hearing of this charge the respondent Wilson was represented by his solicitor and the appellant conducted the prosecution. The breach of the CCTO was admitted. According to the appellant's affidavit sworn and filed 14th September 1999 and its exhibits, the Court register shows that the breach of the CCTO was admitted, that the CCTO was confirmed, with conviction, and that the respondent Wilson was fined $600, with a stay until 14th September 1991. The original convictions imposed and recorded on 27th November 1998, in respect of which the CCTO was made, are set out in Exhibit 1 to the appellant's affidavit of 14th September 1999. These were very serious offences, including trafficking in and use of heroin, possession of a weapon, the introduction of a prohibited drug into another person and handling stolen goods, an incomplete list. On that occasion the respondent was sentenced to nine months' imprisonment, six months of which to be served in custody and the balance in the community. The form of this sentence was driven by the relevant provisions of the *Sentencing Act* in relation to offences which were drug-use connected.

4. This is a convenient point at which to set out in full the key relevant statutory provisions. Subdivision (1B) of the *Sentencing Act* 1991 deals, as its heading indicates, with Combined Custody and Treatment Orders. The relevant provisions are as follows: *[After setting out these provisions, His Honour continued]...*

5. The respondent was released from Barwon Prison on 26th May 1999 but failed to report to the Geelong Community Correctional Service, as required by the CCTO, within two clear working days, that is by 28th May 1999. Sequentially, he failed to attend as directed for supervision on 9th and 23rd June 1999, and on 14th July 1999. Similarly he failed to attend as directed for assessment and treatment on 28th May 1999, 24th June 1999 and 12th July 1999 and, for testing, on 9th June 1999. The reality of these defaults is that, apparently, immediately upon release the respondent opted out of the control and direction of the relevant correctional service. He did not notify the Office of Corrections of his address, which was a changed address. There was a side issue, on which I do not dwell, about mistaken addresses. There is no doubt, however, that the respondent Wilson completely failed to report to the correctional service in accordance with the CCTO within two days and thereafter failed to report, quite clearly deliberately failing to do so. The reasons advanced for this will be later dealt with by me.

6. On 3rd August 1999 a charge was laid and filed by the appellant alleging contravention by the respondent of s18W(1) of the Act, constituted by the breaches previously referred to. The affidavit of the appellant in support of that application identifies the charge, laid in the form of Form 5 of the *Magistrates' Court General Regulations*, alleging a contravention by the respondent of s18W(1) of the Act in that he failed to comply with the conditions of a CCTO imposed by the Court in Geelong and annexing to it a schedule in respect to the breaches of the Order. This (Exhibit AKJ1 to the appellant's affidavit) was a key part of the presentation of the matter to the Court. The schedule set out all of the offences (not all described by me) of which the Magistrates' Court at Geelong on 27th November 1998 convicted the respondent. It set out, *seriatim*, the breaches and failures by the defendant to attend. This involved eight breaches constituted by non-compliance with directions to attend sent to the address of the defendant (3 Maple Street, Bell Park) provided by him as a point of contact after his release, to have the treatment part of the combined custody and treatment order administered upon his release into the community. That schedule asserted that he had been directed to attend the Geelong Community Correctional Services by 28th May 1999, that he did not attend and failed to make contact thereafter with the Service until 2nd June 1999. The rules relating to his release were read to and acknowledged by him, according to that schedule. Wilson later said he had missed the 28th May 1999 appointment because he had been charged with other offences and was then being held at the Geelong Police Station. Other material filed indicated that no charges were raised with respect to those matters. But by 2nd June 1999 Wilson was contacted to attend for supervision on a weekly basis commencing on 9th June and every Wednesday thereafter. The schedule indicated that his mother had made some contact, saying that he had gained paid employment and would not be able to attend and would have to make alternative arrangements. On one occasion the office was left open for him to attend following a telephone call (unaccompanied by any notification of his real address) from him. Without going into further detail, the schedule indicated a series of contacts, often fielded by the mother, and his failure to return calls or attend. Ultimately on 6th July 1999 Wilson attended, claiming that he had not come to scheduled appointments due to employment. On being asked to provide documentation from the employer to explain missed appointments, with detail, he conspicuously failed to comply or thereafter attend. He had not attended arranged appointments

with Barwon Health Drug Treatment Services. The respondent was contracted to attend at testing on a weekly basis on every Wednesday commencing on 9th June to coincide with his supervision appointments. As he missed the supervision appointments, he avoided testing. The summary of this is that Wilson had accrued eight missed attendances and, on the allegations set out in the schedule, had demonstrated an unwillingness to comply with the community component of the order of the CCTO. He attended for supervision only twice within nine weeks.

7. The charge with all of these details was served him on 3rd August and was returned on 17th to the Geelong Court. It was on that occasion the charge was heard by the Court. The respondent was represented by the solicitor Ms Thomas. The breach of the CCTO was admitted. There being nothing asserted to the Court to the contrary of it, the Court deemed, and I act on the basis of, that all of the facts alleged in the schedule to constitute the breach of the CCTO were admitted.

8. The respondent's solicitor, as though the matter were on a plea stated what was said to be the facts of the respondent's behaviour since his release. The substance of these was as follows:

> (1) that the respondent had obtained employment, which accounted for his time between 6.00am and 5.30pm five days a week;
>
> (2) that he had established independent living (that is, away from the former family home); and
>
> (3) that he had commenced a relationship with a young woman in rented premises.

9. The hearing of the charge by the Magistrates' Court of Victoria at Geelong (Mr MF Moloney, M) was tape-recorded and later transcribed. That transcript indicates the submissions of the legal representatives of the parties (including Ms Thomas's statements of the relevant facts) and some final statements explaining the magistrate's decision and his reasons by the magistrate form part of that transcript.

10. As is apparent from the provisions of s18W(7), if the Court decides not to order that the offender serve in custody the whole part of the sentence that was to be served in the community, it must state in writing its reasons for so deciding. The magistrate did not on the date of the hearing deliver with any reasons in writing; he delivered them orally. They were, as was all of the matters that transpired before him, tape-recorded, this being retrieved at a later time when the further steps were taken. In my view these oral statements could not answer the description of stating reasons for decision, unless the tribunal indicated at the time the intention to deliver written reasons at least connected with, or a revised reproduction of, what was orally pronounced. The affidavit of the appellant indicates that after the magistrate pronounced his decision on 17 August 1999, the CCTO expired on 26 August 1999. In the absence of written reasons, the appellant inquired at the Magistrates' Court as to the provision of written reasons. I am satisfied that they were thereafter provided in no better form than what is in the certified extract (Exhibit AJK6). In the relevant respects that extract states,

> "COURT ORDER
> BREACH OF ORDER ADMITTED. ORDER CONFIRMED.
> Exceptional circumstances found in that behaviour of defendant since release from custody is not typical (exceptional) of previous behaviour in that he is now in full-time employment, learning a trade as a plasterer, and working six days a week; he is now living independently and has entered into a new relationship. I accept that the progress made by the defendant in this case since his release from custody has been exceptional.
> Stay to 14/9/99."

That extract notes a plea of guilty and a consent to summary of jurisdiction. I think it must be, notwithstanding their compressed form, that these are intended to constitute the written reasons of the magistrate within the meaning of s18W(7), although I take the view that it is appropriate to have regard to what the magistrate stated in open court as explanatory and in aid of the correct understanding of his reasons. (See my observations in *Frugtniet & Ors v VLA & Ors* (unreported 11 September 1997, p2.)

11. I next refer to some of the matters put before the magistrate by the respondent's solicitor. This involved statements (see pp2-5 in Exhibit AJK3 of the affidavit of the appellant) as to his occupation of his time by employment and his new independent living with his female flatmate.

This was said to amount to an explanation of the respondent not well balancing "these new very significant positive commitments with the old commitments that are lingering by way of the Order ...", these being the breaches which were said "merely" to comprise failure to show up for appointments and be in adequate contact with the Department. Not surprisingly, it was then claimed that a magical transformation had occurred, so that the respondent was now willing to commit himself to the order, as though it were a matter for his option. It was put that he was now in a position to pay a fine because the job in which he was working enabled him to earn a sum to meet a fine "for not meeting the commitments". It was to put to the magistrate that his efforts had been "quite exceptional". It was also said "that he had started a new relationship with a lady and they had discussed what he might do to comply with the order for its balance which won't be all of that long."

12. The magistrate drew to the attention of the solicitor that there had to be exceptional circumstances which had arisen since the hearing and queried whether or not simply because a person was in employment that could be an exceptional circumstance and whether they were in a new relationship living independently amounted to an exceptional circumstance. The submission made by the solicitor for the respondent was that the actions of the respondent did not amount to exceptional circumstances, but that the progress made had been quite exceptional, had not been replicated in his life before and that his efforts did not deserve a further gaol term because he should be given real credit for having made an exceptional effort. The magistrate said nothing about this misrepresentation of the necessary requirements of satisfaction. This reticence was the subject of criticism by Mr R Shepherd who appeared for the appellant. When the magistrate gave his oral reasons he stated that,

> "It would seem to be an integral part of the service of the sentence in the community that the person who was subject to the order completes and complies with any of the conditions which were imposed by virtue of that order."

Mr Shepherd suggested that the magistrate ultimately overlooked that principle and also the submission by the then informant (the appellant) that Wilson had gone his own way rather than comply with the requirements of the order and that that had to be balanced against the facts of the new relationship and employment.

13. The magistrate went on to state that one of the dictionary definitions of "exception" (although, significantly so far as I am concerned, he did not identify it) was that exceptional circumstances meant "exceptional not typical". The learned magistrate then went on to embrace the proposition that any behaviour subsequent to his release which is not typical of his previous behaviour amounted to exceptional circumstances. Unhappily some of the other statements, not strictly part of the written reasons, clearly indicate that the magistrate approached the matter as though this were a plea of guilty to a crime in respect of which he had the ordinary sentencing discretions that the common law confers, subject to the *Sentencing Act* 1991. What the magistrate did was to confirm the Combined Custody and Treatment Order and to impose a fine of $600 for its breach.

14. The appellant, claiming that the magistrate was in the circumstances obliged to order the defendant to serve in custody that whole part of the sentence that was to be served in the community (see s18W(7) of the Act), appealed the order and on 16 September 1999 orders were made by Master Wheeler pursuant to Rule 58.09 of the Rules of this Court. The questions of law were said to be

> (1) whether the magistrate misdirected himself as to the meaning of the expression "exceptional circumstances", and
>
> (2) whether he erred in forming the opinion that "exceptional circumstances" existed.

15. The appellant's submissions commenced with the proposition that the statutory norm in s18W(6) of the Act required the Court, if it found the defendant guilty of the relevant offence, to exercise the power set out in s18W(5)(v) to order the offender to serve in custody the whole part of the sentence that was to be served in the community. The principle was simple — if the Court finds the offender guilty of a breach of sub-s(1) (that is the offender fails without reasonable excuse to comply with the condition of a combined custody and treatment order) then the Court's

obligation under sub-s(6) is (in addition to any fine) to exercise the power to order service of the out of gaol period in gaol unless it is of the opinion that it would be unjust to do so because of exceptional circumstances arising since the CCTO was made.

16. The primary contention of the appellant is that for the purposes of s18W(6) of the Act there were no "exceptional circumstances" (nor for that matter even any circumstances) that would have made it unjust to give effect to the statutory norm in s18W(6) of the Act. Thus the Court should have ordered the respondent to serve in custody the whole part of the sentence that was to be served in the community.

17. A CCTO sentence is a sentence of imprisonment, (see 18Q(1) of the Act). There was some argument as to whether or not there was a difference between this sentence and a sentence of the Community Based Order (a CBO) under which a court is given the power to vary, confirm, cancel and re-sentence: see s47(3A) of the Act. Similarly it was put that in relation to Intensive Correction Orders (ICO) there is no equivalent provision because it is only for breaches constituted in whole or in part by the offender committing another offence punishable by imprisonment during the period of the ICO that the issue of whether the statutory norm should be displaced by exceptional circumstances arises: see s26(3B) of the Act. One of the first propositions advanced by Mr Shepherd therefore was that the differences in treatment within the Act of a CCTO indicates that the statutory intention was such that it was irrelevant whether the breach was constituted by re-offending. This was put on the basis that failure to comply with the conditions will give rise to the activation of the statutory norm, unless exceptional circumstances exist. This, it was said, shows how seriously a breach of a CCTO order is treated, so that "the thumbing of the nose" at the system (which includes submission to the post-release treatments that are a substantial underpinning of the reason for this part of the Act) must be regarded as attractive of full punishment. That punishment is said to be the return to prison. Another way in which it was put was that it was logical to say that a prisoner who breaches a CCTO by failing to attend is in effect escaping from lawful custody during the community part of the sentence. At the time that the magistrate acted (14 September 1999) no power to vary the CCTO was given, that is, the sentence had to be confirmed or the prisoner was to serve the whole of the community part of the term in custody. By the introduction on 1 January 2000 of an amendment to the Act in s18VA, the Court is given the power to vary the order or cancel it. However, the proposition was put, which I accept, that that amendment should be read as assuming an application under s18VA(3) was made at a time before a prisoner has breached the CCTO, that is that the amendment is directed to pre-breach activity. Thus the contrast is made to s47(3A) of the Act which gives the court the power to vary the sentence on the hearing of a charge of breaching a Community Based Order. Even at this time, on the hearing of a charge of breaching a CCTO, the court is still left in the position of either confirming the order or ordering the whole of the term ordered to be served in the community to be served in incarceration.

18. However the principal debate here is as to what amounts to exceptional circumstances and whether or not the magistrate's conclusion (which it must be said, was, to say the least, awkwardly expressed) was not open to him.

19. The law is replete with judicial consideration of issues of "exceptional circumstances". This question has arisen in the context of the exercise of discretions in a multitude of criminal and of civil aspects concerning the relaxing of prescribed conditions.

20. The courts have frequently been obliged to consider the meaning of the phrase "exceptional circumstances" in a variety of contexts, perhaps most commonly in connexion with the granting of bail in murder cases and the taking of appeals out of time. See, with respect to the question of "exceptional circumstances" for the purposes of the *Bail Act* 1977 (s4) *Beljajev v DPP* (unreported, Supreme Court of Victoria, Full Court, 8 August 1991) and again at (1998) 101 A Crim R 362 (Kellam J); *Tundrea* (unreported, Ormiston J, 20 June 1998); *Alexopoulos* (unreported, Hampel J 23 February 1998); and *DPP v McKee* [1998] VSC 195; [1999] 1 VR 232. With respect to other contexts, *Schwerin v Equal Opportunity Board & Ors* [1994] VicRp 60; [1994] 2 VR 279; [1994] EOC 92-561, (a decision of McDonald J in a case concerning leave to appeal out of time from a Magistrates' Court)*; EFM Pty Ltd v NZ Steel (Aust) Pty Ltd* (1998) VSC 68 (Chernov J, application to amend a defence); *Gravett v Geelong City Homing Club Inc* (unreported, Victorian Supreme Court, Kellam J concerning costs); *Hughes v Morgan* (1998) VSC 147 (Beach J, leave to appeal

out of time); and, on the same issue, *Wilson v Myles & McDonald* (McDonald J, Supreme Court of Victoria, unreported, 25 July 1997); and my own decision in *Meadow Gem Pty Ltd v ANZ Executors and Trustees Ltd* (unreported, 8 May 1995, concerning the power to separate the trial of issues between plaintiff and defendant from the issues between defendant and third party).

21. I have no inclination to embark upon any attempt to define what the phrase "exceptional circumstances" means. I am relieved that neither counsel for the appellant nor respondent suggested I should do so. I have, longer ago than I care to remember, expressed my view concerning statutory expressions of this kind. This was not in the context as is frequently encountered, the issue of exceptional circumstances within the meaning of s13 of the *Bail Act* but in the context of an issue as to whether or not committal proceedings had been commenced in the three months after commencement of the proceedings for the offences. See *Owens v Stevens* (unreported, 3 May 1991).

22. On that occasion I stated,

> "The use of the phrase 'exceptional circumstance' is not unknown in the legal lexicon. Section 13 of the *Bail Act* is a well-known example. Exceptional is defined, contextually, in the *Oxford English Dictionary* (2nd Edition Volume V), the greatest dictionary, as meaning 'unusual, special, out of the ordinary course'. This does mean any variation from the norm. The facts must be examined in the light of the Act, the legislative intention, the interests of the prosecuting authority, the defendant and the victims. It may be that the circumstances amounting to exceptional must be circumstances that rarely occur and perhaps be outside reasonable anticipation or expectation. Courts have been both slow and cautious about essaying definitions of phrases of this kind, leaving the content of the meaning to be filled by the ad hoc examination of the individual cases. Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors."

23. I am gratified, and reassured, that McDonald J of this Court in *Schwerin v Equal Opportunity Board* (*supra*) approved of and adopted this statement concerning the caution of the courts in attempting definitions of phrases of this kind.

24. The Act does not define "exceptional circumstances". The magistrate's dictionary definition remains shrouded in mystery, if not doubt. My resort to the *Shorter Oxford Dictionary* and the *Macquarie* fails to find "not typical" (the key part of the magistrate's construction of "exceptional circumstances") as finding a place in the definition of exceptions. By and large "exceptional" is defined as being "unusual, or an unusual instance or extraordinary".

25. The appellant's submission was that the magistrate fell into error at the outset by mis-instructing himself that "exceptional circumstances" meant circumstances that were "not typical" of the behaviour of the respondent, thus concluding that exceptional circumstances had been demonstrated. One has only to think about that proposition to perceive its essential flaw in this context in that an offender who is released to serve the community component of a CCTO and acts in a manner, if not to the contrary of his pre-order behaviour at least untypical of it, might be relieved from the obligation to conform with the conditions that the Act imposes and therefore avoid the effect of the statutory requirements of s18W(6). The paradoxical consequence of this proposition would be that the worse the pre-CCTO history was, the easier it would be to establish that "exceptional circumstances" exist. The comparison by the Court of the prior history and the current presentation, the latter being shown to be contrary to and therefore "untypical", would invite the dispensation. This is, in my judgment, an absurd approach to construction and must be rejected. I conclude therefore that the magistrate selected an insupportable definition or construction of the meaning of the words "exceptional circumstances". These circumstances cannot be construed to be exceptional because such a construction strips the Act in the relevant context of its ability to promote the purpose and object underlying it. One might commence by noting that s1D(2) of the Act provides as one of the purposes of it to prevent crime and promote respect for the law by "(i) providing a sentence so as to facilitate the rehabilitation of offenders". This laudable generality must be given point by focussing on realities. The fact is that before a court may select a CCTO as a sentencing option, it must be satisfied that drunkenness or drug addiction contributed to the commission of the offence (s18Q). The sentencing option specifically includes a Treatment Order. Thus, the employment by courts of a CCTO as a sentencing option involves the expectation that, after release from prison, rehabilitation will be facilitated by closely

supervising the treatment of offenders within the community instead of within the gaol. This is impossible if offenders be permitted to avoid both treatment and supervision upon their release into the community without their offending behaviour being addressed. In this case, of course, drug treatment was never embarked upon. The magistrate approached his task as though he were exercising a general sentencing discretion as to what would be an appropriate sentence.

26. Sections 18V and 18W of the Act were enacted by Act No. 48 of 1997. I refer to the Second Reading Speech of 24th April 1997 of the Attorney-General.

27. After stating that both a CCTO and an ICO involve a period of imprisonment served in the community and that offenders would be returned to gaol unless there were exceptional circumstances, the Attorney said:

> "This sentencing order enables the court to address the rehabilitation needs of offenders who would otherwise be sentenced to a straight gaol term. By providing these offenders with the opportunity to have appropriate treatment for their addiction, a major cause of their offending will be addressed and the likelihood of re-offending reduced."

28. In this case, the magistrate well knew that the respondent was a drug trafficker and drug user, whose offences with respect to that conduct generated the judicial power to place him on a CCTO. It should be noted that the construction of "exceptional circumstances" adopted by the magistrate had the effect of facilitating the release of the respondent into the community, knowing that his drug offending (abuse and trafficking) had not been effectively addressed, a matter which the legislation assumes and facilitates through the programs in s18R and 18S of the Act.

29. It was argued that the plea of guilty to the charge under s18W admitted all of the elements of the offence breaching the CCTO. This, it was said, *ex hypothesi* included the admission that the respondent had failed "without reasonable excuse to comply with the conditions" of the CCTO. One must remark that at least as a commencing point there seems to be something unusual about the conclusion that there was no reasonable excuse not to comply with the conditions of attendance and treatment, and in the same breath to say there were exceptional circumstances and a reasonable excuse not to do so. This is not to deny that the existence of an exceptional circumstance causing a breach might provide a defence to the charge, if it establishes reasonable excuse beyond reasonable doubt.

It must be recalled that for circumstances to be "exceptional" it is not sufficient they were antecedently a breach of the order. They must be circumstances that have arisen since the CCTO was made: (see s18W(6).) The respondent, of course, contended that the circumstances here did arise since the order was made. As a consequence, he is driven to rely upon the essential human normality of the behaviour, but saying there was something exceptional, that is, that it was an exceptional circumstance to get a job, leave home and live with a woman independently. These are, to my judgment, merely changed circumstances. Not only are they not exceptional but, if not normal, at least commonplace. It cannot have been the legislative intention, nor is it the Act's reasonable construction, that an exceptional circumstance was one that with respect to the relevant offender amounted to no more than a change of lifestyle from abnormal to normal.

This is not to say that subsequent events cannot amount to exceptional circumstances within the meaning of s18W(6). One might postulate an offender being in a coma and unable to notify of his situation or other serious illness: (see the instance I gave in *Owens v Stevens*). The Act in fact makes provision for administrative dealing with after gaol circumstances that would justify suspension of the time which include illness and other circumstances. In such a situation, the Secretary of the Department of Justice may under s18V of the Act suspend a CCTO. Without condescending to detail, generally speaking, causes beyond a prisoner's control that would prevent him from complying with a CCTO would provide a reasonable excuse as a defence. Being in a coma or the loss of mental capacity would be such conditions. I do not overlook the fact that if the Secretary suspended a CCTO on good grounds, the period of suspension does not count during any period for which the order is to remain in force. Put another way, the clock is stopped. The respondent may apply for suspension of the CCTO under s18V of the Act on the basis of exceptional circumstances. However, in the respondent's argument here, the mere feature of failing to comply without seeking exemption, permitted the clock for the three months period to continue to run. It is not, perhaps, a point of major significance in the construction of the Act but it would seem to me

to be an unusual construction that produced a consequence that a substantial failure to comply during the term should be rewarded by the Court with confirmation, the effect of which would permit the time during which the respondent was in breach of the order to count as service of the three months' period in the community. This can hardly have been the object of the legislation.

It does not appear to have been a matter of argument before the magistrate that the Operating Procedures of Court (see Ex AJK5, procedure in 5(1)), referring to paragraph 32 of the procedure, identifies exceptional circumstances for special needs offenders. One would be inclined to think that the drive of this aspect is that a person undergoing a CCTO who has "special needs" is probably a person in respect to whom exceptional circumstances exist, because it would be inhumane to return a person with such special needs, so long as they arose subsequent to admissions back to the community, to return to prison. See, too, ss18R and 18S with respect to treatment and reporting.

30. The courts are well familiar with the conditions of s4 of the *Bail Act* 1977 as amended by which bail shall not be granted for a person charged with ... murder unless the Court is satisfied that exceptional circumstances exist which justify the making of the order. Mr Shepherd referred to a number of authorities concerning this matter including *DPP (Commonwealth) v Thinh Tang & Ors* (unreported 6/12/95) and the bail application of *Hanna El Rahi* (unreported 18/1/96) in which Beach J concluded on the facts in those cases that it was not an exceptional circumstance to have been a person of a previous good character, with a good record and the support of family. There are, of course, differences in the legislation and the considerations that are necessarily raised by this part of the *Sentencing Act*.

31. Both sides sought to rely upon *R v McLachlan* [1999] VSCA 122; [1999] 2 VR 665, a Court of Appeal decision which was concerned with the question whether performance of community work under an Intensive Correction Order amounted to "exceptional circumstances" within the meaning of s26(1), (3A), (3B) and (4) of the Act. In that case the offender had complied with the terms of the Intensive Correction Order but, unbeknown to those in authority, was committing other offences. The trial judge declined to accept that there were exceptional circumstances, a view which was upheld on appeal. Chernov JA stated -

> "In my view his Honour did not err in deciding that, in the context of this case, the applicant's community work did not constitute exceptional circumstances. If the applicant is correct in his submission on this point it would mean that an offender could set at naught the policy of this part of the legislation which requires an offender who has relevantly breached the order to serve out the balance of the original term in prison. Such offender could avoid serving the balance of that term merely by performing community work for the duration of the order or a substantial part of it, yet during the same period thumb his or her nose at the court by continuing to commit offences which constitute a breach of the order."

32. Mr P Mellas, who appeared for the respondent, argued that *McLachlan* is inapplicable to this case because all that was decided in *McLachlan* was that exceptional circumstances could not be found in a context when the relevant person was committing other offences whilst complying with the order. He argued that if there had been no offending there might nevertheless still be exceptional circumstances, the case for which he argued. He put it that the Court had not intended to shut the door to a person complying with the order in a very real sense, that is, where there were no criminal offences punishable by imprisonment being committed even though that person was not complying with the conditions that had been imposed. This was all the more so in circumstances where the Court imposed a monetary penalty for the particular breaches.

33. From time to time, it seemed to me Mr Mellas argued that the magistrate had a sentencing discretion; however, a combination of sub-ss(5) and (6) of s18W make it clear that the Court must, in addition to any fine it might impose under sub-s(5), exercise the power given in (5B) to order the balance of a sentence to be served in custody unless it forms the opinion that it would be unjust because of exceptional circumstances which have arisen since the CCTO was made. Thus, there must be an actual finding of exceptional circumstances leading to the opinion that to return the person to custody would be unjust. I accept that the matters relied upon by the magistrate to constitute exceptional circumstances were matters that arose since the original order had been made, namely, the gaining of employment, the commencement of independent living (that is, away from the former family home) and cohabitation with a woman.

34. The Court is not relieved of this exercise of power because there are circumstances which might, in the exercise of an ordinary sentencing discretion, be capable of being taken into account in deciding that it was appropriate to select the less severe option from the possible range of sentencing options. The circumstances must be exceptional. That is a conclusion to be reached on considering post-release events. An Appeal Court is virtually in the same position as a magistrate (once the fact of the circumstances have been found to be identified) to conclude whether or not those circumstances are exceptional, in the sense that it is determined the statute intends. The magistrate was aware that there had to be a finding of exceptional circumstances. When the Court order was amended to give its "reasons", the magistrate stated that the exceptional circumstances were to be found in the behaviour of the defendant because his release from custody which was not typical, that is, exceptional compared or contrasted to previous behaviour. These facts were

> (i) employment, (ii) learning a trade, (iii) working six days a week, and iv) different mode of living.

It was specifically stated that he found that the progress made by the defendant since his release has been exceptional. This can mean no more than improvement in his behaviour in society. This must mean, if it were correct, that a person being released from custody to complete a balance of a term of imprisonment in the community instead of in custody would be free of the obligations imposed upon him or her, when released, to co-operate with the authorities charged with the management of the released person free of the obligations to be tested and treated, and helped, so long as their post-release behaviour was a distinct improvement on previous behaviour. It is, as counsel for the appellant suggested, the mirror image of *McLachlan*. In this case the releasee has not been found to have committed any criminal act constituting an offence in the relevant three month period but has completely failed to comply with the conditions of release. In my view, it must be thought that the legislature intended and desired that persons imprisoned under a CCTO would on release not only be required to observe the law but to undergo counselling, monitoring and treatment. This is because the CCTOs are made in the case of persons found to have been alcohol or drug dependent or addicted. But if that person does not abide by the conditions and/or commits offences, they are to go back to gaol unless there are exceptional circumstances. In my view, it could not have been intended by the legislature that the living of life in an ordinary way, neglecting the obligation to comply with the conditions, could constitute something exceptional, even though to do so may be considerably different from the pre-sentence behaviour.

35. I have referred to the possibility of a person being beyond communication because they were in a coma as an example of what might amount to exceptional circumstance. Other examples might be found to be the subject of judicial speculation. See *Bekink v R* [1990] WASCA 160; (1999) 107 A Crim R 415 where Anderson J in related legislation instanced the destruction of all medium and minimum security prisons by earthquake or flood so that to turn over a prisoner to maximum security would be unduly onerous, or, in Victoria, the case of a person becoming an informer after release so that a return to the prison might produce inappropriate consequences: *R v Rostom* [1996] VicRp 60; [1996] 2 VR 97; (1995) 83 A Crim R 58.

36. Both counsel made reference to the Second Reading speech introducing the *Sentencing Act* (24 April 1997). Mr Shepherd claimed that the effect of the Attorney's statement was to indicate the amendment was introduced because offenders who had breached suspended sentences of imprisonment while committing other offences were not being ordered to serve that period of imprisonment by the courts, thus eroding the effect of the sentencing order. This led, in the Attorney's statement, to state that an amendment was made "to deal with the situation where an offender breaches an Intensive Correction Order or a Combined Custody and Treatment Order by committing a criminal offence punishable by imprisonment ...". He argued that although the reference there was made to committing of a criminal offence, the same principle must apply if there was a breach of the conditions of the order. Mr Mellas argued, as he had in relation to *McLachlan*, that it was the commission of a criminal offence and not a "mere" breach of the conditions that would prompt terms of imprisonment. Whatever might have been said in the Parliament, (the intention of which has been described as something of a fiction (see Dawson J in *Mills v Meeking* (1990) 169 CLR 214 at 234)), sub-s(6) makes the return to prison mandatory (unless exceptional circumstances are found) if the offender is found guilty of the offence.

37. The offender in this case pleaded guilty to the offence and that offence was a breach of the terms of the order. He was not pleading to some additional offence. Moreover, the construction

contended for by the respondent and, apparently espoused by the magistrate, permits the person being released into the community to remain there when the drug offending (in this case, use and trafficking) had not been effectively addressed within the community, which the legislation assumes and facilitates through the programs referred to in ss18R and 18S of the Act.

38. There were eight failures to attend as directed for assessment and treatment from the period 28 May to 9 June. Seven of those breaches were charged as a single offence instead of seven separate offences. The appellant argued that the number of breaches of the CCTO must be a factor weighing against the finding of exceptional circumstances. They may make the finding more difficult, but if the job and its hours and the other matters referred to constitute exceptional circumstances, then it must apply to them all.

39. In this case the respondent breached the order within two days of his release and the three months period, while he was totally unsupervised and untreated, had almost expired when he was charged. It is not an attractive case to seek to circumvent the sentenced person being obliged to serve the sentence. It seems unacceptable that the period of time through which the breaches continued so that the Court might find that the period of the CCTO was nearly at an end should be a feature promoting a finding of exceptional circumstances. Thus the argument was advanced by the appellant because the offender had not completed the CCTO in the community, that ought to incline the Court not to interfere with the statutory norm of s18W(6) which is to give the full nine months proper effect, rather than transform it into a six months sentence plus a fine in the sum of $600. It seems impossible to deny that a court might be entitled to consider factors specific to an individual offender in deciding whether there are exceptional circumstances. But the learned magistrate fell into error in deciding that the matters he identified constituted exceptional circumstances. It is obvious that the magistrate thought they were exceptional because they were not typical of the individual's pre-sentence behaviour.

40. It is hardly necessary to say that exceptional circumstances are not defined in the Act. As I have indicated, neither the *Shorter Oxford Dictionary* nor the *Macquarie Dictionary* includes "not typical" as part of the definition of "exception". The *Oxford Dictionary (Clarendon Press*) defines "exception" as "in the nature of or forming an exception; out of the ordinary course, unusual, special". The *Macquarie* definition is "unusual instance or extraordinary". The logical consequence of the magistrate's finding is that a released prisoner with a serious criminal record involving drugs and alcohol would have an easier task of establishing exceptional circumstances merely because the post-gaol behaviour was a notable improvement.

The paradox is that the respondent claims that the exceptional circumstance is the living of an unexceptional mode of life. This is, to repeat the phrase, the mirror image of the argument rejected by Beach J in the bail application of *Hanna El Rahi*, (supra) that previous good character, a good work record and a supportive family could amount to exceptional circumstances for bail purposes. Here the argument is that the "conversion" from a life of previous deplorable behaviour (such conversion only lasting about 70 days at the time and not including any adherence to the promise to report in two days) constitutes exceptional circumstances. In my opinion, this is mere sophistry and seeks to stand both ordinary language and the statute on their respective heads.

41. Accordingly, in my view the magistrate fell into error in concluding that the matters found by him and set out in the court extract amounted to exceptional circumstances, for the purposes of s18W(6) of the Act. I have no doubt that the learned magistrate was driven by the best of motives, namely, rehabilitation of the life of the offender. I am also conscious of the fact that he did not have the assistance which I have had, when he decided the case. But the whole scheme of management of the convicted person is a creature of statute, the *Sentencing Act* 1991, which does not leave the magistrate at large to deliver a sentence which he or she deems to be in accordance with general sentencing principles. Those principles have been specifically modified by the Act. It is not permissible to label conduct as amounting to exceptional circumstances for the purpose of avoiding the return of the offender to gaol, unless they are such. The magistrate was not entitled to approach the matter as though it were a breach of bond or parole. It can hardly be doubted that if the respondent in this case had complied with the reporting obligations, the correction authorities would have made every effort to tailor their monitoring-treatment-testing-counselling requirements to the practical necessities of his job and his new "independent" living.

The courts cannot stand aside from the enforcement of their own orders when the breach of them is deliberate, wilful, and in the circumstances, absolutely unnecessary. The respondent undoubtedly dropped out of sight, chose to avoid his responsibilities, simply flouting the lawful requirements that he attend to enable the correction authorities, in his and the public interest, to supervise his conduct including his drug problems. The appeal must be allowed. The answer to each question of law is "Yes".

42. A question arises as to what is the appropriate order. In the ordinary way, there may not have been much impediment to this Court making the appropriate order but another matter impacts on that. If I ordered that in lieu of the order of the magistrate of 17th August that the respondent serve in custody the term of three months, that is being the whole of the part of the sentence which was to be served in the community, I would then have to consider whether I should for the purposes of s18W(8)(b) "otherwise order". I have been informed without objection that the respondent is now a prisoner at Port Phillip prison having been sentenced on 18 February 2000 to a sentence of two years' imprisonment with a non-parole period of 18 months for other serious offences committed after his release, the details of which I know nothing. Unless a different order were made the sentences would be cumulative and the question arises whether or not an order should be made that this sentence should be made concurrent with the term now being served. In my view there may be matters that might be advanced on behalf of the respondent in support of an order for concurrency. Such matters should, I believe, be advanced to the Magistrates' Court of Victoria at Geelong. By virtue of s92(7) of the *Magistrates' Court Act* the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the court at first instance.

43. For these reasons I propose to make an order remitting the charge to be re-heard and decided in the light of these reasons and for the Court to then consider the issues of cumulation and concurrency.

44. I will hear counsel on costs.

APPEARANCES: For the appellant Kent: Mr R Shepherd, counsel. Public Correctional Enterprise, solicitors. For the respondent Wilson: Mr P Mellas, counsel. Doyle Considine, solicitors.
