56/87

SUPREME COURT OF SOUTH AUSTRALIA

SARNEY v RIZIDIS

Von Doussa J

22 September 1986; 30 January 1987 — (1987) 43 SASR 216; (1987) 85 FLR 130

INCOME TAX – FAILURE TO COMPLY WITH COURT ORDER TO FURNISH RETURN – OFFENDER PREVIOUSLY FINED FOR FAILING TO FURNISH RETURN – WHETHER BOTH PROCEEDINGS INVOLVE AN ELEMENT OF DOUBLE PENALTY: *TAXATION ADMINISTRATION ACT* 1953 (CTH.) SS8C, 8H.

The imposition of a penalty for an offence under s8H of the *Taxation Administration Act* 1953 for failing to comply with a court order to furnish a return, and which inevitably follows upon a conviction under s8C for failing to furnish a return, does not involve an element of double penalty, as the two offences are separate. On the hearing of an offence against s8H the court should consider afresh all the relevant matters relating to the offender.

Von DOUSSA J: *[After setting out the facts surrounding the charges, the offender's antecedents and the comments of the magistrate made when imposing the penalty, His Honour continued]* ... **[132 FLR]** The learned special magistrate's statement that the respondent, has already incurred a substantial fine...and it seems to me it would be of a double penalty if I were to fine him an amount approximating that amount again ..." on one possible construction would display error. The imposition of a fine for a s8H offence, which inevitably follows a s8C conviction, does not involve an element of double penalty. The two offences are quite separate and should be so viewed by the court imposing sentence on the s8H offence. The sentencing court should assume that when the earlier court imposed a penalty for the s8C offence, the offender's conduct relating to the failure to furnish the return was taken into account up to the date of the conviction and punished at that time. The s8H offence concerns a failure thereafter to comply with the order of the court. It should be assumed that the earlier penalty displays an appropriate exercise of the sentencing court's discretion based upon the information then before the court. This however, does not prevent the court considering the s8H offence from being informed what information was before the court on the earlier occasion. On the hearing of the s8H offence the court is free, indeed bound, to consider afresh relevant matters personal to the offender. If relevant information was not before the court on the earlier occasion, the discretion of the court is not to be fettered by the penalty imposed on the earlier occasion.

In *Collins v Denton* (1987) 43 SASR 192; (1987) 85 FLR 139, a judgment I have delivered today, I have considered matters which may be taken into account in fixing penalty for a s8H offence. I do not repeat what I have said in that judgment. Generally it is to be expected that the penalty imposed for a s8H offence will be greater in amount than the penalty on the preceding s8C offence. Where this is so, no question of "double penalty" arises. However every case must be assessed on its particular facts. Considerations which justified a substantial fine for the s8C offence may not be present in the offender's conduct or in his personal circumstances relevant to the s8H offence.

In the present case, I doubt whether the learned special magistrate in his remarks intended to express a legal principle: that a s8H offence should generally carry a lower penalty than the preceding s8C offence to avoid **[133]** double penalty. I think he was probably intending to say no more than that in the respondent's case, his financial position, as it was disclosed to him, was such that his ability to pay a second fine was markedly reduced by the imposition of the first fine, and that another fine of say $650 would he a significantly greater personal burden to him than the first fine. I do not think he was in error in taking that view of the matter, particularly as the respondent had not appeared when penalty was imposed for the s8C offence. Counsel for the appellant, in his well-prepared argument, stressed that the legislation treats a s8H offence as more serious than the preceding s8C offence. As a general proposition, this has been accepted as correct in this Court: *Krenn v Klitscher* (43 SASR 199, Supreme Court of South Australia, 3 December 1986) and *Collins v Denton* (*supra*). But it does not follow that a fine imposed on the s8H offence must necessarily be not less than the earlier fine for the s8C offence.

In this case it would have been quite wrong and unjust in fixing the penalty, if the court had mechanically applied a formula that the s8H penalty had to equal or exceed the s8C penalty. To approach the matter in such a way would be to deny the basic tenet that the penalty should fit the crime. It was highly relevant that on the earlier occasion no information was before the court about the respondent's financial position nor were any facts in mitigation given for the unexplained continuing failure to furnish the return.

On the hearing of this appeal the appellant tendered a schedule of penalties imposed in South Australian courts of summary jurisdiction during the period from 20 August 1985 to 28 August 1986, for offences against s8H. With one exception, the fine imposed on the respondent is the lowest of the fines imposed on twenty-five persons who were convicted. The penalties ranged from $50 to $1,000. It is difficult to draw any useful conclusions from this schedule as so little is known about the circumstances of each of the other offenders, or about their offences. I am not persuaded by this schedule that the penalty imposed on the respondent departed from the standards applied in the courts during the period in question. The schedule does suggest a trend on the part of magistrates, to impose significantly higher penalties on offenders who have not furnished the relevant return at the time when penalty is imposed for the s8H offence. That is to be expected, but in this case the return had been furnished.

In the present case there were a number of factors which, in my opinion, justified the learned special magistrate taking a lenient view. He was entitled to have regard to the financial ability of the respondent to meet the fine. It seems that this aspect was stressed by the respondent when he pleaded guilty. He was entitled to give weight to the fact that the respondent, though belatedly, had furnished his return before pleading guilty: see *Collins v Denton*. He was entitled to give considerable weight to the fact that the respondent, on receipt of the s8G order, had communicated with his accountant and made arrangements which he thought would bring about compliance with the court order. That these arrangements fell down does not entirely excuse the respondent. He must have known that the return had not been signed by him as the expiry date of the order approached. He should then have been more active in his endeavours to ensure compliance on time.

However the fact that he took steps towards compliance makes his conduct less serious than if he had taken no such steps. **[134]** It is not enough for the appellant to persuade the appellate judge that if he had been in the position of the sentencing magistrate he would have adopted a different course. The sentencing discretion is reposed in the court of first instance, and an appellate court will only interfere on well-settled grounds: *Laxton v Justice* (1985) 38 SASR 376 at 379-381; (1985) 16 A Crim R 46; (1985) 121 LSJS 286.

Whilst I think the fine imposed was low, particularly having regard to the earlier conviction for an offence against s225 of the *Income Tax Assessment Act* 1936, I am not persuaded that the penalty represents an idiosyncratic view of the particular magistrate to the offence in question, or that it is so disproportionate to the seriousness of the offence as to shock the public conscience: see King CJ in *R v Osenkowski* (1982) 30 SASR 212 at 213; (1982) 5 A Crim R 394. I do not think the penalty has been shown to be so plainly wrong that this Court should interfere. I therefore dismiss this appeal.
