51/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v HALL

Crockett, McGarvie and Phillips JJ

6 August 1991

CRIMINAL LAW – SENTENCING – BREACHES OF COMMUNITY BASED ORDER – FACTORS TO BE CONSIDERED WHEN DEALING WITH OFFENDER: *PENALTIES AND SENTENCES ACT*, S33.

Where a person pleads guilty to breaches of a community based order, the court is required to sentence the offender because of those breaches and may take into account matters which have come into existence subsequent to the making of the order (e.g. the offender's compliance with the order) the plea of guilty to the breaches, the fact of and the conclusions which might be drawn from the breaches together with other sentencing factors such as, rehabilitation, deterrence and retribution.

CROCKETT J: [with whom McGarvie and Phillips JJ agreed] **[1]** On 27th May 1989, the applicant, together with two companions named Strachan and Le Brun, were minded to board the Lilydale line train at Mooroolbark at about nine o'clock in the evening. A passenger by the name of McNestrie, with his companion Burnett, went to alight from the train when it stopped at that station. Strachan and Le Brun pushed their way through people who were alighting from the train so that they might board it. Le Brun grabbed McNestrie and forced him back into the carriage saying, "You're not going anywhere". Le Brun and Strachan kept McNestrie on the train and whilst this was happening the applicant stood at the doorway.

In due course, the train took off. Before it did so, in an endeavour to provide some assistance to McNestrie, Burnett alerted a member of the station staff to what had occurred. When the railway employee attempted to make some inquiry about the matter he was told by the applicant, who was hanging out of the doorway, that "everything was okay". Later, McNestrie was freed from the unlawful detention to which he had been subjected by the three young men. The three men were later apprehended by the police and charged with the offence of unlawful imprisonment. Other offences were also charged against them, but with those the court need not be concerned on the hearing of this application.

In due course, the applicant and Strachan were presented in the County Court at Melbourne for trial. The presentment included, in respect of each of them a count of false imprisonment. Le Brun ad been dealt with in the **[2]** Children's Court and had been released by that court on parole. Strachan pleaded guilty to the charge of false imprisonment and was fined $1,500. The applicant pleaded not guilty but after a trial was found guilty by a jury of the offence of lawful imprisonment. He admitted 39 previous convictions from eight court appearances. Those convictions were amassed in the short period from February 1987 to March 1989. After a plea of leniency was made on the applicant's behalf, the judge sentenced the applicant to a community-based order on the conditions that the applicant work 150 hours of unpaid community work over 52 weeks and that he attend a community corrections centre as directed. There were other conditions with which we are not now concerned. In addition, the applicant was fined $2,000 and given until January 1991 to pay the fine. This sentence was imposed in April 1990.

The applicant in numerous ways breached the terms of the community-based order. The breaches consisted of -

(a) ceasing to attend the community corrections centre as directed after having only completed 75 hours of his allotted 150 hours of unpaid community work;

(b) being charged and convicted in the Magistrates' Court at Box hill on 19th October 1990 on charges of recklessly causing injury, theft of a motor vehicle, and resisting arrest in respect of which he was sentenced to an effective term of imprisonment of four months; and

[3] (c) being charged and convicted in the Magistrates' Court at Lilydale on 3rd May 1991 on two charges of theft and three charges of theft of a motor car in respect of which the total effective sentence was eighteen months' imprisonment with a minimum term of nine months.

The applicant was accordingly brought before the judge who had granted the community-based order. Upon that appearance before the judge, the applicant pleaded guilty to the offence created by s33 of the *Penalties and Sentences Act* 1985. After hearing a plea for leniency, the applicant was sentenced on 13th May 1991 to nine months' imprisonment, four months of which was suspended. The balance of the nine months – five months – was ordered to be served cumulatively upon any sentence which the applicant was then undergoing.

The applicant now seeks leave to appeal against the sentences imposed on 13th May 1991 in the County Court. He does so in reliance upon four grounds. They are as follows:

"(1) The sentence is manifestly disparate compared with the sentences imposed on the co-accused.

(2) The learned sentencing judge erred by failing to make the sentence wholly concurrent with the sentence the applicant was currently undergoing.

(3) The learned sentencing judge failed to place sufficient weight upon the applicant's plea of guilty.

(4) In all the circumstances, the sentence is manifestly excessive."

[4] The argument in support of those grounds – particularly, I think, grounds 1 and 2 – rested substantially upon the submission that the judge was required to impose sentence as though he were passing sentence immediately upon the applicant's conviction for the offence of false imprisonment as occurred following the jury's verdict. That submission involved the proposition that the events that had occurred subsequent to the sentence passed at the time of the applicant's conviction were irrelevant for the purpose of determining the sentence which was required to be passed following the applicant's breach of the terms of the community-based order. If the submission were correct, then no doubt there would be something to be said for the proposition that the applicant's sentence was disparate to that imposed upon the co-offenders, particularly the offender Strachan. There might also be something to be said for the view that total concurrency, in the circumstances of any custodial sentence imposed, would be an appropriate disposition.

However, I am of opinion that the principal submission upon which these arguments are based is not sound. It mistakes the task which faced the sentencing judge following the applicant's breaches of the community-based order. His Honour was required to sentence the applicant because of those breaches. That has to be borne in mind and it must remain so, notwithstanding the terms of s33(3)(b) *Penalties and Sentences Act* 1985.

[5] It may be helpful to refer to what appear to be the particularly relevant provisions of s33 (as amended in 1989 and further amended in 1990) which is the appropriate section with respect to the present application. Section 33(1) states:

"If at any time while a community-based order is in force the offender in respect of whom it is made—

(a) fails without reasonable excuse to comply with any condition of the order; or

(b) fails without reasonable excuse to comply with any requirement of the regulations made under this Part—

the offender is guilty of an offence for which the offender may be proceeded against in the supervising court on the charge of the Director-General or of a community corrections officer."

The offender was proceeded against pursuant to those provisions, so that sub-s(2) came into operation. Sub-section (2) relevantly provides:

"If on the hearing of a charge under sub-section (1) the supervising court is satisfied by evidence on oath or otherwise that the offender has committed an offence under sub-section (1) the court may—

(c) if the order was not made by the Magistrates' Court, commit the offender to custody or release

> the offender on bail (with or without sureties) to be brought or to appear before the court by which the order was made."

In this case, the order was not made by the Magistrates' Court. It was made in the County Court. It may be taken that the supervising court was satisfied that the offence created in sub-s(1) was committed by the applicant. It may have been satisfied by evidence on oath or perhaps (as is more likely the case) was satisfied **[6]** otherwise, namely, by reason of the applicant's admission of his breach of the terms of the order. Sub-section (3)(b) is then seen to govern the matter. It provides:

> "(3) If under sub-section (2)(c) an offender is brought or appears before the Supreme Court or the County Court and the court is satisfied by evidence on oath or otherwise that the offender has committed an offence under sub-section (1) the court may—
>
> (b) cancel the order (if it is still in force) and, whether or not the order is still in force, deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender if it had just convicted the offender of that offence or those offences."

The judge in the County Court was, of course, satisfied otherwise than by evidence on oath that the offence referred to in s33 had been committed. He was so satisfied because the applicant pleaded guilty to the offence so created. The judge thereupon cancelled the community-based order and proceeded to deal with the offender for the offence in respect of which the order was made. That may be taken to have been done in conformity with the provisions of s33(3) to which I have just referred.

It is clear that the judge was not required to act oblivious to other matters which might bear upon the appropriateness of the penalty and which had come into existence at a time subsequent to the time which was immediately after the conviction of the offender. For example, sub-s(5) provides that:

> **[7]** "Where under this section a court cancels a community-based order and deals with the offender in another way the court must take into account the extent to and the manner in which the offender had complied with the order before its cancellation."

The judge did so in this case and it is not contended that he failed to give adequate weight to the extent to which the community-based order's terms had been complied with by the applicant before the occurrence of his breach of those terms. It was not denied by either party that it was appropriate for the judge to bear in mind a plea of guilty to the offence created by s33(1) so as to attract whatever benefit may be thought to accrue by reason of the provisions of s4 of the Act.

In my opinion, the judge was not, at the time of his selecting a sentence appropriate to be imposed, inhibited from having regard to – indeed, in the exercise of his discretion, it was as I have already said necessary for him to consider – the fact of the community-based order's terms having been breached and the conclusions which might be drawn from such breach. It follows that it was open to the judge to take the view, when determining upon an appropriate sentence, that he should consider that the applicant was a less hopeful candidate for rehabilitation than the judge obviously thought him to have been at the time when the original sentence was passed.

So, too, the judge would be correct in having regard to the need to emphasise by his sentence in respect of the applicant the requirement of specific deterrence. **[8]** Again, it would not be inappropriate for him to mark, by the sentence selected, his view that some measure of retribution for the commission of the offence be reflected in that sentence.

When one has regard to these factors as being appropriate for the judge's consideration, it appears to me that it is to be seen that the complaints raised by grounds 1 and 2 have no substance. Accordingly, I am not satisfied that either of those grounds have been made out.

So far as the third ground is concerned, it is true that the judge made no mention in his reasons for sentence that he had taken into account the applicant's plea of guilty to the s33(1) offence. However, it is plain that he was not unmindful of his obligations in that regard although

he considered that any advantage to the applicant to be derived from such a consideration could in the circumstances be little more than minimal. With that conclusion, I would agree. The indication that his Honour did bear the matter in mind is to be found in an exchange between him and counsel whilst the plea of leniency was being advanced. It is in these terms:

"COUNSEL: He has pleaded guilty to the breach.

HIS HONOUR: Yes. It does not give him a huge discount like it normally would have, I suppose.

COUNSEL: It is something that has got to be taken into account.

HIS HONOUR: I also have to take it into account that I predicated the previous sentence on the basis of rehabilitation and he turned his back on it."

[9] I am satisfied from that passage that the judge gave the matter such consideration as it deserved. It follows that I find that the third ground has not been sustained. The result of those conclusions is that inevitably the fourth ground must also fail. I would, therefore, dismiss the application.

McGARVIE J: I agree.

PHILLIPS J: I also agree.

CROCKETT J: The formal order of the Court is that the application is dismissed.

APPEARANCES: For the Crown: Mr CD Hollis-Bee with Mr S Cooper, counsel. JM Buckley, Solicitor for the DPP. For the applicant Hall: Mr P Tehan, counsel. Piesse, Clarebrough, solicitors.
