35/90

SUPREME COURT OF VICTORIA

GATES v LLOYD

Marks J

31 August 1990

NATURAL JUSTICE – CBO ASSESSMENT REPORT OBTAINED – NOT DISCLOSED TO COUNSEL – TERMS OF PROPOSED ORDER NOT EXPLAINED TO OFFENDER – REFUSAL BY OFFENDER TO GIVE UNQUALIFIED CONSENT – OFFENDER CONVICTED AND FINED – WHETHER DENIAL OF NATURAL JUSTICE: *PENALTIES AND SENTENCES ACT* 1985, SS28(5), 39(1)

A magistrate when considering making a community-based order ('CBO') in respect of G., adjourned the hearing for the purposes of obtaining a report from a community corrections officer as to whether G. was a suitable person for such an order. When the report was obtained, G.'s counsel was asked whether G. would consent to a CBO. However, counsel indicated that in order to advise G., it was necessary to know whether the report was favourable or not and whether the making of the order would involve a conviction for all purposes. The magistrate refused this request, G. refused to give unqualified consent whereupon the magistrate imposed a conviction and fined G. Upon order nisi to review—

HELD: Order absolute. Remitted for determination of sentence according to law.
An offender is entitled to know exactly what is meant by an order such as a CBO, the conditions which attach to it and the implications of it before being asked to give unqualified consent to the making of the order. The refusal by the magistrate to disclose to counsel whether the report was favourable or not and whether the proposed CBO would be a conviction for all purposes or not amounted to a denial of natural justice. Accordingly, in those circumstances, the magistrate was in error in imposing the conviction and fine.

MARKS J: [1] The applicant was convicted at the Magistrates' Court at Oakleigh, constituted by Mr Gillman, magistrate, on 21 October 1988, of theft and fined $300 with a stay of two months. On 18 November 1988, Master Evans made an order nisi to review the conviction and penalty on the ground that the learned magistrate erred in law and denied the plaintiff natural justice in some thirteen instances set out in the order.

I do not propose to set out the instances as the points raised on this review can be more succinctly identified. But first something is to be said of the facts. The applicant at the time of the offence was recovering from a medically-advised abortion, and, according to the plea, suffering from depression in the aftermath. On 30 August 1988, she had entered Myer Southern Stores, tried on various clothes, including a two-piece bathing suit. She left the store with the bathing suit still on under her clothes. She was apprehended by security personnel, the police were called and she was charged with theft. She made full admissions to the police, was co-operative and appeared remorseful. She had no prior convictions and appeared by counsel before the magistrate at Oakleigh, who entered a plea of guilty on her behalf. In the plea counsel emphasised the mitigating circumstances to which I have referred and asked the magistrate to consider an adjournment without conviction. The magistrate indicated his disinclination **[2]** to follow that course, but that he was considering a community-based order of the kind for which provision is made in Part V of the *Penalties and Sentences Act* 1985. Having in mind the provisions of s28(5), the magistrate indicated that whether he would make a community-based order depended on the contents of the report which he was obliged to seek. Although s28(5) was not specifically mentioned, no doubt both counsel and the court were well familiar with its provisions which make it necessary for certain preconditions to be fulfilled before such an order can be made. Those preconditions involve the consent of the offender and a report being obtained from a community corrections officer that appropriate facilities will be available at the commencement of a community-based order to enable it to be implemented and that the offender is a suitable person for such an order.

Having revealed his disposition, the magistrate adjourned the hearing for one week. Before the hearing was resumed on 21 October 1988, the first hearing having taken place on the 14th,

the magistrate intimated through appropriate channels that he did not desire the attendance of the parties on the 21st. Counsel for the applicant nevertheless attended the court when the matter was called for the second time. The reason, no doubt, was that counsel was not confident as to what course the magistrate was going to take, nor what were the contents of the report from the community corrections officer.

[3] When the matter came on before Mr Gillman on 21 October, counsel for the applicant addressed the court to the effect that he would like to see the contents of the report so that he may make submissions about the sentence. At this point, the magistrate had not indicated with any certainty what course he proposed to take, nor whether the contents of the report were favourable or unfavourable to the applicant. There was an interchange between the magistrate and counsel, the upshot of which was that the magistrate refused to reveal the report, including whether it was favourable or otherwise, and insisted that counsel indicate whether the applicant was prepared to consent to a community-based order. Counsel submitted to the magistrate that under s39(1) of the *Penalties and Sentences Act*, a conviction for an offence in respect of which a community-based order is made is not to be taken to be a conviction for any purpose except four which are set out. However, this provision is subject to the qualification that a court is empowered to direct otherwise. Counsel pointed out to the court that in order to advise his client, it was important that he be able to tell her whether the obvious advantage of a community-based order in it not being for most purposes a conviction at all would be offset by a contrary direction.

This submission and enquiry, in my opinion, was perfectly proper and should have been acted on as such. The magistrate, however, said "This is not a marketplace. I am not going to trade with you. Does **[4]** she consent or not?" Counsel for the applicant said there were further matters he wanted to put, but the magistrate interrupted saying, "Does she consent or not?" To this, counsel replied, "Given you will not allow me to look at the report and you will not give me any indication of whether you intend to convict or not, and she does not know what she has consented to, she does not". The magistrate then said, "She's convicted and fined $300". Counsel sought to put further submissions to the magistrate, but he replied, "I don't know whether you are doing this to impress your client or people in the courtroom. I don't care if you exercise every statutory right under the sun. Do you want a stay?" Counsel for the applicant said, "Yes, two months". Counsel then sought to put other matters but the magistrate replied, "Look, I've finished the case. I am *functus officio*. I have signed", and he waved the information.

To some extent the numerous instances of the denial of natural justice referred to in the order nisi miss the main point. In my opinion, a court seeking a consent of an offender to an order which is criminally based should make it clear what it is precisely to which consent is required. A community-based order might vary greatly in the conditions it imposes. Whilst as a preliminary enquiry, a court might well be justified in asking whether an offender is prepared to consent to a community-based order, an offender is, in my opinion entitled to know exactly what is meant by the order and what it implies by way of deprivation of liberty before **[5]** giving unqualified consent. A community-based order normally, if not always, involves to some extent deprivation of liberty. If a person, for instance, was empowered to withhold consent from or give consent to going to prison and a court simply asked an offender, "Do you consent to going to prison?", it would naturally evoke the response, "For how long?" Similarly, if a community-based order is to be made, one would think that an offender is entitled to know, "What does all this mean?"

In the present case, the main concern of counsel was to learn whether it involved the very important question of the order not being taken to be a conviction for most purposes. The refusal of the magistrate to respond to that enquiry, in my opinion, amounted to a denial of natural justice and I propose to make the order absolute. If necessary, I would also hold that the magistrate did deny natural justice in not permitting counsel fully to make submissions on the plea and on the course which was to be taken by way of sentence. Counsel was entitled to know, in my opinion, at the very least whether the report received from the corrections officer was favourable or unfavourable. It may be a debatable point as to whether counsel was entitled to have a copy of the report, although one would think, as did the Full Court in *R v Hill* [1983] VicRp 84; [1983] 2 VR 231 that if the report was adverse, the rules of natural justice would require disclosure of its contents, to counsel at least, if not to the offender himself or herself.

[6] It would be unwise for me here to embark on the debate as to the precise formulation of

the rule. I think it can be said that circumstances of a particular case generally will dictate what is required by the rules of natural justice. It may be that in some cases it is not required to show the entire report to an offender, particularly where there are psychiatric matters involved or some other matter which is irrelevant. On the other hand, it may be that it is appropriate in a particular case that the legal representative of the offender be shown the contents on an undertaking as to confidentiality. But if the case for withholding the report is justified, it seems to me that there is no justification for withholding from counsel a general indication whether the report is a handicap to or advances the case for the making of a community-based order. I should think that if the magistrate had indicated that the corrections officer had not placed any impediment in the way of an order, then counsel would have been satisfied to that point. If that were the case it would seem that little further advantage could be obtained by seeing the contents. It may well be that if there were any qualification whatever in the report, such a qualification would be relevant to whether the magistrate "otherwise directed" under s39(1). Counsel was entitled to know whether there was any such qualification, and, if there were such a qualification, he would be entitled to know what it was.

[7] The conduct of the Magistrates' Court on this occasion I think was unjust and entirely unsatisfactory. The reason is that the magistrate appears to have imposed the sentence he did, not because it was what he considered to be appropriate, but because he was impatient of the enquiry which I think was reasonably and properly made by counsel for the applicant about what was involved in consent to the community-based order. I propose to set aside the conviction as well as the sentence in this case, because I understand that Mr Gillman, who constituted the Magistrates' Court of Oakleigh has now retired. Accordingly, he cannot deal with the matter again. In my opinion, the matter has to go back to the Oakleigh Court and the magistrate constituting it should be free to impose such sentence as he or she considers appropriate after considering the whole question of sentence afresh. Accordingly, it must be left open to the court to consider whatever submission counsel sees fit to make in the interests of the applicant.

APPEARANCES: For the applicant Gates: Mr PX Elliott, counsel. Legal Aid Commission (Frankston). For the respondent Lloyd: Mr BM Dennis, counsel. Victorian Government Solicitor.
