45/92

SUPREME COURT *OF* VICTORIA

CURRY v MORRISON

Nathan J

9, 30 October 1992

SENTENCING – SOCIAL SECURITY OFFENCES – WELFARE FRAUD – PENALTIES AVAILABLE – FINE AND/OR IMPRISONMENT– WHETHER PROVISIONS OF *SENTENCING ACT* 1991 AVAILABLE – WHETHER POWER TO MAKE A COMMUNITY BASED ORDER WITH UNPAID COMMUNITY WORK – "APPEARS" – "EXPRESSED": *SOCIAL SECURITY ACT* 1947 (CTH.) S239; *SENTENCING ACT* 1991, SS39, 109.

Having regard to inconsistencies and incongruencies, the *Sentencing Act* 1991 is not applicable to offences under s239 of the *Social Security Act* 1947 (Cth.) ('Act'). The sentencing options upon summary conviction are those set out in s239 of the Act, and it is not open to a magistrate to direct that an offender found guilty of an offence under s239 perform unpaid community work pursuant to the provisions of the *Sentencing Act* 1991.

NATHAN J: [*After setting out the facts, relevant statutory provisions and the Magistrate's reasons for making a Community Based Order in respect of offences under s239 of the Act, His Honour continued*] ... **[8]** In my view, the magistrate fell into a number of errors readily explicable by the unhappy liaison between the Victorian and Commonwealth Acts. It would appear a relationship unintended by both legislatures and certainly out of reach of the Commonwealth's mind when the Act was proclaimed in 1947. However, it is necessary to detail some of those errors.

The Act, s109, Table 3 ss(3) permits offences punishable by a term of imprisonment to be converted pursuant to part (a), into fines or pursuant to part (b) into Community Based Orders, or pursuant to part (c) both. Section 109(4) Table 4 operates similarly but with respect to fines, they may be converted pursuant to the Table into CBOs, or both. However, these conversion tables are both expressed to operate **[9]** "unless a contrary intention appears". There is a further qualification, i.e. s39(4) where both Tables 3 and 4 apply "the relevant provision is the one that sets out the lesser number of hours". The result is that an offender may serve a CBO and also be fined but not imprisoned; when converting a period of imprisonment or a fine into CBO the one which requires the lesser number of hours of unpaid community work is applicable, they are not to be aggregated.

An issue for me to decide is whether this regimen reveals an intention to apply to the sentences cited in the Commonwealth Act. I have put the proposition in positive terms; the *Sentencing Act* uses words that its regimen will apply "unless a contrary intention appears". This phrase is more qualified than that which usually relates to contrary intention. The verb generally used is "expressed" rather than "appears". The past participle "expressed" has been considered in a number of cases: *New South Wales v The Commonwealth* [1990] HCA 2; (1990) 169 CLR 482; 90 ALR 355; (1990) 8 ACLC 120; (1990) 64 ALJR 157; 1 ACSR 137 particularly in the passage where Deane J gathered previous authority and discussed the meaning of the past participle "formed" and its relationship to corporations formed within Australia. Of that word he said this:

> "In the context of the use of the phrase 'formed within the limits of the Commonwealth' in contradistinction to 'foreign', the word 'formed' is properly to be understood as representing a use of the past participle as part of an adjectival phrase which is without temporal significance."

Stephen J had also pointed out in *Mikasa (NSW) Pty Ltd v Festival Stores* [1972] HCA 69; (1972) 127 CLR 617 at 660; (1971) 18 FLR 260; [1972-73] ALR 921; (1972) 47 ALJR 14 a merely descriptive use of the past participle is "common enough", it "is not the past tense ... it is neutral in **[10]** temporal meaning and applied equally to the future as to the past". So that the cases reveal that the term "expressed" is little different from the verb "appears". However that difference reveals that the intention covered by the term appears need not be so apparent as the intention

revealed by the word expressed. Nevertheless the cases dealing with the word "expressed" are of some assistance. The past participle is adjectival, it applies to the present as well as the past. Trite, could be the word used to describe the proposition that a "contrary intention" is revealed if to apply the provisions would manifestly deny the intent of the Parliament. The authorities have been usefully gathered together in *Transport Accident Commission v Treloar* [1992] VicRp 31; [1992] 1 VR 447; (1991) 14 MVR 289. To discern what the intention of Parliament might have been it is permissible, if not mandatory, to examine how the legislation might work and whether that reveals any injustice. (See *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 and *Humphries v Polak* [1992] VicRp 58; [1992] 2 VR 129; (1991) 14 MVR 1.) I turn to that examination now, observing that the *Sentencing Act*, operates to displace the penalty provision of s239 of the Act, to that extent it purports to subsequently amend that section.

The effect of s109, ss(3) must be examined in the light of the penalties established by s239(2), that is, a fine of $2000, imprisonment not exceeding twelve months, or both. In the *Sentencing Act*, s209(3)(a), the maximum fine is ten times more than the number of months imprisonment that may be imposed, namely 10 x 12 mths = $1200. This figure is not consonant with the $2000 recited in the *Social Security Act*. **[11]** An obvious discordance between the two Acts becomes apparent. I turn to the alternative of a Community Based Order and its duration when calculated pursuant to the provisions of s109(3)(b) Table 3. Here that is a level 10. In column 2 of Table 3 that period is the third mentioned, namely twelve months or more but less than 24 months. A magistrate is entitled to convert that term into a CBO of 250 hours over a twelve month period, far in excess of the 125 hours to which the magistrate thought he was bound. In the Act the term of imprisonment recited is for a period not exceeding twelve months. In my view the plain language means that a period of imprisonment cannot be in excess of the twelve month figure, but can be for that period or any lesser time. The magistrate was incorrect in assuming that from the twelve month period referred to in the *Social Security Act* he must necessarily deduct some period for remissions. There is no necessity for such deductions at all. Even if there were a requirement in some cases to adjust downwards because remissions have been abolished, there would be many cases in which the imposition of twelve months sentence would be appropriate. It does not follow that taking remissions into account all periods of imprisonment must necessarily fall below the twelve months threshold. Were the magistrate's view to prevail, the total period for which an offender would become subject to community supervision is a period of six months, but in my view the Act, if applicable, is 12 months. For this reason alone the magistrate's decision is inconsistent with the Act.

I return to the magistrate's reasons. The magistrate, when examining s39(3) stated that the applicable sentence was a term of imprisonment rather than the imposition **[12]** of a fine. He therefore concluded that only one provision of s109 prevailed, namely ss(4) Table 4. This conclusion is wholly unwarranted and results from the magistrate concluding the word "applicable" in the sub-section was to be read as the word "appropriate". He may have been personally of the view that imprisonment rather than a fine in the paltry amount recited in the Act was the appropriate or proper penalty, but that does not usurp the function and meaning of the word "applicable" in the section. That word means nothing more than being legally capable of being applied. That a fine and imprisonment or both was legally capable of being imposed in this case is apparent from the words of the section and cannot be doubted.

Therefore the following position emerges, if s109(3) and Table 3 of the *Sentencing Act* were to operate the maximum fine becomes significantly less than that recited in the Act. There is plain an obvious inconsistency between the two; the Victorian Act cannot modify the Commonwealth Act, nor in my view can it be aligned with it. However I should look at the operation of ss(3) globally; the fine can be combined with a Community Based Order; it is not as if the penalties under part (a) and part (b) are mutually exclusive. Part (c) indicates explicitly they are not.

I come now to Table 4 of s109(4). It deals with offences punishable by fine and is also subject to the qualification of being available unless a contrary intention appears. It directs that for those offences for which 10 penalty units or more but less than 60 are assigned, 50 hours of community work over a six month period may be substituted. If this were the only sentencing option, the most severe term **[13]** that could be imposed would be the 50 hours rather than the 125 hours ordered by the magistrate pursuant to Table 3 and by virtue of s39(3).

In my opinion the *Sentencing Act*, s39(3) operates in a totally inconsistent manner to the Act, s239. In the latter, penalties may be fine, imprisonment or both. The *Sentencing Act* permits a CBO in place of a fine. But if either is applicable the CBO must be for the lesser period. Thus a person may receive a CBO of 250 hours plus a fine in accord with ss(3), but a CBO is limited to 50 hours if that is ordered in lieu of a fine in accord with ss(4). In that event the 50 hours order displaces the 250 hours order, but the fine would presumably remain intact. However, s109 is not limited to hours of unpaid community work, but includes a maximum fine under ss(3)(a), or a fine and community work under ss(3)(c). Therefore, s39(3) can have no application where a period of imprisonment is converted to a fine. Section 39 seems to be directed towards presentments containing more than one count, or where a person is presented summarily on more than one information. It makes no sense when it is applied to a single offence for which imprisonment, fine or both are applicable.

The absurdity of attempting to reconcile the penalties recited in the Act with those alternatives imported from the *Sentencing* Act is illustrated by taking each component separately. If the offence had warranted imprisonment alone, an offender could have that penalty converted into a fine not exceeding $1,200, or a Community Based Order not exceeding 250 hours over twelve months or **[14]** both. If the $2,000 fine were taken singularly, it could be converted into a Community Based Order of 50 hours over a six month period.

However, the Act makes the offender amenable to both imprisonment and fine, but the *Sentencing Act* reveals widely disparate consequences when both are reduced to the number of hours to be worked pursuant to Community Based Order. The penalties recited in the Act do not accord with the levels of crime or penalty units in Tables 1 and 2 of s109(1) the *Sentencing Act*. They become even less relevant when considered in the aggregate. No provision at all is made for accumulative or aggregate sentence. If the position for which the Commonwealth contends were to apply, the offence which warrants imprisonment, fine or both, could be rendered into an offence which at its most severe would warrant the imposition of a 50 hour CBO

In my view the *Sentencing Act* has failed to address itself to provisions, such as those in the Act which proffer the sentencer three options. Its system of substituting a CBO for either a fine (by CBO and/or a fine) or a CBO in lieu of imprisonment cannot be made to fit with the Act which allows for an accumulation of different types of penalty. In my view s109(3) and (4) are disjoint and cannot be applicable to a sentence which can conjoin imprisonment with a fine, or impose both.

It follows from the various inconsistencies, inconguencies, and absurdities which I have outlined the Parliament cannot have intended to make the *Sentencing Act* applicable to the *Social Security Act*. The Parliament cannot be presumed to have invested magistrates with sentencing procedures which could work manifest injustice upon persons **[15]** charged with s239 offences. The possibilities of wildly different penalties being imposed for similar offences in different courts is far too high for it to be assumed Parliament either intended or, by lapse, would intend such results. Accordingly I rule that the *Sentencing Act*, s109 has no application to s239 of the *Social Security* Act because the "contrary intention" to make it applicable is manifest.

It must be said this is not the result contended for by Mr Weinberg. He was merely content to suggest that a 50 hour CBO was the maximum penalty applicable. However, where an invalidity is disclosed in argument, the Court has a duty to dispose of or cure that invalidity. A sentence without a statutory or common law base is such an invalidity (see *R v Brattoli* [1971] VicRp 55; [1971] VR 446). This is one such sentence. It follows that the sentencing options are those set out in the Act. I will order that this matter be remitted to the Magistrates' Court at Geelong for sentence in accord with the tenor of this judgment. It is proper in the circumstances to order that it be heard by a magistrate other than the one from whom the appeal comes. It would be appropriate that the matter be re-listed for hearing, so that some irregularities, which I need not detail here, could also be cured. I do not believe there should be any order for costs.

APPEARANCES: For the applicant Curry: Mr M Weinberg QC, counsel. S Young for the Commonwealth DPP. The respondent was not represented.
