10/96

SUPREME COURT OF VICTORIA

NGUYEN v DPP and ANOR

O'Bryan J

30 January, 12 February 1996

PROCEDURE – BREACH OF TWO COMMUNITY-BASED ORDERS – ONE MADE IN MAGISTRATES' COURT, ONE IN COUNTY COURT – WHETHER RULE AGAINST DOUBLE JEOPARDY APPLIES – WHETHER DEFENDANT LEGALLY BEFORE THE COUNTY COURT: *SENTENCING ACT* 1991, S47(2).

N. was released on two community-based orders – one by a Magistrates' Court and one by the County Court. The core and program conditions of the CBOs were identical save for the dates of commencement and termination. Subsequently, N. was charged with breaches of the orders, the facts of which were almost identical. N. was dealt with for breach of the Magistrates' Court order and ordered by the supervising court to appear before the County Court for breach of the other order. Upon appearance in the County Court, N. was sentenced in respect of the original charges. Upon originating motion—

HELD: Originating motion dismissed.
1. Whilst the CBOs ran concurrently, they did not merge for the purposes of the breach proceedings. The breaching offence had its genesis in the CBO in force at the time of the offence. As N. was required to comply with two CBOs, a failure to do so without reasonable excuse exposed him to a charge in respect of each CBO. Accordingly, the rule against double jeopardy had no application.

2. In relation to the CBO made in the County Court, the supervising court was not empowered to deal with N. in respect of the original offences. In view of the supervising court's order that N. be brought before the County Court, N. was legally before the County Court for sentence.

O'BRYAN J: [1] This proceeding is for judicial review of an order made by Judge Neesham in the County Court on 15 December 1994 whereby the plaintiff, having been brought before the Court for breach of a community-based order made on 16 April 1991, was sentenced to be imprisoned for one month on each of four counts (two counts of theft, one count of going equipped to steal and one count of receiving stolen goods), all counts to be served concurrently. The proceeding was commenced by originating motion on 25 May 1995, considerably outside the time fixed by rule 56.02(1) of the *Rules of Procedure in Civil Proceedings*. The time fixed by paragraph (1) was extended by Beach J on 26 May 1995. It appears that the plaintiff's legal advisers had first initiated an appeal to the Court of Appeal within time but when that Court determined it did not have jurisdiction this proceeding was commenced. A chronology of the events leading to the order made by Judge Neesham is necessary.

> **20/21 November 1990:** Nguyen committed four offences of dishonesty.
> **5 March 1991:** Oakleigh Magistrates' Court convicted Nguyen and sentenced him to four months in prison.
> **16 April 1991:** Judge Lazarus in the County Court allowed an appeal against sentence and released Nguyen on a two year Community-Based Order pursuant to s36 of the *Sentencing Act 1991*. Nguyen was required to perform 300 hours of unpaid community work in 12 months and to attend for supervision by a Community Corrections Officer as directed. Dandenong Court was appointed the Supervising Court.
> **12 May 1991:** Nguyen failed to attend for community work as directed without reasonable excuse.
> **[2] 17 May 1991:** Nguyen failed to attend for supervision without reasonable excuse.
> **21 May 1991:** The Magistrates' Court at Oakleigh convicted Nguyen of 15 counts of theft and sentenced him to be released on a two year community-based order. Nguyen was required to perform 300 hours of unpaid community work in 12 months and to attend for supervision as directed. Dandenong Court was appointed the supervising Court.
> **9 June 1991:** Nguyen failed to attend for supervision without reasonable excuse.
> **13 November to 9 December 1992:** Nguyen committed offences of dishonesty.
> **29 January 1991:** Nguyen completed 300 hours unpaid community work.
> **22 September 1993:** On appeal in the County Court Nguyen was sentenced to serve eight months' imprisonment suspended for 24 months.

9 June 1994: 1. A Community Corrections Officer charged Nguyen with breaches of the conditions of the community-based order granted by the County Court on 16 April 1991. The alleged breaches were:

(a) conviction and sentence on 22 September 1993;

(b) failure to attend for supervision on 13 October 1992;

(c) failure to attend for community work on 9 June 1991.

2. A Community Corrections Officer charged Nguyen with breaches of the conditions of the community-based order granted by the Oakleigh Magistrates' Court on 21 May 1991. The alleged breaches were:

(a) conviction and sentence on 22 September 1993;

(b) failure to attend for supervision on 17 May 1991 and 13 October 1992;

(c) failure to attend for community work on 12 May 1991 and 9 June 1991.

16 November 1994: In the Dandenong Magistrates' Court Nguyen admitted breaches of the community-based order dated 21 May 1991. No action was taken by the Court in respect of the original charges. Nguyen was fined $300 for breaching the order.

[3] 15 December 1994: In the County Court Nguyen admitted breaches of the community-based order dated 16 April 1991. Judge Neesham sentenced Nguyen to be imprisoned for one month on each count, all counts to be concurrent.

Part 2 Division 3 of the *Sentencing Act 1991* empowers a Court to make a community-based order in respect of an offender. By s37 of the Act a core condition of a community-based order is that the offender does not commit, during the period of the order, another offence punishable on conviction by imprisonment (ss1(a)). By s38 of the Act a community-based order may have program conditions whereby the offender performs unpaid community work as directed for a period determined by the Court, and be under the supervision of a Community Corrections Officer. Section 39(1) of the Act provides that the purpose of a community service condition is to allow for the adequate punishment of an offender in the community. By sub-section (2) the number of hours for which an offender may be required to perform unpaid community work is fixed according to the term of imprisonment that may be imposed in respect of the offence by s109(3)(b). A statutory penalty scale is thus provided by s109 to equate a term of imprisonment with hours of unpaid community work. Section 42 of the Act provides that the conditions of a community-based order made in respect of an offender are, unless the Court otherwise directs, concurrent with those of any other community-based order in force in respect of that offender. The Magistrates' Court at Oakleigh did not otherwise direct on 21 May 1991.

[4] It is now necessary to set out the provisions of s47 of the Act which prescribe the procedure and jurisdiction of courts when an offender breaches a community-based order.

"(1) If at any time while a community-based order is in force the offender fails without reasonable excuse to comply with any condition of it or with any requirement of the regulations made for the purposes of this Subdivision, the offender is guilty of an offence for which he or she may be proceeded against in the supervising court on a charge filed by the Director-General of Corrections or a community corrections officer. (1A) Irrelevant.

(2) 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 impose a fine not exceeding level 12 and in addition may—

(a) vary the order; or

(b) confirm the order originally made; or

(c) if the order was made by the Magistrates' Court cancel it (if it is still in force) and, whether or not it is still in force, subject to sub-section (4), deal with the offender for the offence or offences with respect to which the order was made in any manner in which the court could deal with the offender if it had just found him or her guilty of that offence or those offences; or

(d) 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.

(3) If under sub-section (2)(d) 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 impose a fine not exceeding level 12 (if the supervising court did not do so) and in addition may—

(a) deal with the offender in any manner in which the supervising court could have **[5]** under paragraph (a) or (b) of sub-section (2); or

(b) cancel the order (if it is still in force) and, whether or not it is still in force, subject to sub-section (4), deal with the offender for the offence or offences with respect to which the order was made in any manner in which the court could deal with the offender if it had just found him or her guilty of that offence or those offences.

> (4) In determining how to deal with an offender following the cancellation by it of a community-based order, a court must take into account the extent to which the offender had complied with the order before its cancellation. (5) Irrelevant. (6) Irrelevant."

In November 1994 when the Dandenong Magistrates' Court heard the charge under s47(1) the community-based order made at Oakleigh on 21 May 1991 was not in force. Consequently, the Dandenong Court was only empowered to impose a fine and to deal with the offender for the offences with respect to which the order was made namely, 15 counts of theft committed some time between November 1990 and May 1991, the precise date not being revealed by the material now before the Court. Mr Perkins of counsel who appeared for the plaintiff readily conceded that the Dandenong Magistrates' Court was empowered by s47(2) to impose a fine and to decline to take action in respect of the original charges i.e. the 15 counts of theft.

The principal thrust of Mr Perkins' argument was that the matters in respect of which the plaintiff was required to appear before the County Court did not constitute **[6]** a charge filed by a Community Corrections Officer for the purposes of s47(1) of the Act; alternatively that if there was a charge before Judge Neesham it was duplicitous, uncertain, void and provided no legal foundation for a sentence of imprisonment. Mr Perkins' principal submission was that the plaintiff was placed in "double jeopardy" for the alleged breaches because he had to face two courts which had to consider separately almost identical breaches of two community-based orders, the core and program conditions of which were identical save as to dates of commencement and termination.

The rule against "double jeopardy" protects a person from being punished twice for the same offence. The offence created by s47(1) has its genesis in a community-based order in force at the time of the offence. Because the plaintiff was required to comply with conditions in two community-based orders, a failure to do so without reasonable excuse exposed him to a charge in respect of each order. The offences for which he was proceeded against in the supervising court, although substantially based upon the same evidentiary facts, were not the same offences for they had their genesis in separate community-based orders in force at all material times. The concurrency provisions in s42 do not have the effect of merging separate community-based orders for the purposes of s47, in my opinion. Concurrency simply means that program conditions, such as hours of unpaid community work to be performed pursuant to separate orders, are not required to be performed cumulatively unless the Court otherwise directs. **[7]** I am not persuaded that the rule against double jeopardy has any application to the present case. The charges filed by the Community Corrections Officer in respect of each community-based order were not duplicitous or uncertain or void.

I turn now to consider the circumstances which led to Judge Neesham imposing a sentence of imprisonment on the plaintiff for the offence in relation to the community-based order made in the County Court on 16 April 1991. The supervising court was satisfied that the offender had committed an offence under s47(1) and no challenge can be made to that finding. When the supervising court is satisfied that the offender has committed an offence, the Court may impose a fine and in addition may exercise the powers prescribed in sub-clause (a) or (b) or (c) or (d). The supervising court did not impose a fine but released the plaintiff on bail to appear before the County Court, the Court which made the order on 16 April 1991. The supervising court was not empowered to deal with the plaintiff for the offences with respect to which the community-based order was made. However, it had a discretion not to make an order under paragraph (d) of ss(2).

In my opinion, the plaintiff was legally before the County Court on 15 December 1994 and the Court was empowered by s47(3)(b) –

> "to deal with (the plaintiff) for the offences with respect to which the order was made in any manner in which the Court could deal with the offender if it had just found him guilty of those offences."

[8] The grounds in support of the originating motion assert in various ways that Judge Neesham erred in imposing a sentence of imprisonment because such a sentence was unjust in all of the circumstances. (See grounds 10, 11 and 12). Mr Perkins also argued that the Court should find error in law because before Judge Neesham imposed a custodial sentence he failed to consider whether the purpose or purposes for which the sentence was imposed could be achieved by a non-custodial sentence as required by s5(4) of the Act and/or did not take into account the extent to which the offender had complied with the order. Although no official transcript exists of

the reasons for sentence the affidavit of Gabriel Kuek sworn on 25 May 1994 recites the substance of His Honour's sentencing remarks. Those reasons show that His Honour did consider whether a non-custodial sentence would be appropriate. It is also clear that His Honour considered and took into account the plaintiff's compliance with the community-based order including completion of 300 hours of unpaid community work.

The jurisdiction invoked by the plaintiff pursuant to rule 56 is to determine whether the Court may grant any relief or remedy in the nature of *certiorari*, mandamus, prohibition or *quo warranto*. *Certiorari* will not lie unless the order in the Court below was made in excess of its jurisdiction. No relief or remedy in the nature of mandamus, prohibition or *quo warranto* is available in the circumstances of the present proceeding. In my opinion, no case has been made out that Judge Neesham made an order in excess of his jurisdiction. This Court has no power to impose another **[9]** sentence upon the basis that it considers another sentence would be more appropriate. If want of jurisdiction in the Court below is not apparent this Court must dismiss the motion for judicial review. In my opinion, Judge Neesham was empowered to make the order he did in the exercise of judicial discretion. In the circumstances the originating motion will be dismissed. The order made by Beach J on 26 May 1995 provided that bail be granted pending the final determination of this matter by the Supreme Court. The plaintiff must now be taken into custody to serve the sentence of one month less any days which must be reckoned as already served.

APPEARANCES: For the Plaintiff: Mr D Perkins, counsel. Kuek & Associates, Solicitors. For the Defendants: Mr JW Hardy, counsel. Solicitor to the Director of Public Prosecutions.

ON APPEAL — [1996] VSC 19

SUPREME COURT OF VICTORIA — COURT OF APPEAL

Winneke P, Hayne and Charles JJA

20 March 1996 — [1996] VSC 19; (1996) 85 Crim R 510

HELD: Appeal dismissed.
The offence created by s47(1) of the *Sentencing Act* 1991 is the breach of a community-based order. A separate offence is not constituted by each individual aspect in which the conditions of a CBO have been breached. Accordingly, where a charge alleged breach of a condition of a CBO by giving particulars of the various respects in which the condition was said to be breached, the charge was not duplicitous, uncertain or void.

CHARLES JA: *[After referring to the facts, the relevant provisions of s47 of the* Sentencing Act *1991 and aspects of the decision under appeal, His Honour continued:]...* **[7]** In argument before this Court the appellant submitted that (a) there should be parity between the sentence imposed initially and the sentence imposed upon resentence; (b) there had, despite the appellant's admission of the breaches, never been a properly identified breach of the first CBO; and (c) Judge Neesham had failed to carry out any meaningful analysis of what it **[8]** was that triggered the breach jurisdiction under s47.

I put to one side the question of double jeopardy. There is, I think, nothing else in the three grounds just mentioned which could justify a claim that Judge Neesham exceeded his jurisdiction. These grounds must accordingly fail as not relating to the single ground upon which this appeal is based. But I should add that none of these grounds, in my view, has any substance.

The next ground was that Judge Neesham had no jurisdiction because the Department of Corrections had elected to bring the matter before the Dandenong Magistrates' Court under s47(1) and s47(2) of the Act and that court had failed to refer the matter to the County Court. Accordingly, so the argument ran, the County Court was left without jurisdiction. However, O'Bryan, J found that the Dandenong Magistrates' Court, as the supervising court, had a discretion under s47(2)(d) and had exercised that discretion by releasing the appellant on bail to appear before the County Court which had imposed the first CBO. This was clearly a proper exercise of the court's discretion and, as O'Bryan, J held, the appellant was therefore legally before the County Court on 15 December 1994 and that court was empowered to act by s47(3)(b) of the Act. Neither Judge

Neesham nor O'Bryan, J was in error in this respect. This ground also fails.

The first ground argued for the appellant was that Judge Neesham "failed to give full operation and effect to the provisions of s47(4) of the *Sentencing Act*" and failed to advert to the "extent to which" the appellant had complied with the first CBO before his Honour's order. It is this ground, as I follow the argument, which **[9]** principally raises the question of double jeopardy. The submission has at least three parts:

> (a) The appellant is in substance being punished twice for the offences which were the source of the first CBO;
>
> (b) the appellant is in substance being punished twice for the offences which amounted to a breach of the first and second CBOs;
>
> (c) Judge Neesham failed, contrary to s47(4), to take into account the extent to which the appellant had complied with the first CBO.

In my view, this submission fails at every point. I observe as to (c) above that Judge Neesham, in his sentencing reasons, specifically adverted to the fact that the appellant had performed 300 hours of unpaid community work and that he was required to take that fact into account. The argument that the appellant had been placed in double jeopardy was rejected by O'Bryan, J. I agree with his Honour's conclusion and the reasons given by him for doing so. In my view, no error is shown in his Honour's judgment.

I desire only to add the following short observations. The course followed by the Department of Corrections in charging the appellant with a breach of the first CBO after it had ceased to be in force and after the appellant had completed his unpaid community work requirement is, in my view, expressly authorized by s47(2)(c) and s47(4) of the Act. The breach of the first CBO was an offence independent of and different from the offence constituted by the breach of the second CBO, even though based on substantially the same facts and even **[10]** though both were being served concurrently. The breaches of the first and second CBOs were not the same offences because, as O'Bryan, J said, they had their genesis in separate community-based orders in force at all material times. The fact that the appellant had completed the punishment component of the first CBO was a matter which Judge Neesham was required, under s47(4), to take into account in dealing with the appellant. It was not a fact which removed his Honour's jurisdiction to deal with the appellant. His Honour took that fact into account. The source of his Honour's jurisdiction to sentence the appellant to a term of imprisonment for the offences which gave rise to the first CBO is s47(3)(b) of the Act.

The submission that Judge Neesham failed to give full operation and effect to s47(4) of the Act could only succeed in an application for judicial review having regard to his Honour's sentencing reasons if the proper construction of s47(4) were that once an offender has fully complied with the punishment component of a community-based order the Court is deprived of jurisdiction to resentence the offender for the offences with respect to which that order was made. In my view, the rejection of any such construction is demanded by the wording and the clear purpose of subs(1), subs(1A), subs(2)(d), subs3(b) and subs(4) of s47.

There is no basis, in my view, for the submission that the charges filed by the community corrections officer were duplicitous or uncertain or void. It was put to O'Bryan J and this Court that there was duplicity in the charge of breach of the first CBO resulting from the fact that the breach of each CBO was said to be **[11]** constituted by a number of different incidents or omissions, each of which constituted a separate offence under s47(1) of the Act. The long-established practice in this State is indeed to charge an offender with a breach of a condition of a CBO giving particulars of the various respects in which the condition is said to have been breached. In my opinion the practice is a sound one. The offence created by s47(1) is, I think, the breach of a community-based order. I do not accept that a separate offence is constituted by each individual aspect in which the conditions of the CBO have been breached.

This point was not taken before the supervising court or before Judge Neesham. Furthermore before both courts the appellant admitted the breach of the CBO. Before Judge Neesham the appellant was legally represented. The fact that the appellant, when legally represented, admitted

the breach of condition before Judge Neesham and made no objection to the alleged duplicity of the charge of breach would, in my view, now provide an insuperable obstacle to the success of this appeal on discretionary grounds, even if the point otherwise had merit: see *R v The Lilydale Magistrates' Court ex p Ciccone* [1973] VicRp 10; [1973] VR 122, at 134.

Finally, it was submitted that the imposition of a fine was a pre-condition to any entitlement of the court to act as Judge Neesham did under s47(3)(b) of the Act. I do not accept that submission. I have no doubt that the court, by s47(3), is given a sentencing discretion whether to fine or not to fine and that the court may proceed to act under s47(3)(b) notwithstanding **[12]** that the court has not proceeded to fine the offender for a breach of the CBO condition.
Nothing I have said should be construed as acceptance of the submission that an error in reasoning by the sentencing judge constitutes error on the face of the record which would entitle the appellant to judicial review by way of certiorari; as to which, see *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873 at 879-880; 39 ALD 193; 82 A Crim R 359. In my view, no error has been shown in the reasons for judgment of O'Bryan, J. I would dismiss the appeal.

WINNEKE, P: I agree.

HAYNE, JA: I also agree.

WINNEKE, P: Gentlemen is there any reason why this appeal ought not to be dismissed with costs? (Discussion ensued)

WINNEKE, P: We do not propose to make any order for costs of this appeal. COUNSEL: May it please the Court.

ORDER: Appeal dismissed.

APPEARANCES: For the appellant: Mr D Perkins, counsel. Solicitors for the appellant: Kuek and Associates. For the first respondent: Mr WH Morgan-Payler. Solicitors for the first respondent: Office of Public Prosecutions.
