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SUPREME COURT OF VICTORIA – COURT OF CRIMINAL APPEAL

R v YOUNG

Crockett, Nathan and Ashley JJ

26 May, 23 June 1995 – (1995) 81 A Crim R 70

CRIMINAL LAW – SENTENCING – WHOLLY SUSPENDED SENTENCE IMPOSED ON 12 COUNTS – COMMUNITY-BASED ORDER MADE ON COUNT 13 – WHETHER MAKING OF CBO WRONG IN LAW: *SENTENCING ACT* 1991, SS5, 7, 27, 36.

Section 36(1) of the *Sentencing Act* 1991 ('Act') provides so far as relevant:

> "A court may only make a community-based order in respect of an offender if—
> (a) it has convicted the offender...of an offence or offences punishable on conviction by imprisonment...."

Section 36(2) of the Act provides:

> "A court may make a community-based order in respect of an offender in addition to sentencing the offender to a term of imprisonment of not more than 3 months."

Y. was sentenced to 18 months' imprisonment (wholly suspended) in relation to 12 counts of obtaining property by deception. On count 13, the court made a community-based order. The Director of Public Prosecutions appealed on the ground that the making of the CBO breached s36(2) of the Act.

HELD: (per Crockett and Ashley JJ, Nathan J dissenting) Appeal dismissed.
The phrase "sentencing the offender to a term of imprisonment of not more than 3 months" in s36(2) of the Act refers only to a sentence imposed in respect of the offence or offences referred to in s36(1)(a) of the Act. It does not refer to any sentence in respect of any offence which is passed in the course of sentencing an offender on the one occasion. Accordingly, it was open in law for the court to impose the sentencing options selected.

CROCKETT and ASHLEY JJ: [1] The applicant pleaded guilty to 13 counts of obtaining property by deception. On each of counts 1-12 the learned trial judge imposed a sentence of 18 months' imprisonment. By the operation of s16(1) of the *Sentencing Act* 1991 (the Act) the terms of imprisonment were to be served concurrently. His Honour made an order wholly suspending the sentence: see s27(1)(2)(4) of the Act. On count 13 his Honour made a community-based order for a two year period: see s36(1) of the Act. He imposed a particular condition that the applicant undergo assessment and treatment for psychological problems. The Director of Public Prosecutions has appealed against the sentence imposed. There are three grounds of appeal, viz:

> "1. The sentences imposed in respect of Counts 1-13 were manifestly inadequate.
>
> 2. In fixing a term of 18 months in respect of each of Count 1-12, and a Community Based Order on Count 13, the sentencing Judge -
> (a) failed to adequately reflect the gravity of the offences generally and in this case in particular.
> (b) failed to take into account or sufficiently to take into account the aspect of general deterrence.
> (c) gave too much weight to factors going to mitigation.
>
> 3. The sentence imposed in respect of Count 13 was wrong in law, as it breaches S36(2) of the *Sentencing Act* 1991."

It is first necessary to consider ground 3, which raises an issue not agitated below. There is a significance point of principle involved, and the issue should be **[2]** determined. If ground 3 succeeds the applicant must be re-sentenced on all counts. If ground 3 fails then the other grounds must be considered in light of the principles set out in *Everett v R* [1994] HCA 49; (1994) 181 CLR 295; (1994) 124 ALR 529; (1994) 68 ALJR 875; 74 A Crim R 241.

It is to ground 3, then, that we now turn. We have reached the conclusion that the ground fails. We must say why that is so. S7 of the Act provides the range of sentencing orders that may be made "if a court finds a person guilty of an offence". The opening words of the section empower a court "subject to any specific provision relating to the offence and subject to this Part" to make a sentencing order of any one of eleven types. We say "any one", because the eleven types of disposition are expressed disjunctively. In reviewing sentencing options a court is constrained by considerations set out in s5 of the Act. They show, consistently with s7, that the focus is upon the sentence which is appropriate to a particular offence. There being no specific provision relating to sentence with respect to the offences with which the applicant was charged then, subject to Pt3 of the Act, s7 empowered the learned trial judge only to impose a single sentencing order in respect of a particular offence. We turn now to s36.

Against the background of s5 and s7, s36(1) prescribes the circumstances which must exist if a community based order is to be made. Thus:

> "A court may only make a community-based order in respect of an offender if— **[3]**
> (a) it has convicted the offender, or found the offender guilty, of an offence or offences punishable on conviction by imprisonment or a fine of more than 5 penalty units; and
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> (b) it has received a pre-sentence report; and
>
> (c) the offender agrees to comply with the order."

Then it is necessary to refer to s36(2), which reads:

> "A court may make a community-based order in respect of an offender in addition to sentencing the offender to a term of imprisonment of not more than 3 months."

The purpose and effect of subs(2) must be considered. In general terms, the subsection permits a court to impose a particular combination of sentencing dispositions. Absent subs(2), nothing in Pt3 of the Act would permit the particular course. Further, to sentence an offender to a term of imprisonment (at least so far as it involves confinement), yet at the same time to impose a community-based order in respect of the same offence would not sit comfortably – absent subs(2) – with the directions given by s5(4) and s5(6).

A second aspect of the subsection is that it permits the combination of sentencing dispositions only to the extent that the term of imprisonment to which the offender is sentenced is not more than three months. It was the common submission of counsel for the Director and the applicant that the rationale of the inhibition is that a community-based order should not commence to operate well into the future. That may be accepted as the true rationale, although it is not the only possible explanation.

[4] The critical question for present purposes is, we think, whether the sentence to a term of imprisonment mentioned in s36(2) refers only to a sentence imposed in respect of the offence or offences referred to in subs(1)(a); or whether it refers to any sentence in respect of any offence which is passed in the course of sentencing an offender on the one occasion. A subsidiary question is whether, if the latter alternative be preferred, a sentence of imprisonment, wholly suspended, meets the description in subs(2).

Only rarely, we think, is it likely that a court, in imposing sentence for a number of offences, will conclude that – if it is appropriate to impose a custodial sentence exceeding three months for some of the offences – it is nonetheless appropriate to impose a community-based order for other offences. So the issue of construction referred to a moment ago is unlikely to have much practical significance. The present case is, to an extent, an instance of the exception. But it is complicated by the fact that the sentence of imprisonment was wholly suspended.

As a matter of construction, and assuming for the moment that a sentence "to a term of imprisonment" is apt to describe a wholly suspended sentence, we are of opinion that the first of the alternative constructions of s36(2) is to be preferred. S36(1) addresses itself to a particular offence or offences. *Prima facie* it should be supposed that the balance of the section relates to the same offence or offences. That proposition naturally embraces subs(2). **[5]** S36(1) falls

within Division 3 of Pt3 of the Act. It would be surprising if provisions in Division 3 which permit imposition of penalties additional to a community-based order should relate to different offences. So, s43 gives power to fine. That seems obviously to relate to the offence or offences referred to in s36(1)(a). There is no reason why it should relate to other offences. The terminology of s36(2) and 43 is similar – see particularly the reference to imposition of another penalty "in addition to" the making of a community-based order. The fact that the sequence of dispositions is reversed between s36(2) and s43 does not, in our opinion, alter the force of the argument. S36(2) has a sensible [operation] in relation to s36(1). It permits the imposition of a combination of penalties in the case of an offence or offences in respect of which a community-based order appears to be generally appropriate. It meets the problem of making a mixed disposition that would otherwise arise by reason of s7.

To give s36(2) an operation with respect to offences other than those referred to in s36(1) would give it a variable meaning. That is, for some purposes it would refer to the offences mentioned in s36(1); whilst for other purposes it would or could refer to both s36(1) offences and offences identifiable only by their being considered by a court at the same time as it considered s36(1) offences. Subs(2) should, in our view, be given a constant meaning, not one that might vary depending on the existence or otherwise of "other offences". **[6]** S36(2) could not preclude, as counsel for the Director conceded, the imposition of a community-based order in the case of an offender already under custodial sentence for a period in excess of three months at time of imposition of the community-based order. That is, s36(2) could not completely preclude the vice which, according to the Director's argument, it was designed to prevent. In the case of a subsection not free of some uncertainty of construction, that fact tells against the construction urged on behalf of the Director.

We should refer also to the predecessor of s36(1)(2). It was s28(1) of the *Penalties and Sentences Act* 1985:

> "Where a court convicts a person of an offence punishable by imprisonment, the court may, instead of sentencing the person to a term of imprisonment or in addition to sentencing the person to a term of imprisonment of not more than 3 months, make a community-based order in respect of the person."

Under that legislation it was, we think, very clear that the sentence of imprisonment would be one relating to the offence(s) in respect of which the community-based order was to be made. The present s36(1)(2) expand upon the original provision. But in view of the history of s36(2) we consider one should be very cautious before concluding that it should be given a dramatically different operation to that which its predecessor had.

Earlier, we left open the question whether s36(2) applies to a sentence "to a term of imprisonment" of more than three months where the sentence is wholly suspended **[7]** under s27(1)(2)(a) of the Act. That question could arise regardless of whether the offences in respect of which sentence is imposed are in a particular case the offences referred to in s36(1)(a), or some other offences in respect of which sentence is passed at the same time. If, as the parties submitted (and we accept) one of the purposes of s36(2) is to prevent undue delay in the commencement of a community-based order, the subsection has no sensible operation where a sentence of more than three months' imprisonment is either wholly suspended; or, at least partly suspended so that the actual period to be spent in custody is less than three months. Despite a want of sensible operation of s36(2) in the circumstances to which we have just referred, it is not at all clear that the subsection will not there apply. It is, however, unnecessary to resolve that issue in order to dispose of ground 3 of the Director's appeal.

Nathan J, whose judgment in draft form we have had the benefit of reading, has concluded that a community-based order is not an available option if, in respect of one set of proceedings or upon a single presentment, a person upon conviction is sentenced to a period of imprisonment in excess of three months - whether or not the sentence is suspended. He has pointed to the fact, as appears from the remarks of the sentencing judge, that the sentences here imposed were inter-related, integrated one with the other. It does not seem to us, however, that this last-mentioned consideration can prevail over the considerations – founded in the verbiage of the Act – to which we have earlier **[8]** referred so as to yield the construction of s36(2) preferred by Nathan J.

The question that next arises is whether the remaining grounds of appeal, considered in the light of *Everett,* require the applicant to be re-sentenced. *[Their Honours considered the appeal against sentence and concluded]*...**[17]** So there is left the matter of the sentence itself. Let it be accepted that an inadequacy of sentence of the kind referred to by Barwick CJ in *Griffiths* [1977] HCA 44; (1977) 137 CLR 293; (1977) 15 ALR 1; (1977) 51 ALJR 749 and by McHugh J in *Everett* will raise an issue of principle requiring intervention by a Court of Criminal Appeal. Can it be said that the sentence here imposed was "definitely below the range of sentences appropriate ..."? In our opinion the answer is "no". A good deal, obviously enough, was said for the Crown as to the nature of the thefts – involving as they did a breach of trust – as to the period during which they were carried out, the evidence of premeditation, their sheer size.

Overlying all this was the use to which the money was put – on high-living for the respondent and Nelson. It is not difficult to understand why this combination of features would be immediately thought to command no sympathy for the offender but rather a need for salutary punishment. The **[18]** deficiency of such an approach, as we perceive it, is not in what it would take account of, but what it would ignore. His Honour took account of both sides of the ledger, in a balanced way. Once he had concluded, as he did, that strong and special mitigatory circumstances existed, it was open to him to consider the option of imposing a non-immediate custodial sentence. That was the option he selected, in respect of all but one offence. His imposition of a community-based order in respect of that other offence permitted attention to be directed to the respondent's psychological rehabilitation. The sentencing options which his Honour selected were open both in law and upon the facts as he found them. No issue of principle has been disclosed in respect of the sentence itself which would authorize intervention by this Court.

We should add only this: a non-immediate custodial sentence having been imposed, and the respondent having been encouraged to set out on the path of rehabilitation, the situation of double jeopardy brought about by a Director's appeal was particularly acute – as was recognized in *Everett* at 880-881. There is a reason to be the more cautious in allowing an appeal in such circumstances. But we have not needed to have recourse to that consideration in the present case. In the event, the appeal should be dismissed.

[NATHAN J *delivered a separate judgment in which he held that the making of the CBO infringed s36(2) of the Act. His Honour also expressed the view that the offences called for the imposition of an immediate custodial sentence.]*

APPEARANCES: For the Crown: Mr JD McArdle, counsel. PC Wood, Solicitors for Public Prosecutions. For the respondent Rhonda Leigh Young: Mr S Kaye QC with Mr I Read, counsel. Galbally & O'Bryan, solicitors.
