42/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

DPP v MAI

Young CJ, Crockett and Murphy JJ

16, 19 June 1989

CRIMINAL LAW – SENTENCING – INTENTIONALLY CAUSING SERIOUS INJURY – COMMUNITY-BASED ORDER MADE – CONDITIONS OF A COMPLICATED NATURE MADE – CONDITIONS IN FORCE FOR EXTENDED PERIOD – COMPENSATION ORDER INCLUDED IN CBO: *PENALTIES AND SENTENCES ACT* 1985, SS28(4), 29(2).

Observations as to a Court's powers to make certain special conditions under a community-based order and the period of time during which the order is to remain in force.

YOUNG CJ: [1] This is an appeal by the Director of Public Prosecutions under s567A of the *Crimes Act* against a sentence imposed upon Vinh Thanh Mai, who pleaded guilty in March of this year to a charge of intentionally causing serious injury and was released on a Community Based order of a complicated kind to which it will be necessary to make further reference.

The Director's principal contention was that the sentence was manifestly inadequate, but the notice of appeal also raised the question of the power of the Judge to make the order he did make. The offence was committed on 27th August, 1988. The respondent, who is a Vietnamese, in company with his younger brother and another Vietnamese, had spent some time drinking beer during the afternoon. Between 6.30 and seven o'clock they left the house in which they had been drinking and moved to the flat of another Vietnamese where they continued drinking. About nine o'clock in the evening the respondent and another man went out and bought some beer. Upon their return some teasing began, and what was at first good natured banter degenerated into an argument of a more serious kind as the respondent became more heated. He threatened to beat up one of the men, whose name was Hoang Dinh Nguyen, in whose house he had started drinking earlier that afternoon and who was a friend of his, but the threat was not initially taken seriously. The respondent then produced a folding knife which he had earlier shown to some of the company. It is described as a butterfly knife with a blade about nine centimetres long. The respondent held it against Hoang's throat whilst the latter was in a **[2]** lounge chair. Hoang pushed the respondent away and went to stand up. As he did so, the respondent stabbed him twice in the left side. The wounds which were thus inflicted were sufficiently serious to require the removal by surgery of the left kidney and spleen to prevent haemorrhage.

When questioned by the police, the respondent said that Hoang had threatened him with a beer bottle, that both men had fallen to the ground, and that he, the respondent, had accidentally stabbed Hoang with the knife which he had been using to cut up food. There was a dispute as to what actually happened, but clearly there was a drunken brawl. Some verisimilitude was lent to the respondent's account because the Crown conceded that soon after the events the respondent was seen suffering from facial injuries which he said he acquired during the brawl.

An extensive plea was made by counsel on the respondent's behalf, but in view of the conclusion at which I have arrived it is unnecessary to go into that plea in any detail. The learned Judge went into the matter very thoroughly and painstakingly. He interrogated the respondent at some length, the respondent having been called at the Judge's suggestion. The learned Judge said that he might order the respondent to pay to the hospital the costs which had been incurred in treating the victim, and also what the victim had lost as a result of his injuries. In other words, the learned Judge clearly indicated that he was not contemplating sending the respondent to gaol, but he said **[3]** that he would consider overnight the course which he would finally take.

In these circumstances, counsel for the Crown said at one point during the course of the discussion that took place on the plea: "There doesn't seem to be anything in the sections that I've

seen that can give the effect of a judgment to what Your Honour proposes", to which His Honour replied, "Under a Community Based Order I can do anything". Then followed a good deal more discussion during the course of which His Honour said this:

> "Well, I want to hear submissions from counsel in relation to the terms of a community-based order I'm thinking of, and of course you have got to get the report from the Community Corrections Officer and if there is a programme and a place available for him. I can't pronounce a community-based order until I have a report from a Community Corrections Officer and it is your obligation to get the Community Corrections Officer. They can be brought in on about half an hour's notice. I won't bring them in today, I will do this tomorrow afternoon. I want to know from the Community Corrections Officer whether there is suitable community work for him to do."

Then a little later, after indicating some views about community work, His Honour said:

> "I will make it a term and condition that he pay forthwith to the victim $4,000, and thereafter the sum of -"

and then His Honour broke off to refer to the amount outstanding and Mr Collis said: "That would be paid off in two years, the $8,000." His Honour went on:

> "I make it a condition that he attend at the TAFE College or one of the high schools – you will have to get this for me tomorrow – to do a language course in English and perform satisfactorily, and I want quarterly reports from the teachers to say he is putting an effort into it and if his effort is not satisfactory, that may be considered as a breach of the order."

[4] A little later, His Honour said, "I will hear counsel as to any further conditions". Then His Honour addressed counsel for the Crown and asked him, "What number of years?" Counsel replied, "I think we could say the period proposed by Your Honour, to which His Honour said, "What, three or four years? You see, the point is, he has to return to the community by virtue of the unpaid work for some of the damage he has caused." Counsel said, "Perhaps we can say four years." Then in ensuing discussion His Honour said, "Why shouldn't I give him a suspended sentence?" Counsel for the Crown said, "There is no reason, I suppose. All the sentencing propositions are open to Your Honour, and what Your Honour proposes we won't argue with. That is all I would like to say." Then there was some further discussion and His Honour said "So the range is 4 to 7 years or a suspended sentence so far as the Crown says?", whereupon counsel said, "The difficulty is, I don't have any instructions at all. Your Honour would be getting my views and I don't think that is appropriate." Then His Honour turned to discuss a matter with counsel for the respondent. The matter was then adjourned till the following day to allow His Honour to consider it and also to allow counsel for the accused to discuss the matter of the Community Based Order and its conditions with his client.

The following day, there was further discussion when the matter was resumed. Counsel for the Crown provided the learned Judge with the information for which he had asked and never suggested to him that what was proposed might be beyond the power of the learned Judge to order. **[5]** It is, of course, clear that in the intervening time he would have had ample opportunity to have obtained instructions if those were needed. During the further discussion, the learned Judge asked counsel for the Crown about the fine and restitution provisions in the legislation, but His Honour seemed to persist in the view that he could do anything that he had a mind to do under a Community Based Order. Counsel for the Crown seemed to have some doubts about it but made no substantial submissions.

His Honour finally expressed his view on the matter, which was that so long as he imposed any one of the conditions listed in s29(2) of the *Penalties and Sentences Act*, he could then do whatever he wished in respect of other conditions. His Honour then granted a Community Based Order without recording a conviction and that order had a number of special conditions attached to it.

I shall not read all of the conditions, nor all of the order, but there are some aspects of it to which I shall draw attention. On its face, the order bears the information that it started on 2nd March 1989, and continues until 20th March, 1992. That is, of course, longer than a Community Based Order is normally able to continue, for s28(4)(b) of the Act provides that a Community Based Order remains in force for such period of not more than two years as is specified by the

Court or, where exceptional circumstances exist, for such longer period as is specified by the Court. It can be taken, perhaps, that in specifying the period of the order **[6]** His Honour found exceptional circumstances and intended to exercise that power. The special conditions started with a requirement that the respondent live at a named residential address. No period was attached to that particular condition. I shall read condition 3, which provides:

> "You must perform unpaid community work of not less than two hours each week, such work to be directed by a Community Corrections Officer stationed at Carlton for a period of three years, from 20.3.89 subject to suitable breaks at Christmas and Easter of each year."

The programme condition in the section is contained in s29(2)(b). That paragraph provides that unpaid community work be performed within one year of the order coming into force, and it is a question whether the order which His Honour made that it continue for three years can be made consistently with that provision.
Condition 4 is:

> "You must enrol for a course of study to become proficient in the English language at the Footscray Adult Migrant Education Centre to be conducted on each Monday and Wednesday between 6.30 p.m. and 8.30 p.m. and apply yourself to such study to the satisfaction of the director of such centre (or his/her deputy)."

The comment I would make on that condition is that s29(2)(a) provides for a programme condition that the offender attend educational and other programmes as directed by the Regional Manager for a period of not more than one year, and there is perhaps a question whether a programme condition of the kind which His Honour prescribed can be made under the section.

Condition 6 of the order provides:

> **[7]** "You are to pay the Royal Melbourne Hospital, within 21 days of this day the sum of $4,517 in respect of the medical services rendered to Huang Dinh Nguyen."

I shall not read condition 7 in full, but it requires payment to Huang Dinh Nguyen of 65 Ashley Crescent, Coolaroo, of a weekly sum of $100 for a substantial period. No doubt His Honour took the view that having imposed a condition that the respondent live at a named address under s29(2)(f) of the Act, His Honour was at large, pursuant to s29(2)(h), which authorises the Court to impose any other condition that the Court considers necessary or desirable.

So far as the compensation provisions in the order are concerned, I merely observe that compensation has invariably been treated in this Court as not part of any punishment inflicted on an offender, and I refer to *R v Braham* [1977] VicRp 11; [1977] VR 104. Counsel for the Director of Public Prosecutions in this Court submitted that the release of this respondent on a Community Based Order for the offence to which he pleaded guilty was to impose a manifestly inadequate sentence, and further that the only proper sentence for an offence of the kind and in the circumstances which I have described was a custodial sentence. I would not be disposed to agree that a custodial sentence was necessarily the only proper sentence, but for reasons which will appear I find it unnecessary to reach a final conclusion upon that question.

The fourth ground of appeal upon which the Director relies is:

> **[8]** "That the learned Judge erred in that it was not open to him to include in a Community Based Order conditions that the respondent attend for an educational program for an unlimited duration or that the respondent perform unpaid community work for a period in excess of one year."

As I have already indicated, there may well be a number of other conditions in the order made by the learned Judge, notably the conditions relating to compensation, which are arguably beyond the power of the Court to impose, but I would not wish to decide those questions without hearing full argument upon them. In any event, it is unnecessary in this case for me to do so, for I have reached a clear conclusion as to the proper disposition of this appeal.

As I have indicated, counsel for the Crown before the learned Judge made it quite clear to him that the Crown would not argue with what the learned Judge proposed. When counsel first

said that, he may indeed have had no specific instructions to that effect, but if there had been any doubt about it, he could have obtained those instructions overnight. In those circumstances, according to well recognised principles accepted in this Court, it is my view that the Crown cannot succeed on this appeal. The position was put succinctly by this Court, composed of Crockett, McGarvie and Southwell JJ in *DPP v Casey and Wells* (1986) 20 A Crim R 191, where Their Honours said:

> "...if the prosecution fails to do what is expected of it at the sentencing hearing thus allowing the judge to fall into error it cannot expect on its appeal to have that error corrected by an appellate court."

In my view, it would be quite unjust in the present **[9]** circumstances to allow the Crown to succeed on an appeal of this kind upon the ground that the sentence imposed was manifestly inadequate. Reference may also be made to *R v Jones* [1984] WAR 175 at p179; (1983) 79 FLR 226; (1983) 10 A Crim R 276 and *R v Tait and Bartley* (1979) 46 FLR 386; (1979) 24 ALR 473 at p477.

In the circumstances, I think it would be equally unjust to allow the Crown to succeed upon the ground that the order appealed from is, or some parts of it are, not within power. Such an argument might, in a special case, stand upon a different footing from the argument that the sentence is manifestly inadequate, but here, where the Crown quite expressly indicated agreement in the course proposed, I do not think that the Crown should be allowed to contend that the learned Judge had no power to make the order which he did make. No argument was addressed to us to suggest there was any special reason why we should do so. Accordingly I think that the appeal should be dismissed.

CROCKETT J: I agree. **MURPHY J:** I also agree. **YOUNG CJ:** The order of the Court is that the appeal is dismissed.

APPEARANCES: For the Crown: Mr R Langton, counsel. JM Buckley, Solicitor for the DPP. For the respondent Mai: Mr D Myers, counsel. Clements Hutchins & Co, solicitors.
