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SUPREME COURT OF SOUTH AUSTRALIA

WINKLER v CAMERON

Legoe J

21, 26 August 1980; 3 March 1981 — (1981) 33 ALR 663

CRIMINAL LAW – SENTENCING – FINE – MEANS OF OFFENDER – ABILITY TO PAY FINE: SOCIAL SERVICES ACT 1947 (CTH) S138(1)(D), (5).

Defendant was convicted, fined and ordered to pay restitution under the *Social Services Act 1947* (Cth) on each of several charges of making false statements in applications for unemployment benefits. The defendant appealed against the severity of his sentence and led statistical evidence as to comparative sentences in other cases and submitted that, he being unable financially to pay the fines imposed, imprisonment in default of payment would be inevitable.

HELD: Appeal allowed.

1. The statistical evidence could be used (cautiously) as a guide to the prevailing range of penalties and the relative criminality of the defendant.
R v Barber (1976) 14 SASR 388; and
R v Morse (1979) 23 SASR 98, considered.
 2. The sentencing magistrate, having properly concluded that a fine rather than imprisonment was appropriate, should have fixed the total penalty having regard to the gravity of the offence and the means of the offender. The time for and regularity of payments by the offender should be assessed and applied to the quantum of, *semble*, the total penalty.
 3. "Total penalty" meant fines, counsel's fees, witness fees, costs, restitution payments and any other sum recoverable under threat of imprisonment.
 4. The means of the defendant should have been fully investigated in order to ensure the reality of the total fine as an alternative to imprisonment.
 5. The several convictions, having constituted one continuous course of conduct, could be dealt with by one penalty under the Act.
 6. The fine should be re-determined after evidence of the defendant's means, but the order for payment for restitution should stand.
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