31/94

SUPREME COURT OF VICTORIA — APPEAL DIVISION

MARADIS v PRESTON and ORS

Tadgell, Nathan and Hansen JJ

7 December 1994

SENTENCING – SUSPENDED SENTENCE IMPOSED – BREACH OF HEARD BY DIFFERENT MAGISTRATE – "THE COURT WHICH SENTENCED THE OFFENDER" – WHETHER SENTENCING MAGISTRATE MUST DEAL WITH BREACH: *SENTENCING ACT* 1991, SS27, 31.

***Obiter*. The expression "the Court which sentenced the offender" in s31(1) of the *Sentencing Act* 1991 ('Act') does not mean the particular magistrate who imposed the suspended sentence but the court itself (a member of which sentenced the offender).**

TADGELL J: *[After setting out the relevant provisions of the Act and dealing with the question whether a County Court Judge has jurisdiction to state a case prior to determination of an appeal, His Honour continued]* ... **[5]** I think the court cannot make any order upon the purported case stated. It may, however, be useful if some observations were made (which must necessarily be *obiter dicta*) about the court's apprehension of the meaning of s31, and in particular sub-s(5), of the *Sentencing Act* 1991. In my opinion there is no indication in s31, or in any other section of the *Sentencing Act*, that an order under s31 may be made only by the judge or magistrate who **[6]** made the order for a suspended sentence under s27. Such a restriction would be likely to cause considerable inconvenience in practice. Moreover it would or might well render the provisions of s31 unworkable in cases where, for example, the judge or magistrate who had made the order under s27 subsequently died, retired, or became ill, or went on leave, or was otherwise rendered unavailable to deal with any breach of the order. Had such a restriction been intended it could easily have been imposed in plain terms. As it is, the expression "the court which sentenced the offender" in sub-s(1) of s31 can be given a sensible operation by treating it as referring to the court a member of which sentenced the offender.

Counsel for the appellant referred us to s23 of the *Penalties and Sentences Act* 1985 which was in a sense the forerunner of s31 of the *Sentencing Act*. He submitted that we might derive inspiration for the interpretation of s31 from s23. Speaking for myself, I can derive no assistance from s23 of the *Penalties and Sentences Act* 1985. S31 is not ambiguous and should be understood to mean what it says and not to mean something which it might mean if a number of other words were added to it. It was also submitted that question A posed by the County Court Judge might be paraphrased by saying, " should the Magistrate who imposes a suspended sentence ordinarily deal with a breach?" It was further submitted for the appellant that ordinarily, that is to say save in cases of illness, or death, or retirement and the like, the sentencing magistrate should deal with the breach of the order for suspended sentence in accordance with a long- **[7]** standing practice of higher courts. As I have indicated question A, as asked, plainly enough deals with a matter of jurisdiction and not of practice. The very argument that there may be cases in which the sentencing magistrate need not deal with a breach of the sentencing order denies the validity of a major premise that that magistrate must necessarily do so.

It is true, I think, that in the Supreme Court when the matter of a breach of, for example, a bond, or of the terms of a community based order, falls to be dealt with, the very judge who made the original order (or it may be the very judges who constituted the Court of Criminal Appeal, if that court made the order) will ordinarily deal with any breach of the order. That has been my own experience. It is, however, I think a matter of practice only and not a matter of necessity. It is no doubt a convenient practice because a question of resentencing may arise upon such a breach and it is convenient that the same mind or minds should reconsider the question of a fresh sentence.

In the same vein, Gibbs J in *R v Judge Leckie ex p. Felman* (1977) 52 ALJR 155; (1977) 18 ALR 93, at page 99, said it seems logical and convenient that a judge who grants a recognizance should be the person who imposes sentence if a condition is broken. If the same bench cannot be reassembled to deal with a breach of a sentencing order I have never heard it suggested, however, that some other bench may not deal with it: See also s15 of the *County Court Act* 1958, which seems to have no counterpart in the *Magistrates' Court Act*. It is to be noted, perhaps, that the task of a court hearing an application under sub-s(5) **[8]** of s31 of the *Sentencing Act* is somewhat limited in the orders to be made. In particular the court will not be called upon to impose any fresh sentence of imprisonment. While in some cases it may be convenient or even desirable that the sentencing magistrate or judge should deal with an application under s31, I cannot think it necessary that that must be so as a matter of jurisdiction. Being of opinion that the County Court judge had no power to reserve the questions he did for the determination of this Court, and that this Court has no jurisdiction to determine those questions, I would propose that the Court make no order.

NATHAN J: I entirely agree with the learned presiding Judge. I add on the following supplement: I too am firmly of the view there is no ambiguity in s31 of the *Sentencing Act*. It must be borne in mind that the *Sentencing Act* operates across the board affecting the entire hierarchy of courts in this state. Furthermore, the *Magistrates' Court Act* itself was amended in 1989 to create a Magistrates' Court of Victoria. The section dealing with a reference to the Court is only sensible when interpreted to mean all courts within the judicial hierarchy and in particular the court at the level at which the sentence was imposed. Had the section been constructed to mean the actual judicial officer concerned, then the words "Judge" or "Magistrate" could easily have been inserted. They are absent and I, for these reasons and those expressed by the learned presiding Judge, agree no further order should be made.

HANSEN J: I agree.

TADGELL J: The order of the Court is that there be no order.

APPEARANCES: For the appellant Maradis: Mr B Stafford, counsel. Elliott Stafford & Associates, solicitors. For the respondents: Mr ME Dean, counsel. Solicitors to the DPP.
