

26/08; [2008] VSC 170

SUPREME COURT OF VICTORIA

DPP v REES and ANOR

Kaye J

22, 23 May 2008

CRIMINAL LAW – SENTENCING – SUSPENDED SENTENCE IMPOSED – SUBSEQUENTLY BREACHED DURING PERIOD OF SUSPENSION – APPLICATION MADE FOR AN ORDER THAT DEFENDANT BE DEALT WITH FOR THE SUSPENDED SENTENCE – DEFENDANT DEALT WITH ON BREACHING CHARGES BUT NO ORDER MADE ON SUSPENDED SENTENCE – "EXCEPTIONAL CIRCUMSTANCES" NOT FOUND BY MAGISTRATE – NO REASONS GIVEN FOR NOT RESTORING THE SUSPENDED SENTENCE – "MAY" – MEANING OF IN S31(1) OF THE SENTENCING ACT 1991 – WHETHER MAGISTRATE IN ERROR: SENTENCING ACT 1991, SS31(1), 31(5A), 31(5B).

1. The use of the verb "may", in s31(1) of the *Sentencing Act* 1991, was employed to invest jurisdiction in the original sentencing Court, in the circumstances described in that subsection. That is, the verb "may" was not used to denote a discretion on the part of that Court; rather, it was used to provide a power to the Court to proceed to exercise a power under subsection (5), in the circumstances described by subsection (1). The mandatory terms of subsections (5) and (5A) reveal a clear statutory intention that, where an offender has been found guilty of an offence punishable by imprisonment and which was committed during the period of the suspended sentence, it must proceed to deal with that offender under the terms of those two subsections. In particular, it is the Act's intention that, in the absence of exceptional circumstances, the Court must restore the sentence which had been held in suspense, and order the offender to serve it.

2. The intention is manifest, not only from the clear terms of s31(5) and s31(5A), but also from the history of those provisions. Section 31(5A) was enacted in 1997 as a result of a perception that the Courts had failed to order offenders, who had breached a suspended sentence by committing another offence, to serve the period of imprisonment which had originally been suspended. Section 31(5A) was enacted to ensure that where an offender breached a suspended sentence in that way, the offender would serve the suspended term of imprisonment, unless there were exceptional circumstances. That intention was articulated, in unequivocal terms, by the Attorney-General in the second reading speech when introducing the Bill for the amending Act. As a result, the Court of Appeal, on a number of occasions, has emphasised that due weight must be given by the Courts to the requirement that "exceptional circumstances" must be established, in order to justify a Court from refraining to make an order under s31(5)(a).

3. In the present case, the defendant pleaded guilty to, and was convicted by the Magistrate on, two charges of driving a motor vehicle on a highway while his licence to do so was suspended, contrary to 30(1) of the *Road Safety Act*. Those offences were each committed by the defendant during the period of his suspended sentence imposed on 15 November 2005 and were both punishable by imprisonment. The informant made an application to the magistrate deal with the defendant under s31 of the *Sentencing Act*. Accordingly, the magistrate was required to deal with the defendant under s31(5) and s31(5A) of the *Sentencing Act*. There was no finding by the magistrate of exceptional circumstances under subsection (5A). In the absence of such a finding, the magistrate was obliged to deal with the defendant under s31(5)(a). The Magistrate had no power to refuse to make an order under that provision. Accordingly, the Magistrate erred by declining to make an order pursuant to s31(5)(a), in the absence of a finding by him of "exceptional circumstances" pursuant to subsection (5A).

KAYE J:

1. On 15 November 2005, the respondent (to whom I shall refer as "the defendant") was convicted by the Magistrates' Court at Ringwood on a charge of cultivating a narcotic plant contrary to s72B of the *Drugs, Poisons and Controlled Substances Act* 1991. He was sentenced to a term of three months' imprisonment, such sentence to be wholly suspended for a period of 24 months.

2. On 28 September 2007, the defendant was charged on summons on one charge of driving a motor vehicle on a highway on 16 August 2007, while the authorisation granted to him to do

so was suspended, contrary to s30(1) of the *Road Safety Act* 1986. He was also charged, on the same date, with being a driver of a motor vehicle who, when requested by a member of the police force to produce his licence for inspection and to state his name and address, had failed to do so, contrary to s59(2) of the *Road Safety Act*.

3. Subsequently, on 2 November 2007 the plaintiff was charged with driving a motor vehicle on a highway on 5 October 2007, while the authorisation granted to him to do so was suspended, contrary to s30(1) of the *Road Safety Act* 1986.

4. The three charges, to which I have just referred, came for hearing before the Magistrates' Court at Ringwood on 21 November 2007. On the same date, the informant on the first two charges also applied for an order, under s31 of the *Sentencing Act* 1991, that the defendant be dealt with for breach of the suspended sentence imposed on him on 15 November 2005. The defendant was represented by counsel. When the matter came on for hearing, there was initially some debate as to whether the Court, on that day, should consider the application that the defendant be dealt with for breach of the suspended sentence. Ultimately, after seeking instructions from the defendant, counsel informed the Court that his client was prepared to proceed with that application. After hearing a plea by counsel on behalf of the defendant, the magistrate fined the defendant a total of \$2,000 on the three charges, together with \$61 costs. His Honour expressly declined to make any order in relation to the defendant's suspended sentence.

5. The Director of Public Prosecutions has brought these proceedings by way of appeal pursuant to s92(1) of the *Magistrates' Court Act* 1989. The sole ground of appeal is that the magistrate erred in declining to make an order, pursuant to s31(5)(a) of the *Sentencing Act* 1991, in the absence of the proof of any "exceptional circumstances" which had arisen since the order of 15 November 2005 suspending the defendant's sentence. As an abundance of caution, the Director has also instituted proceedings by way of originating motion, seeking relief in the nature of *certiorari*, on the same basis. The second set of proceedings were issued in the event that the order of the magistrate, declining to make any order in relation to the defendant's suspended sentence, was not considered to be a "final order" under s92(1) of the *Magistrates' Court Act*.

6. The defendant is unrepresented in these proceedings, and therefore I did not have the advantage of hearing any argument on the question of the status of the decision by the magistrate not to make an order in relation to the defendant's suspended sentence. However, I am persuaded that the order made by the magistrate, in this case, was a final order, for the purposes of s92(1) of the *Magistrates' Court Act*. In *DPP v Moore*^[1], Batt JA (with whom Ormiston JA and Chernov JA agreed) held that the test to be applied, in determining whether an order is final under s92(1), is the same test which is applied in determining whether a judgment or order, which is under appeal, was made in an interlocutory application for the purposes of s17A(4)(b) of the *Supreme Court Act*. Thus, in essence, the relevant test is whether the application by the informant, that the defendant be dealt with for breach of the suspended sentence, might have been subsequently restored or reinstated, notwithstanding the decision of the magistrate not to make an order in respect of it.^[2] Clearly the informant, through his counsel, made the application before the magistrate. The application was addressed by counsel for the defendant. There is no suggestion that the magistrate adjourned the application, or, for some other reason, did not deal with it at that time. Rather, it is clear from the transcript that the magistrate, having heard the application, refused to make an order on it. In my view, that refusal was final and binding on both parties. The informant would not have been entitled to apply, subsequently, to the magistrate for an order against the defendant pursuant to s31 of the *Sentencing Act*. It follows that, in my view, that the decision of the magistrate, not to make an order in respect of the defendant's suspended sentence, was a final order for the purposes of s92(1).

7. Section 31(1) of the *Sentencing Act* 1991 provides (*inter alia*) that if a Court finds an offender, on whom that Court has previously imposed a suspended sentence of imprisonment, guilty of another offence punishable by imprisonment committed within the preceding three years and during the operational period of the suspended sentence, it may, if the offender is present before the Court, proceed to exercise any power conferred on it by s31(5).

8. Section 31(5), s31(5A) and s31(5B) provide:

“(5) If the court that imposed a suspended sentence of imprisonment is satisfied that the offender has been found guilty of an offence punishable by imprisonment committed during the operational period of the suspended sentence it must—

- (a) restore the sentence or a part sentence held in suspense and order the offender to serve it; or
- (b) restore part of the sentence or a part sentence held in suspense and order the offender to serve it; or
- (c) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this subsection; or
- (d) make no order with respect to the suspended sentence.

(5A) Despite anything to the contrary in subsection (5), if the court is satisfied as mentioned in that subsection it must exercise the power referred to in paragraph (a) of that subsection unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances which have arisen since the order suspending the sentence was made.

(5B) If the Court decides not to exercise the power referred to in subsection (5)(a), it must state in writing its reasons for so deciding.”

9. At the hearing before the magistrate on 21 November 2007, counsel for the defendant submitted that his Honour should sentence the defendant to an intensive corrections order on the three substantive charges. He submitted that, upon his client’s successful completion of that intensive corrections order, the Court should consider those matters to constitute exceptional circumstances, which would then justify an extension of the suspended jail term to which his client was already subject. Counsel acknowledged to the magistrate that he was not able to proffer any exceptional circumstances on behalf of his client. In response, the magistrate observed, “if you haven’t got any exceptional circumstances, well, my hands are tied”. Counsel responded that the “fallback” position for his client would be to request that the three month term of imprisonment, which was already suspended, be served by way of home detention. Counsel then proceeded to inform the magistrate of the defendant’s financial circumstances. Upon completion of counsel’s submissions as to penalty, the magistrate imposed the fines, to which I have referred, on the defendant. He then stated:

“So far as the suspended sentence is concerned, I will simply make no order on that, but I might say you’re the luckiest fellow around here today. You won’t get another chance like this.”

10. Mr D Trapnell, who appeared on behalf of the appellant, submitted that the magistrate was obliged to exercise the power under s31(5)(a), to restore the sentence which had been suspended, unless his Honour was of the opinion that it would be unjust to do so in view of any exceptional circumstances which had arisen since the order suspending the sentence was made. From the transcript of the proceedings, it is clear that the magistrate did not form an opinion that any such exceptional circumstances existed, in light of which it would be unjust to restore the sentence, as required by subsection (5A). Nor did his Worship state his reasons in writing for so deciding, pursuant to subsection (5B). Accordingly, it was submitted that the magistrate erred in law in declining to make any order in respect of the defendant’s suspended sentence.

11. On the face of it, there appears to be a tension between s31(1) and s31(5A). Section 31(1) provides that if the Court finds that the offender has been guilty of another offence during the operational period of a suspended sentence, it “may” proceed to exercise any power conferred on it by subsection (5). By contrast, subsection (5) is expressed in mandatory terms, providing that if the Court is satisfied that the offender has been found guilty of an offence punishable by imprisonment during the operational period of the suspended sentence, it “must” proceed to deal with the offender in the manner described by one of the four sub-paragraphs of subsection (5). Subsection (5A) is similarly expressed in mandatory terms, stating that the Court “must” exercise the power referred to in subsection (5)(a) in the absence of exceptional circumstances.

12. In my view, the answer to the apparent tension is that the verb “may”, in subsection (1), was employed to invest jurisdiction in the original sentencing Court, in the circumstances described in that subsection. That is, the verb “may” was not used to denote a discretion on the part of that Court; rather, it was used to provide a power to the Court to proceed to exercise a

power under subsection (5), in the circumstances described by subsection (1). The mandatory terms of subsections (5) and (5A) reveal a clear statutory intention that, where an offender has been found guilty of an offence punishable by imprisonment and which was committed during the period of the suspended sentence, it must proceed to deal with that offender under the terms of those two subsections. In particular, it is the Act's intention that, in the absence of exceptional circumstances, the Court must restore the sentence which had been held in suspense, and order the offender to serve it.

13. That intention is manifest, not only from the clear terms of s31(5) and s31(5A), but also from the history of those provisions. Section 31(5A) was enacted in 1997 as a result of a perception that the Courts had failed to order offenders, who had breached a suspended sentence by committing another offence, to serve the period of imprisonment which had originally been suspended. Section 31(5A) was enacted to ensure that where an offender breached a suspended sentence in that way, the offender would serve the suspended term of imprisonment, unless there were exceptional circumstances. That intention was articulated, in unequivocal terms, by the Attorney-General in the second reading speech when introducing the Bill for the amending Act^[3]. As a result, the Court of Appeal, on a number of occasions, has emphasised that due weight must be given by the Courts to the requirement that "exceptional circumstances" must be established, in order to justify a Court from refraining to make an order under s31(5)(a).^[4]

14. In this case, the defendant pleaded guilty to, and was convicted by the magistrate on, two charges of driving a motor vehicle on a highway while his licence to do so was suspended, contrary to 30(1) of the *Road Safety Act*. Those offences were each committed by the defendant during the period of his suspended sentence imposed on 15 November 2005. They were both punishable by imprisonment. The informant made an application that the magistrate deal with the defendant under s31 of the *Sentencing Act*. Accordingly, the magistrate was required to deal with the defendant under s31(5) and s31(5A) of the *Sentencing Act*. There was no finding by the magistrate of exceptional circumstances under subsection (5A). In the absence of such a finding, the magistrate was obliged to deal with the defendant under s31(5)(a).^[5] His Honour had no power to refuse to make an order under that provision.

15. It follows that the magistrate erred by declining to make an order pursuant to s31(5)(a), in the absence of a finding by him of "exceptional circumstances" pursuant to subsection (5A). Accordingly, I am satisfied that the ground of appeal contained in the notice of appeal is made out.

16. Accordingly, the following orders should be made in this appeal:

1. The appeal by the Director of Public Prosecutions from the order of the Magistrates' Court at Ringwood made 21 November 2007 in Magistrates' Court case No T01244909 be allowed.
2. There be remitted to the Magistrates' Court at Ringwood the application, in case number T01244909, under s31(1) of the *Sentencing Act* 1991 to restore the sentence of imprisonment imposed on the first respondent and held in suspense by order of the said Court made 15 November 2005.

17. For the purpose of completeness, I should note that Mr Trapnell properly acknowledged that, when the Ringwood Court hears the matter remitted to it as a consequence of those orders, the defendant should have a further opportunity to seek to establish exceptional circumstances under s31(5A).

18. As I consider that this Court has jurisdiction to entertain an appeal from the order of the Magistrates' Court, it is not necessary for me to make an order for *certiorari* on the originating motion. In those circumstances, I decline to make such an order, and those proceedings will be dismissed.

[1] [2003] VSCA 90; (2003) 6 VR 430 [19], [20]; (2003) 39 MVR 323. (Batt JA).

[2] See for example *DA Christie Pty Ltd v Baker* [1996] VicRp 89 [1996] 2 VR 582, 599 to 600 (Hayne JA); *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423 439 to 440; [1966] ALR 705; (1966) 40 ALJR 102, (Taylor J).

[3] 24 April 1997.

[4] *R v Steggall* [2005] VSCA 278, [15]; 157 A Crim R 402 (Nettle JA); *R v Ioannou* [2007] VSCA 277, [17]; (2007) 17 VR 563 (Redlich JA); *R v Ienco* [2008] VSCA 17, [14]-[18] (Kellam JA).

[5] See *R v Bice & Anor* [2000] VSCA 226; (2000) 2 VR 364, [3] (Callaway JA).

APPEARANCES: For the appellant/plaintiff DPP: Mr D Trapnell, counsel. Ms A Cannon, Solicitor for Public Prosecutions. The respondent/defendant Rees appeared in person.