33/93

SUPREME COURT OF VICTORIA — COURT OF APPEAL

CURRY v MORRISON

Fullagar, Marks and JD Phillips JJ

11 February 1993

SENTENCING – WELFARE FRAUD – WHETHER COURT EMPOWERED TO MAKE A COMMUNITY-BASED ORDER – WHETHER PROVISION OF *SENTENCING ACT* 1991 INCONSISTENT WITH FEDERAL LAW: *SENTENCING ACT* 1991, SS39(3), 109; *SOCIAL SECURITY ACT* 1947 (Cth.), S239(1)(b); *CRIMES ACT* 1914 (Cth.), S20AB.

(1) There is no inconsistency between the provisions of the *Sentencing Act* 1991 which can be invoked by S20AB of the *Crimes Act* 1914 (Cth.) and relevant provisions of the *Social Security Act* 1947 (Cth.) ('Act').

(2) Where a person is found guilty of charges of knowingly obtaining benefits not payable under s239(1)(b) of the Act, a court is empowered, *inter alia*, to make a community-based order with a condition requiring unpaid community work.

FULLAGAR J: [1] This is an appeal from the decision of a Judge of this Court allowing an appeal to the Supreme Court from the final orders of a Magistrate in a criminal proceedings: see s92(1) of the *Magistrates' Court Act* 1989. The informant, Mr Curry, was a party to a criminal proceeding within the meaning of s92(1), and Mr Rozenes, of Queen's Counsel, appeared, with Mr Lorkin of counsel, not only in his own capacity as Director of Public Prosecutions (Commonwealth) but as counsel for Mr Curry.

Before the Magistrate at Geelong the respondent on 12th June, 1992 pleaded guilty to a charge that she between 15th November 1988 and 28th May 1991 knowingly obtained a benefit not payable, contrary to s239(1)(b) of the *Social Security Act* 1947 of the Commonwealth. What she had in fact done was apply for and take on false representations numerous payments aggregating $26,805.60 of sole parent's pension from the Department of Social Security whilst residing in a de facto relationship. Under the Commonwealth Act an offence against s239(1) was punishable on summary conviction by a fine not exceeding $2,000 or imprisonment for a period not exceeding twelve months or both.

On the face of the relevant legislation, by the *Sentencing Act* 1991 of Victoria and s20AB of the *Crimes Act* 1914 of the Commonwealth, the Magistrate was empowered to make a "Community Based Order", and he was empowered to attach thereto conditions requiring the respondent to perform a period of "unpaid community work": see ss36, 38, 39 and 109 of the *Sentencing Act* 1991. On 15th June 1992 the Magistrate made a Community Based Order (hereafter called a CBO) on the following **[2]** conditions, *inter alia*:

(i) the CBO be for a period of six months, and

(ii) the respondent to perform 500 hours of unpaid community work.

After hearing submissions initiated from the Office of the Director to the effect that the above sentence was outside the powers of the Magistrates' Court, the Magistrate on 10th July 1992 re-sentenced the respondent, this time making a CBO with the condition that she perform 125 hours of unpaid community work over a period of six months.

The Director or Mr Curry initiated an appeal to this Court on the ground that the sentence of 10th July was also outside the powers of the Magistrates' Court. If this is correct, the sentence, being an *ultra vires* order of an inferior court, was ineffective in law: compare *R v Judge Frederico; Ex Parte Attorney-General* [1971] VicRp 51; [1971] VR 425 and *R v Brattoli* [1971] VicRp 55; [1971] VR 446. It seems implicit in the Director's position either that there is here a failure by

the Magistrate to sentence the respondent which is appealable under s92(1) of the *Magistrates' Court Act*, or else that the Magistrate has made an invalid order which the Supreme Court has power to set aside.

It is clear that the orders of the Magistrate, even if *ultra vires*, have an existence upon the register and are being acted upon, and in my opinion there must be jurisdiction in this Court on appeal to have those orders set aside and to direct a sentencing according to law. The learned Judge of this Court allowed the appeal and remitted the case for re-sentencing in accordance with **[3]** the law as he stated it. His Honour, in the course of his reasons for judgment, said this:

> "The seriousness of infringements of s239 must take into account the possible aggregation of the two types of penalty which can be imposed, whether or not to do so is a matter to exercise a magistrate's discretion, and must be dependent upon the particular circumstances."

His Honour expressed the view that "s109 of the *Sentencing Act* has no obligation to s239 of the *Social Security Act* because the 'contrary intention' to make it applicable is manifest." It appears that His Honour, having construed s109, considered that it was inconsistent with the federal sections because he took the view that the combination of s109 and s39(3) of the *Sentencing Act* had the effect of changing the Commonwealth offence from being one punishable by imprisonment or fine or both into one punishable, so far as the making of a CBO is concerned, as if it were punishable only by a fine, or upon the footing that it was punishable only by a fine.

The Magistrate had apparently taken the view that, since he had decided that a mere fine was inappropriate and a prison sentence was appropriate, i.e. appropriate subject only to the power conferred by ss36 and 39 and 109, it followed that his CBO was made only "instead of imprisonment", with the further consequence that the appropriate Table was that under s109(3) to the exclusion of the Table under s109(4). In my opinion the view of the learned Judge, and the view of the Magistrate, were both erroneous and this appeal must be allowed.

The appellant contends that, in the case of offences against Victorian laws, ss36 and 38 and 39 and 109 of the **[4]** *Sentencing Act* 1991 empower a Magistrates' Court to make a CBO, within the limits imposed by s36, in respect of the offender if it has convicted the offender of an offence punishable on conviction by imprisonment or a fine of more than $500. Looking at s109 alone, if the offence is punishable by imprisonment, that is to say if one of the sentencing options available is imprisonment, then the offender may be ordered (in addition to or instead of imprisonment) to perform unpaid community work in accordance with Table 3 in s109.

If the offence is punishable by a fine, that is to say if one of the sentencing options available is a fine, then the offender may be ordered (in addition to or instead of a fine) to perform unpaid community work in accordance with Table 4 in s109. Still looking at s109 alone, if the offence is "punishable by imprisonment or a fine or both", it follows that both Table 3 and Table 4 are "applicable", because the Magistrate is empowered to employ either of the standards. But this situation is altered by s39(3), which provides that, if more than one provision in s109 is "applicable", then the "relevant provision", that is to say the one to be operative to the exclusion of the other, is the provision which sets out the lesser number of hours. In my opinion this analysis is plainly correct and accords with the plain meaning of the relevant sections.

It is also clear that, if the offence created by s239(1)(b) of the *Social Security Act* had been created (with constitutional validity) by a Victorian statute which included also s239(2), an offence against sub-s.(1)(b) would be, within the meaning of s36(1)(a) **[5]** of the *Sentencing Act*, within both of the following descriptions:

> (i) an offence punishable on conviction by imprisonment;
>
> (ii) an offence punishable on conviction by fine of more than five penalty units.

It is also clear that an offence is not placed outside the ambit of s36(1)(a) merely because it is punishable by both of the two penalties. In such a case the offence remains "punishable" by each and within each of the two stated descriptions. Turning to s109 of the *Sentencing Act*, there is no doubt that an offence created in Victorian legislation by such a provision as s239(1)(b) of the *Social Security Act* alongside such a provision as s239(2) thereof would be, within the

meaning of s109(3) of the *Sentencing Act*, "an offence against an Act .... that is punishable by a term of imprisonment (other than life)". The Magistrates' Court, subject to ss36 and 39(3), would therefore have jurisdiction to punish the offender by a CBO with a condition requiring the offender to perform up to but not more than 250 hours unpaid work over a twelve-month period; all this, of course, in addition to or instead of a sentence up to three months' imprisonment limited by s36(2).

It is also clear, however, that such a Victorian enactment as is envisaged – i.e. containing the same provisions as ss231(1)(b) and 239(2) of the *Social Security Act* – would create, within the meaning of s109(4) of the *Sentencing Act*, "an offence against an **[6]** Act .... that is punishable by a fine". Subject to s39(3), the Magistrates' Court would therefore have jurisdiction to punish the offender by a CBO with a condition requiring the offender to perform up to but not more than 50 hours of unpaid work over a six-month period; all this, of course, in addition to or instead of a fine of up to $2,000.

But s39(3) would make clear that, in the case of such an offence against Victorian law, the Magistrates' Court would not be able to choose between the unpaid work provisions of Table 3 in s109(3) and the unpaid work provisions of Table 4 in s109(4). Such a case as I have envisaged would be one where "more than one provision in s109 is applicable" within the meaning of s39(3), so that "the relevant provision" – that is to say the only one left applicable after the operation of s39(3) – is "the one that sets the lesser numbers of hours", that is to say, the provisions of s109(4).

With all respect to the views expressed by the Magistrate in this case, and with all respect to the apparently different views held by the learned primary Judge, I am after full consideration of opinion that no other view, than the one I have embraced, of the relevant provisions of the *Sentencing Act* 1991 is tenable.

I turn to deal with the fact that the statute which creates the offence and the penalties is a Commonwealth statute and not a Victorian statute. Within the meaning of s20AB(1) of the *Crimes Act* 1914, the Magistrates' Court of a participating State (Victoria) is empowered in particular cases to make an order known as a community service order or a similar order. **[7]** Further, Regulation 6(b) of the *Crimes Regulations (Commonwealth*) as amended by SR 1992 No.91 prescribes, for the purposes of s20AB, a CBO made under the Victorian *Sentencing Act* powers. Accordingly s20AB(1) empowered the Magistrates' Court in Victoria in the present case to make such an order in respect of the respondent, who is a person convicted before that Magistrates' Court of a federal offence.

Within the meaning of the s20AB(3) of the *Crimes Act* 1914, sections 36 and 38 and 39 and 110 and (in respect of CBOs) s109 of the *Sentencing Act* 1991 are "provisions of the laws of the states .... with respect to such an order". Accordingly, so far as those provisions of those sections of the *Sentencing Act* are not inconsistent with the laws of the Commonwealth, those provisions of the *Sentencing Act* apply to and in relation to any CBO made by the Victorian court pursuant to the powers conferred by the joint operation of the *Sentencing Act* and s20AB(1) of the *Crimes Act* 1914.

With all respect to the views apparently held below, it is in my opinion clear that there is no inconsistency between on the one hand the relevant State laws here invoked by s20AB of the *Crimes Act* and on the other hand any federal law to which any reference has been made here, or (so far as known) below. The Commonwealth s20AB merely adopts as part of the consequences of committing the federal offence the consequence created by the relevant Victorian sections as to Community Based Orders.

It follows in my opinion that the Magistrate in the present case had no power to attach to a CBO any condition requiring unpaid work in excess of fifty hours over a **[8]** period of six months. The penalties open to the Magistrates' Court included the following:

(1) Imprisonment for up to 12 months.

(2) A fine of up to $2,000.

(3) A Community Based Order provided that any condition for unpaid work did not exceed fifty hours and all such work to be spread over a period of six months.

(4) Any two or more of the foregoing, subject however to s36 and especially sub-sections (2) and (3) thereof.

Although no reference was made to it here or below, I mention for the sake of completion that an intensive correction order pursuant to s19(1) of the *Sentencing Act* is also made a sentencing option in certain circumstances by virtue of the Commonwealth Regulations abovementioned. It follows that the appeal must be allowed. As I have already said earlier, although the orders last made by the Magistrate were *ultra vires* orders of an inferior court, the fact is that they have an existence on the record at the Magistrates' Court and are being acted on, and in my opinion this Court has the power and the duty to order that those orders be set aside.

I should add my opinion that before sentencing the respondent the Magistrate should give very careful attention to all the sentencing options available to him or her and should form his or her own view as to what should be the appropriate orders. And I would add my further opinion that no Magistrate should sentence an offender or re-sentence an offender in his or her private **[9]** chambers or otherwise than in open court. This last addition is made because at least one of the "re-sentencing" orders made by the Magistrate below appears to have been made in his private chambers.

For these reasons I would order that the appeal be allowed and that the orders of the primary judge made 30th October 1992 be set aside. In lieu thereof I would order that the orders of the Magistrates' Court made by way of sentencing or imposition of penalty on 15th June 1992 and 10th July 1992 be set aside. I would remit the case to the Magistrates' Court at Geelong with a direction that the respondent be sentenced according to law. I would direct that the Magistrates' Court be constituted by a Magistrate other than the one from whom the appeal to the Supreme Court was brought.

MARKS J: I agree.

JD PHILLIPS J: I agree too.

APPEARANCES: For the appellant Curry (DPP): Mr M Rozenes QC with Mr EJ Lorkin, counsel. Commonwealth Director of Public Prosecutions. No appearance by the respondent Morrison.
