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SUPREME COURT OF SOUTH AUSTRALIA AT ADELAIDE

YOUNG v FLAVEL

Legoe J

4, 15, 21 December 1981 — (1982) 29 SASR 481; 6 ACLR 239; (1982) 1 ACLC 82

SENTENCING - COMPANIES - OFFICER - BREACH OF PROVISIONS OF ACT - CONVICTION - PENALTY - SENTENCED TO IMPRISONMENT - PRINCIPLES APPLICABLE TO DETERMINE - WHETHER SENTENCE MANIFESTLY EXCESSIVE.

The appellant was convicted by a court of summary jurisdiction for having a deficiency of $63,000 in his company's accounts and sentenced to 21 days' imprisonment for a breach of s161a(10) of the *Companies Act* 1962 (SA). Upon appeal—

HELD: Appeal allowed. Fine of $600 substituted.
(i) The real question was whether the court of summary jurisdiction in electing or deciding to impose a sentence of imprisonment was, by reason of "individualized measure", imposing a sentence which was manifestly excessive or not.
(ii) The sentence of imprisonment was inappropriate because—
(a) The offence was not shown to have been deliberate or to the appellant's own personal financial advantage. In fact the situation was just the opposite.
(b) There was no evidence before the court of special harm or damage occasioned to others.
(c) There were a number of personal mitigating factors.
(d) The court of summary jurisdiction was in error in saying 'the defendant has had all the advantages of trading through a company and must shoulder the responsibilities for the proper administration of the company". On the contrary the appellant had not received such advantages nor attempted to hide behind any corporate veil or certificate of incorporation. He had personally contributed to the company's finances.

Statement by His Honour Judge O'Shea in *R v Daly* (11 April 1980, County Court, Melbourne) viz: "Plainly, the degree of criminality involved may vary greatly from case to case, depending upon many factors, including the object, if any, sought to be achieved by the defaulter, and the harm if any, resultant upon the default. The section is designed to ensure that officers of the company carry out their duty to see that the company keeps proper accounting records and imposes criminal sanction for their failure to do so in the circumstances set out in section 374B", cited with approval.
(iii) The appeal should be allowed and a fine of $600 substituted for the term of imprisonment.

LEGOE J: Having considered the matter during the course of argument, I have come to the conclusion that certain principles of sentencing are appropriate to apply in such prosecutions. In my judgment the steps to be considered are in general terms, although I do not suggest that this approach is inflexible by any means, would be along the following lines, namely:

1. The tariff is that stated above of a fine or imprisonment.
2. Imprisonment of six months is reserved for the most serious offences: see *R v Mills* (1977) 16 SASR 581 at 583.
3. The choice between imprisonment and a fine cannot necessarily be separated in any particular case than by any means other than what *Thomas on Sentencing* describes as the individualized measure. To approach the question of sentence otherwise is to resort to the less appropriate approach of fission: see Bray CJ in *R v Mills*, *supra*, at 583. In the second edition of *Thomas* at p201 the learned author sets out the individualized measure approach as follows:
"The sentencing court must search among the various individualized measures available to it for the one most suited to the particular offender; sometimes the sentencing court will come to the conclusion that there is no suitable individualized measure and find itself forced back to the tariff. The choice of individualized measure is made empirically in each case, on the basis of an assessment of the individual offender's needs."
4. In my judgment the provisions of s161a(10) include all types of offences whether they be associated with acts of dishonesty as opposed to mere negligence, and whether they be associated with large public companies or small proprietary companies of two or more persons.

In these circumstances the penalties provided must of necessity wander over a very large range of different offences from the grossly negligent or even dishonest or criminal conduct down

to the most extenuating mitigating circumstances that could be envisaged. Not only does the penalty under this section spread as widely as I have intimated but it includes first offenders and subsequent offences under the same section. Clearly a second or third offender under this section (whatever the period of time after the first offence) would be facing the more serious of the alternatives provided for by parliament. In short, the sentencing discretion of the sentencing court is stretched to the utmost by this simple penalty provision. The custodial sentence as provided for by this section must be intended to act as a deterrent, and a workable deterrent, for those who are causing the most financial loss to members of the public be they creditors or shareholders who are adversely affected by the defendant's conduct. It is not without significance to note in this regard that recently in *Flavell v Farrah* (Judgment No. 5739 delivered on 30 October 1981), Matheson J considered a case in which the same learned special magistrate discharged the person pleading guilty to three counts alleging breaches of s379g of the *Companies Act*, which is a section clearly involving offences of dishonesty. Indeed the charges in that case were charges where the respondent had induced the sale and delivery of wines on credit by false pretences. In that case an amount of some $6000 had been obtained. An appeal against the manifest inadequacy of the sentence, namely the sentence of discharge on a bond to keep the peace and be of good behaviour and refrain from acting as a director of a company without leave for a period of 12 months pursuant to the provisions of the *Offenders Probation Act*, and relying on the defendant's previous good character, was dismissed.

In my judgment a fine, particularly a fine of up to $1000 may well be just as appropriate as a deterrent, and at the same time, may take into account an equally important consideration in the sentencing process, namely that of the rehabilitation of the particular offender.

Thomas, *Principles of Sentencing* at p219 says:-

> "Fines are primarily governed by the same principles as fixed term sentences of imprisonment, although as will be shown a strong element of individualization is represented by the general principle that the amount of a fine must be related among other things to the offender's ability to pay. Fines in effect constitute the lower ranges of the tariff (discharges, absolute or conditional, may probably be regarded as the lowest point) and are generally used in cases where a deterrent sentence is considered necessary, but the offence is not sufficiently grave to justify a sentence of imprisonment, usually because the offence itself is not particularly serious, occasionally because there are particularly strong mitigating factors".

Thomas also says at p220:-

> "The considerations governing the choice between a fine and a sentence of imprisonment can be discussed conveniently in the contexts of the particular kind of offences for which fines are considered appropriate; in the context of those offences with which the court is dealing, fines appear to be associated with certain groups of offences in particular – driving offences, unlawful sexual intercourse, receiving, and offences involving obscenity are the most common. In each of these cases, it may be said that the range of appropriate sentences include fines, and that fines are considered appropriate up to a certain point on the scale. This point will vary according to the different offences – for most driving offences, as is shown above, fines are considered appropriate except for the most serious instances, where there has been an element of deliberate risk; the point at which fines give way to imprisonment is thus near the top of the scale in this case. Conversely, in cases of unlawful sexual intercourse, fines are considered appropriate only in the less serious cases, where a youth rather than a man of mature years is involved. Here the point is near the bottom of the scale of the offence."

In Daunton-Fear on *Sentencing in South Australia* at p188:

> "It is common for the definition of a statutory offence to be followed by a provision for the imposition of a fine. This provision may state that imprisonment is an additional or alternative punishment. Even where the definition of an offence is not followed by provision for a fine, the sentencing court may have authority to impose one, either under s313(1)(a) of the *Criminal Law Consolidation Act* 1935-1978 or s75(7) of the *Justices Act* 1921-1976. There is, then, a wide measure of discretion as to the imposition of fines. Further, there is generally wide discretion concerning quantum."

In his reasons the learned special magistrate said:

> 'It was revealed during the investigations conducted by the liquidator and officers of the SA Corporate Affairs Commission that the defendant, being a director of the company between 1 January and 9 June

> 1980, did not comply with the provisions of the *Companies Act*, in particular s161a. I think it is fair to say, from the address of Mrs Apps, that the accounting records of the company were insufficient to correctly record and explain the transactions and financial position of the company. There was no cash receipts journal, cash payments journal, creditors' ledger, an inadequate debtors' ledger, no assets register or employees' wages cards and the general journal was deficient. The accounting records were not maintained to enable the accounts of the company to be correctly audited in accordance with the *Companies Act*. It is also fair to say that the defendant has been co-operative throughout the investigation and it is clear from the record of conversation with the officers of the Commission. The deficiency in the company's assets was $63,000, Mr. Pedlar did not dispute these facts and told me in detail about the defendant's background. In particular, (1) his inexperience in operating the business; (2) that although he may have been told of his duties by the company accountant he did not fully realize or appreciate his responsibilities under the provisions of the *Companies Act*; (3) his relationship with other directors and his assumption of sole responsibility for the business; and (4) his personal situation at the time and since 9 June 1980. I have not and do not intend to go into the detail that was put to me by Mr Pedlar with respect to the defendant's personal situation. I have had further material placed before me before pronouncing my decision this afternoon and I emphasize the importance of what material Mr Pedlar has put before me but I do not wish to take that personal situation out of context or out of perspective with the gravity and seriousness of each of these two offences. I have taken the time to give this matter careful consideration and have had the record of interview supplied to me to also re-read. It seems to me that the defendant has had all the advantages of trading through a company and must shoulder the responsibilities for the proper administration of that company. On the defendant's own admissions inadequate accounting records were kept which were insufficient to enable him to ascertain the true financial situation of the company. The defendant is a man aged 32 with a background in banking. He has had contact with an accountant and it must have been obvious to him that the company was not carrying on its financial affairs properly. Creditors to a large extent rely upon directors to conduct the affairs of the company properly and in this regard they were let down by the defendant's shortcomings. Parliament has provided fairly heavy penalties which I must pay regard to in imposing a penalty in this particular case. Now, it seems to me that I must record a conviction and in the light of all the known facts sentence the defendant to 21 days' imprisonment."

[His Honour continued]: Was the sentence of imprisonment manifestly excessive? I have considered a number of cases most of which are concerned with the question as to whether a sentence of imprisonment should have been suspended. In my judgment the real question in this case is whether the learned special magistrate in electing or deciding to impose a sentence of imprisonment was by reason of "individualized measure" imposing a sentence which was manifestly excessive or not. This was the real question to have been considered by him. Applying the general principles, which I have attempted to outline above, I have come to the conclusion after very careful consideration of the cases, that this particular sentence was in all the circumstances manifestly excessive. I have been concerned particularly by *R v Daly* (unreported appeal judgment), Judge O'Shea of Melbourne, dated 11 April 1980 (as supplied to me), and the case of *Walker v Sulan* (1980) 4 ACLR 975.

In *R v Daly*, *supra*, the learned judge on appeal said:-

> "Plainly, the degree of criminality involved may vary greatly from case to case, depending upon many factors, including the object, if any, sought to be achieved by the defaulter, and the harm if any, resultant upon the default. The section is designed to ensure that officers of the company carry out their duty to see that the company keeps proper accounting records and imposes criminal sanction for their failure to do so in the circumstances set out in section 374B.

With great respect I agree. That case was one where the appellant had clearly appropriated funds to his own use. The learned judge was satisfied that the default was deliberate and "had the effect of making it impossible for anyone to find out the actual position of the company". It was not a case of "mere neglect". In the case at bar the appellant has shown that his default was due to lack of understanding by him as to his statutory obligations and pressure of work combined with considerable personal financial contribution to the short fall of funds. It would be contrary to common sense and reason to brand his offence as deliberate. Certainly the learned special magistrate has not found that to be the case.

In *Walker v Sulan*, *supra*, the aspect of the default which weighed most heavily was the period of time over which the default lasted which distinguishes that case from the present. The brief report does not indicate whether it was a deliberate offence or one where the appellant had appropriated funds to his own use. Certainly there is no suggestion that the appellant in that case has contributed towards the deficit personally as has the present appellant. The principles

of Sentencing referred to by me above do not appear to have arisen in *Walker v Sulan*, *supra*, and in my opinion the question for consideration here appear to be clearly distinguishable. Clearly Mohr J on appeal could find no reason for interfering with the penalty imposed in that case. By contrast I consider that there are several aspects of the case at bar which render the sentence of imprisonment inappropriate. In brief those reasons are:

> 1. The offence is not shown to have been deliberate or to the appellant's own personal financial advantage. In fact the situation is just the opposite. (He lost his house and car and paid in $12,000 cash).
> 2. There is no evidence before the court of special harm of damage occasioned to others.
> 3. There are a number of personal mitigating factors.
> 4. In my judgment the learned special magistrate was in error when he said "the defendant has had all the advantage of trading through a company and must shoulder the responsibilities for the proper administration of the company". On the contrary in my view he has not received such advantages nor attempted to hide behind any corporate veil or certificate of incorporation., He has personally contributed to the company's finances.
> 5. In my judgment the seriousness of his neglect in the six months for the first part of 1980 would be appropriately penalized by a fine rather than imprisonment.

In my opinion the appropriate penalty would have been a substantial fine. Whilst it is very difficult to determine what would be an appropriate fine in all the circumstances I have come to the conclusion that a fine which is a little over half of the maximum fine would meet the justice of the case as a sufficient deterrent and take into account the appellant's clear rehabilitation since these offences and the fact that the fine must be a real penalty. I have enquired of counsel as to the appellant's ability to pay: see *R v Belcher* (1981) 27 SASR 46. In my opinion a fine of $600 would meet the case. I accordingly substitute on the first charge under s161a(10) a fine of $600 in lieu of the sentence of the court below. The respondent to pay the appellant his costs of and incidental to this appeal which I fix at $120.
