29/81

SUPREME COURT OF VICTORIA

McGEE v BODNA

Gobbo J

18 May 1981 — [1981] VicRp 74; [1981] VR 776

PRACTICE AND PROCEDURE – PROCEDURE AS TO CANCELLATION OF ATTENDANCE CENTRE ORDERS – MAGISTRATE DECLINED TO ALLOW DEFENDANT AN OPPORTUNITY TO BE HEARD OR HAVE LEGAL REPRESENTATION – WHETHER MAGISTRATE IN ERROR: *COMMUNITY WELFARE SERVICES ACT* 1970, S203(w).

The Director-General may commence proceedings without notifying the offender. The Court has an inherent power to permit appearance in *ex parte* proceedings. The hearing on the breach of the Attendance Centre order must be based on the rules of evidence.

GOBBO J: This is the return of an Order Nisi to review the order of the Magistrates' Court at Camberwell cancelling an attendance order and directing the issue of a warrant of apprehension of the applicant. The applicant had been convicted at the Magistrates' Court at Camberwell of various offences and had been ordered to be imprisoned for 34 weeks, to be served by way of attendance at the Prahran Attendance Centre. After some alleged breaches of his attendance order, the applicant was notified in writing by the Director General that it was intended to apply to the court to cancel the attendance order. The notice contained grounds of cancellation proposed to be relied upon,

When the matter came on for hearing the learned Stipendiary Magistrate declined to hear the applicant or allow him legal representation and in due course, after hearing from a welfare officer, cancelled the attendance centre order and issued a warrant. The Stipendiary Magistrate took the view that he was obliged to proceed on the basis that, in spite of the notification to which the applicant had responded, the applicant was not entitled to be heard.

The grounds of attack were substantially threefold. In the first place, it was put that the power to cancel would only be exercised after notification and after giving the applicant a hearing. Secondly it was said that there was a breach of the rules of natural justice in refusing legal representation and thirdly, it was submitted that the rules of evidence applied and that these had been seriously infringed in the cancellation proceedings.

It is necessary to point out at the outset that the Director-General, though now submitting that the notice was not necessary did in fact give notice to the offender of the application to cancel. This was apparently because of the terms of the *Social Welfare (Attendance Centre) Regulations* 1976. Regulation 236(a) provides as follows:-

> "Where the Director-General intends to make application to a Court for variation or cancellation of an order for attendance at an attendance centre he shall give to the offender seven days' notice in writing of his intention so to do. If the whereabouts of the defendant are not known or the defendant appears to the Director-General to be avoiding service of the notice the Director-General may make application to a Court to dispense with the notice or to fix a mode of substituted service and the Court may make such order as it thinks fit."

The regulation was presumably made pursuant to the power in s203(w) of the *Community Welfare Services Act* 1970 to make regulations as to the conduct, management and supervision of, *inter alia*, attendance centres. There is nothing in the Act itself that in terms requires notice or that refers to orders in this matter being the form or manner prescribed by the regulations. There appears to be no sanction for breach of this regulation. In any event, as the power to make a cancellation order rests on the Act and not the regulations and as the relevant power in the Act is not tied to the regulations, the question of the necessity for notification and a hearing has to be decided by reference to the Act alone.

The relevant provisions of the Act are to be found in s145E(1), (2) and (3) of the Act. For the applicant it was submitted that it is inconceivable that an attendance order be cancelled without the offender being given an opportunity to be heard and that this also was indicated in the references to reasonable excuse for various possible examples of non-compliance with the order by the offender. For the respondent it was submitted that though the legislation was somewhat inelegant, it was open to the meaning that the offender could make out his case when he came before the court after apprehension. These cancellation proceedings were analogous, it was said, to proceedings for commitment under the *Crimes Act* or for issue of search warrants.

The argument relied upon by the applicant rests on the principle referred to by Parke B in *Bonaker v Evans* [1850] EngR 923; (1850) 16 QB 162, 171; 117 ER 840 and expressed as follows:

> "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary."

Unlike the case of *R v Dudley Justices* [1979] 2 All ER 1089; (1979) 1 WLR 891, there is no express legislative authority in the present case. The central question is whether an implied authority is to be found in s145E of the *Community Welfare Services Act* 1970 or elsewhere in that Act.

There are a number of factors that assist in making such implication. The tenor of the language of s145E(1) and (2) is such as to include an offender who may not be able to be found. In that event a warrant for his apprehension could never issue since he would not have been able to be served with notice of the cancellation application. It may be, however, that substituted service of the notice may be possible. Secondly, the section itself simply speaks of an application, there is no hint of any application on notice or any form of hearing involving both parties. Thirdly, the court has wide powers under s145(e)(3), when the offender is brought before the court, to make any appropriate order, including, in my opinion, an order for serving his existing sentence at an attendance centre. It seems clear that it is only on the return of the warrant before the court that any decision is to be reached as to whether the offender has committed any breach of the Act or of the regulations in relation to his attendance centre order. At this point the offender is necessarily before the court and plainly entitled to be heard. The principle set out by Parke B in *Bonaker v Evens* can then properly be given effect to.

So viewed the legislation provides a process that is somewhat analogous to the *ex parte* applications exemplified in search warrant applications. The references to failure "without reasonable excuse" in s145(1)(c) are not in my view decisive against this approach. The basis for cancellation rests in these cases on the court being satisfied that there has been a failure, without reasonable excuse, to comply with rules or regulations or that there have been other transgressions, again without reasonable excuse. This is not a situation where the burden of proof rests on the offender as though he were relying on an exculpatory proviso. The onus of proof is on the Director-General and accordingly there is less force in the argument that the offender must be expected to be present to put forward his excuse.

I am accordingly of the opinion that there is sufficient implied authority in these provisions to sustain the Director-General proceeding to secure a cancellation order without having to notify the offender. I am fortified in my view by a number of *dicta* in the judgment of the Full Court in *R v Hebaiter* [1981] VicRp 39; [1981] VR 367. There the question was whether the sentencing court had jurisdiction to make an order under s145E(3) when the offender had not been brought before the court upon a warrant of apprehension issued under sub-section (2). The Full Court held that the court had no such power unless there had first been an order of cancellation under s145E(1) and the issue of a warrant of apprehension under s145E(2) and unless the offender was brought before the court upon the warrant. In that case, the offender was served with a copy of the application to cancel and was legally represented when the matter was ultimately heard by the sentencing court. It does not appear whether that court received any hearsay material, though there is no reason to suppose that it did.

As to notification to the offender of the application to cancel, the Full Court was of the view that this was not necessary as the following passage indicates at pp16-17 [of the judgment]:

> "And finally it may reasonably be assumed that it was anticipated that the occasions upon which the offender would be present at the time of the making of a cancellation order would be very rare. Only very occasionally could the offender himself be expected to apply. A Director-General's application requires no service upon the offender (though for some reason such service seems to be effected in practice). In the great majority of cases the offender's conduct prompting the Director-General's application would be akin to that of a bailed person's absconding. The judge acts on the unilateral material. Opportunity for mending the Court's hand later on proof of exculpatory facts exists: Cf, s5 of the *Crown Proceedings Act* 1958, sub-section (3) of s145E of the *Welfare Act* allows a like corrective power in the manner later indicated. However, in the case of a 'variation' there is no provision requiring a warrant to be issued to ensure that the other side be heard and, accordingly, the Judge in a variation application, should (before making an order for variation affecting the rights or duties of the opposite party) require notice to be given to that opposite party wherever practicable."

The Court is also plainly indicating in this passage that the opportunity exists on return of the warrant for proving exculpatory factors and so overcoming the effect of a cancellation order. The Court went on to say that when it was satisfied of the blamelessness of the offender the Court would have power to convict the offender to prison but then direct that this unexpired term be served at an attendance centre. Though the views of the Full Court were strictly speaking unnecessary for the particular issue before the Court yet they are views that should be accorded considerable weight especially given the fact that the Court made a comprehensive examination of the operation of s145E of the *Community Welfare Services Act*. I accordingly do not accept the first ground of attack relied upon.

The second ground of attack on the order of the Magistrates' Court was that there was a wrongful denial of appearance by, or legal representation of, the offender. As I am of the view that there was no obligation to notify the offender and that it was within the sentencing court's power to proceed unilaterally, it must follow that there is no right to be heard. Most of the arguments as to the oppressive result of a unilateral cancellation are met by the Full Court's ruling that the original sentence does not simply stand and has to be served upon the cancellation order being made. It is first necessary that there be a warrant served upon the offender and that he be brought before the court on the warrant.

Nonetheless, even where the application is properly made *ex parte*, a Court should be extremely hesitant to deny the other party a hearing, where the other party seeks to appear and to make submissions. As a general principle, a Court in my opinion has an inherent power to permit the other party to appear even though the application is an *ex parte* one. It is a power it should exercise where it may be assisted in carrying out its task, unless there are good considerations in the context of the particular procedures prescribed or of conveniences that tell against that course. I am unable to see that there were such considerations that explain why the learned Stipendiary Magistrate rejected the offender's request here. But the mater was not the subject of any discussion. There is no warrant on the material before me for my interfering on an Order to Review with what is peculiarly a matter within the discretion of the court to which the application to appear is made.

The final Ground of attack on the cancellation order was that it was founded on hearsay evidence and that the rules of evidence should have been taken to apply. The section requires that the court be satisfied "by evidence on oath or by affidavit or otherwise". The word ''otherwise" is plainly an alternative to evidence on oath or by affidavit. The requirement to be satisfied by evidence still remains. The choice of words is somewhat strange as an affidavit is usually evidence on oath. It is likely that the words simply contract oral evidence on oath and evidence in writing on oath. This would still leave evidence that was neither but which might still be evidence, for example, documentary material admissible on its face or real evidence.

As a matter of principle, evidence should generally be taken to mean admissible evidence. It would in my view require clear language before the rules of evidence should be taken not to apply, especially where the tribunal concerned is a court conducted by a judge or a magistrate. See *Geschke v Del Monte Home Furnishers Pty Ltd and Ors* [1981] VicRp 80; [1981] VR 856 where I expressed a similar view in relation to a similar problem.

In the present case there is nothing in the context that leads me to abandon this principle. It is true that the procedure of cancellation has similarities to that of forfeiture of recognisances

under s5 of the *Crown Proceedings Act* 1958 but then that section does not expressly refer to being satisfied by evidence. Though the offender, who has an attendance order cancelled, does eventually have an opportunity to be heard before the prison sentence applies, it should not be assumed that Parliament intended that unilateral proceedings whereby an offender could be made liable to arrest should be conducted without the normal restraints attaching to evidence in a court of law. It was not contested here that most of the material before the learned Stipendiary Magistrate was hearsay and inadmissible according to the rules of evidence. It was submitted, however, that one breach of the order was proved in a proper manner, namely the offender's late arrival on 8th September 1979.

This is correct but in respect of this alleged breach it was said by the witness that the reason given by the offender was that he had walked from his home in North Balwyn to the attendance centre in Prahran since he did not have enough money to take public transport. It was an explanation which the learned Stipendiary Magistrate stated as being a reasonable excuse, if it were true. I do not take him as indicating that there was a basis for disbelieving the account.

In those circumstances I am not prepared to treat this sole breach based on admissible evidence as sufficient to support the cancellation as there was material supporting a reasonable excuse in evidence before the court. In any event the learned Stipendiary Magistrate appears to have based his decision on the whole of the evidence. As most of this was inadmissible it is undesirable, at the very least, to allow an order to stand that is so substantially based on inadmissible material. The order to cancel is an exercise of discretion and it would be unsafe in the circumstances to assume that the learned Stipendiary Magistrate's discretion would have been exercised in the same manner if most of this material had been excluded.

I am accordingly of the view that the Order Nisi should be made absolute and that the matter should be remitted to the learned Stipendiary Magistrate to be dealt with in accordance with these reasons.
