29/10; [2010] VSC 203

SUPREME COURT OF VICTORIA

FATOUROS v JONES

Kaye J

17, 20 May 2010

SENTENCING – PRACTICE AND PROCEDURE – OFFENDER SENTENCED TO SIX MONTHS' IMPRISONMENT TO BE SERVED BY WAY OF AN INTENSIVE CORRECTIONS ORDER – ORDER IN REGISTER THAT SENTENCE BE CONCURRENT WITH OTHER SENTENCES IMPOSED IN CASE – SENTENCES OF 30 DAYS' IMPRISONMENT IMPOSED ON OTHER CHARGES TO BE SERVED CONCURRENTLY WITH EACH OTHER – DECLARATION THAT TIME HELD IN CUSTODY BE RECKONED AS PERIOD OF IMPRISONMENT ALREADY SERVED – WHETHER OFFENDER REQUIRED TO SERVE FIVE OR SIX MONTHS OF THE ICO – WHETHER ORDER SUFFICIENTLY CERTAIN – WHETHER AUTHORISED BY ACT: *SENTENCING ACT* 1991, SS18(2BA), 19; *SENTENCING REGULATIONS* 2002, R16.

F. pleaded guilty to a number of charges and was sentenced to serve terms of imprisonment. In respect of Charge 2 (Traffick in a drug of dependence) F. was sentenced to six months' imprisonment to be served by way of an Intensive Corrections Order (ICO). On two other charges (charges 3 and 4), F. was sentenced to thirty days' imprisonment on each as part of an aggregate sentence and that the time already held in custody be reckoned as a period of imprisonment already served. The order made by the Magistrate in the Court's register stated that the sentence of six months was "Concurrent with other State sentences imposed in this case. Effective total State term imposed is 30 days". Upon appeal—

HELD: Appeal dismissed.

1. The appropriate starting point for resolving the issue raised by this appeal was the terms of the ICO itself. Regulation 16 of the *Sentencing Regulations* 2002 provides that an ICO, under s19 of the *Sentencing Act*, must be in Form 9 in the schedule to the regulations. The ICO made by the Magistrate in this case, was contained in such a form, signed by the Magistrate. As required by the relevant form, F. also signed the order adjacent to the line, in which he acknowledged that he understood the effect of the conditions of the order, and consented to it being made.

2. The ICO contained in that document was clear and unequivocal and provided that F. was sentenced to a period of six months' imprisonment to be served by way of an ICO.

3. It is in that light that the extract of the orders, as recorded in the register, must be properly understood and construed. The order, thus recorded, commenced by reciting the terms of the ICO, namely, that F. was convicted and sentenced to an imprisonment term of six months. The next two lines – stating that the sentence was concurrent with "other State sentences imposed in this case", and noting the "effective total State term imposed is 30 days" – was, in that context, clearly intended to refer to the two terms of imprisonment each of 30 days, imposed in respect of charges 3 and 4. In other words, the Magistrate, perhaps out of an overabundance of caution, was noting that the ICO was to be served concurrently with other "State sentences", which he imposed in the same case, namely, "State sentences" the effective term of which was 30 days. The reference, to the other State sentences of 30 days, was a reference to the sentences imposed in respect of charge 3 and charge 4.

4. Whilst the drafting of the order made in respect of charge 2, and as recorded in the certified extract of the court's register, left some scope for competing argument as to its proper meaning, the order, as expressed in this case, was not so ambiguous that it left its proper construction to an administrative discretion. Rather, notwithstanding its shortcomings, the order, as expressed in the register, was sufficiently clear as to its effect. Any uncertainty, in the proper construction of that order was sufficiently dispelled by the clear and unequivocal terms of the ICO signed by the Magistrate and F. In a particular case, an order may be insufficiently clear and certain to be valid. In particular, such a case may occur where a sentencing order is so expressed that the precise term of custody, to be served by the offender, may depend upon the interpretation of the order by those responsible for the offender's custody.

5. While there are shortcomings in the manner in which the order recorded in the register was expressed, such shortcomings did not constitute an uncertainty, which would have left to administrative judgment the question of the length of sentence imposed on F. in respect of charge 2.

KAYE J:

1. The appellant brings this appeal from sentencing orders made in respect of him by the Magistrates' Court at Dandenong on 24 April 2007.

2. On that day, the appellant pleaded guilty to five charges, which arose out of his arrest following his involvement in a motor vehicle accident on the Frankston-Dandenong Road on Sunday 25 March 2007. At the time of his sentence, the appellant had already spent thirty days in custody, in respect of those charges, by way of pre-sentence detention. On 24 April 2007, the magistrate imposed the following sentences on the appellant:

- Charge 1: (Possess a drug of dependence) – No penalty.
- Charge 2: (Traffick a drug of dependence) – Six months' imprisonment to be served by way of an Intensive Corrections Order under s19 of the *Sentencing Act* 1991.
- Charge 3: (Dealing with property suspected to be the proceeds of crime) – thirty days' imprisonment as part of an aggregate sentence. It was declared, pursuant to s18(4) of the *Sentencing Act*, that the time already held in custody, thirty days, be reckoned as a period of imprisonment already served under that sentence.
- Charge 4: (Use a drug of dependence methylamphetamine) – thirty days' imprisonment as part of an aggregate sentence; pursuant to s18(4) of the *Sentencing Act*. It was declared that the time already held in custody, thirty days, be reckoned as a period of imprisonment already served under the sentence.
- Charge 4: (Careless driving) - $300 fine.

3. The sentences of imprisonment imposed on charges 3 and 4 were each expressed to be "concurrent with other State sentences imposed in this case".

4. The appeal in this case focuses on the question of the validity of the Intensive Corrections Order imposed in respect of the second charge. That issue became significant because, subsequently, on 5 July 2007, the appellant was charged with new offences, which were alleged to have been committed during the period of the Intensive Corrections Order imposed on 24 April. Accordingly, on 10 September 2007 a further charge was issued against the appellant alleging a breach of the Intensive Corrections Order. The proceedings in respect of those charges have been adjourned, pending the determination of the appeal in this case.

5. The appellant filed the notice of appeal, from the orders of 24 April 2007, on 1 September 2008. By an order made on 2 December 2009, Associate Justice Daly, by consent, granted the appellant an extension of time within which to file the notice of appeal in this proceeding.

The grounds of appeal

6. The appellant's notice of appeal contains two grounds, which it is convenient to set out in full:

> "1. The learned magistrate erred when he sentenced the appellant on charge 2 to a term of imprisonment of six months duration to be served by way of Intensive Corrections Order in circumstances where –
> (i) the appellant was sentenced, on additional charges, to an aggregate term of 30 days' imprisonment to be served in custody;
> (ii) the sentence on charge 2 and the 30 day aggregate term of imprisonment were ordered to be served concurrently; and
> (iii) the aggregate sentence imposed for all but charge 2 was reckoned as having been already served.
>
> 2. The learned magistrate, by ordering the appellant to serve a term of imprisonment by way of an Intensive Corrections Order concurrently with a term of imprisonment of actual gaol reckoned as already having been served did contravene:
> (i) section 18(1) and section 18(2)(ba) of the *Sentencing Act* 1991; and
> (ii) section 19(6) of the *Sentencing Act* 1991;
> [ii] (sic) purport to make an order for which there was no statutory or common law power, or which was otherwise *ultra vires*?"

Submissions

7. The issues, raised by the notice of appeal, arise from the contents of the sentencing order made by the magistrate in respect of charge number 2. The order, as recorded in the certified extract of the Court's register, commences by reciting a consent order that the appellant undergo a forensic procedure under s464ZF of the *Crimes Act*, and the making of a forfeiture order in respect of the drugs and instruments seized from the appellant. The relevant part of the order then states:

"Convicted and sentenced to an imprisonment term of SIX MONTHS.
Concurrent with other State sentences imposed in this case.
Effective total State term imposed is 30 days.
Time in custody, 30 days, reckoned as a period of imprisonment already served under this sentence.
Custody Management Issues
The defendant may be at risk due to the following:
Withdrawal from drug of addiction.
Recommend all reasonable assessment and supervision to ensure safe custody.
Sentence of imprisonment to be served by way of Intensive Corrections Order under s19 of the *Sentencing Act* 1991.
The conditions of this order are:
The Defendant is required to attend at FRANKSTON COMMUNITY CORRECTIONS CENTRE by 27/04/2007 by 04:00 pm.
All core conditions under s20 of the *Sentencing Act* 1991 apply."

8. Mr Moglia, who appeared on behalf of the appellant, submitted that the effect of the order, thus recorded, was to sentence the appellant to a term of six months' imprisonment, 30 days of which were to be served immediately, and concurrently with the sentences of 30 days imposed in respect of charge 3 and charge 4, but with those 30 days being declared as the period to be reckoned as already served under such sentence, pursuant to s18(4) of the *Sentencing Act* 1991.

9. Mr Moglia further submitted that such an order was not authorised by, and indeed was contrary to, the provisions of the *Sentencing Act* in a number of respects. First, he submitted that s18(2)(ba) specifically provides that s18 does not apply to an Intensive Corrections Order, so that a court is not entitled to declare, as part of the term of the Intensive Corrections Order, any pre-sentence detention as a period to be reckoned as already served under the Intensive Corrections Order. Secondly, Mr Moglia submitted that there is no provision of the *Sentencing Act*, which enables a court to order that part of a term, prescribed by an Intensive Corrections Order, be served by a period of immediate custody. Thirdly, he submitted that, under the *Sentencing Act*, it is not permissible to impose a term of immediate custody, to be served concurrently with an Intensive Corrections Order.

10. Alternatively, Mr Moglia submitted that, if the Intensive Corrections Order does not have the effect for which he contended, it is ineffective, because the terms in which it is expressed are too uncertain. In this respect, he submitted that the order, as recorded in the extract, leaves it, at the least, unclear as to whether the period of the Intensive Corrections Order, from 24 April 2007, was a period of five months or six months. He submitted that the order, thus expressed, would have the effect that, ultimately, the question of the period of imprisonment to be served by the appellant would be determined, not by the court, but by administrative interpretation of the court's order. In that way, he submitted that the order is, at the least, vitiated by the uncertain and vague terms in which it is expressed.

11. In response, Mr Sonnet, who appeared for the respondent, submitted that the order made by the magistrate, in respect of charge 2, was sufficiently clear. Mr Sonnet referred to the order made by the magistrate, in accordance with Form 9 prescribed by the *Sentencing Regulations* 2002, which, in unequivocal terms, recorded that the magistrate, in respect of charge 2, imposed a sentence of six months' imprisonment, but ordered that that sentence be served by way of an Intensive Corrections Order. Mr Sonnet submitted that the extract of the register, which I have set out above, can be properly understood by referring to the order itself. He submitted that the part of the extract, which referred to the "effective State term (of) 30 days", referred to the terms of imprisonment imposed in respect of charges 3 and 4, and not the term of imprisonment imposed in respect of charge 2. In particular, he submitted that if it was intended that the "effective State term" described in the order was intended, by the magistrate, to refer to the period of the Intensive Corrections Order, then it would have stated that period to be six months, and not 30 days. Mr Sonnet further submitted that the magistrate should be presumed to have complied with the relevant provisions of the *Sentencing Act*, and in particular s18(2)(ba), which precludes the making of a declaration of pre-sentence detention in respect of an Intensive Corrections Order. He submitted that that consideration supports the construction of the sentencing order, imposed in respect of charge 2, for which he contended.

Conclusion

12. In my view, the appropriate starting point, for resolving the issue raised by this appeal, is the terms of the Intensive Corrections Order itself. Regulation 16 of the *Sentencing Regulations* 2002 provides that an Intensive Corrections Order, under s19 of the *Sentencing Act*, must be in Form 9 in the schedule to the regulations. The Intensive Corrections Order, made by the learned magistrate in this case, was contained in such a form, signed by the magistrate. As required by the relevant form, the appellant also signed the order adjacent to the line, in which he acknowledged that he understood the effect of the conditions of the order, and consented to it being made. The order, expressed to be in respect of charge 2, stated:

> "You are sentenced to a period of imprisonment for six months which, with your consent, will be served by way of intensive correction in the community."

13. The order then proceeded to recite the core conditions, with which the appellant was required to comply while undertaking the Intensive Corrections Order.

14. That order, in my view, is the relevant starting point for considering the contents of the certified extract of the court register. That extract is, by s18(5), admissible in evidence on the appeal as the proof (in the absence of evidence to the contrary) of the matters contained in it. Essentially, the certified extract is an extract of the register which, under s18(1) of the *Magistrates' Court Act* 1989, the principal registrar is required to keep of orders made by the court. Thus, while the register records the order, and is *prima facie* evidence of it, nevertheless the original Intensive Corrections Order is the document, which is in the form prescribed by the *Sentencing Regulations*, and which was signed by the magistrate and the appellant. As I stated, the Intensive Corrections Order, contained in that document, is clear and unequivocal. It provides that the period of imprisonment to which the appellant was sentenced was a period of six months, to be served by way of Intensive Corrections Order.

15. It is in that light that the extract of the orders, as recorded in the register, must be properly understood and construed. The order, thus recorded, commences by reciting the terms of the Intensive Corrections Order, namely, that the appellant was convicted and sentenced to an imprisonment term of six months. The next two lines – stating that the sentence was concurrent with "other State sentences imposed in this case", and noting the "effective total State term imposed is 30 days" – was, in that context, clearly intended to refer to the two terms of imprisonment each of 30 days, imposed in respect of charges 3 and 4. In other words, the magistrate, perhaps out of an overabundance of caution, was noting that the Intensive Corrections Order was to be served concurrently with other "State sentences", which he imposed in the same case, namely, "State sentences" the effective term of which was 30 days. I agree with Mr Sonnet that, if the phrase "effective total State term" was intended to refer, not only to the sentences in respect of charges 3 and 4, but also to the sentence in respect of charge 2, it would have been expressed as a total effective State term of six months, and not 30 days. That point lends weight to the construction of the extract of the court register to the effect which I have just described, namely, that the reference, to the other State sentences of 30 days, was a reference to the sentences imposed in respect of charge 3 and charge 4.

16. In that context, it is noteworthy that the two lines referring, respectively, to the effective total State term (of 30 days), and the time held in custody (30 days), mirror the same phrases used in the recording of the sentences imposed by the magistrate for charges 3 and 4. It seems clear, when the totality of the extracts are read, that the magistrate was thus intending to impose an Intensive Corrections Order for a period of six months, to be served concurrently with the 30 days "total State term" imposed in respect of charges 3 and 4, with those 30 days (imposed in respect of charges 3 and 4) being reckoned (under s18(4) of the *Sentencing Act*) as the period of imprisonment already served under those sentences.

17. In reaching those conclusions, I acknowledge that there is some force in the submissions, capably made by Mr Moglia, that the drafting of the order made in respect of charge 2, and as recorded in the certified extract of the court's register, leaves some scope for competing argument as to its proper meaning. However, I do not accept that the order, as expressed in this case, was so ambiguous that it leaves its proper construction to an administrative discretion. Rather, notwithstanding its shortcomings, in my view the order, as expressed in the register, is sufficiently clear as to its effect. Any uncertainty, in the proper construction of that order, is, I

consider, sufficiently dispelled by the clear and unequivocal terms of the Intensive Corrections Order, signed by the magistrate and the appellant. I agree with Mr Moglia that, in a particular case, an order may be insufficiently clear and certain to be valid. In particular, such a case may occur where a sentencing order is so expressed that the precise term of custody, to be served by the offender, may depend upon the interpretation of the order by those responsible for the offender's custody. While there are shortcomings in the manner in which the order, recorded in the register, is expressed, I do not consider that such shortcomings constitute an uncertainty, which would have left to administrative judgment the question of the length of sentence imposed on the appellant in respect of charge 2. As I stated, in my view it is clear that the sentence was for a term of imprisonment of six months, to be served by way of Intensive Corrections Order.

Conclusions

18. For the foregoing reasons, I have reached the following conclusions:

(1) The sentencing order, imposed on the appellant in respect of charge number 2, was for a term of imprisonment of six months, such term to be served by way of Intensive Corrections Order under s19 of the *Sentencing Act* 1991.

(2) I do not consider that the order, as expressed in the register of the Magistrates' Court, was so uncertain or ambiguous as to be invalid.

(3) Accordingly the orders made by the magistrate, in respect of the appellant, on 27 April 2007, were valid.

19. It follows that the appeal should be dismissed.

APPEARANCES: For the appellant Fatouros: Mr S Moglia, counsel. Grigor Lawyers. For the respondent Jones: Mr BL Sonnet, counsel. The Solicitor for Public Prosecutions.
