12/86

SUPREME COURT OF VICTORIA

KIDSTON v CARTER

Hampel J

14 November 1985

CRIMINAL LAW – SENTENCING – ATTENDANCE CENTRE ORDER BREACHED – APPLICATION TO CANCEL OR VARY – BREACH PROVED – WHETHER COURT MUST CANCEL OR VARY – WHETHER COURT HAS A DISCRETION – APPROPRIATE CONSIDERATIONS IN EXERCISE OF DISCRETION: *PENALTIES AND SENTENCES ACT* 1981, S40(1).

When dealing with an application to cancel or vary an Attendance Centre Order, a Court may look at all the circumstances of the case including the various courses and options open upon cancellation of the Order so as to determine whether it should be interfered with or not. Once breach of the order is proved, the Court may cancel or vary the Order or exercise its discretion not to do so.

HAMPEL J: [1] This is the return of an Order Nisi to review the decision of the Stipendiary Magistrate at Geelong delivered on 27th November 1984. **[2]** The grounds are fully set out in the order and can be shortly described as raising two main issues. First is whether s40(1) of the *Penalties and Sentences Act* 1981 leaves a discretion of the court not to cancel or vary an attendance centre order if the criteria set out in sub-section (c) are established. Second, if there is such a discretion whether it was appropriately exercised in the present case.

The respondent, Anthony Reginald Carter, was the subject of an attendance centre order. An incident occurred at the centre as a result of which the applicant, William John Kidston sought to have the order cancelled or varied pursuant to the section on the basis that the respondent struck the supervisor of the centre, broke a glass door and left the centre without authority. After hearing evidence from both sides as to what had occurred, the learned Magistrate found that the respondent had behaved in a manner proscribed by s40(1)(c)(v) in that he struck the supervisor albeit unintentionally. He made no finding about the glass door and considered that the early departure by the respondent from the centre was a trivial matter.

Insofar as is relevant to the issues raised, the section provides:

> "(1) An attendance centre order may at any time on the application of the offender or of the Director-General upon such notice as is prescribed be cancelled or varied by the court which made the order where the court is satisfied by evidence on oath or by affidavit or otherwise—
> (a) ... (ab) ... (b)
>
> (c) that the offender—
> (i) has failed without reasonable excuse **[3]** to report as required by the order of the court permitting the attendance at an attendance centre or the permit of the Director-General or in accordance with the instructions of the court or the Director-General or to report at any place to which he was directed by the superintendent to report under section 39;
>
> (ii) has failed without reasonable excuse to obey any regulations or rules relating to his attendance at an attendance centre or any directions of the superintendent under section 39;
> (iii) has been late or absent without reasonable excuse from a place of attendance during a period of attendance;
>
> (iv) has departed without reasonable excuse from any premises at which he was directed to perform work before the time he was authorized by the superintendent to depart; or
>
> (v) has been idle or careless at work or behaved in an offensive, threatening or disorderly manner whilst an attendance order is in force."

After hearing argument from counsel, the Magistrate exercised a discretion not to cancel

the order or to take any other action. Mr Dowling of counsel, who appeared before me for the applicant, submitted that there was no discretion not to cancel or vary the order once one of the criteria under sub-section (c) had been established. He submitted that the legislative scheme was such that even if the breach was trivial, the court had no discretion but to cancel or vary the order before deciding what course should then be adopted pursuant to sub-section 4 which deals with penalties for breaches. It was said that the section should be so interpreted because the word "may" related to the words "at any time" and simply gave the court authority to act.

I do not agree with this submission and find that the section has the meaning contended for by Mr Halpin of **[4]** counsel who appeared before me for the respondent, namely that once the criteria under sub-section (c) is established, the court may cancel or vary the order or exercise its discretion not to do so.

I list the following matters in support of my conclusion:

1. The section is contained in an Act which is concerned with sentencing matters. Its provisions should not be interpreted as excluding the exercise of discretion unless there is clear legislative intention evident demanding such an approach.

2. The fact that an application pursuant to the section can be made by the offender as well as the Director-General and the fact that the order may be cancelled or varied, both point to the existence of a discretion in s40(1).

3. The very section in question in its remaining subsections, differentiates between what "may" and what "shall" be done in the circumstances set out in those sub-sections.

4. It is most unlikely that Parliament intended to deprive a court of a power not to interfere with an order if misconduct referred to in sub-section (c) is in the court's view so trivial or of such a kind as not to require cancellation or variation of the order.

The next question which arises is whether the discretion not to interfere with the order was properly exercised. It was argued that the Magistrate wrongly took into account the consequences of the cancellation of the **[5]** order in deciding not to cancel it. The affidavit relied on by the applicant does not support this contention, and even if it did, I am not persuaded that the Magistrate was not entitled to look at all the circumstances including the various courses and options open to him in case of cancellation of the order so as to determine whether he should interfere with it or not. His Worship heard evidence as to the conduct complained of both from the respondent and the applicant, and then heard argument from both counsel. He determined that in all the circumstances he should not interfere with the attendance centre order, and I can see no basis on the material before me for interfering with the exercise of that discretion. I am informed that the respondent has since completed his eight months at the centre and the order is now extinguished.

For the above reasons, and in all the circumstances, the Order Nisi will be discharged with costs.
