12/88

SUPREME COURT OF VICTORIA

DOAN v MOSS

JH Phillips J

18, 24 March 1988

PROCEDURE – MAKING OF COMMUNITY-BASED ORDER – ASSESSMENT REPORT FILED BEFORE CONSENT GIVEN TO MAKING OF ORDER – EFFECT – TERMS OF ORDER EXPLAINED – ORDER SIGNED BY OFFENDER – WHETHER SUFFICIENT CONSENT: *PENALTIES AND SENTENCES ACT* 1985, S28.

Section 28(5) of the *Penalties and Sentences Act* 1985 provides:

> "A Court must not make a community-based order in respect of an offender unless the offender consents and the Court is satisfied by a report made to it by a community corrections officer that appropriate facilities will be available at the commencement of the order to enable the order to be implemented and that the offender is a suitable person for such an order."

D., who was represented by a legal practitioner, pleaded guilty (through an interpreter) to a charge of theft. On the plea, the practitioner suggested that the Court might consider the making of a community-based order. A report was obtained which indicated that D. was a suitable person for such an order and that appropriate facilities were available. The Magistrate explained to D. the terms of the order which D. then signed, and D. was then released upon the Court's making a community-based order. Upon order nisi to review—

HELD: Order nisi discharged.
(1) In view of the circumstances surrounding the making of the community-based order and the offender's signing the order, the only conclusion open was that there was no failure to obtain the relevant consent from the offender.

(2) So long as the offender consents to the making of a community-based order before it is in fact made, it is not relevant whether the report as to the offender's suitability is obtained before or after the giving of consent.

JH PHILLIPS J: [1] This is the return of orders nisi to review a decision of the Magistrates' Court at Broadmeadows made on the 13th day of August 1986. On that day the applicant was before that court charged with theft. He consented to summary jurisdiction and pleaded guilty. He was represented by a solicitor, Mr Kuek, a deponent in this matter. At the end of the hearing, the learned magistrate presiding sentenced the applicant to a community based order with the following conditions:

> 1. That he receive psychiatric assessment and **[2]** treatment as directed by the Office of Corrections.
> 2. That he perform unpaid community work totalling 300 hours.

Thereafter on the 8th day of September 1986 the applicant obtained from Master Evans orders nisi in the following terms:

> 1. Jennifer Marian Moss, the respondent, show cause to this honourable court why the order set out in the exhibit TND4, the said affidavit of Gabriel Kuek, should not be reviewed on the following grounds: (A) The applicant did not consent to the making of the order. (B) The learned magistrate failed (a) to read the precise terms of the proposed order to the applicant prior to making it, (b) to adequately explain to the applicant the meaning of the proposed order prior to making it, (c) to afford the applicant an opportunity to discuss the terms of the proposed order with his counsel prior to making it, (d) to afford the applicant, through his counsel, to make submissions on the propriety of making a community based order and of making such an order as was proposed prior to making it.

Community based orders are made pursuant to part 5 of the *Penalties and Sentences Act* 1985, and the sections thereof which are material to this proceeding are:

> 28(1): Where a court convicts a person of an offence punishable by imprisonment, the **[3]** court may,

instead of sentencing the person to a term of imprisonment or in addition to sentencing the person to a term of imprisonment of not more than 3 months, make a community-based order in respect of the person.

Sub-section (5):

A court must not make a community-based order in respect of an offender unless the offender consents and the court is satisfied by a report made to it by a community corrections officer that appropriate facilities will be available at the commencement of the order to enable the order to be implemented and that the offender is a suitable person for such an order.

Section 29(2):

A community-based order shall have attached to it such one or more of the following programme conditions as is specified by the court.

I interpolate that the sub-section then recites a variety of such programme conditions.

In the case of the applicant, the learned magistrate imposed conditions pursuant to sub-paragraphs (b) and (d) of this last mentioned sub-section.

Mr Harber, who conducted the case for the **[4]** applicant with a zeal which commends him to me, submitted that the issues raised in this matter concern (1) the proper construction of s28(5) of the Act or, alternatively, the meaning of the expression "consents" in that sub-section. He submitted that unless he were to act contrary to law, the learned magistrate must first decide and announce the programme conditions he considers appropriate, next obtain the applicant's consent and then direct the compilation of the report referred to in sub-s(5).

He contended that the relevant consent must encompass not only the circumstance of the making of the order but also any programme condition or conditions, and he sought to contrast the above statutory provisions with the provisions of the *Penalties and Sentences Act* 1981 which dealt with attendance centres and which required the provision of the relevant consent after the assessment of the offender. The current Act, Mr Harber argued, represents a deliberate legislative change. There were no programme conditions referred to in the 1981 Act, and now the relevant consent must relate to what he called a "disparate range of sentencing ingredients".

In summary form, his submission involved the proposition that the consent of the defendant must be anterior to the compilation of the report, a circumstance absent in this case on the evidence. Should I not uphold this submission, Mr Harber argued **[5]** that I should hold, as a matter of law, that no consent was obtained from the applicant in circumstances where his solicitor was shut out from explaining the implications and repercussions of the report and certain programme conditions to the applicant; or, put another way, the relevant consent referred to in s28(5) was not obtained and that, accordingly, the learned magistrate lacked jurisdiction to make a community based order.

It is now desirable to set out the facts of this matter. The master made an order for service of the relevant documents of the applicant on the learned magistrate on or before 8 October 1986. In the event, the learned magistrate swore an affidavit dated 20 October 1987, which affidavit was later filed. While Mr Harber accepted that, consistent with authority, the magistrate's account of the proceedings was to be preferred to others, he pointed to the long delay in its production and the lack of any mention of reference to contemporaneous notes and submitted that in those circumstances the magistrate's affidavit should be afforded little weight.

For present purposes the material part of that affidavit reads:

"6. It is my practice to ask a defendant if the condition of a community based order and the penalty for failing to comply with those **[6]** conditions had been explained by the assessing officer and to ask a defendant has he understood same. I believe I did so on this occasion. In any event, I took pains to explain to the defendant through his interpreter exactly what it is to enter into a community based order and what it would mean to him. I explained the program conditions I intended to apply and asked if he consented to the making of such an order. Through his interpreter he replied in the affirmative and the order was then made. On this point I believe paragraph 27 of the affidavit of Gabriel Kuek correctly sets out the substance of my comments."

I interpolate here that it is common ground between the parties that the applicant, a Vietnamese by extraction, had the assistance of a professional interpreter throughout the proceedings and that he in fact signed the order, which order contains the following sentence:

> "I understand the effect and conditions of this order and consent to it being made."

The applicant's solicitor, Mr Kuek, does not depose that the learned magistrate did not explain the order to the applicant. Rather he deposes: **[7]**

> "To the best of my recollection, Mr Tenni SM did not explain the meaning, implications and repercussions of the conditions of the order to Mr Doan, nor did he tell Mr Doan that he had the right to refuse to give consent to the order."

I believe that the phrase used by Mr Kuek, "to the best of my recollection", places some qualification on these assertions. The applicant does not depose that he did not consent to the order. Rather, he deposes:

> "Even though I signed the order, I did not fully understand what it meant."

He accepts that the magistrate tried to explain the order to him. It is the applicant's affidavit which supplies the proper source of his intentions rather than that of Mr Kuek. In these circumstances, I propose to act upon the learned magistrate's account as to the explanation of the terms of the proposed order to the applicant, which is, I add, supported by the affidavit of a police officer on this point. In the light of this, the applicant's own account, and his signature to the order, in my opinion it is impossible to conclude that on the evidence there was a failure to obtain a relevant consent from the applicant. Therefore the learned magistrate had jurisdiction to make the order.

The circumstance that his solicitor was shut out from canvassing aspects of the order with him can be **[8]** of no real assistance to the applicant for, in this case, the solicitor for the applicant had expressly asked for a part 5 order to be imposed and had adverted to psychiatric treatment in prospect. As the applicant had three prior convictions for thefts of a similar nature to that on which he stood charged, this was probably the only realistic approach available. Nor is it to the point that the applicant did not have a perfect appreciation of a difficulty inherent for him in one of the programme conditions. The reality is, no doubt, that because they frequently contain onerous programme conditions offenders consent to these orders being made with varying degrees of reluctance in circumstances where the obvious alternative to an order is a sentence of imprisonment. In most cases the offender would have no actual experience of the effect of the programme conditions.

It remains to consider the alternative submission that the relevant consent must be obtained before the obtaining of the report and after the disclosure of any proposed programme conditions by the magistrate or presiding judicial officer. Mr Dunn, for the respondent, whose cogent arguments lost nothing by reason of their economical presentation, submitted that all the Act required was a consent to the order being made before it was in fact made.

I uphold this submission and, in the plain terms **[9]** of the Act, can see no warrant for the alternative construction. It follows that the orders nisi herein must be discharged. I will hear counsel on the question of costs. I will order that the applicant pay the respondent's costs in the sum of $300.00.

APPEARANCES: For the applicant Doan: Mr H Harber, counsel. For the respondent Moss: Mr PA Dunn, counsel.
