14/96

SUPREME COURT OF VICTORIA

ZAFFIRO v SPRINGVALE CITY COUNCIL and ANOR

Byrne J

31 January, 13, 28 March 1996

PROCEDURE – PERIN – ENFORCEMENT ORDER MADE – APPLICATION FOR REVOCATION OF ORDER – REFUSED BY COURT – DISCRETION OF COURT TO REVOKE ORDER – CIRCUMSTANCES OF THE CASE – WHETHER ORDER SHOULD HAVE BEEN REVOKED: *MAGISTRATES' COURT ACT* 1989, SCHED 7.

Where a person applies to a Magistrates' Court for revocation of a PERIN enforcement order, no restriction is imposed on the Court's discretion. However, the Court should bear in mind that the consequences of not revoking an enforcement order can be severe and punitive to the offender. The Court should be sensitive to the particular circumstances of the case where the possible consequence of the process is imprisonment. If a Magistrate concludes that an applicant should be given an opportunity to present evidence and argument in mitigation and seek the Court's mercy, the Magistrate's duty is to revoke the enforcement order and to proceed to hear and determine the matter. Accordingly, a Magistrate was in error in refusing an application for revocation and stating that a Court should only revoke an enforcement order where there has been some system error or the applicant is not to blame for the way in which the enforcement orders have accumulated.

BYRNE J: *[After setting out the facts and the relevant statutory provisions, His Honour continued:]...***[7]** The application for revocation pursuant to cl13(1) came on for hearing before the Magistrates' Court of Victoria at Dandenong on 21 September 1994. Counsel appeared for Ms Zaffiro and the City was represented by its solicitor who opposed the application. The application appears to have been conducted in an informal manner. I was told that the legal representatives addressed the Magistrate but that Ms Zaffiro did not give evidence. Documents were tendered, including her affidavit of 2 August 1994, the report of Mr Catanese and the bankruptcy documents. It seems likely that the Magistrate was content to **[8]** accept and act upon assertions from the Bar table. I express no view as to the propriety of this; the parties and the Court were content that it should be so. The Magistrate, having considered all of this, refused Ms Zaffiro's application for revocation of the 74 enforcement orders.

The application before this Court seeks to review this refusal pursuant to Order 56. *[After referring to a matter not relevant to this Report, His Honour continued]...* **[9]** The errors of law relied upon in this application before me are those set out in the originating motion. The first ground is without substance; it was not put before the Magistrate and was not pressed before me. The argument before me focused on the ground which alleged in essence that the Magistrate's discretion had miscarried. It was submitted that the magistrate evidently viewed his discretion in a manner which is more constrained than the law allows. For reasons which I shall set out I am of opinion that this ground has been made out.

Clause 13(1) empowers the Magistrate to revoke the enforcement orders. No restriction is imposed upon the discretion conferred upon the Court and no guide is given as to its exercise. In his reasons, the Magistrate says this:

> "10.10 It is my view that the Court should only revoke an order of the PERIN system when there has been a demonstrated error in the system or some other good cause such as when the applicant is blameless in allowing such orders to reach the stage that the orders have reached.
>
> 10.11 This application under s.10(6) is not there to assist people in the defendant's position who deliberately sleeps on her rights."

While I would not quarrel with the Magistrate's assertion that these matters might properly justify the exercise of discretion, it seems to me that he fell into error in concluding that these are the only circumstances in which the power might be exercised. The PERIN procedure was

introduced in 1985 to facilitate the disposition of uncontested matters where an infringement notice has been issued. Such a notice may be issued for offences created by a number of statutes other than the *Road Safety Act* 1986. It is, as I have said, primarily an **[10]** administrative system which operates, as it were, automatically or mechanically when invoked by the enforcement agency. This is reflected in the fact that the order made is not treated as a conviction. Nevertheless, this is not to say that the consequences may not be severe to the offender. Where a real person is the alleged offender the ultimate deterrent for non-payment of a prescribed penalty was, until the amendments which came into force in October 1994, imprisonment whose duration was likewise automatic – one day in respect of each $100.00 or part thereof: cl.5(1)(a). The making of the order imposing the fine, the period of imprisonment in default and the amount of costs are not matters for discretion. The Registrar is not empowered to tailor the order to the particular circumstances of the case. The only power given to the Registrar is to defer payment or to permit payment by instalments: cl.7. It is for this reason that what I have called the points of contact between the administrative and the judicial processes become very important.

Although a PERIN order is not a conviction, its consequences may be severe and punitive. Its utility is to spare the officers of the enforcement agency and the court system the burden of processing uncontested charges for relatively minor offences. But this evident utility should not detract from the criminal features of the process and the fact that, one way or another, its end is to impose punishment, financial or corporal, upon citizens for breach of the law and, ultimately, to induce them to modify their behaviour in ways which are seen as socially useful. As the Minister stated during the second reading speech of the *Magistrates' Court (Amendment) Bill* on 28 April 1994 "For both civil liberty and **[11]** budgetary reasons, the government's policy is that imprisonment should be the remedy of last resort": *Hansard,* Legislative Assembly, p.1306. These words were spoken in the course of presenting an amendment which requires the officer executing a PERIN warrant issued against a real person to seize the person's goods before resorting to imprisonment. This understandable policy is a feature of modern criminal law especially at the sentencing stage.

It means that a sentencing judge or magistrate will not automatically impose imprisonment, or indeed any sentence, but will tailor the order to cater for the nature and seriousness of the offence, its impact upon the victim and society, the particular characteristics of the offender and in the light of accepted purposes of punishment. The courses open to a court under the *Sentencing Act* 1991 reflect the options which are available for this purpose. In the case of the PERIN procedure these requirements are foregone and an automatic sentence is imposed because the charge is uncontested, the offence relatively slight and the punishment modest. There may be, however, cases where these features are lacking and, in such a case, the Court should be astute to ensure that the procedures of the criminal law which treat offenders as human individuals and not as mere numbers are available and exercised.

Such a case may arise where the offender is a persistent offender so that a large number of fines have been accrued. It is not appropriate to ignore the particular difficulties of such a case or to put them aside on the basis that the offender has put themself in the predicament by ignoring or neglecting the opportunities to have the matter heard in court. Such a person may be a stubborn or defiant offender; a person who wants to make a stand of principle; a **[12]** person who is unable to cope psychologically with the prospect of a large and increasing aggregate penalty and who hopes, simply, that it may go away; a person who, by reason of some disability or lack of English, does not understand the consequences of ignoring the notices given; a person who faced with a large penalty including costs does not have the means to pay; or a person who for some good reason believes that the process has been abandoned. The offender may represent some combination of these factors or be a person with different characteristics. To my mind, the criminal law and the courts responsible for its administration should be sensitive to the particular circumstances of the case where the possible consequence of the process is imprisonment, and the more so where the imprisonment is for a considerable period. This is, of course, not to deny the possibility that an offender whose conduct has been contumacious or otherwise such as would, in the proper exercise of discretion, warrant the imposition of the statutory term of imprisonment should not be relieved of that consequence. It is, however, a hard thing to permit a person to remain exposed to severe punishment without giving them an opportunity to be heard.

I do not express any view as to whether Ms Zaffiro falls within any of these categories. These are matters upon which the Magistrate must form a view in all the circumstances. It is sufficient

that I have concluded from the reasons given by the Magistrate that he saw his role in a much more restricted light. If he concludes on the whole of the material before him, that Ms Zaffiro is a person who ought in the circumstances now to be given an opportunity to present evidence and argument in mitigation and to throw herself on the mercy of the Court, **[13]** plainly his duty is to revoke the enforcement orders and to proceed to hear and determine the matter. Accordingly, I will set aside the order refusing the application under cl.13(1) and remit the matter to the Magistrates' Court of Victoria at Dandenong to be determined in accordance with law.

APPEARANCES: Plaintiff: Mr M Hebblewhite, counsel. Solicitors: Ellinghaus & Lindner. No appearance of other parties.
