

12/00; [2000] VSC 223

SUPREME COURT OF VICTORIA

R v BICE and ANOR

Teague J

7 April, 2 June 2000 — 112 A Crim R 260

SENTENCING – SUSPENDED SENTENCE – BREACHED – WHETHER POWER TO MAKE INTENSIVE CORRECTIONS ORDER IN LIEU OF SUSPENDED SENTENCE: *SENTENCING ACT 1991*, SS5, 18Q-18W, 19(1), 31(5), (5A).

Where a suspended sentence has been breached, a court has jurisdiction to order that the sentence held in suspense be served by way of an Intensive Corrections Order. However, there is no option to make an Intensive Corrections Order where the period of the suspended sentence was more than 12 months.

[Note: This decision was reversed on appeal. See: *R v Bice and Anor*, MC02/01; [2000] VSCA 226; (2000) 2 VR 364. Ed]

TEAGUE J:

1. I have been presented with a question of statutory interpretation as a result of the Director of Public Prosecutions ("the Director") seeking judicial review, by way of declaration or *certiorari*, of a decision of Judge Duggan in the County Court. His Honour's decision was on the question: Does a sentencing judge have jurisdiction to order service of imprisonment by an intensive corrections order under s19 of the *Sentencing Act 1991* ("the Act"), when a sentence suspended under s27 of the Act has been breached, otherwise than in exceptional circumstances? He concluded that the answer was yes in the circumstances before him. I am satisfied that that decision was correct.

2. On 7 January 1997, Kaye Bice appeared at the Bendigo Magistrates' Court on two charges of trafficking in cannabis. She opted to appeal from the sentence then imposed, and on 5 March 1997, she appeared before Judge Duggan at Bendigo. Under s27 of the Act, His Honour imposed a sentence of three months' imprisonment on each of the two counts, to be served concurrently, and suspended the sentence for 24 months.

3. On 9 November 1998, Kaye Bice was charged in relation to events that occurred in the latter half of 1998. There were three charges of trafficking in cannabis. One was from 8 July to 31 July 1998, and the others were on 15 October 1998 and 21 October 1998. There were five charges of driving whilst disqualified, the dates being 9, 17, 19, 21 and 22 July 1998. On 29 April 1999, Kaye Bice appeared at the Bendigo Magistrates' Court on the eight charges. She was convicted and sentenced to imprisonment for eight months, that period to be served in the community under an Intensive Corrections Order ("ICO") under s19 of the Act. On 7 August 1999, a Community Corrections Officer prepared a progress report as to the performance of Kaye Bice under the ICO. The report indicated that the response of Kaye Bice to the ICO was positive.

4. On 10 September 1999, Kaye Bice came before Judge Duggan to be dealt with for the breach of the suspended sentence order made on 5 March 1997 by reason of the convictions on 29 April 1999, relative to events in 1998. Through her counsel, Kaye Bice acknowledged that she was in breach of the terms of the suspended sentence. There was discussion as to the sentencing options then open. The hearing of the matter was adjourned to 21 September 1999. On that date, Ms Pullen appeared for the Director and Mr Tehan QC with Ms Gobbo for Kaye Bice before His Honour. On the papers before me, there was uncertainty as to whether Judge Duggan did or did not then express a preliminary view that he would re-sentence on the basis that he did not find that there had been exceptional circumstances under s31(5A) of the Act. That is no longer of importance. The question of the sentencing options open was canvassed. His Honour reserved his decision. On 12 October 1999, Judge Duggan handed down reasons for deciding that he would make an order for Kaye Bice to serve imprisonment under an ICO under s19. He said that that outcome was available even without "exceptional circumstances" being established.

5. On 10 December 1999, the Director applied for judicial review to quash the decision of Judge Duggan and to have the matter returned to the County Court, on the grounds that His Honour lacked jurisdiction to make the decision that he had made, and that there was error on the face of the record. The issue before this court is one of statutory interpretation. Mr Just for the Director submitted that, under s31(5)(a) of the Act, Judge Duggan lacked jurisdiction to make an order for an ICO and was instead obliged to sentence Kaye Bice to a term of imprisonment in custody immediately. Mr Tehan for Kaye Bice submitted that the judge was entitled to proceed as he did.

6. It is necessary to refer to, and in some cases to set out, several provisions in the Act. The italics are mine, and they reflect an emphasis that bears on the matters of construction detailed below.

7. Section 5 provides sentencing guidelines. Sub-section 5(3) provides that a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed. Sub-sections 5(4) to (7) amplify that provision with an effective scale which rises from adjournment to fine to CBO to ICO to CCTO to "*the confinement of the offender*".

8. Sections 18Q to 18W deal with CCTOs, that is combined custody and treatment orders. Section 18Q includes the words:

"If a person is convicted ... and the court *is considering* sentencing him or her to a term of imprisonment ... the court ... may impose a sentence of imprisonment of not more than 12 months and order that not less than 6 months of that sentence be *served in custody* and the balance be *served in the community*."

Section 18W deals with the breach of a CCTO.

9. Section 18W(5) includes the words:

"If ... the court finds the offender guilty ... it ... must ... order the offender to *serve in custody* the whole part of the sentence that was to be *served in the community*."

10. Sections 19 to 26 deal with ICOs. Section 19(1) includes the words:

"If a person is convicted ... and the court *is considering* sentencing him or her to a term of imprisonment ... the court ... may impose a sentence of imprisonment of not more than one year and order that it be *served* by way of intensive corrections *in the community*."

Section 26 deals with the breach of an ICO. Section 26(3A) includes the words:

"If the court finds the offender guilty, it ... must ... *commit the offender to prison* for the portion of the term of imprisonment ... that was unexpired ..."

11. Sections 27 to 31 deal with suspended sentences of imprisonment. Section 27(1) includes the words:

"On sentencing an offender to a term of imprisonment a court may make an order suspending ... the whole or part of the sentence ..."

Section 31 deals with the breach of an order suspending sentence. Section 31(5), (5A) and (6) (in part) provide:

"(5) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a level 10 fine and in addition must—

- (a) *restore* the sentence or part sentence held in suspense and order the offender to serve it; or
- (b) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
- (c) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or
- (d) make no order with respect to the suspended sentence.

(5A) Despite anything to the contrary in sub-section (5), if on the hearing of a charge the court finds

the offender guilty of the offence it must, in addition to any fine it may impose under sub-section (5), exercise the power referred to in paragraph (a) of that sub-section unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances which have arisen since the order suspending the sentence was made.

(6) If a court orders an offender to serve a term of imprisonment that had been held in suspense, the term must be served—
(a) immediately ..."

12. Mr Just argued that, when s35(5)(a) speaks of restoring the sentence after suspension, it had to be construed as meaning that an order had to be made putting back in place the original sentence to a term of full and effective custodial detention. It was not appropriate therefore to put in place a different form of sentence, that is, an ICO.

13. He argued that, to properly construe s31(5), one had to have regard to the words in s27(1):

"On sentencing an offender to a term of imprisonment ...".

He submitted that those words had to be construed as meaning that the offender had to be sentenced to a term of full and effective custodial detention, as the section went on to provide alternative options to that form of sentence. Under the Act there were various references to imposing "a term of imprisonment" and the method by which it is going to be served, one of which was by way of ICO. A suspended sentence was a distinct concept in the Act, and was not full and effective custodial detention. It was put that, although "term of imprisonment" may have a different import in different provisions in the Act, sometimes it must have the clear meaning of full and effective custodial detention, and s27(1) should be treated as a prime example of where that should be treated as the position.

14. Mr Just also argued that, to properly construe s31(5), one had to have regard to s31(5A). While the purpose of the suspended sentence provisions was to provide a "last chance" for a defendant to avoid a term in custody, there could be but one last chance, being that provided under s31(5A) with the concept of "exceptional circumstances". Accordingly, unless s31(5A) could be applied there was no other option open other than a term of full and effective custodial detention. The approach adopted by Judge Duggan was to accept that there could be a further kind of last chance. If the legislature had contemplated that any further last chance was to be available, it would have been expressly spelt out in the provisions of the Act, since it would have amounted to a significant extension of leniency. It was put that a purposive interpretation of the provisions required this conclusion, in the light of what was said in *R v Boucher* [1995] VicRp 7; [1995] 1 VR 110 at 124; (1994) 70 A Crim R 577.

15. I put to Mr Just that I was troubled that the Act used different expressions for what he generally opted to refer to as full and effective custodial detention. At its bluntest, we are talking about immediate incarceration, or being sent straight to gaol. Only the less precise terms, namely "sentence" and "term of imprisonment" were used in s31. As appears from my italics above, there is much greater directness in the terms: "confinement" in s5; "serve in custody" in ss18Q and 18W, and "commit to prison" in s26(3A). I would also note the use of "custody", as in "serve in custody" and "remand in custody" "time spent in custody", or similar in ss5, 10, 16, 17, 18, 18C and 34. "Confinement" is also used in s32. There are instances when the Act uses "imprisonment" where clearly incarceration is not contemplated.

16. Section 18Q(1) provides that a sentence of imprisonment may be imposed which involves part being served in the community. Under s19(9) a sentence of imprisonment must be taken to have been served even though there may not have been one day of incarceration. Under s36, which deals with community-based orders, a sentence of imprisonment can be ordered to be served in the community. Mr Just argued that the contrast between expressions like "commit to prison" in s26(3A) and "order the offender to serve it" in s31(5)(a) was merely a matter of drafting style and should not be taken to have any substantive significance. I am not persuaded that that is correct. On the contrary, I do find it significant.

17. Mr Just also argued that, to properly construe s31(5), one had to have regard to s19(1), which provides that the ICO option was only available when a person had been convicted of an

offence and the court: "is considering sentencing him or her to a term of imprisonment;". Mr Just submitted that when there has been a breach of a suspended sentence the court was restoring a sentence to a term of imprisonment, and was not "considering" whether to sentence the offender to a term of imprisonment. That meant that the ICO option was intended to be available only at the initial stage of sentencing, and not as an option available later as upon the breach of a suspended sentence.

18. Mr Just submitted to me that the Court of Appeal decision in *R v McLachlan* [1999] VSCA 122; [1999] 2 VR 665 settled the matter. That case dealt with the breach of an ICO, and the breach of a suspended sentence. Chernov JA referred to the amendments made by the *Sentencing and other Acts (Amendment) Act* 1997 and to the Second Reading Speech of the Attorney-General on 24 April 1997 as establishing the purpose of the provisions.

19. Mr Just also relied on part of a quotation from that speech, in which this was said:

"The bill amends the provisions to provide that unless there are exceptional circumstances, an offender who has breached a suspended sentence by committing another offence will be imprisoned."

I have a like difficulty treating as having only one clear meaning the word "imprisoned" as I have with the expressions "term of imprisonment" and "sentence of imprisonment". It is evident from the Act as a whole that "imprisoning" no longer means making a person go directly to prison. I would also note that the Attorney-General did, in that speech use the words "will be sent to gaol". They were used as to persons who breach a CCTO or an ICO.

20. I come back to *McLachlan*. In that case, the court's attention was focused on the issue of whether the undertaking of unpaid community work amounted to "exceptional circumstances" for the purposes of s26(3B). It seems to me that, insofar as Chernov JA refers to similarities between the provisions regarding breach of an ICO and breach of a suspended sentence, he goes no further than indicating that the completion of unpaid community work would not, or would not generally, amount to "exceptional circumstances" for the purposes of either s26(3B) or of s31(5A). In *McLachlan*, Phillips JA noted, in dealing with ss18, 26, 31 and 47 of the Act, that although there were some similarities in all four of these sections, there were also significant differences. Having studied them closely, I would certainly agree. In short, I consider that there is no significant contribution made to my interpretative role in either what was said in *McLachlan* or the speech of the Attorney-General.

21. I have set out earlier parts of s5, which enlarge upon the common law approach that the confinement of a person should be an option of last resort and that a sentencer should select the least severe sentencing option which achieves the purpose of punishment. The Act contains a graduated scale of sentencing into which a suspended sentence is a little difficult to slot. That is because it has some characteristics (as to conditions as to supervision) which make it a much lighter sentencing option than an ICO, and than a Community Based Order. On the other hand, it has characteristics (as to potential consequences of a breach) which make it a tougher option.

22. I am satisfied that the expressions "term of imprisonment" and "sentence of imprisonment" where they appear in the Act are generally to be treated as generic terms which may or may not mean incarceration. If "term of imprisonment" in s35(5)(a) was meant to require an immediate committing to or confining in prison, that could have been said in the plain words used elsewhere in the Act. As to s19(1), I am satisfied that the words: "Is considering sentencing him or her to a term of imprisonment" need not be interpreted restrictively as to require contemporaneity.

23. I am satisfied that Judge Duggan was right to interpret the provisions of s35 as he did. The result was to provide a further last chance to Kaye Bice. That does not mean that it is an option that would be available in all cases where there has been a breach of a suspended sentence. The period of the suspended sentence imposed by Judge Duggan as to Kaye Bice was three months. Under s19, an ICO is only an option where the sentence of imprisonment is not more than one year. Under s27, depending on the jurisdiction of the court, a suspended sentence can be for a period of up to three years. It would not be an option to make an order for an ICO on the breach of any suspended sentence where the period of the suspended sentence was more than 12 months.

24. The application is dismissed with costs.

APPEARANCES: For the plaintiff: Mr D Just, counsel. Office of Public Prosecutions. For the first-named defendant (Bice): Mr P Tehan QC with N Gobbo, counsel. Victoria Legal Aid.
