28/78

SUPREME COURT OF SOUTH AUSTRALIA

MAPLE v KERRISON

Bray CJ, Zelling and King JJ

13 February, 14 April 1978 — (1978) 18 SASR 513; 19 ALR 152; 34 FLR 180

CRIMINAL LAW – SENTENCING RELEASE ON RECOGNIZANCE UNDER COMMONWEALTH LAW – WHETHER CONDITION TO ANSWER FOR SENTENCE IF CALLED UPON MAY BE IMPOSED: *CRIMES ACT* 1914 (COM), S20.

CRIMINAL LAW – RECOGNIZANCE – BREACH OF RECOGNIZANCE IMPOSED UNDER COMMONWEALTH LAW – BREACH CONSTITUTED BY COMMISSION OF FURTHER OFFENCE UNDER STATE OR TERRITORY LAW – PUNISHMENT FOR FURTHER OFFENCE – WHETHER DEFENDANT CAN BE CONVICTED FOR BREACH: *CRIMES ACT* 1914 (COM) S20; *ACTS INTERPRETATION ACT* 1901 (COM) S30.

CRIMINAL LAW – *AUTREFOIS CONVICT* – BREACH OF RECOGNIZANCE IMPOSED UNDER COMMONWEALTH LAW – BREACH CONSTITUTED BY COMMISSION OF FURTHER OFFENCE UNDER COMMONWEALTH LAW – WHETHER DEFENDANT CAN BE CONVICTED FOR BREACH.

Two points of law were reserved for the consideration of the Supreme Court of South Australia during the hearing of an appeal against a sentence, imposed by a court of summary jurisdiction for a breach of Commonwealth law. They were:
(1) When a defendant who has been released upon giving security to be of good behaviour for a specified period pursuant to s20(1) of the *Crimes Act* 1914 is, during that period, convicted of and sentenced for a breach of a law of a State or of the Commonwealth can the defendant subsequently be convicted and sentenced for an offence against s20(2) of the *Crimes Act* arising out of his breach of the previous security?

(2) Is it lawful for a court, when releasing a defendant upon security to be of good behaviour pursuant to s20(1) of the *Crimes Act* 1914, to impose a condition that the defendant will appear for sentence when called on at any time during the period specified in the security?

HELD: (i) Per Bray CJ (Zelling J concurring; King J dissenting): When an offender has been punished for an offence under a State Act or a Territory Ordinance for an act or omission which also constitutes an offence under a Commonwealth Act (in this case, breach of recognizance under s20(2) of the *Crimes Act* 1914 (Com)), s30(2) of the *Acts Interpretation Act* 1901 (Com) provides that he shall not be subsequently liable to be punished for the Commonwealth offence.
Statements of Windeyer and Owen JJ in *Devine v R* [1967] HCA 35; (1967) 119 CLR 506; (1968) ALR 17; 41 ALJR 200, adopted.

(ii) Per Zelling and King JJ (Bray CJ dissenting): When an offender has been punished for an offence under Commonwealth law such offence being sufficient to constitute a breach of recognizance under s20(2) of the *Crimes Act* 1914 (Com), he may be convicted of the offence of breach of such recognizance.

Per Zelling J: The essential elements of the offence under s20(2) are different and distinct from the elements of whatever the offence is which causes the breach.

Per King J: The "gist" or "essence" of the offence under s20(2) is non-compliance with a condition of the security given by the offender to the court: The nature of the plea of *autrefois convict*, considered.

(iii) Per Bray CJ (Zelling and King JJ concurring): Breach of recognizance imposed under s20(1) of the *Crimes Act* 1914 (Com) is made a separate offence by s20(2) and a court releasing a defendant on such a recognizance may not impose a condition that he come up for sentence when called on to do so.

Statement of Windeyer J in *Devine v R* [1967] HCA 35; (1967) 119 CLR 506; (1968) ALR 17; 41 ALJR 200, adopted.

***Quaere*, whether a court may release such an offender on a common law bond containing such a condition.**

BRAY CJ: Two points of law have been reserved for the consideration of this court, pursuant to the provisions of s49 of the *Supreme Court Act* 1935 as amended, during the hearing of an appeal against sentence under the provisions of the *Justices Act* 1921 as amended. These two points are perfectly general and nothing turns on the particular facts of the case under appeal. They are:

> (1) When a defendant who has been released upon giving security to be of good behaviour for a specified period pursuant to s20(21) of the *Crimes Act* 1914 is, during that period, convicted of and sentenced for a breach of a law of a State or of the Commonwealth, can the defendant subsequently be convicted and sentenced for an offence against s20(2) of the *Crimes Act* arising out of his breach of the previous security?
>
> (2) Is it lawful for a court, when releasing a defendant upon security to be of good behaviour pursuant to s20(1) of the *Crimes Act* 1914 to impose a condition that the defendant will appear for sentence when called on at any time during the period specified in the security?

Section 20 of the Commonwealth *Crimes Act* 1914 as amended as follows:

> 20(1) If the Court thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth without passing any sentence upon him, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court that he will be of good behaviour for such period as the Court thinks fit to order and will during that period comply with such conditions as the Court thinks fit to impose, or may order his release on similar terms after he has served any portion of his sentence.
>
> 20(2) If any person who has been released in pursuance of this section fails to comply with the conditions upon which he was released he shall be guilty of an offence.
> Penalty: Imprisonment for the period provided by law in respect of the offence of which he was previously convicted.
>
> 20(3) The penalty provided by the last preceding sub-section may be imposed by the Court by which the offender was originally convicted or by any Court of Summary Jurisdiction before which he is brought.
> 20(4) In addition, the recognizance of any such person and those of his sureties shall be estreated, and any other security shall be enforced.

It seems to me that on the wording of the section the second question before us answers itself and it is more convenient to deal with that question first. A familiar principle in the criminal and quasi-criminal legislation of common law countries is a statutory provision giving a court which for good reasons thinks an offender is worthy of leniency, power, with or without proceeding to conviction to discharge him on a suitable recognizance, including, if thought fit, a condition that, when called on to do so within a specified period, he will appear for conviction and sentence if he has not already been convicted, or for sentence if he has been convicted. There may perhaps be power to do this at common law, see *Devine v R* [1967] HCA 35; (1967) 119 CLR 506; (1968) ALR 17; 41 ALJR 200, per McTiernan ACJ at 511; (ALR) at 20, per Windeyer J (CLR) at 516; (ALR) at 23-4, but it is not necessary to discuss this now.

But in s20 the Commonwealth Parliament has not followed this model. The power given by sub-s(1) is a power to release on recognizance. If the recognizance is broken the consequence is not that the defendant may be called up to be sentenced for the original offence, but that he is guilty of a new offence under sub-s(2), namely a failure to comply with the conditions of release. It is true, but irrelevant to the present point, that the penalty for the new offence is the same as the penalty for the original offence.

In *Devine's case* Windeyer J was clearly of opinion that a defendant could not be released under s20 on condition that he would come up for sentence when called on: see CLR at 516; ALR at 24. McTiernan ACJ and Owen J did not find it necessary to decide the matter, but I think it is clear from their language that they inclined to the same view: see per McTiernan ACJ (CLR) at 511; (ALR) at 20 and per Owen J (CLR) at 524; (ALR) at 29. The other two learned judges, Kitto and Taylor JJ did not express any opinion about s20 at all.

A court dealing with an offence against the law of the Commonwealth may, though I strongly doubt it, have power to release the offender at common law on a recognizance which includes an obligation to come up for sentence if called on. But the question asks whether it has power

to release on such a condition under s20(1). In my view s20(2) prevents it from doing that. I do not think Parliament, when it made non-compliance with the conditions of release a substantive offence, contemplated that the defendant should nevertheless remain liable to be sentenced for the original offence.

It is true that under sub-s(1) he may be released after having served some part of the sentence. But there is no machinery for him to be brought back after such release to serve the remainder of the sentence if he breaks the recognizance, and this confirms me in the view I have formed that a condition to come up for sentence when called on cannot be one of the conditions referred to in s20(1). I think the second question should be answered 'No.'

The first question is more difficult In this context it is necessary to consider s11 of the Commonwealth *Crimes Act* and s30 of the Commonwealth *Acts Interpretation Act* 1901 as amended. Section 11 reads where relevant:

> 11(1) Where the act or omission of a person is an offence against a law of the Commonwealth and is also an offence against another law of the Commonwealth or some other law, the person may be prosecuted and convicted under either of those laws.
>
> 11(2) Nothing in this Act shall render any person liable to be punished twice in respect of the same offence.

Section 30 of the *Acts Interpretation Act* reads as follows:

> 30(1) Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence.
>
> 30(2) Where an act or omission constitutes an offence under both —
> (a) an Act and a State Act; or
> (b) an Act and an Ordinance of a Territory,
> and the offender has been punished for that offence under the State Act or the Ordinance as the case may be, he shall not be liable to be punished for the offence under the Act.

Section 11 and s30(1) speak of the offender not being liable to be punished twice for the same offence, not for the same act or omission. In my view they have no application because there is, in my view, no question here of the defendant being punished twice for the same offence. However s30(2) is differently worded. That provides definitely that where an offender has been punished under a State Act for an act or omission which also constitutes an offence under a Federal Act he shall not be liable to be punished for the Federal offence.

In *Devine's case* above both Windeyer and Owen JJ expressed themselves on the point. The other judges did not. Windeyer J said (CLR at 520) (ALR), at 27: 'Can an offender who has been punished once for an offence be punished again under s20(2) (sic, presumably s30(2) was meant) of the *Acts Interpretation Act* (Com);

Owen J said (CLR) at 527-8; (ALR) at 32:

> 'in my opinion then, we must treat the case as one in which the applicant was convicted and sentenced for an offence against s20(2) of the *Crimes Act*, the breach of the recognizance consisting of the fact that he had driven a motor car whilst disqualified from holding a driving licence contrary to the provisions of s193(5) of the *Motor Traffic Ordinance* (of the Australian Capital Territory). For that unlawful act, however, the applicant had already been punished and s30(2) of the *Acts Interpretation Act* provides that ... *[His Honour set out the relevant parts of the sub-section and continued] ...* In those circumstances the applicant could not, in my opinion, be punished for the offence against s20(2) of the *Crimes Act*, either by imposing a sentence of imprisonment or ordering that his recognizance be forfeited.'

In *Devine's case* the offence constituting the breach of the bond was an offence against an Ordinance of the Australian Capital Territory. In such a case, as in the case of a breach of the law of South Australia, the words of s30(2) would appear to be compelling. With respect I agree with the learned judges of the High Court from whose judgements I have cited the above passages. It is

true that the court on that occasion was constituted by five judges, but the other three expressed no opinion on the point.

The result may appear strange. It means that if the breach of the recognizance is something which has resulted in a conviction for a breach of State law it cannot after that conviction be penalized under s20(2). It it is something which does not involve any offence against State law at all, such as a disobedience to the instructions of a probation officer, or if, though it is an offence against State law, there has been no conviction under State law, the offender can be sentenced under s20(2) and to a penalty which may bear no relation to his breach of bond or to the State offence. It was put to us in argument that even stranger consequences might ensue. It was suggested that if the original offence for which he was released under s20(1) was comparatively trivial and the subsequent offence against the State law, was serious, then if, before he is convicted of the breach of State law, he is brought before the court under s20(2) and sentenced, even to the maximum penalty for the original offence, s30(2) of the *Acts Interpretation Act* would be a bar to his prosecution for the subsequent State offence. That, however, seems not to be so. Section 30(2) only deals with a punishment for the offence against State law before any conviction for a breach of s20(2) not with the converse case.

The learned judges of the High Court in *Devine's case* urged legislative reconsideration of s20: see per Kitto and Taylor JJ (CLR) at 512; (ALR) at 21 and per Windeyer J (CLR) at 521; (ALR) at 27. I would, with respect suggest that it is time that their views were heeded. However, that does not dispose of the whole matter, because the first question before us is directed, not only to a breach of State law after release under s20(1) but to a breach of Commonwealth law after such release as well.

Here, s30(2) of the *Acts Interpretation Act* has no application, Section 11(2) of the *Crimes Act* and s30(1) of the *Acts Interpretation Act* only prevent punishment twice for the same offence, not punishment twice for the same act. The offence created by s20(2) is not the same offence as any offence created by the law of a State or the Commonwealth such as is referred to in the first question submitted to us. Therefore conviction and sentence for a breach of the law of the Commonwealth, which is also a breach of the recognizance, is not a bar to conviction and sentence under s20(2) unless the common law comes to the offender's aid, which I think it does.

This question brings us back to the difficult matters considered by this court in *R v O'Loughlin; Ex Parte Ralphs* (1971) 1 SASR 219. I there expressed the view that in five different classes of a case a conviction is a bar to a subsequent prosecution. I adhere to the views I there expressed. Chief Justice was of opinion that Question 1 should be answered no, if the breach concerned is a breach of a State Act

"I think that it is necessary for the purpose of this judgment to analyse what needs to be proved if this man comes up on a charge under s20(2) of the *Crimes Act* for breach of a bond granted to him on this occasion, if one is granted, he having, since entering into the bond committed another offence against a law of the Commonwealth. The essential elements in my opinion are as follows:

> (1) That on such a day he after being convicted of an offence against a law of the Commonwealth was released by the Supreme Court of South Australia on a bond to be of good behaviour for a period of years pursuant to s20(1) of the *Crimes Act*.
> (2) That subsequently on such a day during the term of the bond he was convicted of an offence against a law of the Commonwealth namely (it will there be set out).
> (3) That the offence referred to in paragraph (2) is an offence which is a breach of the condition to be of good behaviour (not all offences are; some status offences in particular do not involve breaches of a condition for good behaviour).
> (4) That the second offence is one of sufficient gravity to induce the court to exercise its discretion to declare the bond broken to impose sentence. (This would certainly be true of a bond at common law: see the judgment of Jacobs J in *R v Judge Leckie; ex parte Felman* (1977) 18 ALR 93. Under s20(2) of the *Crimes Act* the question of whether such a discretion exists may possibly turn on the construction of the word 'fails' in the sub-section).

These elements are, in my opinion, quite different and distinct from the elements in an offence. of forgery or whatever the offence is which causes the breach of the bond. Accordingly, as

Lord Reading pointed out in *Barron's case* there is no general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different, by which I understand the Lord Chief Justice to mean if the constituent elements of the offences are different. There is no bar to convictions for two different offences when the essential elements of the one are not wholly comprehended in the other: see the judgment of Wilson J in *Christchurch City v Smith* (1965) NZLR 932 at 934.

This, however, does not exclude the question of discretion. It is somewhat difficult to formulate any rule as to the exercise of the kind of discretion discussed by Lord Pearce in *Connelly's case*.

For those reasons, in my opinion, Question 1 Should be answered: No, if the breach concerned is a breach of a law of a State; Yes, if it is a breach of a law of the Commonwealth. Question (2) should be answered 'No'.

As we are not agreed in the result, the formal answers to the questions propounded will be stated by the Chief Justice.

KING J: The problem to be resolved in order to answer the first question reserved to us is whether a person charged with an offence against s20(2) of the Commonwealth *Crimes Act* can plead in bar a conviction for the offence against Commonwealth or State law which is the non-compliance with the condition of good behaviour relied upon in the charge under s20(2). I deal first with the position at common law before turning to the relevant statutory provisions.

The scholarly and exhaustive analysis of the authorities in *R v O'Loughlin; Ex Parte Ralphs* (1971) 1 SASR 219 at 232 by Wells J (to whom I am much indebted for the assistance which I have derived from that analysis) renders unnecessary a lengthy review of the cases. No single test has been devised for determining when the plea in bar *autrefois convict* in its strict or extended sense is available. It is certainly available where the charge is of an offence which is the same, or practically the same, as an offence of which the accused has already been convicted or which is comprised in the earlier offence or which is the earlier offence together with circumstances of aggravation. None of those categories apply, however, to a charge under s20(2) of the *Crimes Act* where the conviction pleaded in bar is a conviction of an offence which is relied upon as the non-compliance with the condition of good behaviour.

The circumstances in which the plea is available were considerably extended by the case of *Wemyss v Hopkins* (1875) LR 10 QB 378; 39 JP 549. In that case the ingredients of the two charges were quite different. The court held that the common law precluded a conviction on the subsequent charge. As Zelling J points out, there are differences in the way in which the three judges comprising the court expressed themselves. It is quite clear, however, that the court looked beyond the legal elements of the charges to the factual situation underlying them and decided that the subsequent charge amounted to prosecuting the defendant a second time for what was in essence the same wrongdoing. A plea in the nature of *autrefois convict* is therefore available where, as Wells J puts it in *R v O'Loughlin, supra*, at p258: 'The facts and circumstances that constitute the gist or gravamen of the later charge are in terms, or in effect, the same as those constituting the gist or gravamen of the former.'

I do not think that this can be said of the hypothetical situation under consideration in this case. The gist of the charge under s20(2) is the non-compliance with a condition of the security given by the defendant to the court. The essence of the wrong-doing is the non-compliance with that condition. The fact that the conduct in which the non-compliance consists is itself a criminal offence does not make the gist of the two offences the same. The offence against s20(2) is different in character from the criminal offence in which the non-compliance consists, not only because the legal elements are different (as pointed out by Zelling J) but because the nature of wrongdoing constituting the offences is essentially different. Section 20(2) does not seek to punish the conduct amounting to the non-compliance but the failure to observe a condition of the security given to the court. This essential distinction is emphasized by the fact that the penalty prescribed for the offence under s20(2) is not the penalty for the conduct in which the non-compliance consists but the penalty for the offence in respect of which the defendant gave the security.

I am mindful, of course, that the facts necessary to establish a charge under s20(2) of

a non-compliance consisting of an offence against the law would, of necessity, be sufficient to procure a legal conviction for that offence and that this is the test propounded in the High Court in *Ex parte Spencer* [1905] HCA 9; (1905) 2 CLR 250; *Chia Gee v Martin* [1905] HCA 70; (1905) 3 CLR 649; 12 ALR 425 and *Li Wan Quai v Christie* [1906] HCA 42; (1906) 3 CLR 1125; 12 ALR 429. The test originally derived from some observations of Buller J in *R v Vandercomb and Abbott* [1730] EngR 205; (1976) 2 Leach 708 at 720; 168 ER 455 at 461. It was adopted as one relevant test by Lord Morris of Borth-y-Gest in *Connelly v DPP* (1964) AC 1254 at 1305; (1964) 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145, and subject to adjustment, by Bray CJ in *R v O'Loughlin* at 227. This test cannot, however, be applicable in all cases for the reasons given in *Friedland on Double Jeopardy* (1969) at pp97-101.

This has been generally recognized: *vide R v Cleary* [1914] VicLawRp 83; (1914) VLR 571 per a'Beckett ACJ at 575; 20 ALR 329; 36 ALT 76; *Tucker v Noblet* (1924) SASR 326 per Murray CJ at 332, per Angus Parsons J at 337-8 and per Napier J at 339-40; *R v O'Loughlin*, *supra*, per Bray CJ at 226 and Wells J at 258. Murray J puts it in perspective in *Tucker v Noblet* at 332: 'But it is necessary to bear in mind what the object is which the test is intended to serve. This is stated by Sir Samuel Griffith himself in the passage I have quoted from his judgment in *Li Wan Quai v Christie* [1906] HCA 42; (1906) 3 CLR 1125; 12 ALR 429, where he says: "In order that a previous conviction or discharge can be a bar to subsequent proceedings, the charges must be substantially the same." He then refers to the test as the means of ascertaining whether the charges are substantially the same or not.' As in *Tucker v Noblet* the application of that test in this case would produce a fallacious result. The offence under s20(2) is not substantially the same as the hypothetical offence and the wrongdoing sought to be punished is essentially different.

In my opinion, therefore, a conviction for the offence against s20(2) would not be barred at common law by the conviction for the hypothetical offence. It remains to consider the relevant statutory provisions.

I agree with the Chief Justice that s11 of the Commonwealth *Crimes Act* and s30(1) of the Commonwealth *Acts Interpretation Act* have no application to the present question. Section 30(2), if it applies at all, applies only to a situation in which the non-compliance with the condition of good behaviour is a breach of State law for which the offender has been punished under State law. The applicability of s30(2) depends upon whether the act or omission which constitutes the offence under State law also 'constitutes' the offence against s20(2). There is no binding authority on the point. There are however, the *obiter dicta* of Windeyer and Owen JJ in *Devine v R* [1967] HCA 35; (1968) ALR 17; 119 CLR 506 at 520 and 527-8 respectively, which are quoted by the Chief Justice. These *dicta* of eminent judges of the High Court possess great persuasive weight.

This aspect of the case has given me great concern, for, despite the very great weight to be attached to the *dicta* of those two learned judges of the High Court and despite the fact that in this I differ from both my brethren on this bench, I cannot bring myself to the view that the act or omission constituting the offence against State law 'constitutes' the offence against s20(2). The offence against s20(2) is non-compliance with the condition. This involves not the unlawful act or omission, which amounts to the non-compliance, standing alone, but that act or existence of a current security entered into by the defendant containing a condition to be of good behaviour. The offence against s20(2) is not the breach of the State law but the non-compliance with the good behaviour condition. The act or omission constituting the offence against State law is surely the manner in which the non-compliance has occurred. The relevant meaning of the word 'constitute' given in the *Shorter Oxford Dictionary* (1972) is 'to frame, form; to make up compose'. *Webster* (1924) expresses the meaning more pertinently as to form; to make up, as being the constitutive element or elements.' It seems to me that to constitute an offence, the act or omission must comprise all the elements of the offence other than any required mental element. Apart from any mental element, it must be all that is required to found a conviction for the offence. The offence against s20(2) differs from the type of offence in which the prohibited act or omission is forbidden only to circumstances. I conceive that borderline cases might occur in relation to that type of offence, in which it might prove difficult to determine whether the forbidden act or omission could be regarded as of itself constituting the offence. Under s20(2) the forbidden act or omission is non-compliance with the good behaviour condition of the security constituting the offence against State law is but one. It seems to me therefore that the offence against s20(2) cannot be constituted by the Act or omission which constituted the offence against State law.

I would answer Question (1):

(a) Yes – as to a previous conviction for a breach of a law of State.

(b) Yes – as to a previous conviction for a breach of a law of the Commonwealth.

I agree that Question (2) should be answered 'No' for the reason given by the Chief Justice.
