

18/84

SUPREME COURT OF VICTORIA — FULL COURT

STEWART v ALTER and ORS

Crockett, Murphy and Marks JJ

13 February 1984

CRIMINAL LAW – SENTENCE – APPEAL BY CROWN AGAINST SENTENCE – DEFENDANTS DIRECTORS OF COMPANIES ENGAGED IN BUILDING AND LAND DEVELOPMENT – DEFENDANTS CHARGED WITH BRIBING SECRETARY AND AN ORGANISER OF BUILDING INDUSTRY UNION – DEFENDANTS RELEASED ON \$5000 GOOD BEHAVIOUR BOND – MAGISTRATE CONSIDERED EFFECT ON DEFENDANTS AS DIRECTORS IF CONVICTIONS RECORDED – WHETHER RELEVANT CONSIDERATION: MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, S80(1).

Section 80(1) of the *Magistrates (Summary Proceedings) Act 1975* provides (so far as relevant):

"Where at any time after the commencement of the hearing of an information a Court is satisfied that a defendant is guilty of the offence charged and it appears to the Court to be expedient to do so having regard to all the circumstances including the nature of the offence and the character and antecedents of the defendant and whether or not the defendant has pleaded guilty the Court, without proceeding to conviction, may adjourn the further hearing to a time and place to be fixed ..."

A. and the other defendants (who are directors of companies operating in the building and land development industry) were charged with giving bribes to the Secretary and an organiser of an industrial union whose members worked in the building industry. The bribes involved the defendants' providing materials and labour towards the construction and for premises owned by the union Secretary and the union organiser. The defendants pleaded guilty to the charges, and after hearing pleas from counsel on sentence, the Magistrate adjourned the matters for 12 months upon the defendants' entering into recognizances in the sum of \$5000 to be of good behaviour. One of the matters taken into account by the Magistrate was that the defendants faced disqualification as directors of their companies if convictions were recorded by virtue of s227 of the *Companies Code*. It was submitted on the return of the order nisi that this was not a relevant consideration.

HELD: Orders nisi discharged.

(1) The provisions of s80 of the *Magistrates (Summary Proceedings) Act 1975* are designed to enable a court, when considering sentence, to take into account, generally speaking, the effects which the recording of a conviction might have on the individual concerned.

(2) Although the provisions of s227 of the *Companies Code* may be regarded as being other than punitive, they are not to be ignored as irrelevant for sentencing purposes.

(3) Accordingly, the Magistrate was not in error in considering the consequences of convicting the defendants.

MARKS J: *[After setting out the nature of the charges, and procedural matters relating to the orders nisi, His Honour continued]: ... [13] In so far as the Crown originally relied on an omission to take into account the power of this Court to relieve the respondents from the automatic provision of s227 of the *Companies Code* that reliance was not pursued.*

There remains the argument to the [14] simple effect that the Stipendiary Magistrate was wrong in considering at all the provisions of s227 and the effect they may or would have on the respondents' power to act as directors or be in any way engaged directly or indirectly in the management of their companies should convictions be recorded.

In support of his argument the learned Solicitor-General took us to those authorities which suggest that the provisions of s227 of the *Code* which, of course, were in like terms in the preceding legislation are not punitive. It was submitted that the provisions of the *Code* are to protect the community and not to be categorised as punitive so far as the individuals affected by the provisions are concerned. In my view this argument overlooks the important fact that irrespective of the categorisation of the provisions of the *Code*, they have an effect which could

only be described as detrimental to, or restrictive of, the rights which the respondents otherwise would have.

The argument boils down, in my view, to the Stipendiary Magistrate not being entitled to consider consequences which were thought to be purely for the protection of the public as though it follows that they would have adverse consequences for the respondents. Such a view, I think, would result in a very capricious and uncertain operation of s80 of the *Magistrates (Summary Proceedings) Act*, the provisions of which are, in my view, designed to enable a court when considering sentence, to take into account, generally speaking, the effects which the recording of conviction might have on the individual concerned.

[15] The provisions are intended to apply where circumstances surrounding the commission of an offence call for relief from the consequences which might normally flow, or which might be thought to flow, or known to flow from the recording of a conviction. Although it may be correct to regard the provisions of s227 of the *Code* as being other than punitive, it does not follow, in my view, that s227 does not have consequences for the respondents which are to be disregarded.

It is true that this Court can give relief against the consequences of s227, but that does not dictate that the unrelieved consequences are to be ignored as irrelevant for sentencing purposes. In my view, the provisions of s227 were not irrelevant. They were provisions which the Magistrate was entitled to take into account and I see no error in his having done so. In the course of argument, the learned Solicitor-General took us to the case of *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121 but, in my view, that case is an authority based on an entirely different view of the Magistrate's conduct and intention. There is nothing before us to suggest that the Magistrate's sole purpose or intention in taking the course he did was to obviate the effect of s227. The proper view, in my opinion, is that he considered those provisions as one of a large number of considerations that persuaded him to the course that he took. For these reasons I would discharge the orders nisi.

[16] CROCKETT J: I agree with the result proposed by Marks J and I do so substantially for the reasons given by him. I would add only that in regard to the substantive issue, it appears to me to be plain that legislation which imposes a penalty, not for the punishment of the person penalised, but for the protection of the public, does not on that account prevent the adverse consequences to such a person arising from such an imposition from being considered as a relevant circumstance in the selection of the sentence required to be passed in relation to an offence arising from the facts that attract the operation of that legislation. Nor can it be said that the existence of a power in another court to relieve from the consequences of the legislation in question should, on that account, operate to prevent the sentencing court from being free to give due weight to the effect on the person being sentenced of the unrelieved consequences of such legislation's operation. I do not think it has been shown that the Stipendiary Magistrate acted in reliance on any wrong principle.

MURPHY J: I agree that the orders nisi should be discharged for the reasons expressed by my brethren. I do not wish to add anything further.

CROCKETT J: The order of the Court in each case will be: Order nisi discharged. The applicant to pay the respondent's taxed costs including reserved costs.
