

16/79

## SUPREME COURT OF SOUTH AUSTRALIA

**YOUNG v GEDDIE**

Newman AJ

24 October 1978 — (1978) 45 FLR 400

**SENTENCING – WELFARE FRAUD – MAGISTRATE STATED THAT BECAUSE OF DEFENDANT'S CIRCUMSTANCES HE WOULD NOT IMPOSE IMPRISONMENT TERMS – HEAVY FINE IMPOSED WITH REPARATION ORDER – CLEARLY IMPOSSIBLE FOR DEFENDANT TO PAY THE FINE OR ANY MEANINGFUL FINE – WHETHER MAGISTRATE IMPOSED A SENTENCE WHICH WAS MANIFESTLY EXCESSIVE – WHETHER DEFENDANT SHOULD HAVE BEEN RELEASED ON A RECOGNISANCE UPON CONDITIONS: CRIMES ACT 1914 (CTH), SS19B, 20.**

The defendant was convicted on her own plea to 5 offences relating to the *Social Services Act 1947* (Cth.) each of which the particulars related to making a statement which was false in a particular. For a year she received both an invalid pension and a supporting mother's benefit. She was not entitled to both benefits. The total amount of benefits obtained to which she was not entitled amounted to \$2696. The appellant's invalid pension was \$120 per fortnight. The magistrate imposed a fine of \$1000 with fees of \$73 in default 108 days' imprisonment and ordered that the appellant repay restitution in the sum of \$2696 within 12 months in default six months' imprisonment. Upon appeal—

**HELD: Appeal allowed. Penalty manifestly excessive. Penalty set aside. Released on a good behaviour bond for 3 years to be under the supervision of a probation officer and to make restitution at the rate of \$7 per fortnight.**

**Whilst the magistrate had power to make the orders, the Magistrate, whilst saying that this was not a case in which to impose terms of imprisonment, effectively sentenced the defendant to a term of imprisonment. It is incorrect to impose a fine which is beyond the offender's ability to pay.**

**NEWMAN AJ:** Strangely counsel have been unable to discover any Australian decisions directly on the points raised in this appeal. I have used my best endeavours with an equal lack of success, and this despite the fact that I am sure the problems are faced daily in courts throughout the country. The main question is really whether the penalty should be made to fit the offender.

The appellant was represented by counsel when she appeared in the Magistrates' Court. The magistrate said:

'I take into account the various matters submitted by the defendant's counsel, but there is a large amount of money involved here; moreover the offence is extremely prevalent and no doubt constitutes quite a drain on public funds. I must impose a penalty calculated to deter other people from committing it; but in the circumstances I shall not impose terms of imprisonment.'

He then proceeded under s138(5) of the *Social Services Act 1947* as amended, to impose a penalty of \$1000 with court fees \$3 and counsel fees \$70, a total of \$1073. In default of payment he ordered imprisonment for 108 days and he allowed four months in which to pay. The penalty was clearly less than the maximum he could have imposed.

He then made an order for restitution. This too was within his power. He ordered that the appellant pay to the Commonwealth the sum of \$2690 within 12 months of the date of his order and further he ordered that in default of payment she be imprisoned for a further period of six months.

It was properly conceded by counsel that the orders which were made by the learned special magistrate were orders which he had power to make. The main thrust of the appeal, however, really is that the magistrate, while saying that this is not a case in which to impose terms of imprisonment, has by the orders which he had made, effectively made it a compulsory term of imprisonment.

The appellant has only \$120 a fortnight to maintain herself and her two children. Her total invalid pension for the next four months, the time allowed in which to pay the fine, is not as much as the fine which has been imposed. It is clear that it is just impossible for her to pay the fine or any other meaningful fine.

The Commonwealth *Crimes Act* does not make provision for a court to order a term of imprisonment which term can then be suspended upon an appropriate bond being entered into. It is perhaps a pity that this power is not in the Commonwealth *Crimes Act* as it would certainly be of assistance in a case such as this. I therefore have to consider the provisions of ss19B and 20 of the *Crimes Act*.  
s19B – without conviction, dismissed, or discharged upon entering recognizance.  
s20 – upon conviction, release of defendant upon the entering of a recognizance.

I adopt the comments made by Thomas in his text book *Principles of Sentencing* where he says at p221:

'It is considered incorrect to impose a fine which is beyond the offender's ability to pay, as this is likely to result either in his serving a sentence of imprisonment in default or possible committing further offences to raise the money. It is submitted that the ability of the defendant to pay is relevant only as a mitigating factor reducing the amount which might be fixed by reference to the gravity of the offence alone; it would be inconsistent with the basic power of principles to impose a fine out of proportion to the offence on the ground of the offender's wealth. Plus while there may be discrimination between offenders of different financial standing in respect of similar offences this discrimination is the result of mitigating the fine imposed on the less affluent offender, rather than by increasing the fine imposed on the wealthier man beyond the amount which can be justified by reference to the gravity of the offence.'

I am of the opinion that the penalty imposed is manifestly excessive and I have no hesitation in setting it aside. Having given a lot of thought to the problem of what should be substituted, I propose to quash the order relating to the fine, the court costs and counsel's fees, and order the appellant enters into a bond in the sum of \$50 for the term of three years; upon condition that she be of good behaviour during the term of the bond; that she be under the supervision of a probation officer during that period. It is submitted that I should give serious consideration to ordering that she make restitution of the amount outstanding \$2696 at the rate of \$7 per fortnight. Mr Walsh has informed me that he would not oppose such an order. In the circumstances I commend the Commonwealth on its attitude and I propose therefore to also allow the appeal in relation to restitution and I order that the appellant make restitution to the Commonwealth of the sum of \$2696 at the rate of \$7 per fortnight. Also after discussion with counsel, I do not propose to make any order in relation to default of payment.

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