57/87

SUPREME COURT OF SOUTH AUSTRALIA

COLLINS v DENTON

Von Doussa J

21, 30 January 1987 — (1987) 43 SASR 192; (1987) 85 FLR 139

INCOME TAX – FAILURE TO COMPLY WITH COURT ORDER TO FURNISH RETURN – PENALTY CONSIDERATIONS – WHETHER PENALTY SHOULD BEAR SOME RELATIONSHIP TO THAT IMPOSED FOR FAILING TO FURNISH RETURN: *TAXATION ADMINISTRATION ACT* 1953 (CTH.), SS8C, 8H.

1. Generally speaking, the penalty to be imposed for an offence of failing to comply with a court order to furnish a return under s8H of the *Taxation Administration Act* 1953 will be greater than that imposed on the conviction under s8C for failing to furnish a return.

2. However, the court may impose a lower penalty having regard to the steps taken by the offender to comply with the order, whether those steps have been frustrated in their fulfilment by the negligent inactivity on the part of a tax agent, whether the offender's personal circumstances (health, financial) have changed between the relevant periods, whether the offender has complied with the order prior to hearing and the amount of tax (if any) payable in respect of the return in question.

3. Where an offender was fined $400 on each of two charges of failing to furnish a return, and was subsequently fined a total of $750 for failing to comply with two court orders, although the penalty of $750 was a low one, it was not so low as to be disproportionate to the seriousness of the offence nor did it fall outside the range within which the magistrate might fairly and properly exercise his discretion.

Von DOUSSA J: *[After setting out the nature of the offences, the offender's circumstances and antecedents, the penalties for breaches of section 8H of the Act and decided cases in respect of breaches of section 8C of the Act, His Honour continued) ...* **[142 FLR]** Both *Hagidimitriou's case* and *Viergever's case* are only of indirect relevance to this appeal as both decisions concerned breaches of s8C. An offence under s8H stands on a somewhat different footing as it concerns failure to comply with an order of the court made under s8G.

The question of penalty in such cases was considered by Olsson J in (1987) 43 SASR 199 *Krenn v Klitscher*, Sup Ct of South Aust, 3 December 1986. His Honour said:

> "It seems to me to be an important consideration that a court dealing with matters of this type take into account the fact that the legislation does establish a hierarchy of offences, of which s8H offences are the second and more serious type of offence. This is the more so because what is in issue is, in effect, the disobedience of an earlier formal order of the court directed to the person responsible for the lodgment of the return. It would follow, as night follows day, that, in general, penalties imposed pursuant to s8H need to reflect the obvious policy of the legislation having regard to the very substantial maximum penalties prescribed. It defeats the whole purpose of the legislation if penalties imposed under s8H, following earlier penalties imposed under s8C, are not significantly greater than the s8C penalties – unless, on the particular facts of the case, there are some very special and extraordinary circumstances which would warrant that approach. I find it a little difficult to envisage what such circumstances might be, but one cannot exclude the possibility that they may exist."

I respectfully agree with his Honour's observations that the proper application of s8H will, in general, result in the penalty for the s8H offence being greater than the penalty imposed on the preceding s8C offence. However I do not share his Honour's difficulty in envisaging cases where the circumstances may warrant a different result. For example, a person may be supinely inactive in not taking steps to prepare and furnish a return prior to the conviction for the s8C offence; but after the s8G order he may actively take appropriate steps directed to doing so, which become frustrated in their fulfilment by negligent inactivity on the part of, say, a tax agent: see for example *FCT v Rehn* (1985) 85 ATC 4543, one of the fourteen other cases considered by Zelling J along with *Hagidimitriou's case*; see also *Sarney v Rizidis*, another appeal against penalty at the instance of the Commissioner in which I have delivered judgment today ((1987) 43 SASR 216;

(1987) 85 FLR 130). Another example would be where **[143]** there was a marked alteration in the offender's particular circumstances, such as a change to his health or to his financial position, between the two relevant periods.

In a particular case, there may be circumstances of one kind or another which would make it inappropriate to impose a penalty under s8H, which is higher than the penalty previously imposed under s8C, whether or not that penalty fell within the general range advocated in *Hagidimitriou's case*. Every case will depend upon its own particular facts and the due application of ordinary sentencing principles should guide the sentencing magistrate in the exercise of his discretion.

In *Krenn v Klitscher* the taxpayer had been convicted on two counts under s8C, and fines of $350 and $600 respectively had been imposed. Orders under s8G had been made and had not been complied with. The taxpayer was charged under s8H with failing to comply with each of the relevant orders: He was fined $350 on one count and convicted without penalty on the other. Olsson J, in the circumstances of that case, considered he had no option but to allow the appeal and increase the penalty. Exercising his discretion to impose one penalty in respect of both offences pursuant to s45B of the *Acts Interpretation Act* 1901 (Cth), his Honour imposed a penalty of $1,750. It is important to recognise that the taxpayer had not appeared in the court below or on the appeal, to offer any fact or circumstance in mitigation of his failure to comply with the court orders. He had not lodged the relevant returns at the date of the appeal. His default was continuing, notwithstanding the imposition of the s8C penalties.

In the present case the outstanding returns were filed by the respondent before he pleaded guilty. Even though he did not do so until the morning of the hearing, the fact that the returns had been filed was an important matter in determining the appropriate penalty. Belated compliance with a court order should generally be viewed as less serious than continuing non-compliance. The length of the period of default is a matter properly to be taken into account either where a failure to comply with s8C or a failure to comply with s8G is charged. However I do not accept a suggestion made in argument in this case that the learned special magistrate should, in fixing penalty under s8G, have had regard to the length of time which had elapsed from the end of the relevant tax years. First, in most cases, including this one, it is not likely that the sentencing court would know what arrangements, if any, the taxpayer had with the Taxation Office about extending time within which to file the returns. Further, the taxpayer's delay prior to the date of the conviction under s8C would, or at least should, have been taken into account in fixing penalty for that offence.

In the present case, the respondent not only failed to furnish the relevant returns within the twenty-eight-day period ordered by the court, but he continued his dilatory conduct during the period of the adjournments of the hearing. His non-compliance had extended over a long period after the s8C conviction. Nevertheless, I think it was a matter to be taken into account that he had filed his returns before penalty was imposed. That fact alone distinguishes the present case from *Krenn v Klitscher*. In *Krenn v Klitscher* no mitigating circumstances were put to the court. In the present case, a number of matters personal to the respondent were also raised. The appellant argued that these matters were irrelevant and should have been disregarded, or alternatively, were not shown to have been sufficiently relevant to be given weight. **[144]** One matter was the financial position of the offender. Ordinarily a court should have regard to the financial position of an offender so as not to impose an overall monetary penalty which is crippling or beyond the capacity of the offender to pay. This may not be a factor of importance when a single offence is charged, but it may assume progressively more prominence as the number of offences charged increases. In the present case the information, scant though it was, about the respondent, tended to show he was not a man of means and he could have difficulty paying a heavy fine. It was not irrelevant information. Other matters were the respondent's commitment to charitable work, difficulties caused by his road accident, and the distress associated with his father's protracted illness. These matters were relevant to show that the respondent's failure to furnish the returns was not a contemptuous flouting of his legal obligations.

In my view, it was also relevant for the learned special magistrate to have regard to the fact that there was no tax payable in respect of either financial year in question. In this Court it was suggested that little, if any, weight should have been accorded to that submission. First it was argued that the Taxation Office would have had no time to consider the returns furnished,

or to issue an assessment. That may be so, but if the Commissioner seeks to challenge such a submission he should do so in the court below. If necessary, the imposition of penalty could be deferred temporarily to enable the Commissioner to assess returns filed at the last moment. In many cases, however, the general level of the tax involved may be readily apparent from the information in the return. Reference was also made to *Karlovsky Plumbers Pty Ltd v Hubbard* (1982) 12 ATR 871. That was an appeal against penalty for a failure to remit deductions made from the wages of employees to the Commissioner pursuant to s221F. The headnote reads: "The amount of tax unpaid is not necessarily an important criterion in deciding on the penalty ..." The Commissioner had sought to uphold the imposition of the maximum penalty on the ground that a substantial payment had been delayed. Brinsden J, in the course of giving reasons for reducing the penalty, said at 872-873:

> "The amount in issue is quite a large sum and so therefore it is a serious offence from the revenue's point of view but I, for myself, do not see that the amount that forms the non-payment is necessarily an important criteria in deciding on the penalty. It is possible it could be, but one can easily foresee cases where a sum much larger than this might not be paid, and if this sum warrants the maximum then, of course, a much larger sum could not result in a greater penalty..."

The decision does not support the proposition that it is irrelevant, or nearly so, that no tax was in fact payable by the taxpayer in respect of the tax period for which he has failed to furnish a return. A persistent failure to furnish returns even where no tax is payable, may nevertheless amount to a serious offence. Such a failure impedes the due administration of the legislation. But in such a case the revenue is not being deprived of the receipt of moneys and, generally speaking, there would be reason to treat such a case as more deserving of a lower penalty than a case where substantial moneys are withheld by reason of the failure to furnish a return. In the present case the learned special magistrate considered the imposition of one penalty for both offences, and having arrived at his decision, imposed that penalty on one charge. The appellant appeals only against the **[145]** inadequacy of the sentence on the other charge, that on which a conviction without penalty was recorded. It was argued that the failure to impose a penalty on the second charge in itself reflects error. I do not agree. The reasons for the failure to furnish each return were inextricably connected.

Exactly the same reasons were advanced for each failure and, as the learned special magistrate noted, both orders were made on the same day and served on the same day. Both returns were later furnished on the same day. They both related to the same taxpayer. It was open to the magistrate to determine that he should look at the offending conduct in a global way, but then it was necessary that the penalty imposed be appropriate to cover both offences. There is no reason to suspect that the magistrate overlooked this requirement. It was open to him under s45B of the *Acts Interpretation Act* 1901 to impose one penalty for both offences, and it would have been preferable for him to have adopted that course. However I do not think there is any error arising from the fact that he attached the penalty to one offence only, merely recording a conviction on the other. In my view the penalty imposed was a low one. It is less than I would have imposed. However that is not the test. I think that no error has been demonstrated in the way the learned special magistrate exercised his discretion. It has not been demonstrated that he acted upon a wrong principle or allowed extraneous or irrelevant matters to guide or affect the exercise of his discretion ...
