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SUPREME COURT OF SOUTH AUSTRALIA

UZNANSKI v SEARLE

King CJ, Sangster and Legoe JJ

10 February, 17 March 1981 — (1981) 26 SASR 388; (1981) 52 FLR 83

SENTENCING – ACCUSED CHARGED WITH 3 COUNTS OF FORGING AND UTTERING SOCIAL SECURITY CHEQUES – YOUNG PERSON WITH GOOD WORK RECORD – OFFENCES COMMITTED UNDER EXTENUATING CIRCUMSANCES – CHARGES DISMISSED WITHOUT CONVICTION UPON ENTERING INTO BOND – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1914 (CTH), S19B.

The defendant aged 20 years with no prior convictions for dishonesty, pleaded guilty to three charges of forging and uttering social security cheques. The magistrate discharged the defendant pursuant to s19B of the *Crimes Act* 1914 (Cth) without convicting upon his entering into bonds conditioned for his good behaviour for a period of 18 months. Upon appeal against sentence as being manifestly inadequate, the order was quashed and convictions imposed by a Judge of the Supreme Court of South Australia. Upon appeal—

HELD: Appeal allowed. Convictions quashed. Order of the magistrate restored.
Having regard to the defendant's age, good work record prior to losing employment and no prior convictions for dishonesty, they were matters which would in themselves attract the discretion under s19B.

Per Sangster J: Whilst the extent of the offences was not of a trivial nature, the offences were committed under extenuating circumstances in that the defendant was recovering money owed to another person. Also, he committed the crimes to help a young woman for whose situation he was responsible.

KING CJ: The appellant pleaded guilty before a special magistrate sitting as a court of summary jurisdiction at Para Districts, to three charges of forging and three charges of uttering social security cheques. On the charges of forging and uttering one cheque, the learned special magistrate discharged the appellant pursuant to s19B of the *Crimes Act* 1914 (Cth) without recording convictions upon his entering into two bonds, each in his own recognizance in the sum of $100 to be of good behaviour for a period of eighteen months, and ordered the appellant to make reparation in the sum of seventy-two dollars and to pay sixty dollars costs. He dismissed the remaining four charges without proceeding to convictions. The complainant appealed to the Supreme Court and the appeal was heard by Matheson J. His Honour allowed the appeal, ordered convictions on all charges, and imposed a sentence of three months' imprisonment on each charge, the sentences to be served concurrently. The appellant appeals to the Full Court against the order of Matheson J. ...

Counsel for the respondent in this Court argued that the discretion created by the Section 19B(1) did not arise in the present case because there were no materials before the court which could reasonably lead a court to any of the opinions mentioned. I cannot agree. The appellant is a young man, being twenty years of age at the time of the commission of the offences. He was unemployed and prior to losing his employment had a good work record. Although he had had minor court appearances, there were no prior convictions for dishonesty. It seems to me that these matters relating to the age, character and antecedents of the appellant would in themselves attract the discretion. There were, moreover, certain circumstances related to the offences which appear in the reasons for judgment of Sangster J which, in my opinion, can properly be regarded as circumstances of extenuation. I think that there are sufficient materials in this case to bring the discretion into existence.

It remains to consider whether the learned special magistrate's exercise of the discretion has miscarried. The exercise of a discretion miscarries when the court possessing the discretion misapprehends the principles upon which the discretion is to be exercised, misunderstands relevant facts, fails to take into account relevant circumstances, or takes into account extraneous

considerations. If, of course, the manner in which the discretion is exercised is such that no reasonable tribunal could exercise the discretion in that way unless it had erred in one of the respects mentioned, an appellate court will conclude that some such error has occurred although none is disclosed. In my opinion, it has not been demonstrated that there has been a wrong exercise of discretion in the present case.

There is no indication that the learned special magistrate was under any misunderstanding as to his duties. In his remarks on penalty, the learned special magistrate showed that he understood the relevant considerations. He referred "to the extenuating circumstances and the defendant's prior record involving no dishonesty offences and the defendant's age and antecedents". There is no doubt room for difference of opinion as to the wisdom of the way in which the discretion was exercised. This is demonstrated by the view taken by the learned judge appealed from. That does not, however, mean that there has been a wrong exercise of discretion. If there is room for reasonable difference of opinion, it is, of course, the opinion of the magistrate, upon whom the discretion is conferred by law, which must prevail.

Having already said all that is necessary to dispose of this appeal, I would, however, like to utter a word of encouragement to magistrates in the discharge of their difficult and sometimes delicate task. Powers such as those created by s19B(1) of the *Crimes Act* are conferred on courts as an important part of their armoury for use in the furtherance of the ends of justice. They are designed to assist in the rehabilitation of offenders who are judged to be suitable subjects to be dealt with under such powers. Their purpose is to assist in rehabilitating such persons by keeping them out of prison, thereby avoiding the disruptive effects of imprisonment on an offender's life and the undesirable associations and stigma which are the inevitable accompaniments of a term of imprisonment. Magistrates are to be encouraged to exercise such powers with compassion and imagination, as well as with wisdom and prudence. As long as they act within their powers, avoid error and extraneous considerations, and use the powers conferred upon them reasonably and with due regard for the well-established purposes of sentencing, they are entitled to expect the support of appellate courts in the discharge of their onerous responsibilities. Whilst I recognize that there is room for difference of opinion in these matters, I feel that I ought to express my opinion that the magistrate in the present case exercised his discretion wisely and in accordance with the intention of the legislation. In my opinion, the appeal should be allowed, the order appealed from should be set aside, and the order of the magistrate restored.

SANGSTER J: *[His honour set out the circumstances of the offending and continued]* ... There was no affidavit filed on behalf of the appellant, but the magistrate's notes which appear to relate to submissions on behalf of the appellant are as follows: "Re Roberts' cheques - sold car to Roberts, and Roberts didn't pay for the car - getting money for car. - i.e., garnishee, (3) Gave to Hodge - she had had daughter by him: twenty years old unemployed. Good work record previously".

The appellant's counsel (I presume with consent and by leave) told Matheson J that the following submissions were made to the magistrate: "In relation to the cheques payable to Richard M. Roberts (that is, the cheques the subject of the first four counts in the information) the respondent was living with a group of friends at Broadmeadows Road, Elizabeth North, one of whom was the payee Roberts. Just prior to the commission of the first offence in December 1977 the respondent agreed to sell his Holden sedan to Roberts who agreed to pay the respondent $200 therefor. The respondent handed over the car about six weeks before the date of the offence and during the interim the respondent continuously requested the purchase price from Roberts, who said he could not afford to pay. The respondent thought he would never get his money and took the cheques, the subject of the first four counts. The cheque, the subject of the 5th and 6th counts was payable to a former-next-door neighbour of the respondent's parents. The respondent forged this cheque to help his girl friend who had had his child. The child at that time was twelve months old and his girl friend was in financial difficulties. The respondent was unemployed at all relevant times, but had a good work record previously. He left school at the age of fifteen years. He is now twenty-one. He is the eldest of three children and has had a good relationship with his parents. It was submitted on his behalf that he was full and frank in his admissions, had offered to make restitution in respect of the first cheque, and had no prior convictions for dishonesty."

The grounds of appeal to this Court were simply "that the penalties imposed were manifestly inadequate in all the circumstances". Matheson J set out the history of the matter and then gave

the following reasons for his decision:

> "The informant has appealed to this Court on the ground that the penalty imposed was manifestly inadequate in all circumstances. The maximum penalty the court could have imposed on each count was twelve months imprisonment and/or a fine of $200. It is to be noticed that a period of seventeen months elapsed between the commission of the offences in relation to the first and third cheques. The total amount involved was $216.90. The special magistrate's notes suggest that he was under the impression that all counts related to cheques of his flatmate. The 5th and 6th counts did not. I do not think the circumstances under which any of the offences committed were extenuating in the correct sense of excusing in some appreciable degree the commission of the offences (*O'Sullivan v Wilkinson* (1952) SASR 213). The respondent's prior record, whilst not bad, indicated a disregard for the law. There was nothing special or singular about his age and antecedents. In my opinion, having regard to all the circumstances, s19B should not have been applied and the order of the special magistrate should be set aside and convictions recorded on all counts."

I respectfully agree with an observation by the learned Chief Justice during the course of the argument before us that the appeal should have been on the ground of a wrong exercise of a discretion vested in the magistrate, and that the real questions for this Court are:

> (1) Did the discretion arise?
>
> (2) Is there any indication before us of any improper or extraneous considerations?

To these questions I need hardly add that we are not obliged to find any specific impropriety or extraneity in the magistrate's considerations if the conclusion he reached was so far in conflict with the material before him as to be explicable only by saying that he must have erred. Put another way – as was said by the High Court in *Cobiac v Libby* [1969] HCA 26; (1969) 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257, per Barwick CJ, Kitto and Owen JJ:

> "the ... question is whether there was sufficient material to justify the exercise by the learned magistrate of the discretionary powers" (1969) 119 CLR at p265 vested in him;

and per Windeyer J:

> "The question is not whether any of us in this Court, or any of their Honours in the Supreme Court, would himself have taken the course that the magistrate took. The question is not what we would do, but what could he lawfully do. The discretion was his. He could exercise it as he thought expedient, provided that in the circumstances it was open to him to exercise it at all".: (1969) 119 CLR at p275.

I do not follow Matheson J's suggestion that the magistrate may have been under the impression that all counts related to cheques of the appellant's flatmate – the magistrate's notes refer expressly to a "neighbour's cheque" (counts 5 and 6 relate to the neighbour's cheque).

Turning to the material before the magistrate, I ask myself whether any of that material shows anything in relation to: (i) Character, antecedents, age, etc. of the appellant. The answer must be 'yes – he was a young man with a good work record and no previous convictions for dishonesty, (ii) The extent, if any, to which the offence is of a trivial nature. The answer must be "no". (iii) The extent, if any, to which the offence was committed under extenuating circumstances. The answer must be "yes" – as to counts (1), (2), (3) and (4) the appellant was recovering, albeit by means of crimes of a serious kind, some of the money owed to him by Roberts, and as to counts (5) and (6) he was committing similar crimes to help a young woman for whose situation (i.e. having a young child) he was responsible; which the magistrate could properly have taken into account. To the overall question, the answer must be "yes". Is it to the point that (as in my opinion is the position) the magistrate's exercise of his discretion produced a clear and serious injustice to the complainant and to the public? This is the question that has troubled me most. With considerable regret I have concluded that such a consideration is not to the point. It is not my discretion but the magistrate's: my view of the case may be as wrong as I think his was, but whichever view is right or wrong it was his view that mattered provided that there was some support for it, and some support for it I have already mentioned. In my opinion, the appeal should be allowed and the magistrate's decision restored.
