14/87

SUPREME COURT OF VICTORIA — FULL COURT

R v KARANGES

Murphy, Brooking and Hampel JJ

7 May 1987

PROCEDURE – BREACH OF GOOD BEHAVIOUR BOND – RELEVANT MATTERS TO BE CONSIDERED WHEN DEALING WITH BREACH.

When dealing with a breach of bond, a Court must not punish the offender for the subsequent offence(s), but should decide what penalty, if any, should be imposed for the original offence(s). In order to do this, the Court is entitled to have regard to the subsequent conduct of the offender, the nature of the breach and whether there has been compliance with the conditions of the bond.

MURPHY J: **[1]** I will ask my brother Brooking to deliver the judgment in this matter.

BROOKING J: On 14th March 1985, the applicant pleaded guilty to a presentment containing one count, it being alleged that he did without lawful excuse have in his possession on court premises an offensive weapon, a knife, contrary to s4 of the *Court Security Act* 1980, which provides a penalty for that offence of seven years' imprisonment.

The circumstances of the offence were that the applicant was observed carrying a knife pouch in the precincts of the City Court. He told the police officer who noticed the knife in the pouch attached to his belt that he had attended the court because a friend was in a spot of bother. At the hearing of the plea, it was put on his behalf that that friend was in court to answer a traffic charge. The applicant had a large number of previous convictions which he admitted he sustained over a period **[2]** of about sixteen years, including a considerable number of offences of dishonesty, and offences of wilful damage, assault occasioning actual bodily harm, assault by kicking, assaulting a member of the Police Force in the execution of his duty, being armed with an offensive weapon, and robbery.

The learned sentencing Judge released the applicant on a $500 three year good behaviour bond, making it as clear as it was possible to make it to the applicant that if he broke the bond he would almost certainly be imprisoned for the offence in respect of which the bond had been given.

On 24th February 1987 the applicant was brought before the learned sentencing Judge for breach of bond. The bond having been granted on 14th March 1985, the first of the breaches alleged was an offence of theft committed only four or five weeks later, namely, on 16th April 1985, and there were a number of other offences which had been committed in August 1985 and in December and in November of that year, those being, among others, .05 offences, careless driving, failing to stop after an accident and driving whilst disqualified.

When the case was called on on the 24th February this year, the applicant did not appear and an order was made that a warrant issue for his apprehension. He appeared a little later, giving what the learned Judge seems to have regarded with some justification as an unsatisfactory excuse for his being late. He asked the Judge for an adjournment, saying that he wanted to obtain legal representation. After some discussion, the Judge refused that application and went on to hear what the applicant had to say with relation to the **[3]** matter, the breaches having been admitted in writing by the applicant.

The notice of application for leave to appeal originally contained only the ground, in substance, that the sentence was manifestly excessive. Leave was given in the Practice Court yesterday to substitute another ground, which in substance was that His Honour had erred in refusing the application for an adjournment, thereby occasioning a miscarriage of justice. Mr

Wraith, who has today appeared for the applicant, sought leave to, so to speak, reinstate the original ground of manifest excessiveness, and without ruling on that application, the Court has heard what he has had to say in support of it. So far as the substituted ground, the refusal of the adjournment, was concerned, Mr Wraith sought to rely on two affidavits, one by the applicant and one by his solicitor, but having apprised itself of the content of those affidavits, the Court refused to receive them.

In our view, His Honour has not been shown to have erred in refusing to grant the application. In his report to this Court the learned Judge has said that in his opinion the application for an adjournment was not a *bona fide* one. It is not, we think, necessary to canvass in any detail what passed between the learned Judge and the applicant when the adjournment was sought. What the applicant then said, in substance, to His Honour was that he had not realised that he might need, or would need, legal representation, because he had been in some way misled by the form of the documents served upon him.

It is, we think, sufficient to **[4]** say that it was open, well open, to the learned Judge to take the view that no adjournment was necessary in the interests of justice and that the application for an adjournment was not a *bona fide* one. So far as the original ground, the severity of the sentence, is concerned, the statute provides a maximum penalty of imprisonment for seven years and does not itself provide the alternative of a fine, although that alternative is, of course, to hand.

It must be borne in mind that what this Court is now called upon to consider is not the course taken by the learned Judge originally, which was, of course, that of granting a bond, but the course which he took when the applicant returned before him at a time when His Honour had the benefit of the light thrown on the applicant by his own subsequent conduct notwithstanding the leniency that had been extended to him. Of course the applicant was not to be punished for the further offences: he was to be sentenced for the original offence. But His Honour was entitled to have regard to the subsequent conduct of the applicant and his early and numerous breaches of the bond, in the light of His Honour's clear warning at the time of its grant, in forming a further view as to the likelihood of the applicant's responding well to leniency.

In view of the breaches of the bond and of the previous convictions of the applicant, it seems to us that notwithstanding that the offence to which he had pleaded guilty was by no means a serious one as those offences may go, it is impossible to say that it was not open to the learned **[5]** Judge to take the view that it was necessary to sentence the applicant to a term of imprisonment, and once that view is reached it is, we think, impossible to say that it was not open to the learned Judge to fix upon the term which he selected. Accordingly, in our view, the application must be dismissed.

HAMPEL J: The Judge's role when dealing with a breach of bond was to decide what penalty, if any, should be imposed on the applicant for the original offence.

I had some reservations as to whether, in the circumstances in which this offence was committed, a gaol sentence was appropriate, even at the stage when it was imposed after a breach of the original bond. However, to my mind it is important to remember that the Act places on the accused the onus of showing that his possession of the weapon was with a lawful excuse. The applicant pleaded guilty, and therefore we must proceed on the basis that he was in possession, albeit in the circumstances which he indicated, without any lawful excuse.

In those circumstances, because the sentence was imposed after the breach of the original bond, I am also unable to see where the Judge erred in imposing the sentence which he did. I would therefore also refuse the application.

MURPHY J: The order of the Court is that the application will stand dismissed.
