14/89

SUPREME COURT OF VICTORIA

O'KEEFE v TANKARD

Nathan J

11 July, 5 September 1988 — [1989] VicRp 34; [1989] VR 371

CRIMINAL LAW – SENTENCING – COMMUNITY-BASED ORDERS – REQUEST FOR REPORT AS TO OFFENDER'S SUITABILITY – REPORT ADVERSE – COUNSEL REFUSED PERMISSION TO CROSS-EXAMINE REPORT WRITER – COMMUNITY-BASED ORDER NOT MADE – WHETHER A DENIAL OF NATURAL JUSTICE: *PENALTIES AND SENTENCES ACT* 1985, S28(5).

1. In deciding whether or not to make a community-based order under S28 of the *Penalties and Sentences Act* 1985, a court should bear in mind the general rule that it is repugnant to the basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings.

***R v Carlstrom* [1977] VicRp 44; (1977) VR 366, applied.**

***R v Hill* [1983] VicRp 84; (1983) 2 VR 231, distinguished.**

2. Accordingly, a court was in error where a person adversely affected by a report of a Community Corrections Officer was not given an opportunity to examine the Officer before the court decided not to make a community-based order.

3. Observations as to the manner, nature and extent of the examination of the officer/report writer.

NATHAN J: *[After setting out the facts of the case, the grounds of the order nisi and relevant statutory provisions, His Honour continued]* … **[4]** CBO's and their antecedents, community service orders (CSO's), as provided for in the *Penalties and Sentences Act* No. 9554 (the 1981 Act), have been part of the penal landscape of Australia since European settlement. The convict transportation system had, as a component, the assignment of offenders to free settlers for the purposes of providing unpaid labour.

At one time the entire nation was an outpost of the British Office of Corrections, and this experience of exacting community work from felons is an experience common to all States except one, although, in Victoria to a lesser degree than most. On any view, that system must now be regarded as having been successful, having translated felons into yeomen. Of course the present system is more humanely administered. It has as **[5]** differentiating features, the rehabilitation of the offender and the provision of ancillary support systems to assist with that objective.

I return to the issue in this case which is whether the sentencer should have permitted the offender's counsel to cross-examine a Community Corrections Officer (CCO), whose adverse report effectively denied the offender his freedom. In my opinion it would launder words such as "freedom" and "imprisonment" of meaning if the requirements to attend a given place for a given number of hours pursuant to a CBO was regarded as imprisonment, or that detention in a YTC is not imprisonment. To exclude an offender from a CBO can result, as was the case with O'Keefe in imprisonment. Freedom in this context must mean the choice of the offender to do as he wishes at all times except for those periods consumed by the CBO.

For the reasons which I shall go on to elaborate, I am satisfied a court or sentencer should permit a CCO to be examined about the contents of a report, a word chosen carefully and not synonymous with cross-examination. The parameters of that examination should be constrained by those factors relevant to the sentencing option, and the fitness of the offender for a CBO. It should not be cross-examination at large. I turn now to the reasons for that conclusion. *[His Honour referred to several decisions and continued]* …

[9] In this case O'Keefe presented himself to the CCO. He neither could, nor did know of the contents of that officer's report until it was pronounced in court and read by the magistrate.

He neither could, nor did he have an opportunity to challenge the CCO's findings or to make contrary assertions. Procedural fairness may well have been pursued, but O'Keefe would not have been able to know this. On the other hand a prime requirement of natural justice, given its restrictions in the context of s28, is that a person be given an opportunity to be heard and a right to challenge those decisions which affect his interests, especially so when the consequences may otherwise be incarceration.

It is imperative to consider the CCO's report in the context in which it is given. The 1985 Act requires assessment by a CCO at the same time as the sentencing function is being pursued. There can seldom be a time lapse of more than minutes between the assessments made and the sentences involved. Any remedy that an offender may have by way of judicial review would be brought to nothing if incarceration were to be immediate and some months later, review of the decision giving rise to that imprisonment was heard. If the exercise of the administrative function, which itself gives rise to the judicial function is to be examined, it is proper that it be done at the time when the judicial decision itself is being made.

It is beyond peradventure that a sentencer may go behind and question a reporter relating to the sentencing **[10]** function. Judges and magistrates commonly question those persons who bring to the court pre-sentence reports, whether psychiatric, psychological or social. That process is a testing of the validity, efficiency and force of the opinions expressed by the reporter. It is proper that a similar opportunity to test and evaluate those opinions be extended to the offender or his counsel. To my mind there is no logical difference between a pre-sentence report and a report of a CCO relating, as it does, to only one of the sentence options.

[His Honour then examined R v Hill [1983] VicRp 84; (1983) 2 VR 231*, quoted passages from the judgments delivered in that case, and continued]* ... **[13]** *Hill's* case, which expressed such strong views as to how a report of a superintendent should be accepted is not exactly apposite to the report of a CCO. There are differences between the 1981 and the 1985 Acts so that, although I find the comments in *Hill* of assistance by way of analogy, they are not determinative and were made prior to the cases of *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28 and *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378; (1987) 73 ALR 1; 26 A Crim R 447; 61 ALJR 477. It must also be borne in mind that *Hill's* case was in the nature of an advisory opinion, called for by the trial judge, and not an adjudication upon the rights of an offender's counsel, as is the case before me.

Hill's case considered an attendance centre order rather than a CBO. Those orders, do not have any direct counterpart in the 1985 Act, except insofar as they were the precursors of Youth Attendance Orders (YAO's). An attendance centre order under the 1981 Act was imposed as a substitute for a term of imprisonment for not less than one nor more than twelve months (viz. S26). A superintendent of an attendance centre, required to satisfy the court that the offender was a fit and proper person to receive such an order was obliged to have regard to any directions given by the court as to the way the order might be performed, (viz. s37 sub-s3). The superintendent of a centre could direct the offender to remain in a given employment, and so far as his involuntary unpaid labour was concerned, the venues at which that was to be performed were restricted by s39 sub-s2.

It must also be noted that a CSO was recorded as a conviction unless otherwise ordered, but a CBO is not a conviction unless specifically ordered. **[14]** Most significantly, *Hill* was decided before *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28, from which I quote the following from Mason J (as His Honour then was):

> "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475; [1964] ALR 517; (1963) 37 ALJR 182; 13 ATD 135; 9 AITR 133 Kitto J pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on 'the particular statutory framework'. What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, *inter alia*, the nature of the enquiry, the subject matter, and the rules under which the decision-maker is acting."

This quotation leads me to examine the nature of the enquiry required to be made pursuant

to the provisions of the 1981 Act compared with that of the 1985 Act. In the earlier Act, pursuant to s36(1)(b):

> "A court shall not make an attendance centre order unless it is satisfied from enquiries made to the superintendent of the attendance centre ... that the offender is a fit person to undergo attendance ..."

It can be seen that the enquiry had to be initiated by the court and the fitness was to be measured in terms of attendance at an attendance centre, that is, to receive vocational training and counselling as a form of imprisonment. Whereas in the 1985 Act, s28(5) prohibits a court from making a CBO unless a report by a CCO satisfies it that the offender is a suitable person for such an order. The purposes to be served by a CBO are not the same as those formerly served by CSO's or attendance centre orders, and the roles and functions of a CCO are not those formerly performed by superintendents of attendance centres. The latter had **[15]** obligations to ensure the safe, efficient and proper functioning of the attendance centres which, as I have already noted, provided some vocational training, whereas a CCO is more concerned with the capacities of the offender to function in the community generally, and as such, the work to be involuntarily performed may be done at any number of locations rather than the restricted categories provided for with CSO's.

For these reasons and others which I shall detail, I find I am not bound to follow, nor can I accept the comments of McInerney J in *Hill's* case that it would be unthinkable to allow a reporter to be examined about an adverse opinion concerning the suitability of an offender for some sentence other than imprisonment.

The majority in *Hill* considered, as a general rule, rather than as an absolute one, that a superintendent need not be obliged publicly to justify an opinion as to fitness. However, as I have concluded this Act is distinguishable from its predecessor. I move to *R v Carlstrom* [1977] VicRp 44; (1977) VR 366 which is pertinent and persuasive. The Full Court (Young CJ, Menhennitt and Kaye JJ) considered the access an accused person should have to a pre-sentence psychiatric report called for by the trial judge). In this case the trial judge had relied upon such a report in determining sentence but had not shown that report to the offender or his counsel. Of that fact the Court said (p367):

> "The failure to make this material available to the applicant's advisers produced a very unsatisfactory state of affairs which, we trust, will never occur again. It is fundamental that, save in exceptional circumstances, counsel for a prisoner should have an opportunity of seeing **[16]** and commenting upon any material which is provided to the trial judge, although in some cases it is necessary to obtain from counsel an undertaking not to disclose, for instance, a psychiatric report to his client. If there be a case in which the judge thinks that, for some exceptional reason, a report or some part thereof should not be made available to a prisoner's legal advisers, the trial judge should tell them that he has it and should give most explicit reasons for not allowing them to see it."

The judges, prior to the publication of this report authorized the following addendum (p368):

> "The matter dealt with in this case was a psychiatric report and the court's insistence that counsel for a prisoner should have an opportunity of seeing and commenting upon any material which is provided for a trial judge was based, as Kaye J said in *R v Licata & Regan* (Full Court, 28th February 1977, unreported), upon the principle that it is, as a general rule, repugnant to basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings. The above judgment, however, recognized that there may be cases where the withholding of material is justified. The judgment did not refer particularly to pre-sentence reports obtained pursuant to s507(6) of the *Crimes Act* 1958, the disclosure of which is a matter for the discretion of the trial judge: see *Social Welfare Regulations* 1962, Division VI, Part V, (a), 14 and *R v Webb* [1971] VicRp 16; (1971) VR 147, at p152 but the same principles as to the exercise of the discretion are applicable - Ed VR."

R v Webb (1971) is also a Full Court decision (Winneke CJ, Pape and Lush JJ). The Court made the following observation as to the use to which pre-sentence reports should be put (p152).

> "... the *Crimes Act* 1958 makes provision for the Court to seek a report of this kind. The judge, therefore, was perfectly entitled by law to call for the report and in view of the terms of the Act making that provision, there can be no doubt that he was entitled to make use of the report when he received it. The *Social Welfare Regulations* provide that the judge shall have a discretion when he receives such a

report to decide whether he will or will not disclose it to the parties. If a **[17]** trial judge in the exercise of that discretion is of opinion that the report should be disclosed to the parties, it should, in our view, be done before the sentence is pronounced in order that the parties may have an opportunity at that stage of dealing, if they so desire, with any of the matters stated in the report."

I am of the view the principle as expressed by the Full Court in *Carlstrom* viz. "as a general rule, it is repugnant to basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings", encapsulates the common law and sets the parameters around which s28 should be interpreted.

Preparation of a report by a CCO is undoubtedly an administrative function. The purpose of a report is to provide material upon which a court may exercise its judicial function of imposing a penalty. The structure of s28 is to require a sentencer (not the CCO) to be satisfied that the offender is a suitable person for the imposition of a CBO. The statutory requirement is for a CCO to render the report, both as to the availability of facilities and the suitability of the offender. The section does not devolve upon the CCO the sentencing function. If that were to be the case, very clear and explicit statutory expression would be required. The discretion of the sentencer, whether or not to grant a CBO, must be exercised in a judicial way by a judicial person, not by a CCO in an administrative way. For example, there will be many instances where a CCO reports that an offender is suitable and facilities are available for the imposition of a CBO, but a sentencer, after having heard the entire case and all the witnesses, may nevertheless exercise his discretion adversely to the offender and decline to impose a CBO.

Similarly, the opinion of a **[18]** CCO that a person is unsuitable for an order cannot usurp the discretion invested in the sentencer by s28. As has been observed in the psychiatric field, opinion-givers should remain on tap and not on top. An adverse report by a CCO renders the reporter subject to examination by the sentencer, in exactly the same way as would a favourable report. A sentencer could, on his own volition, examine a CCO and conclude that an adverse opinion of a CCO was unfounded. The sentencer, despite the view of the officer, could find the offender a suitable person for the imposition of a CBO. There can be no doubt that an adverse report should only be concluded in compliance with rules of procedural fairness and natural justice, particularly so when the likely consequence is incarceration. Although if the first request about which the Court is to be satisfied, namely the availability of facilities, is not established, there would be no point in imposing a CBO. Those remarks relate to a CCO's report dealing with the "suitability for a CBO".

In this case, the structure of the 1985 Act must allow a person adversely affected by a CCO's report a chance to be heard. In my view s28 taken in its context, does not exclude such a result. Common law requirements as to procedural fairness and natural justice prevail. The only venue at which the adverse opinion can effectively be challenged is the court during its sentencing process, that is, after the report has been delivered to the court. This conclusion necessarily imputes the right of an offender or his counsel to examine the conclusions and the bases upon which they are made. I have purposefully adopted the word "examine" **[19]** rather than "cross-examine", because the report of a CCO is a product of s28 and is not of the Crown or defence. The opinions of a reporter are not critical to the issues of proving the charge and are not to be likened to evidence in chief called by the Crown. For these and other practical reasons, the author of a report should not be subjected to cross-examination, as is commonly understood, either by the offender or his counsel.

Two matters of public policy need to be reconciled. On the one hand is the need for CCO's to be fearless and frank in expressing their opinions concerning the suitability of offenders for CBO's. On the other, is the basic requirement that a court should not act upon untested or unsubstantiated opinion. However, the two principles can be accommodated. The mere statement of an adverse opinion should not bind a court as to one of its sentence options, thus examination of such views should be permitted and CCO's should be prepared to justify their opinions. An offender or his counsel should not be permitted to examine a CCO in a fishing or oppressive way. The purpose of the examination should be restricted to testing the validity of the adverse opinion and the material upon which it is based. However, a CCO must necessarily rely upon the reports of others when coming to his or her own view as to "the suitability" of an offender. It would not be appropriate to permit the calling of those persons as witnesses or permit attacks upon their

credit unless the offender or his counsel have clear instructions and material upon which to substantiate those attacks.

It is possible to envisage cases where an offender would allege against a CCO personal **[20]** *animus* against him. CCO's should not, however, be subject to baseless personal or professional attack. The sentencer should not permit examination along those lines. A desirable procedure would be for the offender or his counsel to indicate to the sentencer the areas of contention relating to the CCO's report, and to do so in the absence of the author. In most, but not all cases, it would be appropriate for the sentencer to conduct the examination and make the enquiries as suggested by the offender rather than to allow directionless examination. The objective of permitting such examination of a CCO is to provide the court with material upon which it may exercise one of its sentencing options, namely a CBO. The examinations should not go to penalty generally, a sentencer must ensure that any permitted examination is restricted to relevant and pertinent matters.

In this case the cryptic report of the CCO warranted further examination. The officer reported that the behaviour of the offender was "unreliable and uncooperative" and that indicated his unsuitability for a CBO. However, a further comment in the report reads "barely managed to complete his probation". That comment appears to indicate a punitive component in the expressed opinion, namely that if a person barely manages to complete their probation they should be punished further by being ineligible for a CBO. On the other hand, that conclusion as to unsuitability may be justified, on the basis that being uncooperative whilst on probation, indicates the offender is likely to be equally uncooperative in the service of a CBO. On either view, the magistrate should have given the offender or his counsel the opportunity of examining the reporter and of making further submissions. **[21]** For these reasons the order nisi will be made absolute and the matter returned to the magistrate for sentencing in accordance with the terms of this judgment.

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