

13/00; [2000] VSC 101

SUPREME COURT OF VICTORIA

DPP v DEVLIN & ORS

Beach J

21, 30 March 2000 — (110 A Crim R 438)

SENTENCING – COMBINED CUSTODY AND TREATMENT ORDER BREACHED – OPTIONS AVAILABLE ON SENTENCE – SUSPENDED SENTENCE IMPOSED – WHETHER WITHIN POWER: *SENTENCING ACT 1991*, SS18Q, 18W, 105.

Section 18W of the *Sentencing Act 1991* ('Act') provides that where a person has breached a combined custody and treatment order (CCTO), the court may impose a fine and in addition must either:

- (a) confirm the order originally made; or
- (b) order the offender to serve in custody the whole part of the sentence that was to be served in the community.

The court must exercise option (b) unless it is of the opinion it would be unjust to do so in view of any exceptional circumstances which have arisen since the CCTO was made. On the breach of a CCTO, D. was ordered by a magistrate to serve in custody the whole part of the sentence of six months that was to have been served in the community. On appeal, the judge, in finding that D's attempts at rehabilitation amounted to exceptional circumstances, sentenced D. to an aggregate period of 12 months' imprisonment suspended for a period of two years. The judge stated that this sentence was imposed "using powers under section 105" of the Act. Upon the return of a summons upon an originating motion to quash the order—

HELD: Application granted. Decision of County Court quashed. Referred for rehearing.

1. When a court is dealing with breach of a CCTO, the section which must be applied is s18W of the Act and not s105.

2. If the judge took the view that D's rehabilitative behaviour amounted to exceptional circumstances, the appropriate order to have made was one confirming the original order. There was no power to impose a suspended sentence.

BEACH J:

1. This is the return of a summons filed upon an originating motion whereby the plaintiff, the Director of Public Prosecutions, seeks an order in the way of *certiorari* quashing the order of the County Court of Victoria made on 14 December 1999 whereby it was ordered that the first defendant Catherine Jean Devlin (Devlin) be sentenced pursuant to the powers given to the Court by s105 of the *Sentencing Act 1991* (the Act) to an aggregate of 12 months' imprisonment such sentence to be suspended for a period of two years, and the matter remitted to the County Court to be dealt with according to law.

2. On 11 May 1998 Devlin appeared before the Magistrates' Court at Dandenong where she pleaded guilty to 19 charges arising from six different incidents.

3. The learned Magistrate sentenced Devlin to an aggregate sentence of 12 months' imprisonment pursuant to s9 of the Act but ordered that the sentence be served by way of a Combined Custody and Treatment Order under s18Q of the Act.

4. Sub-section (1) of s18Q reads:

"18Q. Combined custody and treatment order

(1) If a person is convicted by a court of an offence and the court—

- (a) is satisfied that drunkenness or drug addiction contributed to the commission of the offence; and
- (b) is considering sentencing him or her to a term of imprisonment of not more than 12 months; and

(c) has received a pre-sentence report—the court, if satisfied that it is desirable to do so in the circumstances, may impose a sentence of imprisonment of not more than 12 months and order that not less than 6 months of that sentence be served in custody and the balance be served in the community on the conditions attached to the order."

5. The Magistrate ordered that the period to be served in custody was to be six months with the balance to be served in the community and declared that 97 days was to be reckoned as a period of imprisonment already served under the sentence (see s18(4) of the Act.)

6. On 30 April 1999 Devlin again appeared before the Magistrates' Court at Dandenong where she was convicted of causing injury contrary to s18 of the *Crimes Act* 1958 arising from an incident which occurred on 16 September 1998, and was sentenced to be imprisoned for 42 days. At the same time Devlin was dealt with for breach of another sentence which had been imposed on her on 8 July 1998. However, at that time she was not dealt with for breach of the Combined Custody and Treatment Order which had been imposed on 11 May 1998.

7. On 13 September 1999 Devlin appeared at the Magistrates' Court at Dandenong in relation to the breach by her of the Combined Custody and Treatment Order.

8. The order had been breached by the offence for which she had been convicted on 30 April 1999 and by her failure to comply with treatment conditions as required by the Combined Custody and Treatment Order.

9. On that occasion Devlin was ordered to serve in custody the whole part of the sentence of six months that was to have been served in the community.

10. Devlin appealed to the County Court in respect of the order. It was that appeal which was before the County Court on 14 December 1999.

11. At the conclusion of the hearing of the appeal the learned County Court Judge said:

"It seems that you have made some attempt to get your life together. I hesitate to throw you back on the rubbish heap while you are continuing in that course. The Magistrate's order is set aside and you are sentenced, using powers under section 105 of the *Sentencing Act*, to an aggregate of 12 months' imprisonment suspended for a period of two years. Do you understand? Would you explain to her what will happen if she offends during that time?"

12. Section 105 of the Act reads:

"105. Appeal against sentence imposed on variation or breach

A person sentenced by a court in a proceeding for variation or breach of a sentencing order has a right of appeal against sentence as if—

- (a) the court had immediately before imposing it found the person guilty, or convicted the person, of the offence in respect of which the sentencing order was originally made; and
- (b) the sentence were a sentence imposed on that finding of guilt or conviction."

13. It is said by the Director that in taking the view he did of the matter the learned Judge fell into error; that the powers he was required to exercise were not those given him by s105 of the Act but by s18W of the Act the relevant sub-sections of which read:

"18W. Breach of combined custody and treatment order

(1) If at any time while a combined custody and treatment order is in force the offender fails without reasonable excuse to comply with any condition of it, the offender is guilty of an offence for which he or she may be proceeded against on a charge filed by a prescribed person or a member of a prescribed class of persons...

(5) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a level 10 fine and in addition must either—

- (a) confirm the order originally made; or
- (b) whether or not the offender has served any part of the sentence in the community, order the offender to serve in custody the whole part of the sentence that was to be served in the community.

(6) Despite anything to the contrary in sub-section (5), if on the hearing of a charge the court finds the offender guilty of the offence it must, in addition to any fine it may impose under sub-section (5), exercise the power referred to in paragraph (b) of that sub-section unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances which have arisen since the combined custody and treatment order was made."

14. In my opinion that is clearly so.

15. Section 105 merely gives a person sentenced by a court in a proceeding for variation or breach of a sentencing order, a right of appeal against the sentence which that person might otherwise not have possessed.

16. But when one is dealing with breach of a Combined Custody and Treatment Order the section which must be applied is s18W.

17. If the Court, including the County Court, finds the offender guilty of the offence then it is mandatory that it confirm the order originally made or order that the offender serve in custody the whole part of the sentence that was to be served in the community.

18. However, so far as the latter option is concerned, and despite what on the face of it is the mandatory aspect of ss(5), the Court is given a discretion.

19. If it is of the opinion that it would be unjust to order the offender to serve in custody the whole part of the sentence that was to be served in the community in view of exceptional circumstances which have arisen since the combined custody and treatment order was made, it may refrain from doing so.

20. In the present case the learned Judge took the view that as Devlin had made some attempt to get her life together — and one presumes he was talking about Devlin's behaviour since the Combined Custody and Treatment Order was made — he would not make an order the effect of which would be to require her to serve further time in custody.

21. If the learned Judge had taken the view that Devlin's behaviour in that regard amounted to exceptional circumstances, then the appropriate order for him to have made would have been one confirming the original order.

22. In the circumstances, the application of the Director is granted, the decision of the County Court of Victoria made on 14 December 1999 is brought up into this Court and quashed.

23. I order that the appeal be referred back to the County Court for re-hearing according to law.

24. By his summons the Director seeks that the Court also make two directions in the matter. As the matter presently stands I am not persuaded that it is necessary to do so. However, as that aspect was not debated by counsel for the Director or Devlin, indeed counsel for Devlin offered no opposition to the Director's application, I will reserve liberty to the Director to re-mention the matter to me if he is so advised.

25. The only application made by counsel for Devlin was that I grant Devlin a certificate pursuant to the *Appeal Costs Act* 1998 in respect of her costs of the County Court appeal and the costs of this proceeding.

26. I am unable to find any section in that Act which gives me the power to do so and the application must therefore be refused.

27. I order that the first defendant Catherine Jean Devlin be bailed on her own undertaking with condition that she appear in the County Court of Victoria on a date to be advised in writing by the Director of Public Prosecutions, that she reside at 37 Alexander Avenue, Dandenong and that she notify the Officer in Charge of the County Court Appeals Section of the Office of Public Prosecutions within 48 hours of any change of address.

28. I make no order as to the costs of the proceeding.

APPEARANCES: For the plaintiff DPP: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions. For the first defendant Devlin: Mr A Brand, counsel.
