

16/99; [1999] VSCA 122

## SUPREME COURT OF VICTORIA — COURT OF APPEAL

***R v McLACHLAN***

Winneke P, Phillips and Chernov JJ A

3 August 1999 — [1999] 2 VR 665

**CRIMINAL LAW – SENTENCING – INTENSIVE CORRECTION ORDER BREACHED BY OFFENCES PUNISHABLE BY IMPRISONMENT – OFFENDER CONTINUED TO COMPLY WITH FORMAL TERMS OF ICO – OFFENDER LATER ARRESTED FOR FURTHER OFFENDING AND IMPRISONED – OFFENDER COMMITTED TO PRISON FOR UNEXPIRED TERM – "EXCEPTIONAL CIRCUMSTANCES" – WHETHER COMMUNITY WORK AND COMPLIANCE WITH ICO AMOUNTED TO EXCEPTIONAL CIRCUMSTANCES – WHETHER UNEXPIRED PORTION SHOULD HAVE BEEN REDUCED: *SENTENCING ACT 1991*, S26(3A), (3B).**

In January 1998, McL was sentenced to 12 months' imprisonment to be served by way of an Intensive Correction Order (ICO). On 3 February, McL committed further offences relating to the driving of a motor vehicle and was fined. McL continued to comply with the formal terms of the ICO in that he reported twice a week, attended drug rehabilitation courses and performed a total of 345 hours of unpaid community work. On 9 October 1998, McL was sentenced to a term of imprisonment in relation to trafficking in cannabis which McL had engaged in since October 1997 thus continuously breaching the ICO. When the breach of ICO proceedings came on for hearing, it was submitted that McL's compliance with the ICO amounted to "exceptional circumstances" making it unjust to commit McL to prison for the unexpired portion. Further, it was submitted that the unexpired portion should have commenced from 9 October. These submissions were rejected; however, the judge exercised his discretion in McL's favour by ordering that the relevant sentences be served concurrently, thereby recognising the partial compliance with and observation of the ICO. Upon application by McL for leave to appeal—

**HELD: Application refused.**

1. The judge was not in error in deciding that in the context of this case McL's community work did not constitute "exceptional circumstances". If McL's submission on this point is correct, it would mean that an offender could avoid serving the unexpired portion merely by performing community work for the duration of the order (or a substantial part of it) yet during the same period thumb his or her nose at the court by continuing to commit offences which constitute a breach of the order. Such a result would set at nought the policy of this part of the legislation which requires an offender who has relevantly breached the order to serve out the balance of the original term in prison.

2. The judge did not have a discretion to order that the unexpired portion be served from 9 October 1998. He was required to commit McL to prison for the unexpired portion of the original sentence as at the date of the breaching offence. No reduction in the unexpired portion was authorised.

**WINNEKE P:**

1. Chernov JA will deliver the first judgment in this application.

**CHERNOV JA:**

2. On 9 December 1998, the applicant pleaded guilty to breaching a relevant condition of an Intensive Correction Order ("ICO") and a suspended sentence imposed on him on 29 January 1998, by committing during the period of the orders, offences punishable by imprisonment. As a consequence, the applicant was sentenced to imprisonment for the period of one month of the suspended sentence and for 360 days being the unexpired portion of the term of imprisonment which was ordered to be served by way of an ICO. His Honour ordered that the 360 days' imprisonment be served concurrently with the incomplete sentence the applicant was then serving (and to which I will refer later) and the one-month sentence.

3. The applicant seeks leave to appeal against those sentences on a number of grounds which essentially involve the interpretation of s26 of the *Sentencing Act 1991* ("the Act") and on the ground that the sentence was manifestly excessive.

4. The applicant first came before his Honour on 20 January 1998 when he was 21 years of age. He pleaded guilty to 12 counts of burglary and two counts of attempted burglary which were committed in the Aspendale and Seaford areas between 6 May and 13 June 1997.

5. The applicant admitted 19 prior convictions from four court appearances between 18 August 1994 and 15 June 1994. They included convictions for theft, criminal damage and obtaining property by deception.

6. The burglary offences committed by the applicant involved forced entry to premises, the taking of goods and their exchange for heroin which was then used by him. When the applicant was interviewed by the police he made full admissions and co-operated by showing them the premises that he had burgled. The value of the goods taken amounted to approximately \$50,000. Some of them were recovered and others were not. The victims were insured and generally, made successful claims on their insurers.

7. His Honour adjourned the hearing of the matters before him to 27 January 1998. After hearing a plea in mitigation of sentence in respect of the burglary charges and in respect of an appeal from an order of the Magistrates' Court made on 22 October 1997 in an unrelated matter, his Honour ordered that a pre-sentence report be obtained in relation to the applicant and adjourned both matters for sentencing to 29 January 1998.

8. In considering what appropriate sentence to impose on the applicant, his Honour took into account a range of matters including his age (at the time of the offences) of 20 years, his background and the fact that in his Honour's view, the applicant had made no real effort to overcome his drug problem. His Honour considered that in the circumstances, he had only two options in relation to sentencing the applicant. One was to commit him to a youth training centre and the other was to impose a term of imprisonment, but allow him to serve it by way of an ICO. Somewhat reluctantly (his Honour called it "a line-ball situation") he sentenced the applicant in relation to the burglary offences to a total effective sentence of 12 months' imprisonment to be served by way of an ICO. He made the applicant fully aware that if he breached the conditions of the order or if he offended again he would be in breach of the ICO and would be required to serve the term of imprisonment imposed on him. In relation to the applicant's appeal against the order of the Magistrates' Court made on 22 October 1997, his Honour allowed that appeal but re-imposed the same orders except that he suspended the one month's term of imprisonment for one year. As I understand it, no complaint is made by the applicant about the sentences so imposed by his Honour.

9. Very shortly after being so sentenced, on 3 February 1998 the applicant committed a number of offences relating to the driving of a motor vehicle, including driving whilst unlicensed, driving an unregistered motor vehicle, attaching false number plates to the vehicle and a number of road traffic offences. The charges were brought on before the Magistrates' Court at Frankston on 10 June 1998. The applicant pleaded guilty to them and was fined.

10. Notwithstanding these events, the applicant continued to comply with the formal terms of the ICO in that he reported at the Community Corrections Centre ("the Centre") twice a week, attended the drug rehabilitation classes, and performed 12 hours a week community work. The Centre was aware of the driving and related offences that had been committed by the applicant on 3 February 1998, but what was not known and what is common ground, is that the applicant also engaged in trafficking and the consumption of drugs (since at least 10 October 1997). On 9 October 1998, he was arrested in relation to trafficking in cannabis and consequently ceased attending the Centre.

11. On 19 October 1998, the applicant pleaded guilty in the Magistrates' Court at Frankston to the drug offences which were committed by him between 10 October 1997 and 9 October 1998. He admitted to selling during this period, 832 grams of cannabis for a total price of \$20,800. He was sentenced on 19 October 1998 to three months' imprisonment (with 11 days counted as having been served). On that basis he was due to complete the sentence on 7 January 1999.

12. On 18 November 1998, however, the applicant came before his Honour and pleaded guilty to offences committed in relation to the breaches of the suspended sentence and the ICO. His Honour had before him the report of the Centre which, *inter alia*, calculated that the unexpired portion of the original sentence was 360 days, being the period between 3 February 1998 and the end of the ICO, which was 28 January 1999. The judge heard submissions from the Crown and from the applicant's counsel and adjourned the matter to 9 December 1998, when he sentenced the applicant as I have previously outlined.

13. His Honour found that:

(a) The date of the offence for the purpose of s26(1) of the Act was 3 February 1998, being the date of the driving offence in respect of which the applicant was convicted on 10 June 1998. In this respect, his Honour arguably erred in favour of the applicant because he had admitted to committing relevant offences since at least 29 January 1998.

(b) The applicant's compliance with the ICO did not amount to "exceptional circumstances" within s26(3B) of the Act, having regard to the fact that he was breaching the order on a continuous basis throughout the whole period.

(c) He was therefore bound by sub-s(3B) to apply sub-s (3A)(c) and cancel the ICO and commit the applicant to imprisonment for 360 days (calculated from 3 February 1998) and for the one month in relation to the suspended sentence.

(d) Section 26(4) of the Act, however, gave the court a discretion in relation to cumulation of sentences. In the circumstances, his Honour proposed to exercise that discretion in the applicant's favour by ordering that the relevant sentences be served concurrently, thereby recognising his partial observation of the ICO.

14. In the result, his Honour ordered:

(a) In respect of the breach of the suspended sentence – that the applicant be imprisoned for one month.

(b) In respect of the breach of the ICO – that the applicant be imprisoned for 360 days to be served concurrently with the incomplete sentence that the applicant was then serving (in respect of the drug trafficking conviction) and with the one month's sentence originally imposed by the Magistrates' Court.

15. His Honour took the view that he had no power to back-date the commencement of the sentences to 18 November 1998. Consequently, he ordered that they commence on 9 December 1998.

16. In his notice of application for leave to appeal, the applicant listed seven grounds on which he intended to rely in support of his application. In the end, however, grounds 1, 2 and 6 were not argued. In terms, the remaining grounds related only to the sentence in respect of which the ICO was made (although it was obvious that the same position would apply to the suspended sentence). Consequently it is sufficient for present purposes if I deal only with the arguments put on behalf of the applicant in so far as they relate to the ICO. Before turning to the argued grounds, it is convenient to deal briefly with the operation of the relevant provisions of the legislation and some aspects of his Honour's decision.

17. Having regard to the circumstances of the case that were before his Honour, sub-ss(3A)(c) and (3B) of the Act required him to commit the applicant to prison for such portion of the original sentence of 29 January 1998 that was "unexpired at the date of the offence under sub-s.(1)" unless he was of the opinion that it would be unjust to do so "in view of any exceptional circumstances which had arisen since the ICO was made". If his Honour were to act under sub-s(3A)(c) and order imprisonment of the applicant, then, unless he ordered otherwise, sub-s(4), almost of its own force, required that the term be served cumulatively on the term which the applicant was serving as a result of the three months' sentence that was imposed on him by the Magistrates' Court at Frankston on 19 October 1998.

18. His Honour held that in the particular case before him, there were no "exceptional circumstances" for the purposes of sub-s(3B) but that he would, nevertheless, exercise his discretion under sub-s(4) (and s36(6)) in favour of the applicant by ordering that the 360 days of imprisonment (and the one month suspended sentence) be served concurrently with the three months' sentence. His Honour thereby effectively shortened the applicant's sentence by approximately one month. He so exercised his discretion in order to give the applicant some credit for the time spent by him in carrying out the punitive aspect of the ICO, namely, unpaid community work. Had his Honour not done so, it seems that the 360 days' sentence and the one month sentence would have to be served by the applicant after the completion of his three month sentence, namely, on or after 7 January 1999. Thus, his Honour effectively allowed in the applicant's favour one-half of the time which he claims he served under the ICO. The applicant

has contended that he served 345 hours of unpaid community work. That translates to 43 working days or approximately eight working weeks and, as I have said, his Honour effectively took one-half of that period into account by ordering concurrency of the relevant sentences.

19. Turning to the contentions put on behalf of the applicant on the appeal, the principal argument was concerned with his Honour's allegedly erroneous interpretation of "exceptional circumstances" in sub-s(3B) and his failure to give any or sufficient recognition to the fact that the applicant had performed 345 hours of community work under the ICO. It was also argued that the sentence was manifestly excessive.

20. It was submitted that his Honour did not regard, but should have regarded, the community work so performed by the applicant as "exceptional circumstances" within the meaning of sub-s(3B), and that his Honour should have exercised his discretion by ordering that the applicant serve only that part of the original sentence not from 3 February 1998, but from 9 October 1998. Moreover, it was said as part of the argument under ground 4, that his Honour wrongly confined the term "exceptional circumstances" to circumstances that "relate to and diminish the significance of the breach offending".

21. I have already mentioned that his Honour had regard to the community work carried out by the applicant but held that, in the circumstances of the case, it did not constitute "exceptional circumstances" within the meaning of the relevant sub-section. That was because, according to his Honour, the applicant, although apparently complying with the ICO, was in reality drug trafficking and thus continuously breaching the order. Consequently, his Honour did not regard that level of compliance as "exceptional circumstances" within the meaning of the relevant sub-section. It is important to recognise, however, that his Honour did not hold that compliance with an ICO and the doing of community-based work under it could not amount to "exceptional circumstances".

22. In my view, his Honour did not err in deciding that, in the context of this case, the applicant's community work did not constitute "exceptional circumstances". If the applicant is correct in his submission on this point, it would mean that an offender could set at nought the policy of this part of the legislation which requires an offender who has relevantly breached the order, to serve out the balance of the original term in prison. Such offender could avoid serving the balance of that term merely by performing community work for the duration of the order, or a substantial part of it, yet during the same period thumb his or her nose at the court by continuing to commit offences which constitute a breach of the order. It is clear that this would contravene the aims of the relevant provision dealing with ICO's, as can be seen from their terms and from the Second Reading Speech of the Attorney-General.

23. Sub-ss(3A) and (3B) were inserted into the Act by s13(3) of the *Sentencing and Other Acts (Amendment) Act 1997* being Act No.48/1997, which was assented to on 11 June 1997, which substituted entirely the previous sub-ss26(2), (3) with sub-ss26(2)-(3C). During the Second Reading Speech on 24 April 1997, the Attorney-General said this when introducing the relevant amendments:

"Analysis of present sentencing practices indicated that in many cases an offender who has breached a suspended sentence by committing another offence will not be ordered to serve that period of imprisonment by the courts. This state of affairs erodes the effectiveness of this sentencing order and brings the legal system into disrepute. The suspended sentence order is intended to provide an offender with one last chance, yet in practice this has not been the case. The bill amends the provisions to provide that unless there are exceptional circumstances, an offender who has breached a suspended sentence by committing another offence will be imprisoned.

A similar amendment is made to deal with the situation where an offender breaches an intensive correction order ... by committing a criminal offence punishable by imprisonment. This recognises that an intensive correction order ... involves a period of imprisonment served in the community. Offenders who breach these orders by committing further offences will be sent to gaol unless there are exceptional circumstances."

24. But, even if the applicant is correct and there were "exceptional circumstances" within the meaning of sub-s(3B), it is doubtful if the court had the discretion to do what the applicant submits, namely, order that he serve part of the original sentence but only from 9 October 1998.

This period would not be the unexpired term within the meaning of sub-s(3A)(c). Such an order would not amount to a variation under sub-s(3A)(a), nor would it fit within sub-s(3A)(c). Thus, there does not seem to be any statutory basis for the court to make the sort of order that was sought by the applicant, even if there were "exceptional circumstances" prevailing in this case. Consequently, the applicant's attack on this aspect of his Honour's conclusion must fail.

25. For completeness I note that his Honour's statement that he confined "exceptional circumstances" to circumstances that relate to and diminish the significance of the offence which constituted the breach of the order, was made in the context where counsel for the applicant sought to rely on material which showed the applicant's relevant conduct in prison which the applicant claimed constituted "exceptional circumstances". In response to that submission, his Honour made the above statement, but he was careful:

(a) to confine his remarks to the circumstances of the present case (or, at most, to "the normal course of events"); and

(b) to make it clear that he was of the view that "exceptional circumstances" referred to circumstances that related to the breach rather than to events that may have occurred after the applicant started his term of imprisonment which was imposed on him as a consequence of the breach.

26. In my view, therefore, his Honour's interpretation of "exceptional circumstances" in sub-s(3B) was not unduly narrow as was contended for by the applicant.

27. It was submitted under cover of ground 3 that his Honour failed to give "sufficient, if any, weight to the applicant's performance of the ICO when exercising his powers pursuant to s26(3B)". I have already mentioned that his Honour gave no weight to the applicant's community-based work for the purposes of that sub-section simply because he did not regard that work as constituting "exceptional circumstances". Since in my view his Honour did not err in that conclusion, the applicant has not made out ground 3. For the above reasons, the applicant has also not made out ground 4, under cover of which he asserted that his Honour erred in not finding that it would be unjust to commit the applicant to prison for the unexpired portion of the original term of imprisonment. The same fate should befall, in my view, ground 5, in which it is claimed that his Honour should have exercised his discretion under sub-s(3B) in favour of the applicant by fixing the unexpired portion of the term from the date the applicant was arrested on drug trafficking, namely 9 October 1998.

28. The applicant also argued (by way of ground 7) that the sentences by which the applicant was imprisoned for 360 days and the one month relating to the suspended sentence were manifestly excessive having regard to the community work performed by him under the ICO, his pleas of guilty to the breaches referred to, his youth and the prospect of rehabilitation which is evidenced by the programmes which he had undertaken while in prison. For the reasons given earlier, however, his Honour had no legal option but to commit the applicant to prison for the unexpired portion of the original sentence and for the period of the suspended sentence. Consequently, those sentences could not be said to have been manifestly excessive.

29. For those reasons I would dismiss the application.

**WINNEKE P:**

30. I agree.

**PHILLIPS JA:**

31. I agree also. I would only observe this. Section 18W of the *Sentencing Act* deals with breach of a combined custody and treatment order, s26 with breach of an intensive correction order, s31 with breach of an order suspending sentence and s7 with breach of a community-based order. There are some similarities in all four of these sections, and one may add to them s25, which does not appear to turn on breach at all. But there are significant differences, and one of them is that on breach of an intensive correction order the court is not expressly enjoined (under s26, that is,) to take into account the extent to which the offender has complied with the order before its cancellation. (See also s31, but contrast s25(4) and s47(4).) Such compliance may, perhaps, in some cases bear upon whether there are "exceptional circumstances" within the meaning of s26(3B), but where it is determined that there are no "exceptional circumstances", the court must



order that the offender serve that portion of the sentence that was unexpired at the date of the breaching offence. No reduction is authorised in that unexpired portion. Here, the judge made orders for concurrency that militated against the full rigor of s26.

32. Despite Mr Keating's earnest argument, I can see no error in his Honour's determination that there were no "exceptional circumstances" in this instance, and, that said, the complaint that the unexpired portion of the sentence should have been reduced in some way must fail.

**WINNEKE P:**

33. The formal order of the Court will be that the application for leave to appeal is refused.

**APPEARANCES:** For the Crown: Miss ME Sexton, counsel. PC Wood, Solicitor for Public Prosecutions. For the applicant: Mr BR Keating, counsel. Slink & Keating, solicitors.

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