33/84

SUPREME COURT OF VICTORIA

R v MAGISTRATES' COURT at SUNSHINE & ANOR; ex parte KIDSTON

Gray J

15 August 1984

CRIMINAL LAW – SENTENCE – ATTENDANCE CENTRE ORDER – OFFENDER SUBSEQUENTLY CONVICTED AND IMPRISONED – APPLICATION FOR CANCELLATION OF ORDER – APPLICATION GRANTED AND ORDER CANCELLED – ORDER THAT OFFENDER SERVE UNEXPIRED PORTION AT ATTENDANCE CENTRE UPON RELEASE FROM PRISON – WHETHER COURT CAN IMPOSE FINE IN LIEU OF UNEXPIRED TERM – OPTIONS AVAILABLE WHERE ORDER CANCELLED: *PENALTIES AND SENTENCES ACT* 1981, S40; *MAGISTRATES' COURTS ACT* 1971, S56.

In March 1984, J. was convicted of driving whilst disqualified and sentenced to be imprisoned for six months, such sentence to be served by way of attendance at an attendance centre. In June 1984, J. was again convicted and sentenced to one month's imprisonment, such sentence to be served in prison. In July 1984, an application was made to the Court for cancellation of the Order made in March on the ground that J. was in custody since the order was made. The court cancelled the order and further ordered that on J's release from custody, he serve the unexpired portion at an attendance centre, notwithstanding that the superintendent's opinion of J. was unfavourable. Upon application for issue of a writ of mandamus—

HELD: Order absolute.
(1) Where a court cancels an attendance centre order, it is required to –
(a) determine the extent to which the offender's attendance shall count as service of the term of imprisonment originally imposed; and
(b) the portion of the term which will he deemed to be unexpired.

(2) A court may determine whether the attendance counts as service of the whole of the term of imprisonment or any lesser part thereof. In exceptional circumstances a court could determine that the offender's attendance counted as service of the entire term of imprisonment.

(3) When the court determines the extent of the unexpired term (if any), it may –
(a) commit the offender to prison for that term;
(b) impose a penalty for breach of the *Penalties and Sentences Act* 1981 or the *Regulations*.
(c) impose a term of imprisonment not exceeding 12 months in addition to the unexpired term; and
(d) if offender is a suitable person, permit the serving of the terms of imprisonment by way of attendance order to commence within seven days of the making of the order.
(4) As the cancellation of an attendance order does not constitute an "offence" and does not result in a "conviction", it is not open to a Court to substitute a fine for the unexpired term of imprisonment.
***Bodna v Edney* (MC 29/84) not followed.**
***R v Hebaiter* [1981] VicRp 39; [1981] VR 367, applied.**

GRAY J: *[After setting out the facts, the relevant provisions of s40 of the* Penalties and Sentences Act *1981 and portions of the affidavit of the Superintendent of the Attendance Centre, His Honour continued]:* … **[5]** It is now necessary to consider the orders made by the learned Magistrate in the light of the relevant legislation. First, the learned Magistrate cancelled the attendance order. He was clearly entitled to make this order under s40 of the *Penalties and Sentences Act* 1981 upon being satisfied that Johnstone was in custody under a sentence of imprisonment.

It has been held by the Full Court in *R v Hebaiter* [1981] VicRp 39; [1981] VR 367, that an order for cancellation of an attendance order does not leave standing the sentence of imprisonment, but leaves a situation where, for the time being, there is no operative sentence at all. That means that when the offender is "further dealt with" (s40(3)) the Court is required to start afresh. In doing so, the Court is confined, in my opinion, to the powers conferred by s40(4). Before exercising those powers, s40(2) requires the Court to determine the extent to which the offender's attendance at the attendance centre shall count as service of the term of imprisonment originally imposed and the portion of the term which will be deemed to be unexpired.

In carrying out the exercise prescribed by s40(2), the Court could, as it seems to me, determine that the offender's attendance at the attendance centre shall **[6]** count as service of the whole of the term of imprisonment or any lesser part thereof. In the former event, of course, there will be no deemed unexpired term. Having carried out the exercise prescribed by s40(2), the Court must then consider what course should be taken to "further deal" with the offender in the exercise of the powers conferred by s40(4).

Section 40(4) is not an easy section to construe. But, in my opinion, the Court may, when the offender is or is brought before the Court, do the following:-

(i) commit the offender to prison for the unexpired term (as determined under section 40(2))

(ii) impose a penalty for any breach of Part III of the Act or the Regulations if such a breach is proved and a penalty provided for:

(iii) impose a term of imprisonment not exceeding 12 months for non-compliance with the attendance order, in addition to any term imposed under (i);

(iv) if terms of imprisonment are imposed under (i) or (iii), permit the offender to serve the aggregate thereof, if not more than 12 months, by way of attendance order. To take this course, the Court must be satisfied that the requirements of section 36 of the Act are fulfilled.

In relation to (i) above, I do not consider that it is open to the Court to impose a fine in lieu of the unexpired term of imprisonment. I mention this because it was suggested that s56(1) of the *Magistrates' Courts Act* 1971 justified the imposition of a monetary penalty. Section 56(1) gives the Court power to impose a monetary penalty where the **[7]** Court has authority to impose imprisonment "for an offence punishable on summary conviction". I do not consider that the authority given to the Court to impose a term of imprisonment upon cancellation of an attendance order falls within s56(1). The cancellation of an attendance order does not constitute an "offence" and does not result in a "conviction".

In an unreported judgment in *Bodna v Edney* (delivered 5 June 1984) Nicholson J reached a different conclusion. However, I prefer the opinion I have expressed which is, in my view, supported by the judgment of the Full Court in *R v Hebaiter* (*supra*) in particular at p376. If the Court was minded to exercise exceptional leniency, it could determine under s40(2) that the offender's attendance at the centre count as service of the entire term of imprisonment. The Court would not then commit the offender to prison under (i) above and would not be required to impose any penalty under (ii) or (iii). Upon that hypothesis, the offender would receive no punishment consequent upon the cancellation of the attendance order. I hasten to add that quite exceptional circumstances would be required to justify the Court in taking such a course. I only mention it in order to illustrate the options open to the Court under s40(4).

In this case it is quite apparent that the learned Magistrate had no jurisdiction to make the order that he did. Although having the certificate of the Director-General before him, he did not undertake the mandatory exercise prescribed by s40(2), presumably because he had concluded that Johnstone should serve the full unexpired term at an attendance centre. **[8]** In making what amounted to a fresh attendance order, the learned Magistrate failed to have regard to section 36. He did not satisfy himself that the offender was a fit person to undergo attendance at an attendance centre. This requirement could only be satisfied in this case if the Superintendent's opinion was favourable. In fact, his opinion was expressed to be unfavourable. See *R v Hill* [1983] VicRp 84; [1983] 2 VR 231.

Furthermore, the attendance order could not operate immediately. The offender was in custody and his release date was, and remains, quite uncertain. I was told from the Bar table that Johnstone is serving sentences which will terminate in October 1984 unless he is released pursuant to a pre-release scheme. In *R v Bridges*, an unreported judgment of the Full Court delivered 23 July 1984, the Court re-affirmed the opinion earlier expressed in *R v Hill* (*supra*) that the commencing date of an attendance order should not be more than seven days beyond the making of the order. This requirement, although breached in this case, hardly goes to jurisdiction. But the failure to comply with s36 clearly does.

In deference to the learned Magistrate, it should be said that he received little assistance from the Bar table in the task of construing this difficult legislation. It is because the matter must be remitted to the learned Magistrate that I have discussed the alternatives open to him. What course the learned Magistrate does take is entirely a matter for him in the exercise of the very wide discretion conferred upon him by s40(4). **[9]** I should add that the order made by the learned Magistrate did not specify the day and time at which attendance was to commence and otherwise failed to comply with s37(1). Attention should be paid to this section when attendance orders are made ...
