**29/83**

## SUPREME COURT OF VICTORIA — FULL COURT

# *R v HILL*

### Young CJ, McInerney and Southwell JJ

### 13 December 1982 — [1983] VicRp 84; [1983] 2 VR 231

**SENTENCING – GRIEVOUS BODILY HARM – CONSIDERATION OF MAKING AN ATTENDANCE CENTRE ORDER – PROCEDURE TO BE FOLLOWED WHEN MAKING AN ORDER: *PENALTIES AND SENTENCES ACT* 1981, S36.**

H. pleaded guilty in the County Court to a charge of inflicting grievous bodily harm. After hearing a plea and discussing relevant sentencing options, the judge concluded that a custodial sentence was appropriate. He then considered whether the imprisonment should be served by way of attendance at an Attendance Centre. Accordingly, he caused enquiries to be made of a superintendent of an Attendance Centre. The report was favourable, but the judge declined to make the order and sentenced H. to 18 months' imprisonment with a minimum of 12 months before eligible for parole. On appeal, the Court laid down the following guidelines when a court is considering the making of an Attendance Centre order.

***Per curiam:***
**(1) A Court should not make an attendance centre order unless it is satisfied from enquiries made from a superintendent or departmental officer of the following matters—**
**(a) that appropriate facilities are available for the offender's attendance; and**
**(b) that the offender is a fit person to undergo attendance.**

**(2) It is the Court, rather than the superintendent or departmental officer which must be satisfied of relevant matters.**

**(3) A Court cannot make an attendance centre order if the superintendent expresses the conclusion that the offender is not a fit person to undergo attendance at that attendance centre.**

**(4) The superintendent's conclusion may generally be communicated to the Court in any appropriate way. It is not necessary that he should attend Court, or if he does, that he state his conclusion on oath.**

**Per Young CJ and Southwell J:**
**(1) As a general rule, where a superintendent concludes that an offender is unsuitable, he should not be required to justify his view in public; and that an offender need not be afforded an opportunity of cross-examining a superintendent.**

**(2) Where a superintendent concludes that an offender is unsuitable, ordinarily the Court should inform the offender of that fact.**
***R v Carlstrom* [1977] VicRp 44; (1977) VR 366 considered.**

**Per Young CJ and Southwell J, McInerney J dissenting:**
**(1) As a general rule, a Court should only make enquiries of a superintendent if it has reached a provisional decision that an attendance centre order would be appropriate.**

**(2) Enquiries of the superintendent should be initiated by the Court. It is undesirable that the offender's legal representatives seek the superintendent's opinion as to the offender's suitability, in advance of the Court's determining to make an attendance centre order.**

**YOUNG CJ and SOUTHWELL J:** *[After setting out the facts and rejecting the submission in respect of self-defence, their Honours discussed the procedure to be followed when a Court is considering the making of an Attendance Centre Order pursuant to s36 of the* Penalties and Sentences Act *1981]:* … **[9]** It may be noted that s36(1) is expressed as a restriction upon the making of attendance centre orders. The Court is not to make such an order unless it is satisfied that appropriate facilities are available for the attendance of the offender at an attendance centre and that the offender is a fit person to undergo attendance at an attendance centre. The Court can only reach that satisfaction from enquiries made to the superintendent of the attendance centre the Court proposes to specify or

to an officer of the Department designated by **[10]** the Director-General for answering enquiries concerning attendance centres. We were told that no such officers had been designated so we shall not refer to them again but what we shall say about superintendents will apply generally to any such officer when designated. The fact that the enquiries are to be made to the superintendent of the attendance centre the Court proposes to specify seems clearly to contemplate that enquiries will be made only after the Court has formed a proposal to specify an attendance centre. In other words, the section contemplates that the Court will first form a provisional view that the offender before it might be permitted to serve his sentence at an attendance centre before enquiries are made of a superintendent. The Court may of course be urged to make an attendance centre order but the information of a proposal to do so is not dependent upon the making of any enquiries. Thus an offender's representative need not have any evidence from a superintendent that the offender is a fit person to undergo attendance at an attendance centre in order to urge upon the Court the making of such an order. In an appropriate case, however, it may be helpful if the offender's representative is able to inform the Court of the nearest attendance centre to the prisoner's place of living.

If, after hearing the plea, the judge contemplates the making of an attendance centre order enquiries may then be instituted of the appropriate superintendent. It is a question by whom such enquiries should be instituted. Sub-section (1) of s36 may be said not to provide an unequivocal answer to that question, although with all respect to those who think otherwise, it is in our opinion, clear that **[11]** the enquiries should be instituted by the Court. We think that it is clear as a matter of statutory interpretation, since, as we have pointed out, the subsection contemplates that the enquiries will be made only after the Court has formed a provisional view that the offender before it might be permitted to serve his sentence at an attendance centre. Moreover, considerations of convenience and administrative efficiency support the view which we would reach upon a construction of the statute. Before an attendance centre order can be made the Court must be satisfied that there will be a vacancy on the day which it proposes to specify pursuant to s37(1) as the day upon which attendance is to commence. This means that it must have the information on the very day upon which sentence is passed, although the order may specify that the attendance will commence a few days hence. Speaking generally we should have thought that an attendance centre order would not ordinarily specify a commencing date more than about seven days after the making of the order. Again speaking generally, it is we think undesirable that the superintendents of attendance centres should be asked by the representative of offenders to answer questions in advance of the Court's forming a proposal to specify attendance at an attendance centre, however provisional or tentative that proposal may be.

Before an attendance centre order can be made the Court must be satisfied that the offender is a fit person to undergo such attendance. But the Court's satisfaction can only be derived from enquiries made to the superintendent of the attendance centre the Court proposes to specify. It follows that if the superintendent says that the offender is not a fit person **[12]** for such an order the Court could not he satisfied that he was. Again, considerations of convenience support this view and they are considerations which may explain why the provisions of the Act take the form they do. The Superintendent is responsible for conducting the centre and he should not have foisted upon him an offender whom he considers unsuitable. Moreover, the success of the attendance centre scheme must depend at least in part upon community acceptance, in particular by the community in the immediate neighbourhood of the centres. The superintendent will, therefore, be sensitive to the possibility of damage to the scheme which might flow from the misbehaviour of a person attending a centre. A superintendent may, accordingly, in some cases be reluctant to state or justify his views in public and as a general rule we think that he should not be required to do so. The considerations we have expressed lead to the conclusion that in the ordinary case an offender need not be afforded an opportunity of cross-examining a superintendent. This will generally be of no disadvantage to an offender for it is difficult to imagine a case in which a superintendent who had formed the view that an offender was not a fit person to undergo an attendance centre order could be persuaded under cross-examination to change his view. But it is of little use to conjure up hypothetical cases. No doubt a wide variety of situations will arise in practice, but once it is seen that the Court's satisfaction that an offender is a fit person for an attendance centre order can only be derived from a superintendent, the practical importance of the superintendent's opinion becomes obvious.

It is the conclusion of the superintendent that is relevant for a sentencing judge's purpose. That is to say, **[13]** the conclusion whether or not the offender is a fit person to undergo attendance.

The superintendent's reason for the conclusion will not generally be relevant. It follows that the superintendent's conclusion may generally be communicated to the Court in any appropriate way. There is nothing in the Act which suggests or requires that the superintendent attend Court, or if he does, that his conclusion as to the fitness of the offender should be stated in the form of sworn evidence.

If the Court is satisfied from enquiries made to a superintendent that a particular offender is a fit person to undergo attendance, we should have thought that save in the most exceptional circumstances an attendance centre order would follow. In such a case the offender would necessarily know the result of the Court's enquiries. If, however, the Court received advice from a superintendent that an offender was not a fit person to undergo attendance, a question would arise whether the sentencing Judge should inform the offender of that fact. Ordinarily we think that the judge should do so although as the information is of its very own nature not of a kind upon which an offender or his counsel it is likely to be able to make useful comment the observations of the Court in *R v Carlstrom* [1977] VicRp 44; (1977) VR 366 at p367 have little application. In any case an offender upon whom a superintendent has reported unfavourably will usually he able to infer that fact because he will almost invariably have been seen by the superintendent and no attendance centre order will have been made. It is, therefore, difficult to imagine any circumstances in which it would not be appropriate for a sentencing judge to inform the offender of an unfavourable report.

**[14]** In the present case, notwithstanding a favourable report from a superintendent, the learned Judge did not make an attendance centre order, but sentenced the applicant to eighteen months' imprisonment. We are at a loss to understand by what process of reasoning such a result could have come about. The difference in terms of punishment between even the maximum of twelve months in an attendance centre and eighteen months' imprisonment is so great that we are unable to understand why the learned Judge instituted enquiries of a superintendent as to the suitability of the applicant for an attendance centre order. There was some discussion during the plea of the question whether a term of imprisonment *simpliciter* was different in nature from a sentence imposed pursuant to s467(e) of the *Crimes Act* permitting the offender to serve the sentence by attendance at an attendance centre but in our opinion it is unnecessary to pursue that discussion. It is sufficient for present purposes to notice that they are vastly different in effect. Speaking generally we should have thought that where a sentencing judge has instituted enquiries of a superintendent of an attendance centre and receives an unfavourable report the sentence that would follow would, save in most exceptional circumstances, be a sentence of less, and probably substantially less, than twelve months' imprisonment. It might even be a bond or probation.

We have made these observations because, in our opinion, as a general rule, a sentencing judge should only make enquiries of a superintendent of an attendance centre if he has reached a provisional decision that an attendance centre order would be appropriate. In the words of the section the Court makes the enquiries of the superintendent of **[15]** the attendance centre it "proposes to specify". But even if it were possible to make enquiries of an officer designated by the Director-General for answering enquiries, we think that such enquiries would generally only be instituted after the sentencing judge had reached a provisional conclusion that an attendance centre order would be appropriate. In the present case there was never any need to institute enquiries of a superintendent because the learned Judge decided that a sentence of eighteen months' imprisonment was appropriate. Nevertheless the question having been raised we have thought it proper to discuss the practice which we think should be adopted. We hope that what we have said will provide sufficient guidance to sentencing judges in most cases.

The question for decision on the application, however, is not whether the learned Judge's process of reasoning can be fully comprehended, but whether in all the circumstances the sentence of eighteen months' imprisonment is beyond the range of sentences open to the learned Judge. Put in another way, was the sentence for this offence by this offender manifestly excessive? After the most careful consideration we have reached the clear conclusion that the sentence cannot be so described. The offence was a serious and cowardly assault and we think that the learned Judge was entitled to take the view of the facts which he in fact took. It is not to the point that any member of this Court or any other judge might have imposed a different sentence or might have made an attendance centre order. It is only a question whether a different sentence should have been imposed. As we are unable to answer that question in the affirmative the application must be dismissed.