

18/06; [2006] VSC 218

SUPREME COURT OF VICTORIA

DPP v NEISSER

Hargrave J

13, 21 June 2006

STATUTORY INTERPRETATION – PERSON CONVICTED OF A SEXUAL OFFENCE PRIOR TO COMMENCEMENT OF *SEX OFFENDERS REGISTRATION ACT 2004* – PERSON UNDERGOING SUSPENDED SENTENCE FOR A REGISTRABLE OFFENCE AT TIME OF COMMENCEMENT OF ACT – FINDING BY MAGISTRATE THAT PERSON NOT AN EXISTING CONTROLLED REGISTRABLE OFFENDER – WHETHER MAGISTRATE IN ERROR: *SEX OFFENDERS REGISTRATION ACT 2004*, S3.

Section 3 of the *Sex Offenders Registration Act 2004* ('Act') provides:

"existing controlled registrable offender' means a person who, as a result of having been sentenced for a registrable offence, was under the supervision of a supervising authority or any other person or body immediately before 1 October 2004."

Where a person was undergoing a wholly suspended sentence for a registrable offence before 1 October 2004, the person was not under the supervision of a person or body. The Act does not apply to all persons who commit sexual offences. It applies to only those offenders who were, immediately before 1 October 2004, undergoing a sentence for a registrable offence, as a result of which sentence the offender was being supervised in some way. Accordingly, a magistrate was not in error in finding that a person who was undergoing a wholly suspended sentence for a registrable offence immediately before 1 October 2004 was not an existing controlled registrable offender.

HARGRAVE J:

FACTS

1. On 11 March 2004, the respondent was convicted in the County Court of Victoria at Melbourne of three counts of sexual penetration of a child aged between 10 and 16 years of age, contrary to s48(1) of the *Crimes Act 1958* (Vic). The respondent was sentenced to a total effective sentence of eight months' imprisonment ("the sentence"). The sentence was wholly suspended for a period of 12 months.

2. On 13 January 2005, the respondent attended the Springvale Police Station, where he was served with a notice of reporting obligations ("the notice") dated 6 January 2005. The notice stated that the respondent was a "registrable offender" within the meaning of the *Sex Offenders Registration Act 2004* (Vic) ("the Act"). Further, the notice advised the respondent that he was required to report to Victoria Police within 28 days and comply with reporting obligations under the Act. The notice advised the respondent to telephone a specified toll free number to arrange a time to report, and stated that serious penalties may apply to any person who fails to comply with reporting obligations under the Act. At the time of service of the notice, a member of Victoria Police explained to the respondent his obligations in relation to the notice. The respondent then signed an acknowledgment to confirm receipt of the notice.

3. The respondent failed to report to Victoria Police within 28 days of receipt of the notice.

4. In 15 March 2005, the respondent attended the Springvale Police Station where he was interviewed in relation to the offence of failing to comply with his reporting obligations without reasonable excuse, in contravention of s46(1) of the Act.

5. In the interview, the respondent admitted receiving the notice and failing to comply with his reporting obligations. He said that his reasons for failing to do so were because he was scared of what was going to happen and because he was taking medication for psychosis which affected his judgement.

6. The respondent was charged on summons dated 31 March 2005 with failing to comply with

his reporting obligations under the Act ("the charge"). The charge was heard in the Magistrates' Court of Victoria at Dandenong on 26 October 2005. The only issue which was argued before the magistrate was one of statutory interpretation. The parties joined in requesting the magistrate to determine, as a preliminary issue, whether the respondent was an "existing controlled registrable offender" within the meaning of the Act. If he was not, then it was acknowledged by the prosecution that the charge ought be dismissed. The magistrate decided the issue in favour of the respondent and dismissed the charge.

7. By notice of appeal dated 25 November 2005, the appellant appealed to this Court under s92(1) of the *Magistrates Court Act* 1989 (Vic) on a question of law. The sole ground of appeal is that:

"The learned magistrate erred in finding that the respondent, who was undergoing a wholly suspended sentence for a registrable offence immediately before 1 October 2004, was not an 'existing controlled registrable offender' as defined by the [Act]."

RELEVANT PROVISIONS OF THE ACT

8. The purpose of the Act is stated in s1(1) in the following terms:

"1. Purpose and outline

(1) The purpose of this Act is—

(a) to require *certain offenders* who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time—

(i) to reduce the likelihood that they will re-offend; and

(ii) to facilitate the investigation and prosecution of any future offences that they may commit;

(b) to prevent registered sex offenders working in child-related employment;

(c) to empower the Police Ombudsman to monitor compliance with Part 4 of this Act." (Emphasis added.)

9. Section 1(2) of the Act contains an outline of the Act. Relevantly, s1(2)(b) provides:

(2) In outline this Act—

(b) requires *certain offenders* who are sentenced for registrable offences on or after 1 October 2004 to report specified personal details for inclusion in the Register (and extends this requirement to *certain offenders* sentenced for registrable offences before that date);" (Emphasis added.)

10. Section 2 of the Act provides that the Act came into operation on 1 October 2004.

11. Section 3 of the Act contains a number of relevant definitions. For present purposes, I note that "registrable offence" has the meaning set out in s7 of the Act and "registrable offender" has the meaning set out in s6 of the Act.

12. It is common ground that the offence of which the respondent was convicted was a "Class 1 offence" within the meaning of the Act and was thus a "registrable offence" within the meaning of s7 of the Act.

13. The question is whether the respondent is, as a result, a "registrable offender" within the meaning of s6 of the Act. Section 6(1) provides:

"(1) Subject to sub-sections (3) to (6), a registrable offender is a person whom a court has at any time (whether before, on or after 1 October 2004) sentenced for a registrable offence."

14. As I have said, it is common ground that the respondent was sentenced for a registrable offence.

15. One of the sub-sections to which s6(1) is subject is s6(4), which provides:

"(4) Unless he or she is a registrable offender because of sub-section (2) or is an existing controlled registrable offender, a person is not a registrable offender merely because he or she was sentenced for a registrable offence before 1 October 2004."

16. It is common ground that the respondent is not a registrable offender because of s6(2). The

issue for determination is whether the respondent is an "existing controlled registrable offender" within the meaning of the Act. If he is, then he is a "registrable offender" within the meaning of the Act.

17. Section 3 of the Act defines "existing controlled registrable offender" in the following terms:

"existing controlled registrable offender" means a person who, as a result of having been sentenced for a registrable offence, was under the supervision of a supervising authority or any other person or body immediately before 1 October 2004;"

18. In order to understand the definition of "existing controlled registrable offender" it is necessary to refer to other definitions contained in s3 of the Act.

19. "Sentence" is defined in an inclusive manner. The definition includes any order that is a "sentencing order" within the meaning of the *Magistrates' Court Act*. A sentencing order within the meaning of the *Magistrates' Court Act* includes any order made under Part 3 of the *Sentencing Act 1991* (Vic). Part 3 of the *Sentencing Act* provides for the full range of sentences, including sentences involving no supervision of the offender, for example, a fine or a suspended sentence.

20. "Supervised sentence" is defined in a manner which includes a sentence referred to in s6C(1) of the *Corrections Act 1986* (Vic). Section 6C(1)(d) refers to:

"(d) A person who is serving a sentence of imprisonment that was wholly or partly suspended and who is in the community in accordance with that sentence."

21. "Supervising authority" is defined in the following terms:

"supervising authority", in relation to an offender, means the authority prescribed by the regulations as the supervising authority of the class of offender to which he or she belongs."

22. At the time of the alleged contravention by the respondent of his reporting obligations,^[1] reg 18 of the *Sex Offenders Registration Regulations 2004* ("the Regulations") made the following provision concerning the identity of a "supervising authority" for the purposes of the Act:

"18. Supervising authority"

(1) For the purpose of section 50(3) of the Act, the person or body that is required to give notice to a registrable offender is the supervising authority specified in column 2 of Table A in the Schedule for the class of offender specified in column 1 of the Table to which the registrable offender belongs.

(2) For the purpose of section 53 of the Act, the person or body that is required to give notice to the registrable offender is the supervising authority specified in column 2 of Table B in the Schedule for the class of offender specified in column 1 of the Table to which the registrable offender belongs."

23. At this time, reg 18(2) contained an obvious error. It referred to notice being given under s53 of the Act "to a registrable offender". In fact, s53 of the Act requires notice to be given "to the Chief Commissioner of Police". Prior to the hearing of the charge, this obvious error was the subject of amendment to correct the error.^[2] Nothing turns on the existence of the error in reg 18(2) at the time of the alleged offence and the laying of the charge.

24. Relevantly, item 2 of Table A of the Regulations provides that where a registrable offender is sentenced for a registrable offence by the County Court, as was the respondent, the supervising authority required to give notice under s50(3) of the Act is the County Court.

25. It is arguable that the relevant supervising authority for the purposes of s50(3) of the Act in relation to a registrable offender who is sentenced for a registrable offence before 1 October 2004 is the Secretary of the Department of Justice. Such an interpretation is open because items 1 to 7 of Table A use the future tense to describe the class of offender in column 1. Such offenders include a person "who is sentenced", "who is released" or "who enters Victoria". If this be correct, the supervising authority for the purposes of s50(3) of the Act is, under item 8 of Table A, the Secretary of the Department of Justice. Item 8 of Table A describes the class of offender as any registrable offender "not referred to in items 1 to 7". However, having regard to the view which I take of the issue on appeal, it is not necessary for me to decide this question.

26. Relevantly, item 3 of Table B of the Act provides that, when an adult registrable offender ceases to be subject to a supervised sentence, the supervising authority required to give notice to the Chief Commissioner of Police under s53 of the Act is the secretary of the Department of Human Services.

27. Section 50 of the Act provides for written notice to be given to a registrable offender of his or her reporting obligations in certain circumstances. Under s50(3), that notice is to be given by the person or body specified in, or determined in accordance with, the Regulations. As appears above, reg 18(1) provides for a person or body described as the "supervising authority" in column 2 of Table A of the Regulations to give the notice. The identity of the "supervising authority" differs according to the class of registrable offender specified in each item of column 1 of Table A.

28. Section 53(2) of the Act requires "the supervising authority" to give notice to the Chief Commissioner of Police in the events specified in s53(1). As appears above, reg 18(2) provides that the "supervising authority" who is to serve the notice is the person or body described in column 2 of Table B of the Regulations. The identity of the "supervising authority" differs according to the class of registrable offenders specified in column 1 of Table B of the Regulations.

THE MAGISTRATE'S DECISION

29. The learned magistrate expressed her conclusions succinctly. In her Honour's view, the respondent was not under any supervision immediately before 1 October 2004 because the sentence was wholly suspended and thus did not involve any actual supervision by any person. Further, her Honour was of the view that the Regulations did not have the effect that there was any "supervising authority" in relation to the respondent immediately before 1 October 2004 because the Regulations operated prospectively only.

APPELLANT'S ARGUMENTS

30. On behalf of the appellant, it was submitted that, as a result of the respondent having been sentenced for a registrable offence, he was, immediately before 1 October 2004, under the supervision of either:

- (1) a "supervising authority" as defined in s. 3 of the Act; or
- (2) another person or body.

31. The first limb of the appellant's argument depended upon the definition in s3 of the Act of "supervising authority". It was submitted that the definition of "supervising authority" must have been intended to apply to persons sentenced for registrable offences prior to 1 October 2004, because otherwise the reference to supervision by a supervising authority would have no work to do in the definition of "existing controlled registrable offender".

32. In my view, this argument does not address the question of statutory interpretation which I must decide. The mere fact that there may be a body which is, within the definition in the Act, a "supervising authority" in relation to a person sentenced for a registrable offence before 1 October 2004 does not answer the question of whether that person was in fact "under the supervision" of that "supervising authority". In this regard, it was acknowledged by Mr Ryan SC, who appeared on behalf of the appellant, that neither the Act nor the Regulations contain any provision empowering a "supervising authority" to supervise a person convicted of a registrable offence or stating the manner of permitted or required supervision. The Act and Regulations are completely silent on these issues.

33. In circumstances where the respondent was undergoing a wholly suspended sentence, Mr Ryan could not point to any evidence of supervision of the respondent by either the County Court or the Secretary of the Department of Justice. Nor could he point to any power of the County Court or the Secretary of the Department of Justice to supervise the respondent as a result of him being sentenced to a wholly suspended sentence for a registrable offence.

34. In effect, the first limb of the argument made on behalf of the appellant depends upon the Act providing that, whenever there is a "supervising authority" in respect of a person sentenced for a registrable offence, there is a deemed supervision of that person. I do not accept that the

definition of "existing controlled registrable offender" is directed at deemed supervision. It is concerned, in plain words, with actual supervision.

35. Having regard to my view on the first limb of the submissions on behalf of the appellant, it is not necessary to decide whether the magistrate was correct in her view that there was no "supervising authority" in relation to the respondent immediately before 1 October 2004. The issue is of no consequence if actual supervision is required by either the supervising authority, if there be one, "or any other person or body" at the relevant time.

36. The second limb of the appellant's argument, that the respondent was in fact under the supervision of a person or body other than a supervising authority, relied upon a form of inchoate supervision arising from the possibility that a person undergoing a wholly suspended sentence may commit an offence punishable by imprisonment during the operational period of the suspended sentence, and thus be guilty of an offence under s31(1) of the *Sentencing Act* 1991 (Vic).

37. Sub-section 31(1) of the *Sentencing Act* 1991 provides:

"31. Breach of order suspending sentence"

(1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits, whether in or outside Victoria, another offence punishable by imprisonment, 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."

38. Under sub-ss31(5) and 31(5A) of the *Sentencing Act*, where a court finds a person guilty of an offence under s31(1), the court must restore the sentence or part thereof which was suspended unless it would be unjust to do so in view of any exceptional circumstances which have arisen since the order suspending the sentence was made.

39. It was submitted on behalf of the appellant that, having regard to the provisions of s31 of the *Sentencing Act*, there was a level of supervision over any person undergoing a suspended sentence because of the possibility that a charge may be filed under s31(1).

40. I reject this submission. In my view, the definition of "existing controlled registrable offender" is directed at persons who are actually under the supervision of a person or body at the relevant time. The fact that it is possible that a person undergoing a suspended sentence may contravene s31(1) of the *Sentencing Act*, and thus be charged with that offence, does not amount to supervision within the ordinary meaning of the word.

41. "Supervision" is defined in the *Macquarie Dictionary* as:

"the act or function of supervising; oversight; superintendence."

42. "Supervise" is defined in the *Macquarie Dictionary* in the following way:

"to oversee (a process, work, workers, etc.) during execution or performance; superintend; have the oversight and direction of."

43. "Superintend" is defined in the *Macquarie Dictionary* in the following way:

"to oversee and direct (work, processes, affairs etc.); exercise supervision over (an institution, place, etc.)."

44. In my view, supervision involves the act of supervising. The fact that some action may be taken against a person if certain events occur in the future does not involve any active supervision of that person. Nothing is required to be done in relation to that person unless and until the specified event occurs.

45. Mr Ryan made an alternative submission under the second limb of his submissions. It was submitted that the Act clearly intended to include a wholly suspended sentence for a registrable offence within the definitions of "sentence" and "supervised sentence". Reference was made to the definitions of "sentence" and "supervised sentence", in s3 of the Act, each of which includes, a sentence which is wholly or partly suspended.

46. Further, in this regard, reference was made to s27(5) of the *Sentencing Act* which provides, with certain immaterial exceptions, that:

"A wholly suspended sentence of imprisonment must be taken to be a sentence of imprisonment for the purposes of all enactments except..."

47. Although I accept that the legislature intended to include a wholly suspended sentence for a registrable offence within the definitions of "sentence" and "supervised sentence", this does not, in my view, assist the appellant. If the legislature had intended to include within the definition of "existing controlled registrable offender" any person who was undergoing a "sentence" or "supervised sentence" for a registrable offence immediately before 1 October 2004, it could easily have done so. Alternatively, if this was the intention of Parliament, there would have been no need for a definition of "existing controlled registrable offender" in the Act. Instead of the words "or is an existing controlled registrable offender" in s6(4), Parliament could, and in my view would if that was its intention, have said "or was undergoing a sentence or supervised sentence for a registrable offence immediately before 1 October 2004."

48. Such an approach to the interpretation of the Act does not deprive the definitions of "sentence" and "supervised sentence", to the extent that they include a suspended sentence, of any work to do in the Act. Under s50(2)(a) and s50(3) of the Act, and reg 18(1) of the Regulations, a registrable offender must be given notice under s50 by the specified "supervising authority" as soon as practicable after he or she is sentenced for a registrable offence. Under s53(1)(c) and s53(2) of the Act and reg 18(2), the Chief Commissioner of Police must be given notice by the specified "supervising authority" when a registrable offender ceases to be subject to a supervised sentence.

49. I am accordingly of the view that the respondent was not an "existing controlled registrable offender" immediately before 1 October 2004. As a result, I am of the opinion that s6(4) of the Act has the effect that the respondent is not a registrable offender within the meaning of the Act.

50. In reaching my conclusion, I have considered whether the result which I have reached is so inconsistent with the purpose and object of the Act that a strained construction, such as that contended for by the appellant, ought be adopted.^[3] In my view, the construction which I prefer does not offend the purpose and object of the Act. As I have emphasised, the purpose and object of the Act is to require "*certain offenders* who commit sexual offences to keep police informed of their whereabouts and other personal details". The purpose of the Act is not to apply to all persons who commit sexual offences. This is particularly so in respect of persons sentenced for a registrable offence before 1 October 2004. Clearly, the Act does not intend to subject all such persons to its regime. In this regard, Parliament has made a choice to include some but not all persons convicted of registrable offences under Victorian law prior to 1 October 2004. It is apparent that Parliament has made a policy decision to include only those offenders who were, immediately before 1 October 2004, undergoing a sentence for a registrable offence, as a result of which sentence the offender was being supervised in some way.

51. For the above reasons, the appeal should be dismissed.

^[1] 11 February 2005, being 28 days after service of the notice on 13 January 2005.

^[2] *Sex Offenders Registration (Amendment) Regulations* 2005 (Vic), SR 94/2005, reg 7.

^[3] Compare s35(a) *Interpretation of Legislation Act* 1984 (Vic); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* [1981] HCA 26; (1981) 147 CLR 297; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434.

APPEARANCES: For the appellant DPP: Mr C Ryan SC, counsel. Stephen Carisbrooke, Acting Solicitor for Public Prosecutions. For the respondent Neisser: Mr J Willis, counsel. Robert Halliday & Associates, solicitors.
