**11/79**

## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

# *O'SHANNASSY v TAYLOR*

**Blackburn CJ**

**30 May, 8 June 1978 — (1978) 21 ACTR 9**

**CRIMINAL LAW – SENTENCING – RECOGNIZANCE – OFFENCES PROVEN – DEFENDANT TO BE RELEASED WITHOUT SENTENCE IF SECURITY GIVEN – DEFENDANT REFUSED TO GIVE SECURITY – EFFECT OF REFUSAL – WHETHER DEFENDANT MUST BE ASKED FIRST WHETHER WILLING TO GIVE SECURITY – WHETHER MAGISTRATE *FUNCTUS OFFICIO* – WHETHER SENTENCE MAY BE IMPOSED AFTER REFUSAL TO GIVE SECURITY: *PUBLIC ORDER (PROTECTION OF PERSONS AND PROPERTY) ACT* 1971 (CTH) S12(1), (2)(c); *CRIMES ACT* 1914 (CTH) S20; *COURT OF PETTY SESSIONS ORDINANCE* 1933 (ACT) SS141(1), 142.**

**CRIMINAL LAW – SENTENCING – CONSCIENTIOUS BELIEFS – RELEVANCE OF IN SENTENCING – CONDUCT OF ACCUSED FROM TIME OF OFFENCE TO COMPLETION OF HEARING – CONSCIENTIOUS BELIEFS – SINCERITY OF ACCUSED – REFUSAL TO GIVE SECURITY – ASSERTION OF INTENTION TO REPEAT OFFENCES.**

**MAGISTRATES' COURTS – CONVICTION – RECOGNIZANCE – PRONOUNCEMENT THAT DEFENDANT SHOULD BE RELEASED ON RECOGNIZANCE – EFFECT OF – WHETHER ORDER IN SENSE OF IMPRISONMENT OR FINE – WHETHER MAGISTRATE MAKING ORDER *FUNCTUS OFFICIO*: *CRIMES ACT* 1914 (CTH) S20.**

The appellant was charged in the Court of Petty Sessions of the Australian Capital Territory with an offence under s12(1) and another offence under s12(2)(c) of the *Public Order (Protection of Persons and Property) Act* 1971 (Cth.). The two charges were heard together by consent and the court found the offences proved. The magistrate decided to apply s20(1) of the *Crimes Act* 1914 (Cth) and ordered the appellant's release without passing any sentence, upon the appellant giving security; but the appellant refused to give any form of security. Thereupon the court was adjourned. Later in the same day, when the appellant was again before the court, the appellant was informed by the magistrate that the appellant would be kept in custody because of his refusal to enter into the recognizance.

Two days later the appellant was again brought before the magistrate and again the appellant refused to enter into a recognizance. After a number of further adjournments during the day the magistrate finally sentenced the appellant to four days' imprisonment on each charge, the terms to be concurrent. The magistrate then vacated his previous order, declared that he was not *functus officio* and adjourned the court to "note the files".

From that decision an appeal was made to the Supreme Court of the Australian Capital Territory claiming that the sentence in each case was unlawful and even if lawful, was too severe. The two appeals were heard together by consent.

**HELD: that both appeals should be dismissed and the orders of the court below confirmed for the following reasons:**

**1. The effect of s20 of the *Crimes Act* 1914 (Cth) is that the convicted person is free to decide whether or not he wishes to enter into a recognizance; but a court which decides to apply s20 of the Act is not required first to ask the accused whether he is willing to give security.**

**2. The pronouncement by the court that it will apply s20 of the *Crimes Act* 1914 (Cth), is not the making of an order in the same sense as the imposition of a term of imprisonment or a fine.**
***R v Manchester Justices; ex parte Lever* (1937) 2 KB 96; (1937) 3 All ER 4;**
***R v Mills; ex parte Edwards* (1958) SASR 54;**
***R v Smith; ex parte James* (1966) SASR 47; and**
***Kimlin v Wilson; ex parte Kimlin* (1966) Qd R 237, referred to.**

**3. The adoption of the course provided by s20 of the *Crimes Act* 1914 (Cth) is an announcement that if the defendant gives the security and if the security is to the satisfaction of the court, the defendant will be released without sentence, otherwise a sentence will be imposed; and the inference is inevitable that if one of these conditions is not met a sentence will be required.**

**4. In deciding whether, in all the circumstances the sentence was appropriate, it was permissible to look at the appellant's conduct and attitude for the whole period beginning at the time of the offences and ending at the completion of the hearing of the appeal. While the conscience of the convicted person may well be a relevant consideration, the argument put by the appellant to the effect that the court may, and sometimes should, countenance breaches of laws which do not command the assent of a substantial number of members of the community should be totally rejected.**

**The following factors were taken into account by His Honour in arriving at an appropriate sentence:**
**(i) That the appellant deliberately broke the law for a purpose which to him seemed morally right;**
**(ii) the appellant's sincerity;**
**(iii) that he was in custody between the hearing and the sentence;**
**(iv) the maximum sentences fixed by the Act;**
**(v) that the appellant refused to give security in accordance with s20 when that course was open to him, and his explicit reasons for doing so, namely, that in so refusing, the appellant was asserting his intention of committing these offences again and other offences, when he was fit.**

*Cur. adv. vult.*

**BLACKBURN CJ:** It is necessary to set out in detail the course of events in the court below from the moment when the learned magistrate found the offences proved. He said:

> "I take into account fully the circumstances and the fact (that) I believe he had a sincere belief that his conduct was justified. ... I take action under s20 of the *Crimes Act* of the Commonwealth. Mr O'Shanassy is convicted on both charges, but I order his release forthwith – this order relates to both charges. Mr O'Shanassy – without passing any sentence upon his giving security. ... "

By this point the appellant interrupted and began a colloquy of some length in which he repeatedly made it clear that he would not enter into any form of security. He invited the magistrate to impose a sentence of imprisonment, but the magistrate declined to do so and repeated that the order was in pursuance of s20 of the *Crimes Act*. He then adjourned the court for the purpose of noting his orders on the information.

I note that the magistrate's note in each case includes the word 'forthwith' (which he also used in pronouncing the order in court). The word 'forthwith' probably appeared because of the magistrate's unconscious recollection of the terms of s556A of the *Crimes Act* 1900 of New South Wales. It does not occur in s20 of the *Crimes Act* 1914 (Cth) which the magistrate was quite correctly applying, s556A being inapplicable. The incorrect use of the word 'forthwith' did not, of course, affect the validity of the orders. In other respects the Magistrate's note in each case, made in his own handwriting, was a normal and proper note of his order, and included the letters and figures: 's20(1) CCA' (ie. s20(1) of the Commonwealth *Crimes Act*). Later in the same day the magistrate had the appellant before him, but said that he did not know why he was sitting in the matter, as he had already pronounced his order. It appears that the appellant had by this time repeated his refusal to enter into a recognizance, and that neither the magistrate, nor prosecuting counsel, nor the staff of the Clerk of the Court, knew what should be done. Eventually the magistrate said that he would adjourn the Court for ten minutes saying:

> "I do not think I am formally *functus officio* but I am going to be when the court finally rises, and even if I am not formally *functus officio*, what powers have I to amend the order because I am not changing my view – I still think that is the appropriate penalty ... I do not think there is anything I can do ..."

Counsel for the prosecution submitted that if the appellant would not enter into the recognizance he should be brought back for some other order, but this the magistrate held he had no power to do. He elicited from the appellant a further firm refusal to enter into the recognizance, and having said that if he were to rise at that stage, he would be 'definitely *functus officio*', he purported to: "Formally allow the matter to continue on foot until the close of business tomorrow night just in case there is some way around this dilemma." Before adjourning for the day he took note of what the appellant said were his medical requirements, and indicated to the appellant that he would be in custody because of his refusal to enter in the recognizance.

On 16th November 1977, the second day after the events just related, the appellant was again brought before the magistrate, who told him that he had had the matter relisted, 'to see if there is a way around it'. The appellant was maintaining his attitude of refusal to enter the recognizance.

The appellant made it plain, not only at this point but repeatedly during the hearing of the charges, that his actions which constituted the offences had been deliberately performed because of a conscientious concern to bring home to the government that action should be taken to provide such 'low-cost accommodation'. He also made it plain that his reason for refusing to enter into the recognizance was that he would not promise not to commit acts which his conscience and political beliefs commended to him, even though they might be offences against the law.

The appellant's submissions on these matters were repetitious, polemical, and relevant only by his own eccentric standards. It is plain, indeed, that the appellant regarded the proceedings in the court below as a means of disseminating his views on a wide range of matters but I do not doubt, and think the magistrate accepted, that he was sincere. Before me his contentions were less wide-ranging, but to the same effect.

The learned Magistrate proceeded to hear evidence on oath from the deputy clerk of the court that the appellant had refused to enter into a recognizance. The Magistrate then asked the appellant whether he would pay a fine; the reply was that he would not; whereupon the magistrate explained the penalty provisions of the offences in question. There followed a lengthy discussion between the magistrate and counsel for the prosecution (with some attempts by the appellant to intervene), in the course of which the magistrate addressed himself to the courses which he saw as open to him in law; and eventually the hearing was adjourned yet again, the appellant being told to 'stay in the custody of the court'.

When the magistrate sat again, later that day, a solicitor appeared for the appellant, not having yet been able to take instructions, and the situation was explained to him by the Court. After a further adjournment, the solicitor submitted that as the magistrate had not in the first place given the appellant the choice whether to enter into the recognizance or not, his existing order should be vacated. The magistrate appears to have acceded to this submission, though the transcript is obscure at this point. The solicitor then apparently submitted that the appellant should be sentenced 'until the rising the court' in view of the time he had spent in custody.

The magistrate then reviewed again the circumstances of the offences, and the appellant's previous convictions – not without some interjected assistance from the appellant. He now rejected the idea of the recognizance which he had previously ordered, as 'not feasible' (apparently because the appellant would not enter into it) and rejected the idea of a fine on the ground that the appellant had said that he would not pay any fine. By this process he arrived at a sentence of imprisonment; he considered a week to be appropriate, but as the appellant had been three days in custody, awarded a penalty of four days' imprisonment, on each charge, the terms to be concurrent. These are the sentences now under appeal. After vacating his previous order and declaring that he was not *functus officio* (presumably this referred to his condition before and not after his final order) the magistrate adjourned once more to "note the files'.

This appeal is, of course, a complete re-hearing. Normally it is unnecessary to set out the course of proceedings in the court below but in this case it was necessary because the appellant argued that the sentence was not merely too severe, but unlawful. The appellant's first argument to me was that the first order – that he should be released on a recognizance – was unlawful when it was pronounced because he was not first asked whether he was willing to enter into a recognizance. This argument, though I do not accept it, is based on what in my opinion, is a correct view of the effect of s20 of the *Crimes Act* 1914 (Cth) that is to say, that the convicted person is free to define whether he wishes to enter into the recognizance or not. He is not 'bound over', or ordered to enter into a recognizance (contrast s547 of the *Crimes Act* (NSW)). But it does not follow that the court which decides to apply s20 is required first to ask the accused whether he is willing to give security; though it may be convenient to do so.

If the court, without first asking the defendant whether he is willing, pronounces an order for his release on giving security, and the defendant then declines to give security, the position is exactly the same as if the Court had first asked the defendant whether he was willing, and the defendant had said that he was not. The magistrate's concern whether he was *functus officio*, or whether he would be so when he rose at the end of the day, and whether he could delay this legal consequence by some verbal incantation about 'allowing the matter to remain on foot' until some later day – all this was wide of the mark. The oral pronouncement that the court will apply s20

of the *Crimes Act* 1914 (Cth) whether or not it is followed by a written memorandum, is not the making of an order in the same sense as is the imposition of a term of imprisonment or a fine. In the latter case on the making of the order the magistrate is *functus officio*. The making of the minute or memorandum required by s141(1) of the *Court of Petty Sessions Ordinance* 1933, and *a fortiori* the drawing up of the order under s142, are separate requirements, not corresponding to the sealing of the order of a superior court. But the adoption of the course provided by s20 of the *Crimes Act* 1914 (Cth) is an announcement that if the defendant gives the security and if the security is to the satisfaction of the court, the defendant will be released without a sentence. The inference is inevitable that if one of these conditions is not met a sentence will be required.

Any other view would mean that s20 provided an independent alternative sentence which a court could impose on a defendant. If a defendant refused to give the security he would be condemning himself to an indefinite term of custody. This is not only an impossible construction of the words of the section, but also an affront to common sense. The section is clearly intended to give the convicted person an opportunity to escape sentence by giving security not to offend again. The learned magistrate was quite right, therefore, in his eventual decision to impose a penalty when the appellant declined the opportunity. It is unfortunate that that decision came two days later; but that did not invalidate it. There is no substance in the appellant's contention that the decision could lawfully have been made only on the same day as the refusal of security. The magistrate was entitled to do as he in fact did, namely adjourn the proceedings while he considered the law, notwithstanding that he did not explicitly say that.

In this case I take into account that the appellant deliberately broke the law for a purpose which to him seemed morally right; I take into account the appellant's sincerity; I take into account that he was in custody between the hearing and the sentence; and I take into account the maximum sentences fixed by the Act. I ignore the fact that the appellant obviously used the proceedings of the Court of Petty Sessions, and less obviously the proceedings in this court, to achieve publicity for his views. I also take into account, notwithstanding the appellant's submission that I should not do so, that the appellant refused to give security in accordance with s20 when that course was seen to him, and his explicit reasons for doing so. In so refusing, the appellant was asserting his intention of committing these offences again, and other offences when he was fit. The court may therefore treat him as an impenitent offender. Once again, it is no doubt relevant that he acted in accordance with his own conscience.

Bearing all these matters in mind, I think that the concurrent sentence of four days' imprisonment on each charge was appropriate. The appeals are dismissed and the orders of the Court of Petty Sessions affirmed.

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