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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v HULJAK

Crockett, Marks and Gobbo JJ

16 April 1991

CRIMINAL LAW – SENTENCING – BREACH OF COMMUNITY BASED ORDER – ORDER CANCELLED - SOME OTHER ORDER MADE – COMPLIANCE WITH ORDER TO BE TAKEN INTO ACCOUNT: *PENALTIES AND SENTENCES ACT* 1985, S33(5).

Where a court deals with an offender who is in breach of a Community Based Order and the court decides to cancel the order and deal with the offender in another way, the court must take into account the extent to and the manner in which the offender complied with the order before its cancellation.

CROCKETT J: [with whom Marks and Gobbo JJ agreed] **[1]** On 26 April, 1989 the applicant pleaded guilty in the County Court at Melbourne to a presentment which contained three counts. Those counts charged the applicant with the offences of false imprisonment, intentionally causing injury and indecent assault.

The applicant admitted having previously been convicted of the offences of theft of a motor car, driving with a blood alcohol content in excess of 0.05, possession of Indian hemp, and theft. These convictions were recorded on four court appearances between 1982 and 1987. After a plea of leniency was heard on the applicant's behalf, the judge pursuant to s28 of the *Penalties and Sentences Act* 1985 placed the applicant on a Community Based Order for two years commencing 8 May 1989, and ordered that the applicant perform 400 hours of unpaid community work during a period of 52 weeks. The order contained other terms to which it is unnecessary to refer. It was, of course, granted subject to the standard requirements which included a provision that the applicant not breach the law during the currency of the Community Based Order.

The applicant was then brought before the judge on 13 February 1991 to answer a charge of having breached the Community Based Order. The applicant pleaded guilty to that charge. The breach was occasioned by a number of convictions being recorded against the applicant during the period of operation of the order. The convictions arose out of three court appearances and included two convictions for the offence of driving a motor vehicle whilst disqualified from doing so in respect to which a term of imprisonment of six **[2]** months was imposed on both of those charges, such terms of imprisonment to be served concurrently.

The judge had before him at the hearing on 13 February 1991 a report from the Regional Manager of the Carlton Community Corrections Centre. That report deals with the extent to and the manner in which the applicant complied with the order prior to its cancellation. The cancellation was effected by the judge on the day that the matter first came before him. The judge was also assisted by a plea for leniency which was made on the applicant's behalf. His Honour remanded the applicant for sentence until 21 February 1991.

On that date, the judge delivered his reasons for sentence which consisted very largely, if not entirely, of a resume of the details concerning the commission of the three offences with which the judge was then concerned. Having dealt with those matters and having considered the matters that constituted the breach of the Community Based Order, the judge sentenced the applicant on the count of false imprisonment to a term of two years' imprisonment, on the count of intentionally causing injury to a term of nine months' imprisonment and on the offence of indecent assault to a term of four months' imprisonment. As no order for total or partial cumulation was made, the effective sentence was one of two years' imprisonment. The judge fixed a minimum term of 15 months.

It is with respect to those sentences that the applicant now applies for leave to appeal.

He does so on two grounds: the first is that the judge erred in failing to **[3]** take into account, in accordance with s33(5) of the *Penalties and Sentences Act* 1985, the extent to and manner in which the applicant had complied with the Community Based Order before its cancellation; the second ground is that the sentence of the Court in all the circumstances is manifestly excessive.

At no point in the course of his reasons for sentence did the judge refer to s33(5) of the *Penalties and Sentences Act*. That sub-section is in these terms:

> "Where under this section the Court cancels a Community Based Order and deals with the offender in another way, the Court must take into account the extent to, and the manner in which the offender had complied with the order before its cancellation."

The absence in his Honour's reasons of any reference to the requirements of that provision would strongly suggest that his Honour neglected to take them into account. A perusal of the transcript that records what was said in the course of the plea for leniency makes it clear beyond argument that his Honour was unaware of the provisions of the sub-section, or at all events did not intend to give any consideration to the requirements of that statutory provision. As I have said, the material to permit him to have complied with the requirements of the sub-section was before him, but it seems that that material was completely disregarded by the judge when he was determining upon what he considered to be an appropriate sentence to pass. Upon the hearing of the application before us counsel for the Crown conceded that the record of the proceedings in the Court below establishes that the judge did **[4]** fail to have regard to this statutory requirement, and that that failure amounted to a sentencing error.

Accordingly, it is for this Court to consider for itself what in all the circumstances may be thought to be an appropriate sentence to pass upon the applicant with respect to the three offences with which we are concerned.

In that connection, counsel for the applicant pointed to a considerable number of factors which he contended so served to mitigate the offences that the sentence which this Court should pass should be significantly less than that which the judge saw fit to impose. In determining what I would propose as sentences to be passed in view of those selected by the judge as appropriate, I have had regard to the contents of the Regional Manager's report in order that there might be taken into account the extent to and the manner in which the applicant had complied with the Community Based Order before its cancellation.

The maker of that report was not called to give evidence. Counsel for the applicant was given an opportunity to consider whether he required that officer be called in order that he be cross-examined. No application was made for an adjournment to permit such a course to be followed.

In the circumstances, the course that the hearing of the application followed can be construed, I think, as amounting at least to an implied concession on the part of both counsel that this Court was free to act upon the contents of the report without requiring the attendance of the maker of that report. **[5]** In those circumstances, a determination to proceed now to re-sentence the applicant does not, I think, involve any departure in principle from anything that was said by Nathan J in *O'Keefe v Tankard* [1989] VicRp 34; (1989] VR 371.

The Court's attention was particularly drawn to the fact that the applicant did complete 400 hours of unpaid community work, and did so within 52 weeks, albeit that the manner of its performance was less than totally satisfactory. I note also that the applicant complied with the condition of the order as to drug assessment, treatment and testing. I would also bear in mind the other matters to which the Court's attention was drawn in relation to compliance with the Community Based Order, in particular to the fact that the applicant pleaded guilty to its breach when he was brought before the judge to be dealt with.

Then, so far as the offences for which he has to be resentenced are concerned, I bear in mind that he pleaded guilty in the first place to each of those three offences, that the evidence discloses that he had a previously good work record and that his prior convictions were of little relevance in dealing with these offences of violence. Our attention was drawn to the manner in

which he was then and is now domestically circumstanced and to the prospects that it was said can be reasonably entertained for his ultimate rehabilitation.

The other matters to which reference was made have also been borne in mind by me. However, the fact remains that the offences, particularly those of false imprisonment and intentionally causing injury, involved quite disgraceful **[6]** conduct on the part of the applicant. The manner in which he treated his de facto wife, who was then four or five months pregnant, and who had only on the day in question returned from hospital after some days during which she received treatment, amounted to quite appalling behaviour.

The photographs which show the nature and extent of the injuries which had been inflicted upon this young and obviously, in the circumstances, helpless girl reveal circumstances which mark the offences as being, I think, particularly grave. So far from considering the effective sentence of two years as being excessive, still less manifestly excessive, it is a sentence which I think can only be regarded as merciful. Speaking for myself, I would have been strongly minded to have substituted a more substantial sentence, but for what I regard as the convention (which is a matter of practice to a large extent adopted in this Court since the right was conferred upon the Crown to appeal against a sentence imposed) that this Court not itself when re-sentencing increase the penalty despite the statutory power to do.

[*His Honour then briefly stated the facts and the Court imposed an effective sentence of 2 years' imprisonment with a minimum term of 12 months.*]

APPEARANCES: For the Crown: Mr J Bowen, counsel. JM Buckley, Solicitor for the DPP. For the applicant Huljak: Mr P Tehan, counsel. Legal Aid Commission Victoria.
