57/94

SUPREME COURT OF VICTORIA

AITKEN v MOTEN-CONNOR

Smith J

31 January, 9 February 1995

SENTENCING – INTENSIVE CORRECTION ORDER BREACHED – OPTIONS AVAILABLE TO COURT ON BREACH – "VARY THE ORDER" – MEANING OF – WHETHER COURT MAY IMPOSE A SUSPENDED SENTENCE – "COMMIT TO PRISON" – MEANING OF: *SENTENCING ACT* 1991, SS3, 7, 19, 21, 25, 26.

1. Section 26 of the *Sentencing Act* 1991 ('Act') provides that where a court is satisfied that an offender has breached an Intensive Correction Order (ICO), the court may:

"(a) vary the order; or

(b) ... commit the offender to prison ..."

2. The expression "vary" in s26 of the Act does not authorise the substitution of a new kind of penalty. After the order is varied the section intends that the varied order be an ICO. It must still be capable of being described as an ICO.

3. The expression "commit the offender to prison" should not be regarded as a sentence of imprisonment for the purpose of the Act. Accordingly, an order committing an offender to prison under s26(2)(c) of the Act would not attract the provisions of the Act dealing with suspended sentences.

4. Accordingly, a magistrate was in error in imposing a suspended sentence of imprisonment upon being satisfied that an offender had breached an ICO.

SMITH J: [1] This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 from a final order of the Magistrates' Court at Melbourne made on 27 October 1994 whereby Mr Moten-Connor was convicted and sentenced to a term of imprisonment of three months, such sentence being wholly suspended pursuant to s27 of the *Sentencing Act* 1991.

Mr Moten-Connor had on 12 January 1994 been convicted on charges of receiving stolen goods, obtaining property by deception, theft and failure to answer bail and had been admitted to an Intensive Correction Order commencing on 12 January 1994 and finishing on 11 October 1994.

By charge and summons dated 9 February 1994 Mr Moten-Connor was charged that without reasonable excuse he had failed to comply with the conditions of the intensive correction order in that he had:

(i) failed to report for supervision as directed on 27/1/94, 28/1/94 and 3/2/94 and

(ii) failed to perform unpaid community work as directed or 15/1/94, 22/1/94 and 27/1/94.

Mr Moten-Connor was represented at the hearing. His counsel submitted that the learned Magistrate had as a sentencing option the power to vary the intensive correction order pursuant to s26(2)(a) of the *Sentencing Act* 1991 and to impose a suspended sentence pursuant to s28 of the Act. Counsel applied for the matter to be adjourned to enable an assessment to be made as to the defendant's suitability for a residential program at Odyssey House. The hearing was adjourned to 1 September 1994. The learned Magistrate indicated that in reaching her decision she gave primary **[2]** consideration to the judgment of Mandie J in the case of *Dimitrovski v Jones* (unreported, 23 August 1994). She stated that in sentencing the defendant it was appropriate to consider the extent of his drug problem and that the Court had not been fully informed at the time when the Intensive Correction Order had been made and was therefore misled as to his suitability for such an order. The learned Magistrate concluded:

"I do have power to vary the order and am obliged to follow the decision of the Supreme Court, in that vary can mean to change the dates of an intensive corrections order."

The learned Magistrate then remanded Mr Moten-Connor to 27 October 1994 releasing him on bail to Odyssey House for assessment and imposing bail conditions relating to reporting to Heidelberg police. On 27 October 1994 evidence was heard from a representative of Odyssey House. The learned Magistrate accepted submissions that the defendant should be given the opportunity to undertake the residential Odyssey House program and to that end sentenced the defendant stating that in relation to the breach of the Intensive Correction Order that he should not have been placed on that order given the extent of his drug use in that that drug use placed him in a situation where he was unable to comply with the order. The learned Magistrate held that the case of *Dimitrovski* gave the Court the power to impose a disposition other than an intensive corrections order. In so holding, the learned magistrate was presumably referring to the discussion in that case of the power to vary the order. In relation to the **[3]** breach of Intensive Correction Order, given the favourable reports from Odyssey House, she proposed to impose a suspended sentence with no other order that would place any additional requirements on the defendant. The learned Magistrate also indicated that she had taken into account the time spent in custody by the defendant and imposed the abovementioned suspended sentence.

Section 26 of the Sentencing Act 1991 provides the following: *[After setting out the relevant provisions of the Act, His Honour continued]* ... **[4]** The learned magistrate stated that in interpreting the Act in the way she did she was relying upon the decision **[5]** of Mandie J in *Dimitrovski v Jones* (above). In that case, Mandie J considered an appeal from an order made in the Magistrates' Court at Geelong pursuant to s26(2)(c) of the Act that the defendant serve the unexpired portion of the sentence.

The questions of law raised in that appeal were whether the magistrate erred in ruling that he had no power to vary an Intensive Correction Order where breach of it was proven under s26 of the Act and whether the magistrate erred in taking into account provisions of s25 of the Act when determining his power pursuant to s26 of the Act. The following propositions emerge from his Honour's reasons. They are propositions with which I agree.

(a) Each of the powers bestowed upon the Court by s26(2) is discretionary and may or may not be exercised as the Court considers appropriate in all the circumstances, subject to any of the express provisions of the Act (reliance was placed on s45(1) *Interpretation of Legislation Act* 1984). Accordingly, if the offence is proved the Court may or may not impose a fine and may or may not exercise one of the three further powers set out in subpara(a), subpara(b) and subpara(c).

(b) The imposition of a fine does not affect the continuance of the Intensive Correction Order (s26(5)(a) and s26 envisages that the Intensive Correction Order may continue notwithstanding the commission of an offence.)

(c) The power to vary the Intensive Correction Order is not confined to varying any special conditions which **[7]** may be imposed pursuant to s21.

His Honour stated

"To 'vary' in ordinary usage in the present context means to change or alter or to modify so as to adapt the relevant circumstances. It seems to me that the whole object or purpose of investing a court with a power to confirm, vary or cancel the ICO where an offence has been committed is to give to the court flexible tools to deal with the variety of circumstances which may arise when an offence, being a breach of the conditions of the ICO is committed."

(d) His Honour also stated that in his opinion the power to vary the order also included: "the power to alter the period of the order and hence the term of imprisonment itself". An ICO is a sentence – a composite thing comprising both a sentence of imprisonment and the order as to manner of service thereof (see s3(1), 7(6), 19(1)(5)(6) – compare the reasons in the Full Court in *R v Hebaiter* [1981] VicRp 39; [1981] VR 367, 374, 376)."

(e) His Honour rejected the submission that an Intensive Corrections Order cannot be varied or confirmed once it has expired saying that such an the interpretation would lead to both absurdity and injustice. It should be noted that s26 may be **[8]** invoked at any time up until three years after the date on which the breach of the Intensive Correction Order occurred. Thus the section envisages that the discretions

conferred by s26(2) are likely to be relevant and considered in cases that are brought to Court after the expiration of the term of imprisonment imposed under the Intensive Correction Order.

His Honour, applying the above principles, accepted the submission for the appellant that the learned magistrate's decision was vitiated by error of law because he had ruled that he had no power to vary the Intensive Correction Order under s26(2)(a). His Honour directed that the matter be remitted to the Magistrates' Court for reconsideration.

In the present case, counsel for the appellant submitted firstly that the power to vary the order containing s26(2)(a) of the Act was confined to any special conditions that might have been imposed. Counsel had to concede, however, that such a power would presumably at least allow variation of that part of the order that specified the supervising court and also conceded that it would authorise changes to the period of the order but argued that it would authorise an increase and not a decrease. I agree with the view expressed by Mandie J that the power to vary the order includes a power to alter the term of imprisonment and is not confined to the variation of special conditions.

It was also submitted by the appellant that the sentencing options set out in s7 of the Act are set out in **[9]** hierarchical form indicating what sentences are viewed by the Parliament as being more serious than others. It was submitted that the Intensive Correction Order was listed higher in the list than the suspended sentence option (the former in para(b) and the latter in para(c)). Counsel argued that it would be surprising if s26(2) in authorising the variation of the order would authorise an order which varied the term of imprisonment to a shorter period where there had been a breach of the order. Counsel submitted that that was what the magistrate had done in this case and that the section did not authorise such a variation.

In reading s7 of the Act one might be excused for thinking that there had been some sort of ranking of priority of the various sentencing options recorded. But para(k) would include within it, by cross-reference to other Acts, penalties more severe than those that precede it. Further the hierarchical view can hold true only if one compares the extremes of each kind of order or the minimum of each kind of order. In particular cases, it may be demonstrated that a term of imprisonment could be less severe than an Intensive Correction Order. Thus, a term of imprisonment of one month might be seen to be less of a punishment than an Intensive Correction Order of 12 months. No implications should be drawn of the kind submitted from the order of sentences listed in s7. To interpret s7 in the way suggested by the appellant would prevent the learned magistrate from addressing adequately the objectives in s1 of the Act. The listed paragraphs are alternatives and a sentencing court can and should consider all of them before determining what **[10]** sentence to impose.

In any event in the present case the comparison is between a term of imprisonment of nine months to be served by way of intensive correction in the community and a sentence of three months suspended for 24 months while the offender undergoes effectively treatment by and confinement at Odyssey House. It would have been open to the learned magistrate to view such an order as being more severe than the original order imposed while at the same time seeing it as an order that offered greater hope for rehabilitation than the previous order.

For these reasons, I am not persuaded that the learned magistrate erred in not adopting the suggested hierarchical approach. Counsel for the appellant also submitted that the order that was made involved a substitution, not a variation – the substitution of an order of three months imprisonment suspended for 24 months. It is submitted that such an order was not authorised by the section. This issue was not an issue in *Dimitrovski* above and thus the reasons of Mandie, J do not deal with it directly.

It seems to me that the first question that arises is the proper interpretation of the words "the order" in the phrase "vary the order" in s26(2)(a). These words refer back to the order referred to in subs(1), namely "an Intensive Correction Order". As noted above "Intensive Correction Order" is defined to mean "an order made under s19(1) that a term of imprisonment be served by way of intensive correction in the community."

[11] Taking a strict approach to the interpretation of the definition of "Intensive Correction

Order" it might be argued that the phrase "vary the order", in referring back to the Intensive Correction Order, concerned only the intensive correction part of the order imposed under s19. This construction assumes that it is possible to separate one part of the order from another. In support of that construction it may be said that under s19, the sentence comprises two parts - an order that the offender be sentenced to imprisonment and an order that it be served by way of intensive correction. The latter, however, is dependent upon the former – the period of an Intensive Correction Order is the period of the term of imprisonment imposed (s19(6)). S19(5) provides that an Intensive Correction Order must be taken to be "a sentence of imprisonment for the purposes of all enactments except ... (certain specific enactments)."

As Mandie J saw the nature of an Intensive Corrections Order, it is a composite thing comprising both the imposition of a term of imprisonment and an order as to the manner of its service. In my view, the whole of the order imposed is intended to be subject to the power to vary. This would include in my view both aspects of the order – the term of the imprisonment and the intensive correction aspect (including any special conditions). Support for the view that the reference to "the order" includes the order for imprisonment aspect is also arguably found in the use of the word "order" in s25(1). That section authorises the court to re-sentence the offender in circumstances where it has **[12]** cancelled "the order". Thus, the section assumes that cancellation of the order will have the effect of wiping the slate clean and requiring the court to re-sentence.

There may, however, be limits to be found in the word "vary" in para(a). The expression "vary" does not authorise the substitution of a new kind of penalty. After the order is varied the section intends that the varied order be an Intensive Correction Order. It must still be capable of being described as an Intensive Corrections Order.

It becomes necessary then to identify the important features of an Intensive Corrections Order. It might be argued that major features of the Intensive Correction Order are the imposition of the term of imprisonment and the treating of the order as a sentence of imprisonment. From the legal point of view that is a very significant aspect of the order. Plainly, however, it is the requirement that the sentence of imprisonment be served by intensive correction that gives an Intensive Corrections Order its identity. To remove the latter is to change the character of the Order so that it ceases to be an Intensive Corrections Order.

Clearly, the sentence imposed by the learned magistrate could not be called an Intensive Corrections Order. By way of comparison, an order extending or limiting the period of the term of imprisonment specified in the order would not affect the character of the order as an Intensive Corrections Order. The section should be compared with s25 and with s47 (dealing with breach of Community Based Orders) which expressly authorise a court where the order is breached to re-sentence the offender **[13]** (compare the cases on the statutory power to vary trusts which while permitting substantial variation require the "substratum" of the trust to be retained – eg *Re Ball's Settlement Trust* [1968] 1 WLR 899 and *Allen v Distillers Co (Biochemicals) Ltd* [1974] QB 382; [1974] 2 WLR 481).

In my view, the power to vary the Intensive Corrections Order did not authorise the order that the learned magistrate made. What she did was re-sentence the offender by imposing a different sentence – a suspended sentence. Accordingly, I must find that she erred in law in proceeding on the basis that the power to vary authorised the orders made.

I have considered the question whether the order made by the learned magistrate was authorised by s26(2)(c). That provision authorises the Magistrates' Court to:

> "cancel it (if it is still in force) and, whether or not it is still in force, commit the offender to prison for the portion of the term of imprisonment to which he or she was sentenced but was unexpired at the date of the offence under subs(1); ..."

In the present case the Intensive Corrections Order had expired by the time the learned magistrate came to make her decision and make the challenged orders on 27 October 1994. Thus, it was not necessary to cancel the order and the latter part of para(c) operated empowering the learned magistrate to "commit the offender to prison" for the portion of the term of imprisonment unexpired at the date of the offence. An issue that arises is whether in making an order committing

an offender to prison for that term, a magistrate would be imposing "a sentence of imprisonment" within the meaning of s27 of the Act which arguably would authorise the **[14]** order made suspending the sentence of imprisonment.

Accepting for the moment the validity of such an analysis, the order made was not authorised because the learned magistrate did not sentence the offender for the portion of the term of imprisonment unexpired at the date of the offence. I am not satisfied, however, that the above interpretation is open.

Some significance must be attached to the use of the words "commit the offender to prison" as opposed to the words usually used in the Act such as "sentencing ... to a term of imprisonment". The words "commit ... to prison" appear only in s26 of the Act. A computer search would suggest that the only other place where such an expression appears in Victorian legislation is in the *Maintenance Act* 1965 dealing with breach of maintenance orders.

Counsel were unable to direct me to any authority that might explain the use of the phrase. The expression is commonly found in the law of contempt where reference is made to committing people to prison for contempt and there is a substantial body of learning concerned with the distinction between attachment and committal for contempt (see, for example, *Oswald on Contempt, Committal and Attachment*, 23 and following). In Jowitt's *Dictionary of English Law* (at 384) it said:

> "A person is committed to prison when he is sent there by a court of judge, generally for a short period or for a temporary purpose."

A number of references there follow and, generally, are concerned with orders for committal made upon proof of breach of court orders.

[15] It may well be that the express empowering of the magistrate to commit the offender to prison was included in part out of a concern to make the source of the power to send to gaol clear and to avoid any risk of the situation that occurred in *R v Hebaiter* [1981] VicRp 39; [1991] VR 367. Nonetheless, a deliberate choice of language appears to have been made. The provision could have empowered the magistrate to sentence the offender to a term of imprisonment for the unexpired portion as defined. Instead the section refers to the cancellation of the order, including the sentence of imprisonment, and then empowers the magistrate to commit the offender to prison. An explanation for the choice of words is that it is intended to empower the sentencing court to make an order that is immediately effective as compared with the power to sentence to a term of imprisonment which may be suspended.

On balance, it seems to me that the proper interpretation to place upon the provision is that it was intended that the order committing the offender to prison should not be regarded as a sentence of imprisonment for the purposes of the Act. Thus, it would seem to me that an order committing an offender to prison under s26(2)(c) would not attract the suspended sentence provisions such as s27 and s28.

For the foregoing reasons, the appeal should be allowed.

It is also my view that it would be appropriate to remit the proceeding to the Magistrates' Court for further hearing and determination according to law. In the light of the foregoing, the options available to the magistrate dealing with matter would appear **[16]** to be somewhat limited. The offender did not apply to vary the order under s25 of the Act and he is now too late. No special conditions were imposed originally under s21 of the Act but it may be possible to impose special conditions by way of variation. It seems to me that there are prescribed programs (see *Sentencing Regulations* 1992, Reg10). The approval and direction of the officer-in-charge of the programme would be needed (see Schedule to Reg10).

Another issue would be whether it is possible to impose a special condition requiring the offender to attend the specified prescribed programme unless the original pre-sentence report so recommended (s21). There is no evidence before me about whether there was a pre-sentence report or what it contained. I note that the receipt of a pre-sentence report appears to be a condition

precedent to the making of an Intensive Corrections Order (s19(1)(b)). Read literally, s21 arguably prevents the imposing of special conditions based on a subsequent pre-sentence report. It would seem remarkable, however, if the power to vary did not include the power to add special conditions.

It may be that s21 should be read *mutatis mutandis* in that situation or "the pre-sentence report" as "a pre-sentence report". The point was not argued before me and I express no final view on the matter. Another option that may be open, depending on the circumstances when the matter is reheard, would be simply to confirm the original order made under s26(2)(b). Much would depend on the circumstances as they present themselves to the court and I should, therefore, make no further comment.

APPEARANCES: For the appellant Aitken: Mr SP Gebhardt, counsel. Peter S Wood, Solicitor for the Office of the Public Prosecutions. For the respondent Moten-Connor: Mr L Webb, counsel. Ian Polak, solicitor.
