33/74

SUPREME COURT OF VICTORIA

HALDANE v CONGERTON

Gillard J

21 August 1974

SENTENCING – MOTOR TRAFFIC MATTER – DRIVING WHEN LICENCE CANCELLED – MAXIMUM SENTENCE THREE MONTHS' IMPRISONMENT – ONE DAY'S IMPRISONMENT IMPOSED – SENTENCING CONSIDERATIONS – THE OBJECT OF PUNISHMENT – WHETHER DISCRETION MISCARRIED: *MOTOR CAR ACT* 1958, S28.

HELD: Order nisi discharged without costs.
1. The object of punishment is to prevent anti-social behaviour by the commission of crimes and offences. The intention is to prevent the person charged from committing a further offence, particularly of a similar character, and to deter other members of the community from committing such offences. The person charged may be prevented from repeating his misconduct by first incapacitation, that is, by removing him from the community and segregating him from other people; secondly, by reformative treatment, that is by so attempting to remove the desire to commit further offences; and thirdly, by intimidation, that is, by making the person afraid of the consequences of committing further offences.

2. A very wide discretion is generally given to courts to impose punishments. The usual policy of the law is to fix maximum penalties which are intended to cover the worst cases of the offence, but to leave to the discretion of the tribunal to determine to what extent in the circumstances of a particular case the punishment should be much less than the maximum, and to decide what should be the appropriate punishment. Such tribunal generally, has the great privilege of observing the offender and hearing submissions made on his behalf in his presence, and generally to watch the effect of such submissions on him and other people congregated in the Court. Efforts are always made by the legal representative of the offender to palliate the offence and to bring home to the tribunal facts or circumstances which, whilst not excusing the anti-social behaviour, nevertheless gave some explanation for it.

3. After giving the matter anxious consideration it could not be said that the sentence passed was so unreasonable that the Magistrates could not have come to that conclusion. It was a matter to which different minds would react in different ways. It was obviously a case calling for clemency. It was understandable that the Magistrates were impressed, having regard to the veniality of the defendant's behaviour. In the circumstances, the Magistrates did not fail to exercise properly the discretion conferred on them by the legislation. Accordingly, the order nisi was discharged without costs.

GILLARD J: This is an order nisi to review a decision of the Magistrates' Court at Preston on an information returnable in that Court on 18th February 1974, wherein Robert Keith Haldane was the Informant and William Thomas Congerton was the defendant.

The defendant was charged that on 12th February 1974, at Preston he did drive a motor car after his licence had been cancelled and during a period of disqualification from obtaining a licence. He was charged with an offence contrary to the provisions s28 of the *Motor Car Act*, wherein he we liable to punishment for a period not exceeding three months. To that charge he pleaded guilty.

It appears that on Tuesday, 12th February, at about 7.45am the defendant was driving a Holden motor car along Wood Street, Preston, when he was intercepted by the informant. On being asked to produce his motor driver's licence the defendant admitted he did not have such a licence, and when he was asked where was his licence, the defendant replied that he had lost it at court, and he was then asked, "Was your licence cancelled at the Alexandra Magistrates' Court in November last year for an offence of exceeding .05%" the defendant replied "Yes". When

asked to explain why he was driving the motor car he said he only took the motor car because he wanted to go to play soccer at Diamond Creek after his work had been completed.

It appeared from further evidence that at the Alexandra Magistrates' Court on 29th November 1973, the defendant was convicted of driving with a blood alcohol level in excess of .05%. He was fined $50 and his licence cancelled, and he was disqualified from obtaining a licence for a period of 12 months. At the conclusion of the proceedings he was asked as to his prior convictions and be admitted that at the Preston Magistrates' Court on 31 July 1972, on a charge of exceeding 35 miles per hour in a 35 miles per hour zone he was found guilty and fined $50. He also admitted that at the same Court on the same day, he had been convicted of driving a motor car while having a blood alcohol level in excess of .05% and was fined $50, and his probationary licence was cancelled and he was disqualified for a period of three months. The Magistrates were then addressed by a solicitor appearing for the defendant, who called a witness, Mr Archer, who was apparently the sales manager of the defendant's employer. Mr. Archer gave evidence regarding the defendant's work record, and he informed the Court in evidence that the defendant had been deprived of the company car and had suffered a drop in wages upon his conviction. Unfortunately, it does not appear which conviction Mr Archer was referring to, but I have assumed that it was the conviction in relation to the driving with an excess of .05 at Alexandra. Mr Archer also said that the defendant had agreed to sell his motor car prior to his apprehension, and that the sale had been completed on that day.

Mr Archer also gave evidence that the defendant was an English immigrant who was alone in Australia, his parents having gone to Rhodesia. He expressed the opinion that the defendant was of good character but that he badly lacked someone to seek guidance from and this was probably the cause of his driving whilst disqualified. He also stated that if a substantial gaol term were imposed his company would have to dismiss the defendant from its employment.

The solicitor then addressed the Bench on the matters raised by Mr Archer, and pointed out that it was the Court's responsibility to fix a term of imprisonment which fitted the circumstances of the case. He pointed out the Magistrates' powers under the *Justices Act*, and he also emphasised the lack of facilities for the treatment of prisoners convicted under the *Motor Car Act* at the Pentridge Gaol. He further submitted that the Magistrates should ensure that any sentence fixed did not cause moral and physical harm during the period in gaol than was necessary.

Having heard that evidence and those submissions, the Magistrates, being three honorary Magistrates, convicted and sentenced the defendant to one day's imprisonment. It appears that he was thereupon taken into custody, which I am told in the affidavit was at 12.30pm and the defendant was imprisoned until 6.00pm the same day. It would appear that he did not suffer one day's incarceration as he was sentenced. Presumably they kept him at the watchhouse at Preston and possibly it is a station which closes at 6.00 p.m,, and accordingly instead of serving a full 24 hours' imprisonment he served but five and a half hours.

The informant then applied on 27th May of this year for an order nisi to review that decision of the Magistrates' Court at Preston, and Master Collie granted such order nisi on the ground that the Magistrates were in error in that the penalty imposed by them was so manifestly inadequate and/or inappropriate in the circumstances as to amount to a failure by them properly to exercise their discretion.

A very wide discretion is generally given to courts to impose punishments. The usual policy of the law is to fix maximum penalties which are intended to cover the worst cases of the offence, but to leave to the discretion of the tribunal to determine to what extent in the circumstances of a particular case the punishment should be much less than the maximum, and to decide what should be the appropriate punishment. Such tribunal generally, has the great privilege of observing the offender and hearing submissions made on his behalf in his presence, and generally to watch the effect of such submissions on him and other people congregated in the Court. Efforts are always made by the legal representative of the offender to palliate the offence and to bring home to the tribunal facts or circumstances which, whilst not excusing the anti-social behaviour, nevertheless gave some explanation for it.

The object of punishment, of course, is to prevent anti-social behaviour by the commission

of crimes and offences. The intention is to prevent the person charged from committing a further offence, particularly of a similar character, and to deter other members of the community from committing such offences. The person charged may be prevented from repeating his misconduct by first incapacitation, that is, by removing him from the community and segregating him from other people; secondly, by reformative treatment, that is by so attempting to remove the desire to commit further offences; and thirdly, by intimidation, that is, by making the person afraid of the consequences of committing further offences.

In my view, the circumstances of this case do not necessarily require incapacitation in the sense in which it is used there. Indeed, as we shall see, there is some form of incapacity already arrived at in the facts. It is in the second and third aspects that the court would have been most concerned in prescribing the appropriate punishment in the present case.

There has been very little that was dramatic in the circumstances which call for draconian treatment of the defendant. Thoughtlessly he breached the law for his own personal convenience. On the other hand he did not place any member of the community in jeopardy by his misconduct. In my view therefore, his conduct did call for some clemency with a possibility of inducing him to conform and to reform.

On the other hand, he did commit a serious offence and the community requires that he must not be permitted to get away with his defiance of the law. He must necessarily be intimidated to some extent to show that the law must be obeyed and that he cannot get away with his disobedience of it.

In modern times, I think, in our permissive society, this aspect of the law is quite frequently forgotten, particularly in certain areas of human conduct in our community, but sitting as a Judge in this Court, despite the modern trends, one should not lose sight of the duty of the courts to vindicate the law and to see that it is appropriately observed.

In my view these were the two competing factors that the magistrates should have taken into account. Does the sentence imposed demonstrate that they did not understand or alternatively did not advert to these factors? Unfortunately the magistrates gave no reasons for their order and we do not know how they were affected by the various facts that emerged from the affidavits, such as for example, that the defendant had been arrested and placed in custody on the day of the commission of the offence.

I have been referred to a judgment of the Full Court consisting of Smith, Adam & Little JJ, where the Court upset an order of the Magistrates' Court at Ferntree Gully where in sentencing an offender under s28 of the *Motor Car Act* the magistrate sentenced him to the rising of the court. The court immediately rose, and accordingly in fact, no punishment was imposed on the person charged. Accordingly the Court said that the Magistrate must impose some term of imprisonment and referred the matter back to him to act in accordance with the law stated by them. Mr Justice Smith in particular pointed out that offences under s28 were regarded as serious offences calling for punishment. At the same time he emphasised that there was really no redeeming feature in the offender's conduct. Accordingly he was of the opinion that the offender should have been sentenced to some term of imprisonment, that is, if I understand his judgment correctly.

The case is clearly distinguishable from the present by, first the difference in the circumstances of the commission of the offence, and secondly, in the present case, punishment was in fact imposed by the magistrates and in fact was served. I assume, although I doubt whether it was in accordance with the provisions of the *Gaols Act* 1958.

The vital question then, for my consideration was the period of punishment so short that this Court must come to the conclusion that either the magistrates took into account matters they should not have taken into account, or alternatively, they did not take into account relevant matters, or alternatively, because of the result it must appear that the exercise of their discretion miscarried.

It is therefore necessary to consider more closely the circumstances most favourable to the defendant: cf. *Australian Iron & Steel Company Ltd v Greenwood* [1962] HCA 42; 107 CLR

308 at p311; [1963] ALR 710; 36 ALJR 171. The magistrates did impose punishment of one day's imprisonment. It is clear that they did purport to exercise the discretion; they did impose a punishment. Secondly the magistrates did refuse to grant a bond or to allow the defendant out on probation. It must therefore be assumed that having rejected the solicitor's plea for such a course, they must have come to the conclusion that some intimidation of the defendant was necessary.

It may be that the magistrates could have been impressed by the fact that the defendant was already punished by first, losing the benefit of his employer's car, secondly, a drop in wages and thirdly, having to sell his own motor car.

They might have also been impressed by his incapacity in future to drive a motor car, by being deprived of the company car and having had to dispose of his own motor car. To this extent the magistrates might have come to the conclusion that the defendant's desire to drive a motor car had been diminished because without having a motor car it would be unlikely he would commit future offences of this character. Again the Magistrates could have taken the view the defendant was a disadvantaged person in our community who did not receive that parental guidance which every young man has to assist him in carrying out and observing his civic responsibilities and duties. In some context this, in my view, is gravely exaggerated but as an argument for clemency it should not be overlooked. In accordance with that view, if it were accepted, the magistrates might have not been very greatly impressed with the defendant's antecedents. They may have accepted the legal representative's submission, that a term of imprisonment at Pentridge would be of no value is reclaiming the defendant, a comparatively young man.

It is notorious that all tribunals do believe that clemency shown at the proper time may bring about some measure of reformation by not exposing the defendant to the moral and physical harm that can occur to them in gaol. Again I think this view is gravely exaggerated. My view on this is that punishment means what it says, and if a person puts himself deliberately in jeopardy I do not believe that crocodile tears should be shed in very great sympathy with him. However, I cannot overlook the fact that I was not the tribunal dealing with this young man. I have to consider the effect it would have upon three honorary Magistrates at Preston. I repeat, having regard to the effect that I know such submissions do have upon tribunals it must not be forgotten when I come to assess what the Magistrates have done.

From the form of the information the Magistrates also should have known that the defendant had at some stage been in police custody. I came to this conclusion as soon as I saw the form of the information, and secondly, when I read the evidence that was tendered to the Court. I was told by Mr Fogarty who appears for the informant, to move the order absolute, that the defendant was in custody at the Watch House from 9.05am till 11.10am. In fact he had been picked up by the informant at 7.45, so he was in the custody of the police for about 3½ hours.

Finally, the Magistrates might have been impressed that the circumstances of this offence were of a venial character, despite the legislative intent to be found in the history of the amendment of the section to which my attention has been drawn.

There was nothing of the background of drink and violence as in the case considered by the Full Court. This young man did a foolish thing to drive a motor car so he could attend presumably practice at soccer at Diamond Creek. There were no reprehensible features which made this a case for dire punishment. On the other hand there was a blatant breach of the provisions of s28. The discretion given by the provisions of that section, of course, is very wide.

Although I personally would not have treated the offender as the Magistrates did that is not the test that I should look at. Can I conscientiously be persuaded that the Magistrates failed to exercise the discretion conferred upon them by law having regard to those half a dozen matters to which I have already made reference? Did the Magistrates fail to exercise the discretion conferred on them by the section? They undoubtedly took a very lenient view of the defendant's conduct.

Giving the matter anxious consideration over the lunch hour I cannot say it was so unreasonable that they could not have come to that conclusion. It is a matter to which I think different minds would react in different ways. It was obviously a case calling for clemency. I can

well understand Magistrates being impressed, having regard to the veniality of the defendant's behaviour. Feeling this way as I do I am not persuaded that the Magistrates have failed to exercise properly the discretion conferred on them by the legislation.

Accordingly, the order nisi will be discharged without costs.

APPEARANCES: For the informant/applicant Haldane: MR JF Fogarty, counsel. Mr J Downey, Crown Solicitor. For the defendant/respondent Congerton: Messrs J Murphy & Co, solicitors.
