01/89

SUPREME COURT OF VICTORIA

DI STEFANO v HOOD and ORS

Kaye J

12 August 1988

BAIL – FAILING TO ANSWER – PLEA OF GUILTY – CHARGE ADJOURNED – WHETHER ACCUSED HAS STATUTORY RIGHT TO APPLY FOR BAIL – SUMMARY OF CHARGE GIVEN BY PROSECUTOR – SUMMARY DISPUTED – EFFECT OF WHERE PLEA OF GUILTY – REPORT TENDERED TO COURT ON PLEA – NOT READ BY PRESIDING MAGISTRATE – CONCLUSIONS OF REPORT WRITER STATED TO COURT BY COUNSEL – WHETHER FAILURE TO READ REPORT VITIATED SENTENCE – CBO MADE – CONVICTION NOT PRONOUNCED IN OPEN COURT – WHETHER COURT REQUIRED TO PRONOUNCE CONVICTION: *PENALTIES AND SENTENCES ACT* 1985, SS28, 29, 39; *BAIL ACT* 1977, SS4(2), 30.

Immediately after S. pleaded guilty to 3 charges of failing to answer bail, S.'s counsel informed the court that there were other charges listed at the court for hearing that day. As the relevant informations were not before the Court, the magistrate indicated that he intended to remand S. in custody to appear at the court where the charges could be dealt with, and that bail would be refused on the ground that being a person in custody for failing to answer bail, S. was disqualified from admission to bail.

The hearing in respect of the 3 charges of failing to answer bail was continued, summaries were given by the prosecutor, whereupon S.'s counsel announced that S. did not accept the summaries. Notwithstanding the objection, the magistrate proceeded with the matter, sought information concerning S.'s antecedents and during the plea by counsel, a psychologist's report was tendered to the court. S. was then remanded in custody for 8 days pending the obtaining of a pre-sentence report relevant to the making of a community based order ('CBO') pursuant to the provisions of the *Penalties and Sentences Act* 1985 ('Act').

On the resumed hearing, S. pleaded guilty to the remaining charges and during the plea, the magistrate disclosed that he did not have the psychologist's report before him, nor had he read it. As no copy was in court, S.'s counsel recounted the conclusions expressed in the report; the magistrate sentenced S. and, *inter alia*, made a CBO and requested counsel to forward a copy of the report to the Office of Corrections. In making the CBO, the magistrate did not pronounce that the order was a conviction for all purposes.

An order nisi was obtained on the grounds that the magistrate was in error in:
(1) denying S. his statutory right to apply for bail;
(2) proceeding with the hearing when the summaries were disputed;
(3) imposing sentence without first reading the psychologist's report; and
(4) failing to pronounce in open court that the CBO was recorded as a conviction for all purposes.

HELD: Order nisi discharged.
(1) Although the magistrate was in error in denying S.'s right of establishing that his failure to answer bail was due to causes beyond his control, the pleas of guilty together with the absence of some explanation meant that any application for bail was bound to fail.

(2) A plea of guilty operates as an admission of all the essential facts and law constituting the offence. S.'s plea of guilty admitted sufficient facts to constitute the offence of failing to answer bail and accordingly, it was not necessary for the magistrate to hear sworn evidence or an agreed statement of facts before passing sentence.
***R v Inglis* [1917] VicLawRp 99; (1917) VLR 672; 23 ALR 378, followed.**

(3) In view of counsel's statements concerning the conclusions expressed in the psychologist's report, and the magistrate's reference to it after making the CEO, it followed that the magistrate was aware and mindful of the contents of the report and took them into account in passing sentence.

(4) Sections 28 and 29 of the Act do not require the court when making a CBO
(a) to pronounce that the order will be recorded as a conviction for all purposes;
(b) to direct in open court that the order shall not be a conviction for all purposes.

KAYE J: *[After setting out the details of the charges, the sentence imposed and a preliminary objection to the validity of the orders nisi, His Honour continued]* ... **[5]** At the hearing in the Preston Magistrates'

Court on 16th April 1987, in reply to the magistrate's enquiry, Mr Lavery announced that the applicant pleaded guilty to the three charges of failing to answer bail. When the magistrate stated his intention to deal with the breach of bail offences, Mr Lavery informed him of other charges against the applicant which were listed for hearing on the same day. The magistrate stated that as the informations relating to the other offences were not then in the Court and as the informations were proper to be heard in the Broadmeadows, Dromana and Melbourne Magistrates' Courts, he intended to remand the applicant for hearing of all the informations to the Broadmeadows Court on 22nd April 1987.

Mr Lavery then made application for bail. The magistrate refused the application on the ground that the applicant was in custody pursuant to warrants of apprehension for failing to answer bail, and that the applicant had entered pleas of guilty in relation to those charges. Mr Lavery submitted in substance that by the provisions of s4(2)(c) of the *Bail Act* 1977 the applicant might be admitted to bail if he discharges the onus of satisfying the magistrate that his failure to answer bail **[6]** was due to causes beyond his control. The magistrate stated that he would then hear the three informations of failing to answer bail.

Mr Lavery informed the magistrate that the pleas of guilty had been entered upon the understanding that all charges against the applicant would be dealt with then at the Preston Court. He submitted that all informations should be heard together, adding that he proposed making an application for bail. The magistrate stated that he would not hear an application for bail and that he would proceed to hear the charges of failing to appear on bail because pleas of guilty to those charges had been made. The magistrate directed the prosecutor to proceed with summaries in relation to the breach of bail charges.

At the conclusion of reference to the summaries by the prosecutor, the magistrate sought information of the applicant's previous convictions. Mr Lavery informed the magistrate that the applicant did not accept the summaries referred to by the prosecutor. He submitted that as the applicant did not accept the summaries and that as there was no evidence relating to the charges of failing to answer bail, the hearing of the information ought to be adjourned so that evidence of those matters might be called. The magistrate stated in substance that in accordance with "high authority" he could sentence the applicant on the facts admitted by the applicant's plea of guilty. After further discussion the magistrate stated that he intended to proceed with the matters and again sought from the prosecutor information concerning the applicant's previous convictions.

He then called on **[7]** Mr Lavery to address him concerning penalties. Mr Lavery submitted, *inter alia*, that, in the absence of information concerning the substantive offences for which he was on bail, the magistrate was not fully informed for the purposes of fixing penalty for breach of bail. Mr Lavery tendered a psychologist's report concerning the applicant and submitted that, having regard to the contents of the report, a non-custodial sentence would be appropriate. The magistrate remanded the applicant in custody until 24th April 1987 at Heidelberg Magistrates' Court, in order that a pre-sentence report relevant to the making of a community-based order could be obtained from an officer of the Office of Corrections at Heidelberg.

O.R. No. 68

The magistrate's decisions so made are the subject of the order nisi in O.R. numbered 68. The complaint made under the order nisi is that the magistrate erred in that he refused to hear an application for bail despite the applicant being entitled to make such application, and that he proceeded to sentence the applicant "despite such refusal". (No doubt the expression "despite such refusal" is meant "notwithstanding the applicant's application for bail").

Mr Perkins elected that the order nisi made in O.R. No. 68 should be treated as arising out of information numbered 4960 by which the applicant was charged with failing to answer bail at Dromana Court on 7th April 1986.

The magistrate's stated reason for refusing to hear the application for bail was based on the circumstance **[8]** that the applicant was in custody under warrants of apprehension for failing to appear on bail. It is implicit in his reason that the magistrate considered the applicant, being a person in custody for breach of bail, was disqualified from admission to bail. However, by s4(2)(c) of the *Bail Act* 1977 it is provided:-

> "Notwithstanding the generality of the provisions of sub-section (1) a Court shall refuse bail—
> (c) if the accused person is in custody for failing to answer bail unless the accused person satisfies the Court that the failure was due to causes beyond his control."

Although this provision was brought to his attention by Mr Lavery, the magistrate refused to hear the application for bail thereby denying the applicant an opportunity to discharge the onus of satisfying the statutory requirement that his failure to answer bail was due to causes beyond his control. Again, a short time later the magistrate refused to entertain a similar application. By precluding the applicant from making application for bail, the magistrate denied him his statutory right; consequently the magistrate was in error.

As a result of being denied the chance to satisfy the magistrate of matters referred to in paragraph (c) of s(4)(2), the applicant continued to be held in custody for a further period of eight days until the resumed hearing on 24th April. Thus any wrong which he might have suffered became spent at the end of that period. No order made in these review proceedings would be capable of rectifying any detriment which the applicant might have suffered as a **[9]** result of having been denied the chance of discharging the statutory onus which he bore. Any such detriment would, of course, only have been suffered by him if he had been able to establish to the magistrate's satisfaction that his failure to answer bail was due to causes beyond his control. Although Mr Lavery did not inform the magistrate what facts were intended to be relied upon as constituting such causes, it is sufficient for these purposes that the applicant, by error of law, was denied an opportunity of securing bail.

However, the magistrate's refusal to entertain the application for bail was justifiable on a ground other than the reason stated by him. For reason to which I shall later in this judgment refer, the applicant's pleas of guilty to charges of failing to answer bail contrary to the provisions of s30(1) of the *Bail Act* 1977 involved admissions of fact by him that his failures to do so were without reasonable cause. Consequently, in the absence of some explanation by Mr Lavery foreshadowing the nature of the causes, the magistrate was entitled to assume that the applicant would not have been able to discharge the onus of satisfying him that his failures were due to causes beyond his control. After the magistrate refused to hear the applications for bail, the applicant did not seek to alter his pleas of guilty.

Consequently, an application for bail heard while the pleas of guilty were extant, was bound to fail. The magistrate's refusal to entertain applications for bail and orders remanding the applicant in custody, although made for erroneous reason but being **[10]** maintainable for proper reason appearing on the face of the proceedings, the order nisi must be discharged: *Green v Patten* [1894] 15 ALT 254 at 255; and *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38 at 42; [1954] ALR 168.

I now turn to consider the remaining orders nisi. Upon the resumption of the hearing at the Heidelberg Court on 24th April, the applicant pleaded guilty to all the other charges save for the charge of driving whilst disqualified which was withdrawn. Summaries relating to each charge were read and accepted by the applicant. In the course of a plea, Mr Lavery drew the magistrate's attention to the similarity of the terms of the favourable assessment of the applicant by the Office of Corrections officer and by the psychologist in his report which had been admitted in evidence. The magistrate disclosed that he did not have the psychologist's report before him, and that he did not read the report during the hearing on 16th April.

Mr Lavery informed the magistrate that he did not then have a copy of the report with him but requested the magistrate to bear in mind the contents of the report. From his recollection of the contents of the report, Mr Lavery recounted to the magistrate the conclusions expressed by the psychologist. After a short adjournment, the magistrate sentenced the applicant, imposed fines upon him and made orders for the performance of a community-based order. When doing so the magistrate added that Mr Lavery was required to forward a copy of the psychologist's report to the Office of Corrections at Heidelberg. **[11]** In the principal affidavit Mr Lavery deposed that when the community-based order was presented for signature by the applicant, he (Mr Lavery) noted that the magistrate had marked on the back of the document that the order was to be a conviction "for all purposes" and that when pronouncing the order the magistrate did not state that the order was a conviction for all purposes.

O.R. No. 68A

The information nominated by Mr Perkins as the basis for the order nisi in O.R. 68A was information numbered 4961 by which the applicant was charged with failing to answer bail at the Melbourne Court on 27th June 1986.

By the order nisi it is complained that the imposition of sentences on charges of failing to answer bail, in the absence of sworn evidence or agreed summary of facts relating to the charges was made in error on the following grounds that:-

> (a) The magistrate proceeded with the hearing of the informations without having any details of the substance of the charges, the subject of those informations, properly before him;
>
> (b) The magistrate proceeded to sentence the applicant without hearing either sworn evidence or agreed summary as to the background of the said offences;
>
> (c) The magistrate did not adjourn the hearing of the matter in order that either sworn evidence agreed to by both parties could be put before the Court.

[12] Under these grounds Mr Perkins submitted that the magistrate was not entitled to sentence the applicant using the summary relating to the charges read or presented by the prosecutor. It was contended that, the applicant having expressed that he did not accept the summary, the magistrate was required to hear sworn evidence of matters relevant to the charge of failing to answer bail.

Mr Perkins was unable to direct attention to any statutory provisions or rule concerning the use to be made of a summary in criminal proceedings. It was accepted by counsel that a summary is a statement of facts concerning the offence charge as appears in the information. It is not clear from the contents of the principal affidavit whether the summary was a document or a verbal statement of facts. Nevertheless from the contents of the principal affidavit I assume that the prosecutor in the present matter made a verbal statement of certain facts by way of a summary. Mr Lavery did not identify to the magistrate which of the facts summarised by the prosecutor were disputed by the applicant. However, Mr Lavery having objected to the summary, the magistrate referred to what he described as "high authority" by which he could sentence the applicant upon facts admitted by the plea of guilty. Thereafter the magistrate made no further reference to the summary, and there is no evidence that for the purposes of sentencing the applicant he relied upon any matter or fact stated by the prosecutor from any summary.

A plea of guilty operates as an admission by an accused person of all the essential facts and law constituting the offence with which he is charged: *R v Inglis* [1917] VicLawRp 99; [1917] VLR 672; 23 ALR 378 (Full Court). **[13]** It follows that by his plea of guilty to the offence of failing to answer bail the applicant admitted the following facts constituting the offence laid under s30(1) of the *Bail Act* 1977:-

> 1. that on 27th June 1986 he was a person released on bail conditional on his appearance at the Melbourne Magistrates' Court on 27th June 1986;
>
> 2. that on 27th June 1986 he failed to appear at the Melbourne Magistrates' Court in accordance with the undertaking of bail and deliver himself into custody; and
>
> 3. that he so failed to appear without reasonable cause.

Therefore for the purposes of considering the penalty or sentence to be imposed upon the applicant, the magistrate was not required to hear sworn evidence or an agreed statement of facts relating to the commission of the offence. The magistrate, taking into account the facts admitted by the plea of guilty, was empowered to pass sentence upon the applicant for the offence against the *Bail Act*. From the reference made by him to high authority, it is clear that the magistrate sentenced the applicant taking into account those admitted facts.

The applicant was entitled to present by way of matters in mitigation of sentence or penalty such facts as he thought fit. This Mr Lavery did by tendering the psychologist's report and addressing the magistrate as to the appropriate penalty. However, there is no evidence that the magistrate took into account any matter or fact stated by the prosecutor in the course of the

summary or otherwise, nor is there any evidence that the magistrate **[14]** took into account any erroneous or irrelevant matter or fact. It follows that the several grounds of the order nisi in O.R. No. 68A were not made out.

O.R. No. 68B

By the order nisi in proceedings O.R. No. 68B, it is asserted that the magistrate imposed sentence upon the applicant without having read the psychologist's report. Information numbered 4961A was selected by Mr Perkins as the proceedings relevant to the order nisi. By this information the applicant was charged with having failed to appear on 17th July 1986 at Broadmeadows Court in answer to bail. The order nisi was made on the following five grounds:-

> (a) that the magistrate was bound to take into account the psychologist's report properly prepared and tendered and admitted in evidence;
>
> (b) that the magistrate failed to read the report;
>
> (c) that the magistrate failed to take into account matters referred to in the report;
>
> (d) that the magistrate failed to adjourn the further hearing of the matter so that such report could be brought back into Court and read and considered by him prior to imposing sentence;
>
> (e) that the magistrate proceeded to sentence the applicant despite the absence of such report.

Neither the report nor a copy of it was exhibited to any of Mr Lavery's affidavits. Consequently I am **[15]** unaware of its contents. However, having been admitted in evidence in the course of the plea, it must be assumed that the contents related to matters personal to the applicant. I therefore accept that the contents concerned matters proper to be considered by the magistrate when determining the sentence or penalty for the offences to which the applicant had pleaded guilty.

On 24th April, and shortly before pronouncing sentence and penalties, the magistrate disclosed that he did not read the report on 16th April, being the day of the previous hearing when the document was admitted in evidence. At the time when the magistrate made the disclosure, the report was not in Court; its location was then not revealed. Taking into account the distance separating Broadmeadows and Preston Courts, it is unlikely that the report was in the magistrate's possession during the short interval before he passed sentence upon the applicant.

On the assumption that they were relevant, if the magistrate failed to consider the contents of the report, he erred with a consequence that the applicant suffered an injustice. On the other hand Mr Lavery recapitulated to the magistrate the contents of the report. Being concerned that the magistrate should be mindful of the contents, it is a reasonable assumption that Mr Lavery recited to the magistrate all relevant observations of the applicant made by the psychologist and his opinions and conclusions concerning the applicant.

[16] In addition Mr Lavery was aware of the conclusions expressed by an officer of the Office of Corrections in a report which at the conclusion of the hearing on 16th April the magistrate had directed to be obtained. Mr Lavery, on the resumed hearing, drew the magistrate's attention to the similarity of assessments of the applicant made by both the officer and the psychologist. Thus the magistrate was made aware of an important conclusion or opinion reported by the psychologist. By not seeking an adjournment to procure the report for consideration by the magistrate, it is to be presumed that Mr Lavery was satisfied he had brought to the magistrate's knowledge all the relevant contents of the report.

Furthermore, the magistrate's direction to forward a copy of the psychologist's report to the Office of Corrections, which he gave to Mr Lavery, is significant in this connection because by inference it indicates the following: First the magistrate had knowledge of the contents of the report; secondly, the magistrate accepted that the contents of the report were relevant; thirdly, the contents were considered by the magistrate when passing sentence and fixing penalty.

It is also noteworthy that one condition of the community-based order was that the applicant would undergo assessment and treatment for medical or psychiatric problems as directed

by the Regional Manager. This was the only condition of the order to which the contents of the psychologist's report could have related. It follows that the magistrate was aware and mindful of the contents of the **[17]** report, and that he took into account those contents when determining the sentences and penalties which he imposed on the applicant. Consequently, the circumstances that the psychologist's report was neither available to the magistrate nor read by him did not vitiate the sentence for breach of bail passed upon the applicant. Therefore, the grounds of the order nisi were not established.

O.R. No. 68C

The fourth order nisi was made in proceedings O.R. No. 68C. Mr Perkins declined to elect an information to which the review proceedings applied on the ground that the matters complained of related to all four informations. However, for reasons which will shortly appear, counsel's omission to do so is immaterial to the outcome of the proceedings. The order nisi is directed to the form of the community-based order made by the magistrate. By the order nisi it is sought to challenge the validity of the community-based order on the following grounds:

> (a) that the learned magistrate failed to specifically order in open Court that the imposition of the community-based order was to be recorded as a conviction for all purposes;
>
> (b) section 39(1) of the *Penalties and Sentences Act* 1985 directs that a community-based order shall not be a conviction for all purposes unless the Court specifically directs otherwise;
>
> **[18]** (c) if the learned magistrate wished to direct otherwise this direction should have been made in open Court;
>
> (d) that the learned magistrate only addressed the question as to whether the imposition of community-based order would be a conviction for all purposes when entering details of this order in the order book.

The community-based order was not exhibited to any affidavit which was before the Master when the application for the order nisi was made. A certified copy of the order was exhibited to an affidavit sworn by Mr Lavery during the course of the present hearing; I have examined its contents without objection by counsel. Having considered the document, I have concluded for reasons about to appear that the grounds of the order nisi are without foundation. I venture that had the document been exhibited to an affidavit in support of the application for the order nisi, the Master would have refused the application.

The power of a Court to make a community-based order is enacted by s28(1) of the *Penalties and Sentences Act* 1985. The contents of an order are provided for by s28(6), (7) and (8). Conditions required to be attached to an order made under s28 are provided for by s29. Those provisions do not include a requirement that the Court making the order should pronounce that the order will be recorded as a conviction "for all purposes." Furthermore there is no statutory requirement for the Court making the order to direct in open Court that the order shall not be a conviction for all purposes.

Section 39(1), providing the purposes for which a community-based order may be disregarded, is in the following terms:-

> **[19]** "39. (1) Except where the court by which a community-based order is made otherwise directs, a conviction for an offence in respect of which a community-based order is made is not to be taken to be a conviction for any purpose (including the purposes of any enactment imposing or authorizing or requiring the imposition of any disqualification or disability on convicted persons) except—
> (a) in relation to the making of the order, or proceedings under this Part; and
> (b) as provided in section 93(3); and
> (c) subject to sub-section (2), for the purposes of cancellation or suspension of, or disqualification of the offender from obtaining, a permit, endorsement, licence or other authority to drive a motor car; and
> (d) in relation to proceedings against the offender for a subsequent offence."

The section neither directs nor requires that a community-based order shall not be a conviction "for all purposes". Moreover the community-based order made in the present case records merely that the order is a conviction. It does not record or recite that the order is a conviction "for all purposes" as deposed to by Mr Lavery. The order confirming in all respects with the requirements of s28(6), (7) and (8) and s39(1), the grounds of the order nisi are not sustainable. For the foregoing reasons each order nisi will be discharged with costs.