29/84

SUPREME COURT OF VICTORIA

BODNA v EDNEY

Nicholson J

5 June 1984

CRIMINAL LAW – SENTENCE – ATTENDANCE CENTRE ORDER – WHERE ORDER CANCELLED WHETHER COURT HAS SENTENCING DISCRETION TO IMPOSE A FINE IN LIEU OF UNEXPIRED PORTION: *PENALTIES AND SENTENCES ACT* 1981, S40; *MAGISTRATES' COURTS ACT* 1971, S56.

Section 40 of the *Penalties and Sentences Act* 1981 ("the Act") provides (insofar as relevant):

" (1) An attendance centre order may at anytime on the application of the offender or of the Director-General upon such notice as is prescribed be cancelled or varied by the court which made the order where the court is satisfied by evidence on oath or by affidavit or otherwise—
(a) that the circumstances of the offender—
(i) have changed since he was sentenced; or
(ii) were wrongly stated or were not accurately presented to the court before sentence—
to such an extent that the attendance should not be commenced or continued (as the case requires); ...
(c)(iii) that the offender has been late or absent without reasonable excuse from a place of attendance during a period of attendance ...

(2) On the hearing of an application under sub-section (1), the court having regard to a certificate by the Director-General as to the attendance of the offender at an attendance centre under the order ... may, and when such order ... is cancelled shall, determine the extent to which such attendance shall count as service of the term of imprisonment to which the offender was sentenced and the portion of such term which will be deemed to be unexpired.

(4) Where an offender appears or is brought before a court upon a warrant ... the court may, in addition to committing him to prison for the unexpired portion of the term of imprisonment to which he was sentenced and to imposing any penalty upon him for any breach of this Part or the regulations, sentence the offender to be imprisoned for a further term of not more than twelve months in respect of his failure to comply with the terms and conditions of his attendance order ..."

On 2 August 1982, E. was convicted of obtaining property by deception and sentenced to be imprisoned for three months, such sentence to be served by way of attendance at an attendance centre. E. failed to report as required, and on 31 August 1982, upon application being made, a magistrate cancelled the order on the ground as set out in s40(1)(c)(iii) of the Act and ordered the issue of a warrant. E. was subsequently arrested and brought before another magistrate on 11 April 1983 who, after hearing a plea made by E., imposed a fine in default imprisonment. Later, B. obtained an order nisi and upon its return, argued that E. should have been committed to prison for the term of the unexpired portion of the sentence of imprisonment. E. contended that s40(4) of the Act conferred a discretion on the magistrate, and that s56(1) of the *Magistrates' Courts Act* 1971 enabled the court to substitute a fine in lieu of imprisonment. Upon order nisi to review—

HELD: Order discharged.
(1) Where a court cancels an attendance centre order and determines
(a) the extent of the offender's attendance; and
(b) the unexpired portion of the term of imprisonment,
it has a discretion not to require the offender to serve the unexpired portion, either as imprisonment *simpliciter* or by way of attendance at an attendance centre.
***R v Hebaiter* [1981] VicRp 39; [1981] VR 367, considered.**

(2) As the court was exercising an independent power of imposing a term imprisonment, it was empowered by s56(1) of the *Magistrates' Courts Act* 1971 to substitute a fine for the unexpired portion of the term of imprisonment.

NICHOLSON J: *[After setting out the facts, the grounds of the order nisi and relevant provisions of the Act, His Honour continued]:* ... **[8]** One thing which is clear about the present case, however, is that at no stage did either magistrate pay any regard to the provisions of sub-section (2) or make any determination thereunder when making their orders. That sub-section appears to be intended to enable the Court to determine the unexpired portion of the term of imprisonment imposed by the original attendance centre order. It requires the Court in the cases of a cancellation order to

make two separate determinations, these being, first, the extent to which the offender's attendance shall count as service of the term of imprisonment originally imposed and, secondly, the portion of the term so imposed which will be deemed to be unexpired.

The specific reference to the second matter suggests that it is not intended that the Court simply makes the first determination and then engages in a mere arithmetical calculation as to the balance, but rather that the Court has an additional discretion, having made the first determination, to determine what portion of the sentence should then be deemed to be unexpired. This second requirement may be explicable upon the basis that the sub-section contemplates that the Court may wish to impose a lesser sentence than the unexpired portion of the original sentence if it proposes that such a sentence will be **[9]** served as a term of imprisonment *simpliciter*.

A difficulty about this construction is that the sub-section appears to contemplate that the relevant determination may be made at the time that the cancellation order is made, which will usually be at a time prior to the offender being before the Court and before it exercises its powers pursuant to sub-section (4) which, as I have mentioned, includes a discretion to permit the unexpired portion of the sentence to be served at an attendance centre. Nevertheless, I think it is the only intelligible construction that can be applied to the sub-section, for otherwise the words "and the portion of such term which will be deemed to be unexpired" would be otiose.

If such a construction was to be applied in the circumstances of this case, it is apparent that the Court would have had to determine that, there having been no attendance pursuant to the attendance centre order, there was nothing which could be counted as service of the term of imprisonment to which the offender was sentenced. Nevertheless the Court was still required to determine the portion of such term which was deemed to be unexpired. It may have chosen to determine that the whole of it should have been deemed to have been unexpired, but it was not, in my opinion, bound to do so.

However, it made no determination at all. On one reading of sub-section (2) it might be thought that the necessary determinations under the **[10]** sub-section must be made at the time of making the cancellation order, which in this case would have meant that they should have been made by the learned magistrate on 31 August 1982. However, I think that the better view is that the Court is not bound to make them at this time but may adjourn the hearing in the way that was done here and make the appropriate determinations at a subsequent time when the offender is present and can be heard. Indeed it would appear to be desirable that it should do so in most cases in order to enable the offender to be heard.

One other matter which arose in argument during the course of the present case was the fact that a different magistrate had heard the matter when the offender came before the Court and a different magistrate to the original magistrate who made the cancellation order finally dealt with the matter. This was not one of the grounds of the order nisi to review, and in those circumstances I have not found it necessary to determine whether this particular matter had any effect upon the validity of the Court's order. I should not, however, be taken to be saying that it is desirable or, indeed, lawful for a different magistrate to hear an application which was commenced before another.

There may be, however, and I accept that there probably are, practical difficulties in the case of orders of this nature when a considerable time may elapse between the date of the issue of the warrant and the date when the offender comes before **[11]** the Court and quite often the magistrate then sitting at that court will be different to the original magistrate. It seems at least desirable that if the practice adopted in the present case is to be followed that the section should be amended to make it clear that such a course is open.

Although the learned magistrate did not make the determinations which he was required to make pursuant to sub-section (2) in the present case, it is apparent that whatever the result of such determinations had been made, he did not regard this case as an appropriate one to impose a custodial sentence, whether by way of imprisonment *simpliciter* or by way of attendance centre order. If I were to simply refer the matter back to him for the purpose of his making the appropriate determinations pursuant to sub-section (2), this would still leave unanswered the question which might be thought to be central to the present case as to whether the magistrate

was obliged to impose a custodial sentence of one form or another. I think it preferable to consider the matter upon the assumption that had he made the determinations required by sub-section (2), he would have determined that there having been no attendance pursuant to the order then the whole of the original term should be deemed to be unexpired. To adopt this assumption is to adopt the most unfavourable position so far as the respondent is concerned.

Approaching the matter upon this basis, it is necessary to consider two questions, the first being **[12]** whether the magistrate was then obliged by the terms of sub-section (4) to either commit the offender to prison *simpliciter* or by way of attendance centre order; and the second question is whether he had any power to substitute a fine for the unexpired portion of the term of imprisonment. As to the first question, sub-section (5) at first sight would appear to lead to a conclusion that once a determination of the unexpired portion of the term is made by the Court pursuant to sub-section (2), then it must be served as imprisonment unless the Court permits it to be served at an attendance centre pursuant to sub-section (4). On the other hand, such a construction would seem to be inconsistent with sub-section (1), which allows a Court to vary or cancel an attendance centre order, on the application of the applicant or the Director-General on the ground, *inter alia*, that the circumstances of the offender have changed since he was sentenced to such an extent that the attendance should not be commenced or continued.

It would be a curious result indeed if an applicant was to succeed on such an application, for example, on compassionate grounds, and the Court having made the determination required by sub-section (2) was then obliged to require him to serve the unexpired portion of the term as imprisonment *simpliciter* or at an attendance centre, which would place him back in the same position as he was before. Sub-section (4) itself is cast in permissive terms, **[13]** in that the word "may" appears immediately prior to the words "in addition to". In *R v Hebaiter* [1981] VicRp 39; [1981] VR 367 the Full Court said at VR p376:-

> "In sub-section (3) the words "in addition to" can signify no more than that the power given is one of several, all of which may be exercised cumulatively if so desired. It cannot be supposed that they signify the existence of either an implied power to commit to prison or an implied power to impose a penalty for breach of the Act to which express powers conferred by sub-section (3) are "in addition". The sub-section provides, in effect that, where (and only where) an offender is brought before a court upon a warrant issued under the provisions of subsection (2), the court (and that must mean the court which cancelled the attendance order) may: (a) commit to prison for the period of the unexpired term; (b) impose any penalty (of fine or imprisonment) for breach of the Act or regulations; (c) impose a further term of imprisonment for failure to comply with the attendance order – but may permit the offender to serve the aggregate, of such terms of imprisonment as are awarded, by way of attendance. The word "aggregate" is clearly used in the sense of the aggregate period of time for which the offender in the end stands sentenced. It is the aggregate of the term (if any) imposed under (a) and the term (if any) imposed under (b) and the term (if any) imposed under (c)."

The Full Court would appear to have been of the opinion that all of the Court's powers under sub-section (4) were permissive and it follows that the Court is not obliged to exercise all or any of them. It is also apparent that the Full Court considered that it was open to the magistrate to impose a fine in the exercise of the powers under sub-section (4), but it did not, of course, consider the question which faces me as to whether a fine can be imposed in lieu of requiring the offender to serve the unexpired portion of his term. **[14]** In my opinion the Court, having made a determination under sub-section (2), retains a discretion not to require the offender to serve the unexpired portion either as imprisonment *simpliciter* or at an attendance centre. In the present case the learned magistrate was obviously of the opinion that the circumstances of the offender had changed since the making of the original order to such an extent that the attendance should not be continued, and this would have entitled him to cancel or vary the original order pursuant to sub-section (1). It would be a curious result if I was to hold that he thereafter lacked the discretion to not require the offender to serve the unexpired portion of the term originally imposed in such circumstances.

So far as the question of the imposition of a fine in lieu of the original attendance centre order is concerned, I think that the answer to it depends upon whether in requiring a person to serve the unexpired portion of a term of imprisonment a Court can be said to be "imposing imprisonment for an offence punishable on summary conviction" within the meaning of s56(1) of the *Magistrates' Courts Act* 1971 as it then was. In my view, in exercising his powers pursuant to

sub-section (4) the learned magistrate was imposing imprisonment for an offence. By this time the original sentence of attendance had been cancelled and there was a sentencing void.

In requiring an offender to **[15]** serve the unexpired portion of a sentence as determined under sub-section (2), the learned magistrate was exercising an independent power to impose a term of imprisonment if I am correct in my view that he had a discretion in the matter. Accordingly, I consider that s56(1) enabled him to substitute a fine for the unexpired portion of the term of imprisonment. Having regard to these findings, it remains for me to consider what should be done with the matter.

Although I have found that the learned magistrate failed to make appropriate determinations pursuant to sub-section (2), I have approached the matter upon the basis of what the position would have been if he had made such determinations in the most unfavourable way that he could have done so far as the applicant was concerned. It is clear from my decision that had he done so he was still entitled to reach the decision that he did, which was not to imprison the applicant or to require him to continue with an attendance centre order.

It follows, I think, that no purpose would be served in my referring the matter back to the learned magistrate. Further, the failure to make such a determination was not one of the grounds of the order nisi except by implication, and none of those grounds have, in my opinion, been made out. The order nisi will accordingly be discharged. I order that the respondent's costs be taxed and when taxed be paid by the applicant.

APPEARANCES: Mr RA Osborn for the Applicant Bodna. Mr A Neal for the Respondent Edney.
