17/96

SUPREME COURT OF VICTORIA

DIMITROVSKI v JONES

Mandie J

5, 23 August 1994

SENTENCING – INTENSIVE CORRECTION ORDER – BREACHED – EXPIRED AT DATE OF HEARING BREACH – OPTIONS OPEN TO SENTENCING COURT – "VARY" – MEANING OF – WHETHER COURT MAY EXTEND OPERATION OF ICO: *SENTENCING ACT* 1991, S26.

1. Where a breach of an Intensive Correction Order ('ICO') is proved, the Court may or may not impose a fine on the offender. Also, the Court having decided whether or not to fine, may or may not exercise one of the three further powers namely, to vary or confirm the ICO or cancel it (if it is still in force) and commit the offender to prison for the unexpired portion.

2. The power to vary or confirm an ICO is available whether or not the ICO has expired or is no longer in force.

3. To "vary" in the present context means to change or alter or to modify so as to adapt to the relevant circumstances. The power to vary includes a power to change the operative dates of the ICO so as to add a new period in substitution for a past period which has not been served.

MANDIE J: *[After setting out the facts, the details of the ICO, the magistrate's ruling, and relevant provisions of the* Sentencing Act 1991*, His Honour continued]*...**[10]** If while an ICO is in force the offender fails without reasonable excuse to comply with any condition of it, he is guilty of an offence (s26(1)). If the court is satisfied that the offender has committed an offence, the court may impose a fine not exceeding level 12 and in addition may vary the order, or confirm the order originally made, or if the order was made by the Magistrates' Court cancel it (if it is still in force) and, whether or not it is still in force, commit the offender to prison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 was sentenced that was unexpired at the date of the offence (s26(2)). S26(2)(d) and (3) deal with the position where the ICO was made by another court. A fine does not affect the continuance of the order if it is still in force **[11]** (s26(5)(a)). On a plain reading, 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. Furthermore, s45(1) of the *Interpretation of Legislation Act* 1984 ("the Interpretation Act") provides that where the word "may" is used in conferring a power, that word shall be construed as meaning that the power so conferred may be exercised, or not, at discretion.

It follows that, if the offence is proved, the court may or may not impose a fine. This much was conceded on behalf of the respondent. It also follows that the court, having decided whether or not to fine, may or may not also exercise one of the three further powers which it has under subpara(a)(b) and subpara(c) of s26(2). It was however submitted by Mr Halpin, who appeared on behalf of the respondent, that upon a proper construction it was mandatory for the court to exercise one of these three alternative powers. He referred by way of contrast to s31(5)(d) dealing with offences or breaches in relation to suspended sentences where specific provision was made empowering a court to "make no order". He contended that s45(1) of the *Interpretation Act* was inapplicable to s26(2) because the latter section evinced a "contrary intention" (see s4(1)(a) of the *Interpretation Act*). The only specific matter relied upon as showing that s26(2) evinced a contrary intention (that is, by requiring the exercise of one of the three powers) was the **[12]** necessity to establish whether the sentence had been duly served or not. It was submitted that once a breach of conditions of the ICO had been established, it was necessary either to vary the ICO, or confirm the ICO, or cancel the ICO (if it was still in force) and, whether or not it was still in force, commit the offender to prison (if the ICO was not varied or confirmed). In support of this argument, reference was made to s19(9) which provides that a sentence must be taken to have been served and the offender wholly discharged from it on certification by the Director-General of Corrections

that the offender has complied with the conditions of an ICO. S19(9) is in my opinion simply an administrative or evidentiary provision. It should not be read to mean, as the respondent sought to do, that the sentence could not be taken to have been served **unless** such a certification has been given.

There seems to me to be no reason at all to construe s26(2) of the *Sentencing Act* (contrary to its natural and ordinary meaning) as mandating in every case the exercise of one of these three powers, although in many cases it may well be necessary to exercise one of them. For example, an offence of a minor nature may be committed which did not otherwise affect the offender's continuing performance of the conditions of the ICO. A court may or may not fine the offender. A fine does not affect the continuance of the ICO (s26(5)(a)) – thus this provision itself contemplates the continuance of the order, notwithstanding the commission of an offence. It may be that the hypothetical offence has also involved some very minor **[12]** loss of time required to be served under the ICO. This might in a given case justify an order in addition to the fine that the ICO be "confirmed" so as to remove any question which might otherwise arise of a failure to have duly served the necessary hours under the order to that point. In another case, it might be appropriate to consider a variation of the ICO by altering its dates of operation. For example, if a period of attendance had been missed by an offender, it might (or might not) be appropriate to add that period to the operative period of the ICO in substitution for the period missed.

However, it was submitted on behalf of the respondent that the power to vary the ICO extended only to any special conditions as referred to in s21 (or, perhaps, to some aspects of the core conditions as well) but to no other aspects of the ICO. No real reason was advanced to support this submission. I can find no reason to restrict the language used by Parliament and no reason why the power of variation should be so limited. To "vary" in ordinary usage in the present context means to change or alter, or to modify so as to adapt to 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.

Assume that an offender is sentenced to 12 months' imprisonment to be served by way of intensive correction. On the second day of operation of the ICO, the offender commits a breach of the ICO conditions and two months later is convicted of the offence under s26(1). The offence involves a minor breach. The offender has continued in the meantime to comply with the ICO. The court might impose a small fine under s26(1) and confirm the ICO under s26(2)(b) so that it will continue to operate unchanged and unaffected by the breach. Alternatively, take the same example but the offence involves a very serious breach. The court might impose a larger fine, cancel the ICO and commit the offender to prison for 12 months less one day (being the unexpired portion of the term of imprisonment at the date of the offence). Alternatively, take the same example but this time the offence involves a real but not too grave breach and the offender has been told by the officer on the second day not to attend further at the Corrections Centre pending the hearing. The court fines the offender and considers that it is inappropriate to cancel the order having regard to the degree of seriousness of the breach but also inappropriate to confirm it having regard to the lapse of two months and that it might be appropriate to vary the ICO so as to cope with the "lost" period of two months. This might be done by ordering that the ICO be varied by extending its operative period by an extra two months in substitution for the prior period of two months not duly served.

The power to vary the ICO does in my view include a power to change the operative dates of the order so as to add a new period in substitution for a past period which has not been served. In my opinion the power to vary the order also **[15]** includes 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 reasoning of the Full Court in *R v Hebaiter* [1981] VicRp 39; [1981] VR 367, 374, 376). S25 of the *Sentencing Act* empowers a court to vary or cancel an ICO in three categories of circumstances. It was common ground that the court acting under s26(2)(a) was not confined to those categories but it is useful in this context to consider them. One category is where the offender is no longer willing to comply with the ICO (which probably would lead to a cancellation of the ICO); another category is where the offender is no longer able to comply with

a condition of the ICO (which might lead to a variation of the condition or to a cancellation of the ICO). The further category is where the circumstances of the offender were wrongly or inaccurately stated to the court which made the ICO. It seems to me that circumstances in that category could lead either to a cancellation of the ICO, or might well justify a variation, up or down, of the term of imprisonment to be served by way of intensive correction. If that is so, then there is no reason that the power to vary the ICO under s26(2)(a) should be more restricted than the power under s25.

Mr Halpin submitted that even if, contrary to his submission, the power to vary was a wide one, it was not available to the magistrate in this case because an order that was no longer in force could not be varied. Likewise, **[16]** an order that was no longer in force could not be confirmed. Accordingly, he submitted that the magistrate had no alternative open but to make the order, which he did make, committing the appellant to prison. The position may be tested by considering the above example of the offender sentenced to a 12 months' ICO. What if the breach on the second day is of a real but not too serious nature and the offender continues and otherwise complies with the ICO and serves all but the last two weeks of the ICO, at which time the breach is discovered, and he is told not to attend further? After the ICO is no longer in force, he is convicted of the offence under s26(1). The court fines the offender but considers it inappropriate to commit the offender to prison for the unexpired period commencing on the second day but wishes him to serve the final two weeks by way of intensive correction. It might be appropriate (if the power existed) to vary the ICO (although it had expired) by adding to its operative period from that day a period of two weeks in substitution for the prior period of two weeks not duly served. Alternatively, the same breach is not discovered until after the ICO has expired ie is no longer in force. The court considers it inappropriate to commit the offender to prison for 12 months less one day when, save for this breach, he has complied with the ICO and all its conditions for the full period of 12 months. The court might consider it appropriate to fine him and to make no other order or in addition (if the power existed) to confirm the ICO, although it had expired. Indeed, in a case in this Court of *Brain v Groh and Anor* (No. 8465 of 1993, 21 **[17]** February 1994, Ashley J), counsel for the informant acquiesced in the making of a declaration that a Community Based Order might be confirmed in circumstances where it had expired or was not still in force, under the equivalent provision relating to such an order, s47(2)(b) of the *Sentencing Act*.

The proposition advanced on behalf of the informant, that an order cannot be varied or confirmed once it has expired, whilst strictly logical, could lead to both absurdity and injustice. Depending upon a mere accident of timing, the court would have a power to vary or confirm the ICO as an alternative to committing an offender to prison if the matter came to court during the currency of the ICO but no alternative but to commit the offender to prison in very nearly the same circumstances if the matter came to court after the ICO had expired. This construction manifestly would not promote the purpose or object of the Act (see s35(a) of the *Interpretation Act*) which, as set out in s1 of the *Sentencing Act*, includes the following:

> " ... (a) to promote consistency of approach in the sentencing of offenders; ...
> (c) to provide fair procedures—
>
> (i) for imposing sentences; and
>
> (ii) for dealing with offenders who breach the terms of conditions of their sentences ..."

In my view, the construction which must be preferred and adopted is that a court has the power under **[18]** s26(2) to vary or confirm an ICO, whether or not the ICO has expired or is no longer in force. It was submitted by Ms. Thomas, who appeared as counsel for the appellant, that the learned magistrate's decision was vitiated by an error of law because he ruled that he had "no power" to vary the ICO "on this day" under s26(2)(a) of the Act. His Worship appeared to think that the power to vary the ICO was governed by s25 and he may also have thought that he could not vary the ICO because it was no longer in force. Ms. Thomas submitted that the Magistrates' Court had a discretion to fine or not to fine for an offence under s26(1) and then had a discretion to do nothing else at all, or to act under subpara(a) or subpara(b) or subpara(c) of s26(2). She further submitted that an ICO could be varied whether or not it was still in force and that the power to vary comprehended *inter alia* a change in the commencement date of the ICO or a change in the term of imprisonment to be served by way of intensive correction.

For the reasons which I have already stated, I accept the substantive submissions made

on behalf of the appellant as to the nature of the Court's power. The question remains whether the order of the learned magistrate is vitiated by error or can be upheld on any available ground. Mr Halpin submitted, in the alternative to his other submissions, that the magistrate in any event did consider whether he should vary the ICO and decided that he should not do so and it could not be shown that his discretion had miscarried. I cannot accept this submission. In my opinion, the learned magistrate was no doubt correct in **[19]** all the particular circumstances of this case to consider that he had to either vary, confirm or commit to prison but he wrongly considered that he had no power to vary the ICO and therefore failed to consider whether he should do so. The whole argument before the magistrate centred on whether he had power to vary the order. The respondent's representative specifically submitted that the variation power was confined to the circumstances set out in s25 and in any event extended only to alteration of special conditions. He submitted to the magistrate that he could either confirm the order or commit the appellant to prison. In substance the magistrate accepted these submissions and, as I have decided, was in error of law in doing so.

One option open to the magistrate was to fix new dates for the operation of the period of the ICO which had not been served by the appellant. I stress that I do not express any view at all as to whether that "second chance" should or should not be afforded to the appellant. That is a matter entirely for the supervising Court to decide but a matter which in my opinion it has not thus far in its discretion duly considered.

ORDER: The appeal is allowed. I will order that the said order of the Magistrates' Court at Geelong made 6th April 1994 be set aside and the matter be remitted to that Court for reconsideration according to law and in accordance with these reasons. I will make further orders that the appellant's bail be continued pending determination of this matter by the Magistrates' Court and that the respondent pay the appellant's costs of this appeal including reserved costs.

APPEARANCES: For the appellant: Ms S Thomas, counsel. Solicitors for the appellant: Doyle Considine. For the respondent: Mr B Halpin, counsel. Solicitor for the respondent: Ronald C Beazley.
