

REGINA *v.* HALL

[LCA 79/1988]

**1988.** Supreme Court: Underwood J.

May 3, 16, 1988.

*Criminal Law — Jurisdiction, practice and procedure — Jurisdiction — Supreme Court — Suspended sentence — Imposed on motion to review — No jurisdiction over breach of condition.*

*Criminal Law — Jurisdiction, practice and procedure — Judgment and punishment — Sentence — On motion to review — Suspended on condition — Condition broken — Supreme Court functus officio — No jurisdiction over breach — Justices Act 1959, Pt. IX.*

*Justices — Appeals from and control over — Review proceedings — Subsequent proceedings — Breach of condition of suspended sentence imposed on review — No jurisdiction in Supreme Court over breach — Justices Act 1959, Pt. IX.*

[Aust. Dig., Criminal Law [469], [590], Justices [392.5]]

On a motion to review, the respondent was sentenced to a term of imprisonment which was wholly suspended on condition that he be of good behaviour for eighteen months. The Crown applied to the Supreme Court to put the sentence into effect because the respondent had breached a term of the conditions.

*Held*, that—

- (a) once the motion to review was determined the Supreme Court was *functus officio*; and
- (b) there is no provision in the *Justices Act* 1959, Pt. IX, giving the court jurisdiction to hear and determine the application.

Observations as to proper procedure.

#### APPLICATION.

Maurice Wilfred Hall had moved to review the sentence of imprisonment imposed by a magistrate on one charge of burglary and one charge of stealing. The motion was allowed, the orders were set aside and in lieu it was ordered that the applicant be sentenced to imprisonment and that the execution of the sentences be suspended upon condition that he be of good behaviour for eighteen months. Within that period he broke the condition. The applicant was called upon to appear in the Supreme Court to show cause why the sentences of imprisonment should not be put into effect.

*H. M. Lambert*, for the Crown.

*S. C. Chopping*, for the respondent.

*Cur. adv. vult.*

MAY 16.

UNDERWOOD J. set forth the facts leading to the application and continued:

Upon the hearing of the application I raised the question of the jurisdiction of this court to entertain the application.

Learned counsel for the Crown sought to rely upon the jurisdiction given by the *Criminal Code*, s.386A(2), which provides:

"Subject to this section, where the court is satisfied that a person on whom a suspended sentence has been imposed has failed to observe any condition on which the sentence was suspended, the court, if it considers it proper to do so—

- (a) may order that sentence to take effect;
- (b) may order a sentence . . . to take effect in place of the suspended sentence; or
- (c) may, by order, vary the conditions on which the execution of the sentence was suspended."

The subsection does not confer jurisdiction for the determination of the application because s.386A(1) provides:

"For the purposes of this section references to a suspended sentence shall be construed as references to—

- (a) a sentence the execution of which has been suspended; or
- (b) so much of a term of imprisonment the execution of which has been suspended,

under section 386 or under this section; and references in this section to the suspension of a sentence shall be construed accordingly."

The sentences in question were not imposed under either s.386 or s.386A of the *Code*. They were ordered in an exercise of jurisdiction given the Supreme Court by the *Justices Act* 1959, s.110(2).

In the alternative, learned counsel for the Crown sought to invoke the inherent jurisdiction of the court. The extent of the court's inherent jurisdiction is confined to protecting the court's process from abuse. The learned author of "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23, at p.24, wrote:

"The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation."

Lord Blackburn in *Metropolitan Bank, Ltd. v. Pooley* (1885) 10 App. Cas. 210, at p.220, said:

"But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing — the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action."

The above passage was cited with approval as being apposite to criminal proceedings. See *Connelly v. D.P.P.* [1964] A.C. 1254, at p.1361.

In the present case, the respondent is not in contempt of the order of this court nor has there been any abuse of the court's process. The jurisdiction of this court to review orders made in courts of petty sessions exists solely by virtue of the *Justices Act* 1959, Pt. XI. See *Maynard v. Rush* [1965] Tas. S.R. 233; *Hesselman v. Reid* [1973] Tas. S.R. 93 and a judgment of mine, *Minogue v. Mele* Serial No. B8/1987. The court's jurisdiction to make orders on the hearing of a motion to review is confined by the provisions of the *Justices Act* 1959, s.110. In *Reg. v. Jefferies* [1968] 3 All E.R. 238, [1969] 1 Q.B. 120, the Court of Appeal (Criminal Division) held that the statutory jurisdiction of that court was not enlarged by its inherent jurisdiction so as to permit the institution of proceedings not within the terms of the statute.

Once the motion to review was determined and the order made, the court was *functus officio* with respect to the matter. The *Justices Act* 1959, Pt. XI, does not give this court jurisdiction to determine whether the respondent has breached a condition of the order, nor to make any punitive order as a consequence of him doing so. Accordingly, I hold that the court has no jurisdiction to determine the application and it must be dismissed but before leaving the matter I should refer to some provisions in the *Justices Act* 1959.

Generally speaking, the *Justices Act* 1959 is a procedural enactment. In the majority of cases determined in courts of petty sessions the penalty is prescribed by the statute which creates the offence. An offence against the *Criminal Code* which, by virtue of the

*Justices Act* 1959, s.72, may be determined in a court of petty sessions, the election by the defendant to have the matter there determined converts the indictable offence into a simple offence. See s.72(1). Section 72B(4) prescribes liability to imprisonment upon conviction for such a simple offence. Section 74C(1) gives justices "who have adjudged a person convicted" power to suspend the execution of certain periods of imprisonment upon such conditions as they think fit.

Upon the review of an order of sentence, the Supreme Court is empowered, by the *Justices Act* 1959, s.110(2), to set aside the order and, by par. (i) of that subsection, to "exercise any power that might have been exercised by the justices in relation to whose order the motion to review is made". In the present case, the sentences of imprisonment were imposed by this Court pursuant to the power contained in s.74B(4) and the execution of those sentences suspended pursuant to the power given justices by s.74C(1). Subsection (2) of the latter section provides:

"Where the execution of a sentence has been suspended upon condition under subsection (1), the Attorney-General or a police officer or probation officer may make complaint to a justice that the person mentioned in the complaint has broken a condition of the suspension."

The following subsections set out the relevant procedure and confer on a court of petty sessions power to make certain orders upon proof of a breach of condition including an order putting the original sentence into effect.

In my opinion, the expression in s.74C(2) "where the execution of a sentence has been suspended upon condition under subsection (1)" refers to the power given by subs. (1) to suspend the execution of a sentence of imprisonment. It does not refer to the identity of the court or judicial officer who exercised the power. The condition precedent for making a complaint for breach of condition of suspended sentence is fulfilled if the order of suspension was an exercise of the power given justices by subs. (1). Cf. *Reg. v. Petersen* 1982 Tas.R. (N.C.) 12. Upon the determination of the motion to review this Court exercised the power given justices to suspend the execution of the sentences of imprisonment and accordingly, the provisions of s.74C(2) *et seq.* apply in the event it is alleged that the respondent is in breach of a condition upon which the execution of the sentence was suspended.

*Application dismissed.*

Attorneys for the respondent: *Ogilvie McKenna.*

M.K.C.