

***Police v Heritage* [2019] SASCFC 60 (31 May 2019) – South Australia Supreme Court (Full Court)**

‘Activation of suspended sentence’ – ‘Breach of conditions of good behaviour bond’ – ‘Sentence’

Charge: Aggravated assault.

Appeal type: Appeal against Magistrate’s sentence (excusal of breach of bond).

Facts: In 2016 the respondent assaulted his partner and was sentenced to imprisonment for 9 months, suspended upon entering into a good behaviour bond for 18 months. In 2017 the respondent breached his good behaviour bond by committing a further assault on his partner. The Magistrate excused the breach of bond, extended the bond by 6 months, and sentenced the respondent to imprisonment for 28 days for the fresh offending suspended upon the respondent entering into a further good behaviour bond for 18 months. The Police appealed against the excusal of the breach of bond ‘on the ground that, in excusing the breach, the Magistrate erroneously relied on the respondent’s personal circumstances as opposed to the nature and circumstances of the offending’ at [3].

Appeal dismissed by single Judge. Police sought permission to appeal to Full Court.

Issue: Did the Magistrate erroneously rely upon the respondent’s personal circumstances as opposed to the nature and circumstances of the offending when excusing the breach of bond?

Decision and reasoning: Granting permission to appeal and dismissing the appeal, the Full Court held:

‘The approach by the Magistrate to the finding of *proper grounds* to refrain from revoking the suspension was erroneous, as was the Magistrate’s conclusion that there were *proper grounds* to refrain from revoking the suspension’ at [41]. ‘The Judge erred in concluding that the Magistrate did not rely on the respondent’s personal circumstances in deciding to refrain from revoking the suspension’ at [47]. Notwithstanding the error, the appeal should be dismissed in the exercise of the court’s residual discretion, as the respondent has been living a law-abiding life in the community for an extended period of time since being sentenced, and the balance of the original period of suspension of the original sentence and the extended period of the suspension has now expired at [63].

Reasoning - proper grounds:

The police relied upon a series of decisions commencing with *Norman v Lovegrove* [1986] 40 SASR 266 and *R v Buckman* [1988] 47 SASR 303 in which the Supreme Court held that when determining whether there are *proper grounds* within the meaning of s 58(3) of the *Criminal Law (Sentencing) Act 1988* (SA)—a largely identical provision is now contained in s 114(3) of the *Sentencing Act 2017* (SA)—upon which a breach of bond should be excused, those proper grounds must relate to the ‘nature and circumstances of the breaching offence as opposed to the personal circumstances of the defendant’ at [13]. Blue J held in relation to the meaning of the expression *proper grounds* that ‘it has authoritatively been decided by this Court and it follows from the text, context and evident purpose of subsection 58(3) that those grounds are confined to the nature and circumstances of the breach; they do not extend to personal circumstances of the offender or to circumstances occurring after the breach’ at [22]. His Honour reasoned that the ‘distinction between circumstances of the offence and personal circumstances is well understood in practice although it is more difficult to define in *a priori* terms. The circumstances of the offence comprise those circumstances existing at the time of commission of the offence which bear on the culpability of the offender in committing the offence’ at [31]. His Honour differentiated between a ‘circumstance of the offence’, for example, an offender suffering a mental impairment which contributed to the committing of the offence, and a ‘personal circumstance’, for example, where ‘it is desirable that a defendant receive treatment for a mental impairment which cannot effectively be provided in prison’ or where hardship is caused to the defendant’s dependant at [31].

His Honour, at [35], cited the Magistrate’s three reasons for refraining from revoking the suspension:

- > That the respondent needed professional assistance to address his mental health and anger management issues;
- > That the respondent was supporting his partner and 10 month old child who would suffer hardship if the respondent were to be imprisoned; and
- > That the revocation of the suspension of the sentence of imprisonment would be disproportionate and oppressive to the 2017 offending.

His Honour held that reasons 1 and 2 were personal circumstances. While the third reason related to the circumstances of the breach, his Honour held that ‘there was no basis on which it was open to the Magistrate to conclude that activation of the original sentence would be a disproportionate consequence of the 2017 offending’ at [40].

Reasoning – the reasons of the Judge:

The Judge referred 'to decisions of single Judges of the Court that the Full Court authorities do not preclude a court taking into account personal circumstances', however, stated that it was not necessary to decide this as the Magistrate did not take into account the respondent's personal circumstances when deciding to restrain from revoking the suspension' at [43]. Blue J held the Judge erred in his conclusion that the Magistrate did not rely on the respondent's personal circumstances in refraining from revoking the suspension.

Reasoning – permission to appeal:

Permission to bring a second appeal by the Crown against sentence by a magistrate 'will only be granted in rare and exceptional cases. This will ordinarily only be when it is necessary to establish or maintain correct sentencing principles or adequate sentencing standards or where the error is so disproportionate to the seriousness of the crime that it demands correction on appeal' at [49]. Permission to appeal should be granted 'having regard to the importance of the maintenance of the correct sentencing principles and the availability of the residual discretion' at [61]. However, as allowing the appeal would have resulted in the defendant's imprisonment after he had been living a law-abiding life in the community for a sustained period' at [62], the Court should dismiss the appeal in the exercise of its residual discretion.