HIGH COURT OF AUSTRALIA

15 February 2023

STANLEY v DIRECTOR OF PUBLIC PROSECUTIONS (NSW) & ANOR
[2023] HCA 3

Today, the High Court published its reasons for allowing, by majority, an appeal from a decision of the New South Wales Court of Appeal. The appeal concerned whether the sentencing judge failed to consider community safety, assessed by reference to the relative merits of full-time detention as against intensive correction in the community in addressing an offender's risk of reoffending, before declining to make an intensive correction order ("ICO") under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Sentencing Procedure Act"), and whether the failure to do so is a jurisdictional error of law.

The appellant pleaded guilty in the Local Court of New South Wales to various contraventions of the *Firearms Act 1996* (NSW), and was sentenced to an aggregate term of imprisonment of three years with a non-parole period of two years. She appealed to the District Court of New South Wales against the severity of the sentence. On appeal, conducted by way of a rehearing, the appellant asked the District Court to make an ICO that would have directed that her sentence of imprisonment be served "by way of intensive correction in the community". Section 66(1) of the Sentencing Procedure Act provides that community safety must be the "paramount consideration" when deciding whether to make an ICO. Section 66(2) provides that, when considering community safety, the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending. The District Court confirmed the original sentence and dismissed the appeal. The Court's reasons failed to make any express reference to, or findings in relation to, the assessment in s 66(2).

Having no further appeal rights, the appellant sought relief in the nature of certiorari from the Court of Appeal quashing the decision of the District Court. The Court of Appeal concluded, by majority, that non-compliance with s 66(2) was not a jurisdictional error of law and that its jurisdiction consequently did not extend to the correction of such an error.

The High Court, by majority, allowed the appeal. The Court held that the jurisdiction to make an ICO calls for a subsequent and separate decision to be made after a sentence of imprisonment is imposed. Properly construed, s 66 imposes a limit upon the jurisdiction of the sentencing court to decide whether a sentence of imprisonment is to be served by way of full-time detention or intensive correction in the community. The failure to consider the paramount consideration in s 66(1) by reference to the assessment of community safety in s 66(2) demonstrates a misconception of the function being performed when deciding whether to make an ICO by failing to ask the right question within jurisdiction. Such an error of law does not invalidate a sentence of imprisonment, but means that the court's discretion (and duty) in deciding whether or not to make an ICO has not been exercised. Here, the District Court failed to undertake the assessment required by s 66(2) and thereby fell into jurisdictional error.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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