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SUPREME COURT OF VICTORIA

MASTERSON v TENEGLIA

King J

1 December 1977

LOCAL GOVERNMENT – INFORMATION ISSUED BY POLICE OFFICER IN RELATION TO A CONTRACT OF SALE OF A DWELLING HOUSE – RIGHT TO PROSECUTE – PUBLIC OFFENCE – INFORMATION DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *LOCAL GOVERNMENT ACT* 1958, S918B(2).

A police officer issued an information under S918B(2) of the *Local Government Act* alleging that the defendant did enter into a contract of sale of a dwelling house constructed by him for which an approved indemnity was not in force. The information was struck out on the preliminary objection that a member of the police force had no power to prosecute for an offence under that Act. Upon Order Nisi to review—

HELD: Order absolute.
1. A member of the public may prosecute an offence of a public nature unless this right is clearly taken away by the Legislature.

2. The offence involved here was of a public nature in that it was intended to protect a class of purchasers of dwelling-houses.

3. In this particular case the right of a member of the public to prosecute was not taken away by the legislation.

4. There was in the *Local Government Act*, no clear and express language taking away the public's *prima facie* right to prosecute for a breach of s918B(2).

KING J: ... "Section 918B(2) was introduced into Part XLIX of the *Local Government Act* by the *Local Government (House-builders' Liability) Act* 1973 (No. 8529 of 1973) as part of a scheme for ensuring that members of the public are indemnified against loss or damage resulting from builders' failure properly to construct dwelling-houses. Mr Sundberg on behalf of the applicant submitted three prepositions:-

1. A member of the public may prosecute an offence of a public nature unless this right is clearly taken away by the Legislature. In support of this proposition he relied on the judgment of the Full Court of the Supreme Court of Victoria constituted by five Judges in *Armstrong v Hammond* [1958] VicRp 77; [1958] VR 479; [1958] ALR 940, and the later judgment of Herring CJ in *Lynch v Sloan* [1959] VicRp 85; [1959] VR 656; [1959] ALR 1172. The principle laid down by the Full Court in the former case was expressed at p480 in the words:-

> "The general rule is that any member of the public may lay an Information for an offence if the breach of law charged is of a public nature. The rule is stated thus by *Halsbury* (3rd ed.), Vol. 10, p337; 'Generally speaking, any person may lay the Information and make the charge before the Justice, except where a statutory provision limits the power of making the charge to certain persons, or makes the consent or order of some person a condition precedent to the institution of the proceedings.'"

At p481 the Court said:-

> 'The right of any member of the public to lay an Information is an important public right and is so much to the public benefit that it is not to be presumed from uncertain language that the Legislature has in any particular case taken the right away. 'For any offence of a public nature any person may by the Informant, unless it appears plainly that the Legislature has expressed a contrary intention.'" (Per Hood J in *Greenwood v Leary* [1919] VicLawRp 14; [1919] VLR 114 at p116; 25 ALR 27; 40 ALT 135).'

2. The offence involved here is of a public nature in that it is intended to protect a class of purchasers of dwelling-houses.

3. In this particular case the right of a member of the public to prosecute is not taken away by the legislation.

A primary question is therefore whether the offence here is an offence of a public nature. In *Armstrong v Hammond* (*supra*) the defendant was charged with procuring unknown men to wilfully damage public property, viz., foreshore trees at Rosebud; in *Lynch v Sloan* (*supra*) the defendant was charged with using an automatic shotgun for the purpose of attempting to kill native game. Both these cases concerned the protection of public property, but the property protected by s918B(2) is private property. However, in *Armstrong v Hammond* (*supra*) at pp480-181 the Full Court said:-

> 'The offence created by section 20(3) is of a public character. It is true that it relates both to private and public property; but the public is as much interested in the protection of private property against wilful injury or damage, as it is in its protection against theft. Larceny is clearly a crime in respect of which any member of the public may lay an Information.'

At this point the Court referred to *Sargood v Veale* [1891] VicLawRp 127; (1891) 17 VLR 660; 13 ALT 212. In that case the defendant was charged with stealing dead wood from the property of one Wilson, an Information being laid by Wilson's property manager. The Magistrate decided that Sargood has no interest in the penalty and could not lay the Information and dismissed it. Although the Information related to the protection of private property the Full Court held that it was for an offence against an enactment for the benefit of the public at large and that it could be laid by anyone.

Mr Dyett for the defendant submitted that s918B(2) is designed to protect a particular class of people, i.e., purchasers of new homes, this was sufficient to prevent the offence being of a public nature. The rights here protected are rights of individuals to compensation in respect of their private property, but such rights are not confined to a section of the population fixed by reference to locality or identity. Almost everyone in the community is potentially a beneficiary under this part of the Act, and as a result every member of the public has in my opinion an interest in seeing it properly carried out in respect of fellow citizens whose property is affected at the moment. 'Every member of the public is interested in the performance of the duty', to use the words of Cussen J in *Dunstan v Neems* [1914] VicLawRp 48; [1914] VLR 364 at p369; 20 ALR 219; 36 ALT 10.

I think Mr Sundberg's first and second propositions are established. Mr Sundberg's third proposition that in this case the right of a member to prosecute is not taken away by the legislation is based on the Principle expressed in the words I have already quoted from *Armstrong v Hammond*. He maintains that there is not to be found in the legislation in this case any limitation express or implied of the power of prosecution to particular persons or any provision express or implied making the consent or order of some person a condition precedent to this institution of proceedings.

Mr Dyett for the respondent appears to put his case in two ways. In respect of Mr Sundberg's first two propositions he says that this case falls within some exceptions to the general rule mentioned by the Full Court in *Sargood v Veale* (*supra*) at p662, where the Court said:—

> 'A different rule applies in cases where the offence is against an enactment relating to a matter of purely local concern, and not of general interest or affecting the general public; *R v Hare, ex parte Bush* ([1887] VicLawRp 17; (1887) 13 VLR 71); or where the offence charged is the breach of a law the enforcement of which is committed by Statute to local authorities: *Reg v Panton, ex parte Schuh* ([1888] VicLawRp 91; (1888) 14 VLR 529); and see as to this case: *Keane v Schuh* ([1890] VicLawRp 45; (1890) 16 VLR 199). In any of these cases an Information cannot be laid by a person who is not interested in the penalty, and who is not duly authorised to lay the Information by a party interested or by Statute.'

The essence of this argument is that if an offence falls within either of the categories mentioned in this passage then an information in respect of it can be laid only by a person who

passes one of two tests — (1) that he is interested in the penalty in the sense that he will get it if he succeeds or (2) that he is duly authorised to lay the information by a party who will get the penalty if the prosecution succeeds or is authorised to do so by statute.

It is therefore necessary to consider whether the said statement of exceptions in *Sargood v Veale* is a correct statement of the law, and whether, if it is, this case falls within the exceptions referred to. I have already expressed the view that an offence against s918B(2) is of a public nature. In *Reg v Hare, ex parte Bush* (*supra*) it was held by the Full Court of the Supreme Court that a police constable could not institute a prosecution under a Shire by-law prohibiting the carting of night-soil through the streets of the Shire at certain hours. The Court said at p74:—

> 'This by-law, and the offence against this by-law, are matters of purely local concern, and not of general interest, and do not affect the general public. They merely affect the ratepayers of Moorabbin and no one else.'

At p75 the Court distinguished between the case before them and *Cole v Coulton* [1860] EngR 625; (1860) 2 E & E 695; 121 ER 261; 29 LJMC 125; 2 LT 216; (1860) 24 JP 596 where there was a general public Act which made provision as to the keeping of places for public resort, this provision being embodied in a local Act which also provided that any penalty awarded for breach of the public Act was to be paid to the municipal corporation or to certain commissioners of the district, according as the proceedings for the penalty were taken on behalf of one or other of them. The Court quoted Cockburn CJ as saying:—

> 'The case is not that of a grievance to an individual, in respect of which a penalty is given by Statute to the party aggrieved by way of redress; but the offence is one against public decency and propriety. The general act makes every person liable to the penalty, and does not prohibit anyone who may choose from laying the information. The special act engrafts upon this a special provision that the penalty, when imposed, shall go to one or the other of two specified bodies, according as the proceeding is on behalf of one or the other. The only restraint, therefore, put by the special act upon the power of an individual to lay the information is that he must claim the penalty on behalf of one of the bodies named in that act.'

I think that the nature of an offence under s918B(2) of the Victorian *Local Government Act* falls under the principle in *Cole v Coulton* rather than that of *Reg v Hare ex parte Bush*. Mr Dyett relied more strongly on the exception based on *R v Panton, ex parte Schuh*. In this case it was held that a Sunday observance offence under the *Police Offences Act* could not be prosecuted by a police officer. The statutory provision concerned provided that one half of any penalty recovered was to go to the treasurer of the city, town or borough where it was incurred, and one half to the police reward fund. The Court said at p531:

> 'The informer must have an interest in the penalty. He does not have such an interest in the result of the proceedings from the mere fact that the penalty was applied to a fund out of which he might have a contingent interest hereafter. The strict rule of law applicable to these proceedings and which was laid down in the cases, is one consistent with wise policy. It is extremely desirable that the local authorities should understand that the obligation to enforce the provisions of the Statute lies upon them; and that persons are not to be tempted to assume the position of a common informer under a law of this kind in the hope of gaining a pecuniary benefit from taking such proceedings. It is a very peculiar law, and required very peculiar judgment and discrimination in putting it into force. We are glad to find that a common informer has not the power to sue.'

This passage strongly suggests that the Court considered that as a matter of public policy the enforcement of a Sunday observance law should not be brought about arbitrarily through action by informers, but that it should be applied by someone who can be relied on to do so with 'judgment and discrimination'. This may make *R v Panton, ex parte Schuh* a special case which does not support the generally expressed exception based on it in *Sargood v Veale*. However this may be, I understand it to be one of Mr Dyett's main contentions that as the *Local Government Act* authorises the local municipal council to take legal action to enforce s918B and as the penalty recovered from any prosecution is to go to the municipal fund of the local municipality, the present case falls within the exception, based on *Reg v Panton, ex parte Schuh*, referred to in *Sargood v Veale*. I understand also that Mr Dyett argues in the alternative that if such exception does not apply there are in the *Local Government Act* sufficient indications that municipal councils only are to enforce the Act to displace any *prima facie* assumption that any member of the public may

prosecute, that is, Mr Sundberg's third proposition is not correct.

It is therefore necessary to look at the provisions of the statute relevant to this case. Part XLIX of the Act, which is headed 'Building Regulations' and includes s918B in Division 1A entitled 'House Builders' Liability' begins with s916A, which states:—

> '1. This Part shall have effect in every municipal district in Victoria and shall apply to any lands of the Crown in those municipal districts which are occupied under lease, licence or other authority from the Crown or from anybody incorporated by an Act of Parliament for a public purpose.
>
> 2. Save as otherwise expressly provided the administration of this Part within any municipal district shall be carried out by the Council thereof.'

Part XLIX has in it also Division 2 also headed 'Building Regulations' and a Division 3 headed 'Fire Protection in Existing Buildings.' Both these divisions entail extensive administration by municipal councils, so that it cannot be inferred from s916A(2) alone that only municipal councils are to have the power to enforce Part XLIX at law. Part XLVII is headed 'Legal Proceedings and Enforcement of Act' and relates to the whole Act, to which Division 1A of Part XLVII is headed 'Legal Proceedings by and against Municipalities'. In it s866 provides that the council 'may order either generally or in any particular case proceedings to be taken for the recovery of any penalties, and for the punishment of any person offending against the provisions of this Act, and may order either generally or in any particular case proceedings to be taken for the recovery of any penalties, and for the punishment of any person offending against the provisions of this Act, and may order the expenses of such prosecution or other proceedings to be paid out of the municipal fund. Section 867 provides that the clerk of the municipality or any other officer of the council appointed by the chairman of the municipality may represent the municipality or the council in all respects as though he had been the party concerned. Section 868 provides for the reimbursement of such representative. Sections 869 to 875 are mainly evidentiary provisions to facilitate proceedings by municipalities and councils. Division 2 of Part XLVII is headed 'Enforcement of Act'. Sections 883-7 are to assist council officers in their administrative work. Section 888, which is particularly relied on by Mr Dyett, is as follows:

> 'It shall be the duty of every member of the police force who finds any person committing a breach of any of the provisions of this Act or of any by-law, regulation or joint regulation made thereunder to demand from such person his name and place of abode and to report forthwith the fact of such breach and the name and place of abode of such person to the clerk of the municipality in whose district such breach was committed.'

Section 893 provides as follows:-

> "Except where it is by this Act provided to the contrary all penalties recovered for offences against this Act committed against the by-laws or regulations or in the municipal district or in any way in respect of any municipality shall be paid in the municipal fund of such municipality."

The *Local Government Act* thus gives municipal councils the power to prosecute offences under the Act including offences under s918B, and facilitates their doing so, and directs penalties into the local municipal fund. It follows that if the alleged exception to the general rule referred to in *Sargood v Veale* based on *R v Panton ex parte Schuh*, exists in law the present case would be such an exception, and only municipal councils could prosecute. However, Mr Sundberg maintains that the courts have made it clear that the law is not as so stated in *Sargood v Veale*. Mr Dyett takes some comfort from the that in *R v Hare ex parte Bush* at p75 the Court said:-

> 'It is plain that no person in the position of a stranger or who has no connection with the subject matter of the prosecution, can undertake the role of prosecutor. This view is fortified by certain sections of the '*Local Government Act* 1874'. Secs 512-516 seem to contemplate the council being the proper party to take proceedings, or that the council is to give authority to someone else to do so.'

It happens that s512 of the *Local Government Act* 1874 corresponds with s866 of the present Act, and that ss513 to 516 of the 1874 Act are duplicated by ss890 to 893 of the present Act. However, the Court went on to say:-

> 'It is unnecessary to express any opinion upon the point as to whether, upon the analogy of the case in *Cole v Coulton*, a ratepayer of this particular Shire might lay this complaint.'

The Court thus put its remarks in the context of the offence concerned being of purely local interest. Another case relied on by Mr Dyett was *Pinkerton v Heaney* [1889] VicLawRp 82; (1889) 15 VLR 392. In this case the offence was encroaching upon a road within the municipal district of the Shire of Bungaree; the Full Supreme Court referred to s516 of the *Local Government Act* 1874 and said-

> 'By the same Act it is provided that the Council is to be the body which is to have the care and management of all roads within its municipal district. It has been often held in this Court that in such a case the body authorised to receive the penalty, or some person authorised by it, is the only person who can take proceedings against the commission of the offence for which the penalty is instituted.'

Thus the decision in this case also appears to be explicable as relating to a matter of purely local interest.

As Mr Dyett was careful to point out, the cases to which I have so far referred as mentioned by him are old cases. He referred also to *Steane v Whitchell* [1906] VicLawRp 118; [1906] VLR 704; 12 ALR 390; 28 ALT 60 where the Full Supreme Court had before it an information against a defendant for commencing a building without first paying to the Town Clerk the necessary fees. At p706 the Court said:—

> 'There are three classes of Statutes in the construction of which questions of this kind have frequently arisen. In the first class, the fact that the offence is of a public nature ... or that the legislature has shown that it intended it to be dealt with as an offence of a public nature by providing that it be heard in the ordinary manner and before the ordinary tribunals ... has led the Court to the conclusion, in the absence of some fairly plain indication to the contrary, that any member of the public may prosecute.
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> In the second class the destination of the penalties or the nature and description of the offence, as one in which only certain persons or bodies, or certain classes of persons are interested, has resulted in a decision that the Information must not be in the name of any person other than one of those indicated. In these cases, if nothing more appears, the information must be laid or exhibited by, or must at least show on its face that it is laid at the instance and with the authority of, the persons or one of the persons interested ...'

It is not clear to me that the Court was saying that the second class may exist even where the offence is of a public nature.

Mr Dyett drew my attention also to the case of *Dunstan v Neems* [1914] VicLawRp 48; [1914] VLR 364; 20 ALR 219; 36 ALT 10. This was a case of prosecution of a person appointed by a municipal council as returning officer, so that it is not in the same category as the present case or the cases already cited. It is, however, noteworthy for the fact that it was a prosecution under the *Local Government Act* and for the following statement by Cussen J at pp368-9:-

> 'That being the position, the main question argued was as to whether Dunstan could properly lay an Information. It was argued in the first place that s694 (corresponding with s866 of the present Act) provides especially that such Informations can only be laid by persons authorised by the council of the municipality to lay the Information. Certain decisions of our own Courts given in connection with the *Local Government Act* 1903 were relied on as showing that the Court took the view that the section then in force, corresponding to s694, did provide that prosecutions should be instituted only by persons authorised by the Council, but even in those cases the Court did not expressly determine as to whether or not prosecutions in certain cases could not be instituted by a ratepayer. The Act, however, is now altered in that the provision in question has been placed in that part of the Act dealing with legal proceedings by and against municipalities, and I think for that reason I am not bound by the previous decisions of this Court, and can decide the proper construction of the Act having regard to the position in which the section is now placed.
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> So construing it, I come to the conclusion, without much doubt, that it does not limit the initiation of proceedings for the enforcement of the Act to persons authorised by the council. All that s694 does say is in a division headed 'Legal proceedings by and against Municipalities; 'The Council may order either generally or in any particular case proceedings to be taken for the recovery of any penalties and for the punishment of any person offending against the provisions of this Act and may order the

> expenses of such prosecution or other proceedings to be paid out of the municipal fund.' That no doubt enables councils to initiate proceedings, but it does not confine the initiation of proceedings to councils. Then it has been pointed out that this was a matter of local concern, and that under s721' (corresponding with s893 of the present Act) 'the penalties are to go to the municipal fund. It has been decided that that is not a conclusive test. I do not mean to say that a section cannot be so expressed as to show that only the person to whom the penalty is given can initiate prosecutions, but it has been decided in several cases that that is not the necessary result. The true rule, as laid down in *Sargood v Veale*, and in decisions of the High Court in England, is that *prima facie* anybody may lay an information for the enforcement of an Act. Before *Sargood v Veale* this Court was disposed to hold otherwise, but in that case it was pointed out that the authorities relied on in the previous decisions had been cases of *qui tam* actions and informations, and that they did not refer to informations for criminal offences. I have then to look to see whether there is anything in this Act to point to a different construction, either because it is a matter of purely local concern, or because it is expressly prescribed. I can find no such provision, at all events none which would prevent a ratepayer instituting proceedings under s150 for the prosecution of offences under ss117 and 126. The real test, is not I think, to ascertain the destination of the penalty, although that may be of use, but to find whether the prosecutor is interested in the performance of the duty or interested in the remedy, using that expression in a general sense. In some cases it can be said that every member of the public is interested in the performance of the duty the breach of which is the subject of the information in this case. It may be that anybody could lay an information in such a case, but all I have to decide is whether a ratepayer can do so, and I have no hesitation in saying that he can.'

The reason that I have cited the judgment in this case at some length is because the statutory provisions referred to in it correspond to those relevant to the present case and express a different point of view in respect of them from views expressed in earlier cases to which I have referred.

I think therefore that even before the more recent decisions of *Armstrong v Hammond* (*supra*) and *Lynch v Sloan* (*supra*) it had been established that there was no exception to the general rule in favour of cases where a local authority is given the right to prosecute and the penalties are to go into a municipal fund. In *Armstrong v Hammond* (*supra*) the Full Court referred to the earlier cases to which I have referred and cited part of the passage I have cited from *Dunstan v Neems*. I think therefore that it is clear that where the law alleged to be broken is of a public nature, as I have found the law in this case to be, there is no such exception to it based on *Reg v Panton ex parte Schuh* as is suggested by the judgment in *Sargood v Veale*.

There is however also to be considered the alternative argument that in this case the right of members of the public to prosecute an offence of a public nature is taken away by the legislation. All the authorities already referred to may be regarded as relevant to this argument also, as is also the summary of the relevant provisions of the Act. I think that Cussen J's observations in *Dunstan v Neems* support the view that there is no implication to be drawn from ss866 and 893 displacing the *prima facie* interpretation that anyone may bring an information under the Act. There is also to be taken into account the duty under s888 of police officers to report breaches of the Act to the clerk of the local municipality. This provision was s716 of the *Local Government Act* 1903 and thus predates the remarks of Cussen J in *Dunstan v Neems*. Sections 695, 696 to 704 and 711-16, already referred to, were also in the 1903 Act in similar, if not identical, terms. In addition, s888 cannot of itself be construed to take away the right of members of the police force, let alone the general public, to prosecute offences under the Act. It is consistent with municipal councils knowing what is happening in their areas and with police having the choice of themselves prosecuting or leaving it to the local council to take responsibility for prosecutions.

In any event, the Full Court in *Armstrong v Hammond* has held at p481 that the right of any member of the public to lay an information for an offence of a public nature is not to be taken as denied in the absence of clear and express language. There is in the *Local Government Act*, in my opinion, no clear and express language taking away the public's *prima facie* right to prosecute for breach of s918B(2).

Some other cases were cited by Mr Dyett. One of them was the decision of the High Court in *Christie v Permewan Wright & Co Ltd* [1904] HCA 35; (1904) 1 CLR 693; 10 ALR 234. This was a case of a prosecution under the *Customs Act* by a customs official, and the point was taken that he was not authorised to prosecute. It was contended that any person could lay an information for an offence under the *Customs Act,* on the ground that the penalty was imposed for the benefit

of the general public. The Full High Court held that so to hold would be to interpret the Act in a way inconsistent with the whole history of customs legislation in England and in the colonies. A prosecution under the *Customs Act* thus appears to be a special case. Mr Dyett also quoted the West Australian case of *Scott v Harry* (1951-3) 51-54 WALR 1. This was the case of a prosecution under legislation which stated that in proceedings taken against any person for an offence against a specified act the information may be laid in the name of an inspector or police officer or constable, or of any person aggrieved. The prosecutor did not fall within those categories, but the argument was put that the word 'may' in the statutory provision left it open to any other member of the public to lay an information. Virtue J said at p3:—

> 'Much argument has turned on the use of the word "may" and its normal permissive connotation as negativing an exclusive interpretation of the sub-section. But the normal meaning of "may" as used in a statute in the conferring of a power is to import a discretion in contrast to "shall" which imports that the exercise of the power shall be mandatory.'

The main point of the citation of this case appears to have been to discount any reliance by the applicant on the use of the word 'may' in s866 of the Victorian *Local Government Act*. I do not think this matters as I have already held, in effect, that the applicant's case does not depend on the use of this word. An unreported decision by Murphy J in *Boyd v Lanares*, where His Honour held that an offence against the *Tobacco Leaf Marketing Board Act* could be prosecuted only by an officer of that Board, appears to have depended on the particular words of that Act.

For the reasons I have given my order is therefore that the order nisi before me be made absolute with costs.
