31/84

SUPREME COURT OF VICTORIA

R v MAGISTRATES' COURT at MELBOURNE; ex parte HOLMAN and ORS

Gobbo J

24 May 1984

CRIMINAL LAW – PROCEDURE – SUMMARY JURISDICTION – WHETHER COURT CAN STAY HEARING TO PREVENT ABUSE OF PROCESS – WHEN COURT CAN EXERCISE SUCH POWER – WHETHER FAIR TRIAL IN JEOPARDY.

H. and others ('the Applicants') were members of a Union which was the subject of an inquiry by a Royal Commission. When the applicants were summoned to give evidence before the Commissioner, they refused to answer questions, and tendered a Union Resolution made in 1981 to the effect that the Union's members would not co-operate with the Commissioner. Subsequently, the applicants were charged with a conspiracy framed in general terms and the specific offence of refusing to answer questions. When the matters came on for hearing in January 1984 a magistrate granted leave to withdraw the conspiracy charges notwithstanding objection by the applicants. He then adjourned the other charges to enable the applicants to seek an indemnity from the Attorney-General and the Director of Public Prosecutions in respect of the conspiracy charges. Such indemnity was subsequently refused. When the summary charges came on for hearing in May 1984, it was submitted that the court should stay the hearing of the charges on the ground that an abuse of process was involved. It was argued that the applicants would be prejudiced in the conduct of their defence unless an indemnity were granted in respect of the conspiracy charges. The court refused to stay the hearing. On applications for orders nisi for prohibition—

HELD: Applications dismissed.
(1) It is possible that a magistrates' court has power to stay a prosecution where it is an abuse of the process of the court.
***Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145; and**
***Moevao v Dept of Labour* [1980] 1 NZLR 464 per Woodhouse J, applied.**

(2) However, such a power can only be exercised in exceptional circumstances involving weighty matters which are not in the realm of mere speculation or hypothesis.

(3) Notwithstanding that the matters raised were valid factors, there was nothing to show that a fair trial was in jeopardy or that they could be characterised as exceptional circumstances.

GOBBO J: [1] These are applications for orders nisi for prohibition in respect of the decision of a stipendiary magistrate refusing to grant a stay of the hearing of certain charges against the applicants. The basis of the application is that the court should grant a stay in order to prevent an abuse of its own process. I accept that there is a power in superior courts and possibly also in courts of inferior jurisdiction to stay a prosecution where it is an abuse of the process of the court. The main relevant authority is the decision of the House of Lords in *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145. Lord Morris said at AC p1301 as follows:

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process of the court."

[2] Later at the same page, he said:

> "The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

Lord Devlin in the same case said at p1354:

> "The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

In *Connelly's case* Their Lordships were divided in their views as to whether a court had power to stay a validly instituted prosecution and in respect of which there was no valid plea in bar, though the majority would seem to have recognised that there may be such a power. All Their Lordships were agreed that the power could only be exercised in exceptional circumstances. The authorities have been put before me in a very helpful fashion. One of those authorities was the decision of the New Zealand Court of Appeal in *Moevao v The Department of Labour* [1980] 1 NZLR 464. In that case the earlier authorities were usefully reviewed. All three members of the court there were of the view that a superior court has an inherent jurisdiction to stay or dismiss a prosecution for abuse of the process of the court, but on the facts, they found **[3]** there was nothing that justified such an unusual intervention. Mr Justice Woodhouse was of the view that the power extended to a Magistrates' Court. A final view on that matter was not expressed by the other judges.

A judgment that was especially relied upon by the applicants before me was that of Mr Justice Richardson, in particular a passage at page 482 where he said:

> "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression."

Later in the same judgment His Honour said when referring to the difficulties of exercising a discretion in this matter:

> "The twin problems of an absence of objectively ascertainable standards and the relative unfamiliarity of the Courts with the weighing of all the considerations which may bear on the exercise of prosecutorial responsibility require the Courts to tread with the utmost circumspection. While the Court must be the master and have the last word, it is only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of criminal justice that a Court would ever be justified in intervening."

I turn now to the matters that are relied upon as showing an abuse of process. The applicants were charged in August 1983 with breaches of s6 of the Commonwealth *Royal Commissions Act* 1902. These were summary offences relating to an alleged refusal of the applicants to answer questions asked of them at a Royal Commission hearing on the 7th June 1983. At the same time they were charged with a conspiracy framed in general **[4]** terms and said to have occurred on the 1st July 1981.

On the 29th November 1983 the applicants were informed that, in confirmation of an earlier indication, all charges of conspiracy would be withdrawn. On the 23rd January 1984, over the protest of the applicants, leave was granted by the stipendiary magistrate to withdraw the conspiracy charges. An application was then made at that time by counsel for the remaining summary charges to be adjourned in order to enable the applicants to seek an indemnity from the Commonwealth Attorney-General in respect of the conspiracy charges and also in order to enable particulars of the summary charges to be provided. That application was granted and the matter was adjourned to the 21st May 1984.

On the 15th February 1984 a letter was written to the Attorney-General seeking indemnity in respect of the conspiracy charges and other charges under the *Crimes Act* 1914. There was

a formal acknowledgement of that letter and then on the 9th May 1984 the Director of Public Prosecutions wrote in these terms:

> "I refer to your letter dated 15 February 1984 addressed to the Attorney-General concerning your clients, Messrs. McDonald, Sproule, Holman, Burns, Dix, Spiller and Scott, who have been charged with offences under sub-section 6(1) of the *Royal Commissions Act* 1902. You have requested that your clients be granted an indemnity against prosecution in respect of any conspiracy and of any offence under section 7A of the *Crimes Act* 1914 relating to the refusal of your clients to answer questions before the Royal Commission into the activities of the Federated Ship Painters and Dockers Union. As you may be aware, since the commencement of the *Director of Public Prosecutions Act* 1983 in March of this year I am responsible for the conduct of prosecutions for offences under the **[5/6]** law of the Commonwealth. Pursuant to my function under sub-section 6(1)(e) of the Act, I will be carrying on the proceedings instituted against your clients. While I am empowered under sub-section 9(6) of the *Director of Public Prosecutions Act* to give the undertakings you have sought, I have considered the matters you have raised in your letter and I have formed the view that it would be neither desirable nor appropriate that I do so. Accordingly, I have refused your request."

It was signed by the Commonwealth Director of Public Prosecutions. Fresh informations were laid in April 1984 in respect of the summary offences and on the 21st May 1984 when these informations came on for hearing, an application for a stay on the ground that an abuse of process was involved was made and refused. The application was based on the following general consideration, namely that the defendants would be prejudiced in the conduct of their defence unless an indemnity or immunity were granted. I do not have the full text of the discussion that occurred before the magistrate, though I have the reasons for his decision. It appears, however, that there was no evidence called, but that the matter proceeded on the basis of submissions from counsel and such material such as the correspondence, some or all of which has been read, as was not in dispute.

[7] The matter was argued before me on a twin basis, namely, as the argument that was put before the Stipendiary Magistrate or addressed to me upon the alternative argument that this court has a supervisory jurisdiction and that in that sense I am entitled to look at the material myself and not merely look for fundamental error on the part of the Stipendiary Magistrate. It was said that there was nothing to stop the Crown resurrecting the conspiracy charges and their withdrawal would not sustain a plea in bar, such as, *autrefois acquit* or issue estoppel. It was put that an indemnity which could only be given by the Attorney-General was, other than a pardon by the Governor-General, the only realistic protection from such charge. It was submitted that given the fact of the charges having been previously charged, albeit that they are now withdrawn, it could not be said that the prospects of exposure to conspiracy charges were hypothetical.

It was submitted that the defendants were being denied a fair trial of the summary charges in that they were being denied the option of giving sworn evidence for fear that they might be cross-examined in such a way as to elicit evidence against them in respect of the possible revived conspiracy charges. The same point was made in relation to the applicants being precluded from offering evidence in support of a plea of mitigation in the event of their conviction on the summary charges.

In substance the case for the applicants was that they could not receive a fair trial of their hearing of the **[8]** summary charges whilst they were exposed to the risk of conspiracy charges. Mr Weinberg, who put the main argument on behalf of the applicants, put the matter graphically as follows, that there was an abuse of process in that either what the prosecution was seeking to do was to turn the Magistrates' Court into an arm of the investigative procedures of the Royal Commission to seek out evidence of conspiracy or that a conspiracy charge was being left hanging over the heads of the applicants to prevent them from going into the witness box or to prevent them from giving evidence in mitigation.

On behalf of the Director of Public Prosecutions it was submitted that there were a number of substantive answers to the arguments that were put. It was said, first of all, that the concept of oppression as recognized by the authorities was not made out in the present case. It was further submitted that if the circumstances were capable of mounting to oppression that then the oppression could only occur at the point of time when the conspiracy charges were brought on and proceeded with. Thirdly, it was argued that it was inherently wrong in principle to directly or indirectly stay proceedings until in effect either an indemnity was given or the Crown were

compelled to bring on and proceed with the conspiracy charges. Finally, it was argued that what was really being contended for was a far-reaching proposition that whenever there is a risk of a further charge arising out of the subject hearing, then notwithstanding that there was no evidence of any intention to bring the further charge and notwithstanding that there was no evidence of any improper practice in the first hearing, **[9]** then there should always be a stay in the absence of an indemnity or other step precluding the second charge.

It was submitted on behalf of the Director of Public Prosecutions that there was no intention of reviving the conspiracy charges, that the dropping of these charges had been made to reflect the view expressed by the High Court in *R v Hoar* [1981] HCA 67; [1981] 148 CLR 32; [1981] 37 ALR 367; 56 ALJR 43, that where there are both conspiracy charges and substantive offences the proper course is normally to proceed with the substantive offences. It was also put that it was a matter of interference with the role of the Attorney-General and the Director of Public Prosecutions and that what was sought in effect by the applicants was a direction by the court to grant an immunity.

There were a number of arguments also addressed to me in relation to what might be described in one sense as procedural matters, namely, that this being an application for an order nisi for prohibition it had to be shown that the magistrate exceeded his jurisdiction and it was submitted that there being no excess of jurisdiction on his part in deciding an application of this nature. It was also submitted that a court will rarely interfere with the conduct of proceedings by way of prerogative writ especially in relation to criminal proceedings in the absence of compelling circumstances which had not been made out and, finally, it was argued that what was sought here was a judicial interference with a Crown prerogative in relation to the granting of indemnities. So far as those procedural matters are concerned I am of the view that consistent with other decisions in this court, including a recent decision of my own, that where **[10]** the essence of the application is based upon a claim of denial of natural justice then that involves a matter that goes to jurisdiction and supports a possible remedy of prerogative writ of prohibition.

In any event there would seem to me to be force in the argument that Mr Weinberg put, that if an abuse of process case is made out to the relevant degree then that would seem by its nature to go to the very matter of defect of jurisdiction. I am therefore not minded to uphold the first objection. The other matters, it seems to me, really are caught up with the substantive matters and it is convenient to deal with those in the course of dealing with the substantive arguments. As was noted in the course of argument, and indeed Mr Weinberg did not fail recognize the difficulties raised by his argument, the applicants' case might on one view of it lead to the proposition that any person charged with an offence could put forward and seek to sustain a plea of abuse of process and secure a stay on the basis that he might point to other charges that might spring from material that might emerge from his exercising his right to give sworn evidence.

In my view such a proposition is plainly not sustainable. Indeed it was not argued that any such wide proposition could be made out on the authorities or could be sustained in principle. It needs to be noted in that context that the circumstances, that a prosecution hearing may throw up evidence of other offences, is not an unusual one. An exercise of the power of staying a prosecution for abuse of process in that situation could not be described **[11]** as being one exercised in exceptional circumstances. It is urged before me that the present case is not in that category at all and in effect there are exceptional circumstances here. The particular matters that were relied upon were that here charges of conspiracy were actually laid though now withdrawn and, secondly, a request for an indemnity has not been granted and that the applicants have been informed that no limited immunity will be given by the Director of Public Prosecutions pursuant to s9 sub-s6 under the *Director of Public Prosecutions Act.*

In addition reliance is placed upon the recent amendment to the *Royal Commissions Act* 1902, and the limitation as to self-incrimination abrogation, particularly, the reference to charges not being otherwise disposed of. These are valid factors, but I have come to the view that they are not decisive nor could they properly be described as exceptional or being able to be characterised as exceptional circumstances. Moreover, a withdrawn charge may in one sense be a better situation than a charge which is not yet laid but which one is apprehensive may be laid if further evidence emerges. If, as is argued, the key consideration is denial of a fair trial then one must look at the trial itself. Here there is very little in my view to show that a fair trial is in jeopardy. Courts are

frequently asked at the outset of a trial to exclude material in order to protect an accused's right to a fair trial. **[12]**. Here the task is a much more difficult one for the court and the applicants, for an applicant cannot normally be expected to show his hand entirely in relation to the defences that he or she would seek to rely upon, but if an applicant seeks the exceptional course of staying a prosecution as an abuse of process, he would need, in my view, to be able to point to weighty matters that are not in the realm of mere speculation or hypothesis.

In the present case these matters are, in my view, not present and the factors relied upon are not of that character. They could readily arise in similar form as a matter of course and they would not require, in my view, an exceptional or an unusual scenario to bring them about. There is a further consideration that tells against the applications. The most helpful *dictum* that was relied upon so far as the application was concerned was the following statement by Lord Devlin in *Connelly's case* at page 1353:

> "In my opinion, if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and of injustice to defendants. The Crown might, for example, begin with a minor accusation so as to have a trial run and test the strength of the defence. Or, as a way of getting round the impotence of the Court of Criminal Appeal to order a new trial when, as in this case, it quashes a conviction, the Crown might keep a count up its sleeve. Or a private prosecutor might seek to harass a defendant by multiplicity of process in the different courts."

It is important to note that this passage occurs in the context of discussing a sequence of hearings and following a reference in the previous paragraph to the doctrine of *autrefois acquit*. The typical intervention of the court referred to by His Lordships is to prevent the Crown reopening what is in **[13]** effect the same matter. But that is not this case here; the present prosecution is not a reopening. There has not yet been an opening and the possible reopening would only occur if, after these prosecutions were disposed of, the prosecution were contrary to its statement of intent to resurrect charges of conspiracy. That would be the point to seek recourse to the doctrine of the plea of abuse of process and in that sense there is, in my view, substantial weight in the argument relied upon by Mr Merkel who appeared for the Director of Public Prosecutions that the time to ascertain oppression is at the time when the second matter comes forward. That is the tenor of the speeches in *Connelly's case* and it, in my view, accords with the way in which oppression and even unfairness is discussed. By analogy with the doctrine of double jeopardy, the applicants here are in effect raising an equivalent plea before they face their first jeopardy.

For those reasons, I am of the view that the applications for orders nisi must fail. It makes it, therefore, unnecessary to deal with the other procedural matters that were raised and the applications will therefore be dismissed.
