24/82

SUPREME COURT OF VICTORIA

FAWNS v WOODS

Crockett J

24 February 1982

PRACTICE AND PROCEDURE – INDICTABLE OFFENCE TRIABLE SUMMARILY – COURT MUST FIRST OBTAIN CONSENT FROM ACCUSED BEFORE DEALING WITH THE MATTER SUMMARILY – CONSENT NOT OBTAINED – MATTER DEALT WITH SUMMARILY – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURTS ACT* 1971, S70.

W. was charged with the indictable offence of assault occasioning actual bodily harm. At the conclusion of the evidence for the prosecution defence counsel said that the defendant would be going for trial. Counsel and the Stipendiary Magistrate entered into some discussion about the evidence which indicated that the Magistrate had formed an adverse opinion about certain critical evidence. After two adjournments counsel stated that his client desired that the charge be heard summarily and that the plea was not guilty. The Magistrate thereupon proceeded to deal with the matter by expressing himself as not satisfied that the charge had been made out and dismissed it.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrate for further determination. The failure of the Magistrate to put the words of the section to W. preparatory to his being asked how he pleaded to the charge, and as a condition precedent to the hearing of the charge, meant that the purported hearing was without jurisdiction and, accordingly, invalid.

CROCKETT J: *[After setting out some preliminary matters, His Honour continued]* … **[3]** So far as is relevant for present purposes, the order nisi to review the decision rests upon the single ground that the Magistrate had no jurisdiction to proceed to deal with the matter summarily, and accordingly, lacked jurisdiction or authority to dismiss the information.

The ground thus relied upon invites attention to the procedure required to be followed before an offence, which otherwise would be an offence to be dealt with on indictment, can be dealt with summarily. The provisions are to be found in s70 of the *Magistrates' Courts Act* 1971 where it is stated:

> "Where the Court before which a person is charged … proposes either
> (a) on the application of the prosecutor before the hearing of any evidence … or
>
> (b) on the application of the prosecutor or the person charged or on the motion of the Court at any time during or immediately after the hearing of the evidence for the prosecution—
> to dispose of the case summarily one of the Justices shall state to such person the substance of the charge against him and shall then say to him these words or words to the like effect:
>
> 'Do you consent that the charge against you shall be tried by us, or do you desire that it shall be sent for trial by a jury?'
>
> and if the person charged consents to the charge being summarily tried and determined as aforesaid he shall then be asked how he pleads to the charge and the Court shall proceed to deal with the case summarily."

It is said for the informant/applicant that requirements of that section are mandatory so that if any one or more of them is or are not followed then the court is without jurisdiction to deal with the charge summarily. … The principal point relied upon by the applicant was the omission by the Magistrate to put to the defendant the words to be found in s70, or words to a like effect. That is to say, the court did not put to the defendant words explaining the option which he possessed to determine the mode of trial for the determination of the charge then pending against him. The second principal omission relied upon by the applicant in support of a contention that there was by reason of such omission a fatal flaw in the proceedings was that the defendant was not asked how he pleaded to the charge.

In relation to each of those omissions it may be said that what counsel stated to the Magistrate amounted, in the first place, to an answer to the question concerning the defendant's option which revealed his desire to be dealt with summarily and then that counsel had sufficiently dealt with the question of how the accused man pleaded by stating on his behalf that it was his intention to plead not guilty. On behalf of the applicant in the proceedings before me no reliance was placed upon the fact that it was not the respondent himself but his counsel who provided the answer to each of those questions. However, what, as I say, was relied upon was the omission to put the question concerning the option and to put the question as to how the defendant was pleading when the matter was to proceed summarily. As at all times not only was the defendant present in court, but he had his counsel available to advise him, and as, in fact, he was advised as to his rights when adjournments for the purpose were sought and obtained by counsel, it may be thought in the circumstances that the suggestion that the provisions of the section should be strictly adhered to amounted to a requirement of needless technicality. Furthermore, as it was plain that the Magistrate had taken a strong view as to the lack of cogency which should attach to the main body of the prosecution evidence, it would seem that the applicant's present appeal is entirely without merit. In those circumstances, if I were left free to deal with the matter in the absence of authority, it may be that I would take a different view from that which I think the previously decided cases compel me to take.

The question as to whether there is any necessity to put to the defendant personally the words to be found in the statute has arisen in two previous cases in this court. *Dodemaide v Tucker* [1927] VicLawRp 78; (1927) VLR 539; 33 ALR 385; 49 ALT 48 is a case in which Mann J held that it was a condition precedent to the power of a Court of Petty Sessions to hear and determine a charge that would otherwise have to be dealt with on indictment, that the words of the section be put to the defendant and that he cannot waive that condition. In that case the defendant had been convicted following a hearing that took place when the defendant's solicitor indicated that the defendant would consent to the matter's being heard summarily. Accordingly, it might be thought that the case is distinguishable from the present because the present, unlike *Dodemaide's case*, does not involve the protection of an accused person's rights which might be said should be strictly adhered to where they are defined statutorily.

Any such point of distinction, however, is removed by *Hacking v Keath* [1966] VicRp 50; (1966) VR 364, a decision of Adam J. There there was an appeal by an informant in relation to an offence which would otherwise have been dealt with on indictment but for the accused person's counsel having entered a plea of not guilty on behalf of the accused and indicated the accused's consent to be dealt with summarily. His Honour at p369 said:

> 'Regarded as a matter of substance it might appear that by making application by his counsel for a summary trial, even although such application was made before any evidence was heard, there was a sufficient compliance with the statutory conditions of jurisdiction, particularly as strict compliance with the statutory conditions is presumably required only for the benefit of the person charged, and so far as possible, through his counsel, he waived such strict compliance. But the answer to this approach is, I think, to be found in the decision of this Court in *Dodemaide v Tucker* ..."

Those two authorities afford powerful persuasive authority to which I must have regard, and I have no doubt that, unless it appears to me that they are manifestly wrong or can be distinguished, then I ought to follow them. It is impossible to say that they are so clearly wrong that on that ground I ought not to follow them. Accordingly, I propose to treat myself as bound to accept the principles found in those cases unless there is some feature distinguishing them from the present case.

For the respondent it was suggested that the present case is distinguishable from *Hacking v Keath* by reason of the purpose for which the legislation exists; that is to say, that it is to protect the rights of accused persons. The procedure is to be found in s70, and if in a given case it is clear that those rights have been found not to have been lost to the defendant by reason of non-compliance with the statute, then that non-compliance ought not to be found fatal to the validity of the proceedings which have taken place. Now, it is this very argument which I have just indicated that Adam J found insufficient to afford a distinction between the case that he was dealing with and *Dodemaide v Tucker*.

But in the present case counsel for the respondent has maintained that this case is itself

distinguishable from *Hacking v Keath* on the ground that Adam J reached his conclusion in that case by virtue of the fact that the accused himself was not present when the proceedings were being conducted, and that it was insufficient for counsel to consent, or to enter a plea, on behalf of an accused who was not himself present; and if the present case is accordingly distinguishable from *Hacking v Keath* on such a basis then the point of distinction relied upon between the present case and *Dodemaide v Tucker* can, it was submitted, be a valid point of distinction. I think the flaw in that argument is that Adam J in the case decided by him did not, I think, reach the conclusion he did by reason of the absence of the accused from the summary proceedings.

As I understand the reasons of His Honour, the non-attendance of the accused at the summary hearing was independent of the conclusion which His Honour reached as to the necessity for strict compliance with the statutory conditions and the inability of counsel to waive that strict compliance. In my view, the authorities make it plain that counsel cannot validly waive strict compliance regardless of whether his client was present or not at the time when he purports to waive it. Accordingly, I think it becomes plain that the failure of the Magistrate to put the words of the section to the respondent preparatory to his being asked how he pleaded to the charge, and as a condition precedent to the hearing of the charge, means that the purported hearing was without jurisdiction and, accordingly, invalid.

The other point of purported invalidity in the proceedings was that the defendant had not been asked how he pleaded to the charge. It might be thought that that requirement certainly could be waived if a plea is entered on the accused's behalf by his counsel, particularly if at the time the accused himself is present, and, furthermore, if the plea is entered is one of not guilty. However, there is a decision of a Divisional Court in England, *R v Wakefield Justices* (1970) 1 All ER 1181, that suggests that the requirement specifically to ask the accused how he pleads is a mandatory requirement so that omission to put such a question can be fatal to the validity of the proceedings. It may be that the English authority can be distinguished from the circumstances of the present case, but having regard to the view that I have expressed as to the other point taken, it becomes unnecessary to express a view about this particular submission. ...

Order that the order of dismissal made below be set aside and that the matter be remitted to the Magistrate to be further heard according to law.
