23/72

SUPREME COURT OF VICTORIA

HOWARD v PACHOLLI and GALBRAITH

Anderson J

31 July, 23 August 1972 — [1973] VicRp 83; [1973] VR 833

PROCEDURE – DEFENDANT PACHOLLI CHARGED WITH BEING AN UNDISCHARGED BANKRUPT DID TAKE PART IN THE MANAGEMENT OF A COMPANY – DEFENDANT GALBRAITH CHARGED WITH AIDING AND ABETTING THE COMMISSION OF PACHOLLI'S OFFENCE – APPLICATION FOR A STAY OF PROCEEDINGS – PACHOLLI HAD BEEN CHARGED PREVIOUSLY – DOUBLE JEOPARDY – *AUTREFOIS ACQUIT* – FINDING BY MAGISTRATE THAT IT WOULD BE UNFAIR TO PLACE DEFENDANT IN JEOPARDY A SECOND TIME – INFORMATIONS STRUCK OUT – WHETHER MAGISTRATE IN ERROR: *COMPANIES ACT* 1961, S117.

HELD: Orders nisi absolute. Magistrate's orders set aside. Remitted to the Magistrates' Court to be heard in accordance with the law.

1. The magistrate did not have the discretion he claimed to have in this case, nor was he for any other reason empowered to postpone indefinitely the hearing and determination of the information before him. There is no general discretion based on some imprecise regret that particular proceedings are being pursued against the defendant, and there was no legal basis for the magistrate's decision to stop the proceedings against Pacholli on the basis of double jeopardy.

2. Accordingly, the magistrate was in error in striking out the information for the reasons given by him. The magistrate's order was designed to shelve or dispose of the information for what were invalid reasons and after some deliberation he decided to strike it out instead of adjourning it.

3. If, instead of striking out the information, he had adjourned it to a date to be fixed to await some action by the Crown in respect of the indictable offences upon which the defendant had been committed in 1968, his reasons for so doing would have included at least some of those which he expressed in striking out the information. Such an adjournment would likewise have been an improper order.

ANDERSON J: This is the return of an order nisi to review the order of the Magistrates' Court at Coburg made on 26 October 1971 striking out an information laid by the informant, David Harold Howard, charging the defendant, John Dennis Pacholli, that he "between 20 February 1968 and 28 March 1968 at Coburg...being an undischarged bankrupt did take part in the management of Latina Motors Pty Ltd, without leave of the Court contrary to s117 of the *Companies Act* 1961".

Section 117(1) provides that

> "Every person who being an undischarged bankrupt acts as a member of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the Court shall be guilty of an offence against this Act. Penalty: Imprisonment for six months or $1000, or both".

Charged at the same time before the Magistrates' Court was one Jack Alexander Galbraith, the allegation against him being that he did aid, abet, counsel and procure the commission of the offence with which Pacholli was charged. Both the offence under s117 of the *Companies Act* 1961 and the offence of aiding and abetting under s77 of the *Justices Act* 1958 are summary offences. The general limitation imposed by s215 of the *Justices Act* 1958 for the laying of an information for a summary offence is 12 months from the time when the matter of such information arose and not afterwards, but s381(2) of the *Companies Act* 1961 provides that "Notwithstanding anything in any Act proceedings for any offence against this Act may be brought within the period of three years after the commission of the alleged offence or, with the consent of the Minister, at any later time". Prior to the laying of the informations against Pacholli and Galbraith the Minister's consent in writing had been obtained to the taking of such proceedings notwithstanding that three years had elapsed since the commission of the alleged offences: see *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198; [1949] ALR 992.

When the informations came on for hearing before the stipendiary magistrate constituting the court at Coburg, counsel appeared for the informant and for Pacholli, and Galbraith appeared in person. Pacholli pleaded "not guilty", but Galbraith pleaded "guilty". Thereafter, the parties agreed that both matters be heard together. At that stage counsel for Pacholli made application for a stay of proceedings. The first ground of his application was that in 1968 Pacholli and Galbraith had been charged before the court of petty sessions at Melbourne with having conspired together for Pacholli to take part in the management of Latina Motors Pty Ltd, whilst he, Pacholli, was an undischarged bankrupt, without the leave of the Court, contrary to s117 of the *Companies Act* 1961.

The magistrate before whom the committal proceedings had been conducted in 1968 had declined to commit Pacholli and Galbraith for trial and had discharged them. The magistrate had so acted pursuant to s47 of the *Justices Act* 1958 which provides that if the evidence is not sufficient in his opinion to put on trial the person charged with an indictable offence—which conspiracy is—he shall order him to be discharged. Counsel for Pacholli now submitted that although the two charges, namely, the conspiracy charge and the charge of the substantive offence under s117 of the *Companies Act*, were not identical, the material was substantially the same and his client should not be placed in double jeopardy by the court allowing the information under s117 to continue to be heard. He further submitted that it would be unfair to proceed with the hearing of the information at the present time because on the occasion when the magistrate in 1968 had declined to commit Pacholli for trial on the charge of conspiracy, he had nevertheless committed Pacholli for trial on several other indictable counts relating to other matters but which were related indirectly to the conspiracy charge and to any evidence given in relation to it. The precise terms of these other charges were not detailed but related, it was said, to allegations of false pretences and of fraud in respect of businesses other than Latina Motors Pty Ltd, but there was said to be an interrelation between them and Latina Motors Pty Ltd.

Though more than three years had elapsed since the committal proceedings, trials based thereon had not taken place, and counsel for Pacholli submitted that Pacholli would not be able to get into the witness-box in answer to the information under s117 without prejudicing his position in relation to the hearing of those other trials. He submitted, further, that since the Crown had a right to proceed in respect of the conspiracy charge by presenting Pacholli for trial under s353 of the *Crimes Act* 1958, Pacholli was still at risk in relation to the conspiracy charge and would be prejudicing his position if he gave evidence on the charge under s117, because the Crown could use that evidence in a subsequent trial for conspiracy.

These submissions were developed at length before the magistrate, who also heard counsel for the informant in reply. After a short adjournment the magistrate returned to the Bench and referred to *Falkner v Barba* [1971] VicRp 39; [1971] VR 332, a decision of Gillard J relating to pleas of *autrefois acquit* and cognate matters. The magistrate said that he was satisfied that the plea of *autrefois acquit* did not apply in courts of summary jurisdiction, but that the decision of Gillard J made it clear that the general principle applied that as a matter of fairness a person should not be twice prosecuted for the same or substantially the same offence. He also referred to *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145, and said that these decisions indicated that the court had a general discretion to determine whether it was unfair or not to place a defendant in jeopardy a second time. He said therefore that, although he did not consider the plea of *autrefois acquit* was available, a magistrates' court had been held to have a discretion as to this matter, and that applying the principles of that judgment he therefore had to determine whether he ought to exercise his discretion in the present case.

He said he thought there were four matters which he should take into account in exercising his discretion. They were:

(i) that a period exceeding three years had elapsed since the defendant had been discharged on the conspiracy charge;

(ii) that the defendant had been discharged from a charge of conspiracy to commit the substantive offence charged in the present information;

(iii) that the defendant was at present committed for trial for offences of a similar nature and in which evidence was given relating to the subject-matter of the present information, and

(iv) that he thought that the charge against Galbraith of aiding and abetting the substantive offence was very close to a charge of conspiracy, although it was not the same.

After further discussion he said that applying his discretion he should hold it a bar to the prosecution of the present information for an offence against s117, and notwithstanding objection by counsel for the informant, he struck out the information against Pacholli.

The magistrate, as a matter of fairness and for the same reasons as in Pacholli's case, struck out the information against Galbraith charging him with aiding and abetting.

In due course the informant obtained orders nisi to review the order of the magistrate in each case, the grounds of the orders nisi being essentially the same in each case. In the case of Pacholli, the grounds were expressed thus:—

1. That the stipendiary magistrate was in error in holding that the discharge of the defendant on 23 August 1968 upon committal proceedings in respect of a charge of conspiracy to commit an offence under s117 of the *Companies Act* 1961 entitled him to exercise a discretion to stay the prosecution of the information.

2. That the stipendiary magistrate was in error in holding that the defendant had been placed in jeopardy by the said committal proceedings and the said discharge, and was being placed in jeopardy a second time by the prosecution by way of the said information.

3. That the stipendiary magistrate was in error in holding that the said discharge upon the said conspiracy charge should be treated as substantially the same as a discharge or acquittal for an offence under s117 of the *Companies Act* 1961.

4. That the stipendiary magistrate was in error in taking into account in exercising his discretion to strike out the said information the following irrelevant matters, and each of them:—

(a) that the defendant was discharged upon the said committal proceedings;

(b) that three years had elapsed since the said committal proceedings.

5. That the stipendiary magistrate was in error in striking out the said information in that he had no power to strike out the information in the circumstances of the case.

It is apparent, I think, that the magistrate in striking the information out, intended to bring to finality the proceedings against the defendant, Pacholli, for a breach of s117, or at least to postpone indefinitely any further proceedings on that information. Discussion took place between him and counsel as to whether striking out the information or adjourning the hearing thereof was the proper order for him to make, and he chose to strike the information out. The real point involved in this order to review is not so much whether the appropriate order was to strike out the information or adjourn the hearing, but whether the magistrate had power to make an order postponing indefinitely the hearing and determination of the information for the reasons which he gave.

It seems to me that there may have been some confusion in the magistrate's mind because of his reference to the observation by Gillard J in *Falkner v Barba*, *supra*, at pp336-7, that in "a summary prosecution before the magistrates' court the plea in bar of *autrefois convict* in the strict sense could not be made"; and the further observation, at p342, in the following terms:

"A further suggestion also emerged...that having regard to an earlier conviction, as a matter of fairness and in the exercise of proper judicial discretion, the court should not allow a second prosecution to proceed on the same facts, particularly if the offences are of a similar character. It appears from the addresses of the majority of the House of Lords in *Connelly's Case*, [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145, that they also would accept that there was such a discretion residing in the court to prevent oppression or unfairness to an accused person to bar a second prosecution being instituted on the same or similar ultimate facts: see per Lord Reid at (AC) p1296; per Lord Devlin, at p1347; per Lord Pearce, at p1364. The precise nature of that discretion, however, was ill defined."

It is to be noted that his Honour was speaking, as also were their Lordships, of a judicial

discretion in the context of a second prosecution on the same facts for the same or a similar offence, not a discretion at large. They were speaking of a discretion, the exercise of which recognized the common law doctrine "enshrined", as Gillard J in *Falkner's Case*, at p336, put it, "in the Latin tag 'nemo debet bis vexari pro una et eadem causa'", which doctrine is echoed in s28 of the *Acts Interpretation Act* 1958, and is applicable as a matter of fairness and justice in situations where the plea of *autrefois* would not be available because of the technicalities which surround it. A consideration of what was decided in *Connelly's Case* makes this clear.

In *Connelly's Case*, Connelly and three other men were charged on two indictments with murder and robbery with aggravation arising out of an office robbery. In accordance with practice, the indictment for murder was tried alone. The jury returned a general verdict of guilty against all four men. Connelly successfully appealed to the Court of Criminal Appeal which held that the jury had been misdirected as to Connelly and a verdict of acquittal was entered. Thereafter, upon being indicted for robbery, Connelly unsuccessfully pleaded *autrefois acquit*. The trial judge was asked to exercise his discretion to prevent the Crown from proceeding on the indictment for robbery but he held that the only discretion which a judge had in such circumstances was to express an opinion; and he expressed the opinion that it would be wrong to proceed. Despite this opinion the Crown subsequently proceeded with the prosecution and Connelly was convicted of robbery. He then appealed, and eventually the matter reached the House of Lords which dismissed Connelly's appeal. Their Lordships held that the doctrine of *autrefois acquit* did not apply. In so doing several members of the Court discussed the rule of practice based on *R v Jones* [1918] 1 KB 416, that a second charge is never combined in the one indictment with a charge of murder, and expressed the view that apart from exceptional cases it was an inconvenient rule which should be changed—as, indeed, it subsequently was.

It is in the context of the particular facts of *Connelly's Case* that the observations of their Lordships are to be considered, and it is clear from the decision that once the plea of *autrefois acquit* (or other kindred plea) failed, the trial judge had no discretion to prevent the trial for robbery proceeding. Lord Morris of Borth-y-Gest, at (AC) pp1299-1300, said:

> "In my view the learned judge was entirely correct in so declining. He had no power to suppress the prosecution. There was no abuse of the process of the court. The indictment was correct in form. There was no basis for the quashing of it. Should it, then, be said (in a somewhat vague and imprecise way) to have been 'unfair' that the appellant should have been tried on the second indictment? The guiding principles as to what is fair and in the interests of justice have been evolved over the centuries; some of them, indeed, find their expression in the rules governing the pleas of *autrefois acquit* and *autrefois convict* and other kindred pleas; but if an appellant, being faced with a charge, cannot show that any of these pleas avail him, why is it unfair that he should take his trial? He will not be convicted unless his guilt of the charge is established so that a jury are quite sure of it. Why is that contrary to the interests of justice? I consider that if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it, and if there is no plea in bar which can be upheld the court cannot direct that the prosecution must not proceed."

Both Lord Morris at (AC) p1300, and Lord Hodson at pp1335-6, expressed agreement with what Lord Goddard CJ, said to the same general effect in *R v Chairman of London Quarter Sessions; Ex parte Downes* [1954] 1 QB 1, at p6; [1953] 2 All ER 750, at p752. At (AC) pp1354-5 Lord Devlin also discussed the remarks of Lord Goddard and explained their context and would appear to suggest that if there is a gross abuse of process the court can protect itself against it by refusing to allow the indictment. He was, however, speaking in a context analogous to double jeopardy.

There may be a case in a superior court where the formal plea of *autrefois* should succeed, or in a magistrates' court where s28 of the *Acts Interpretation Act* 1958 would be applicable; in such a case the barring of the second indictment or information would seem to be by operation of law rather than by the exercise of a discretion: see per Lord Hodson, in *Connelly's Case*, at (AC) p1335. Alternatively, there may be a case in which a second charge is in terms different from the first, but the subject-matter of both charges is the same or so similar as to amount in effect to the charging of the defendant twice with the same wrongdoing (e.g. *Wemyss v Hopkins* (1875) LR 10 QB 378, and *Falkner v Barba* [1971] VicRp 39; [1971] VR 332) where *autrefois* would not apply, but the maxim *nemo debet bis vexari*, the scope of which is broader, would operate as a bar; and whether it would be by operation of law or by the proper exercise of judicial discretion

that an injustice or an abuse of process would be prevented would seem to be immaterial from a practical point of view: see per Lord Goddard CJ in *Flatman v Light* [1946] KB 414, at p419; [1946] 2 All ER 368, at p370.

In *Connelly's Case*, at (AC) p1364, Lord Pearce, after referring to a number of cases, said:

> "The above cases show that a narrow view of the doctrines of *autrefois acquit* and *convict*, which has at times prevailed, does not comprehend the whole of the power on which the court acts in considering whether a second trial can properly follow an acquittal or conviction. A man ought not to be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or a previous acquittal. And it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that courts should apply to such cases an avowed judicial discretion based on the broader principles which underlie the pleas."

Indeed, the plea of *autrefois* is but an aspect of the doctrine more happily expressed in the Latin maxim. It is sad to think that, with the advent of the Common Market, other frankish phrases may tend further to displace the noble-sounding Latin, which, in such maxims as *nemo debet bis vexari pro una et eadem causa*, conveys more adequately the common law of England.

As the reasons given by the magistrate show, he purported to exercise a "general discretion" to determine whether it was fair or not to place the defendant in jeopardy a second time, as though this "general discretion" enabled a court to stop proceedings otherwise properly before it if it did not share the view of the informant that the information should not have been laid or proceeded with. In so acting, I think he overlooked the requirements of the law as to double jeopardy.

Whether one seeks to call in aid s28 of the *Acts Interpretation Act* 1958, or the plea of *autrefois* or the maxim *nemo debet bis vexari* or the analogous principles to be applied in courts of summary jurisdiction (*Flatman v Light*, *supra*; *Falkner v Barba*, *supra*) it is clear from the authorities, first, that a necessary prerequisite to the application of the relevant principle is that the defendant has been in jeopardy or peril in earlier legal proceedings; and, secondly, that he cannot be said to have been in jeopardy or peril in the legal sense of such expressions unless in effect there has been a trial and verdict thereon by a jury or a court of competent jurisdiction.

This was clearly expressed by Cockburn CJ in *R v Charlesworth* (1861) 9 Cox CC 44, at p53, in these words:

> "It appears to me, when you talk of a man being twice tried, that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy, you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass, because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time."

In other words, it is necessary that the first charge or indictment shall have been disposed of "on its merits": *Barnes v Gougousis* [1969] VicRp 123; [1969] VR 1019, at p1022; *Lloyd and Ors v Roberts* (1965) 109 Sol Jo 850; *Ward v Hodgkins* [1957] VLR 715, at p718 [1957] VicRp 103; [1958] ALR 348; *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238; [1967] 2 All ER 161. "Obviously what is fundamental to *autrefois acquit* is a verdict of acquittal of the offence charged": per Lord Devlin, delivering the judgment of the Privy Council in *Director of Public Prosecutions v Nasralla*, *supra*, at (AC) p245; [1967] UKPC 3.

In *Wemyss v Hopkins* (1875) LR 10 QB 378, at p381; 39 JP 549, Blackburn J referred to "the well-established rule at common law, that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, *transit in rem judicatam*, that is the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter". In *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, at p599; [1947] ALR 27, Dixon J (as he then was), said:

> "The rule against double jeopardy requires for its application not only an earlier proceedings in which the defendant was exposed to the risk of a valid conviction for the same offence as that alleged against him in the later proceedings, but that the earlier proceedings should have resulted in his discharge or acquittal."

Again, in *R v Wilkes* [1948] HCA 22; (1948) 77 CLR 511, at pp18-9, Dixon J said: "There must be a prior proceeding against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding." There are, in other cases, many expressions to the same effect.

It is evident that the defendant, Pacholli, was not in jeopardy when the conspiracy proceedings were before the court of petty sessions in 1968. Committal proceedings, such as those proceedings were, are not judicial proceedings; the powers there exercised are ministerial not judicial (*Re Mercantile Bank; Ex parte Millidge* [1893] VicLawRp 85; (1893) 19 VLR 527; *R v Woodhouse* [1919] VicLawRp 105; [1919] VLR 736, at p739; 25 ALR 415; 41 ALT 98), and the court had no jurisdiction to deal finally with the information: *R v Woodhouse, supra*. The discharge of the defendant did not involve the dismissal of the information or the acquittal of the defendant. The defendant could have been brought before justices on a subsequent occasion and further evidence could have been led and he could have been committed for trial, or a grand jury could have been applied for (*R v Cameron and Cracknell* [1897] VicLawRp 83; (1897) 22 VLR 481), or the Crown could have presented him for trial under s353 of the *Crimes Act* 1958. A withdrawal of an information is not a dismissal (*Davis v Morton* [1913] 2 KB 479; [1911-13] All ER Rep 369), and even a dismissal for want of prosecution is not a dismissal which lays the foundation for the application of the doctrine of double jeopardy, for no issue has been joined between the parties: *Ward v Hodgkins* [1957] VicRp 103; [1957] VR 715; [1958] ALR 348; *Barnes v Gougousis* [1969] VicRp 123; [1969] VR 1019; *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, at pp600-1; [1947] ALR 27.

In my opinion, the magistrate did not have the discretion he claimed to have in this case, nor was he for any other reason empowered to postpone indefinitely the hearing and determination of the information before him. As already indicated, there is no general discretion based on some imprecise regret that particular proceedings are being pursued against the defendant, and there was no legal basis for the magistrate's decision to stop the proceedings against Pacholli on the basis of double jeopardy. I think, therefore, that the magistrate was in error in striking out the information for the reasons given by him. I do not propose to explore the question of the magistrate's power to strike out an information in an appropriate case. The magistrate's order was designed to shelve or dispose of the information for what were invalid reasons and after some deliberation he decided to strike it out instead of adjourning it. If, instead of striking out the information, he had adjourned it to a date to be fixed to await some action by the Crown in respect of the indictable offences upon which the defendant had been committed in 1968, his reasons for so doing would have included at least some of those which he expressed in striking out the information. Such an adjournment, in my view, would likewise have been an improper order.

There is, of course, power in a magistrates' court, both statutory and inherent, to adjourn proceedings for a reasonable time and upon reasonable grounds; and, in appropriate circumstances, the adjournment of proceedings *sine die* may be a proper exercise of the inherent power: see *Lee v Saint* [1958] VicRp 25; [1958] VR 126; [1958] ALR 545. But, as that case shows, an adjournment *sine die* will be set aside if the discretion embodied in such power is unreasonably exercised upon extraneous or extra-judicial grounds. "In the ordinary course of events", said Herring CJ, in that case, at pp129-30, "there can be no warrant for adjournments of this kind (i.e., adjournments for an indefinite period) for they may really involve a refusal by the court to hear and determine the case then before it. Adjournments of this kind like adjournments for an unreasonable period may in effect amount to the Court declining jurisdiction. I repeat what I said in *Matheson v Matheson* [1952] VR 27, at p30; [1952] VicLawRp 6; [1952] ALR 58, viz.:

> "The adjourning of litigation that comes before a court of petty sessions is very much a matter of discretion, and it is most undesirable that this discretion should be fettered in anyway. At the same time, this discretion is a judicial one and must be exercised in accordance with legal principle and upon relevant and not irrelevant considerations. I think it may also be said that there are adjournments and adjournments. In the ordinary course of events cases are adjourned from day to day, and sometimes it is necessary to put them over for longer periods or to the next sittings of the Court in a particular place. But the indefinite adjournment of proceedings may amount to much more than a mere postponement; it may amount to a refusal to hear and determine the particular application before the Court, and in these circumstances the adjournment may become a mere disguise for a refusal to exercise a jurisdiction committed to the Court."

In *Lee v Saint*, the complainant, a married woman and the mother of two children, brought maintenance proceedings against the defendant as the putative father of the two children. It appeared that the husband of the complainant had instituted divorce proceedings against her on the ground of her adultery with the defendant. On the application of the defendant, who alleged that the evidence in the divorce proceedings would be very similar to the evidence to be given in the maintenance proceedings, the magistrate adjourned the maintenance proceedings *sine die* pending the hearing of the divorce proceedings. Herring CJ held that the magistrate had wrongly exercised his discretion upon extraneous or extra-judicial grounds.

In *Matheson v Matheson* a summons to debtor under the *Imprisonment of Fraudulent Debtors Act* for arrears of maintenance was adjourned *sine die* pending the hearing of divorce proceedings instituted by the debtor against his wife, the complainant. Herring CJ held that in the circumstances the adjournment amounted to a refusal to exercise the jurisdiction committed to the court and he remitted the case to be dealt with according to law. Such cases as *Lee v Saint*, *Matheson v Matheson*, *R (Deeny) v Justices of County Tyrone* [1909] 2 IR (KBD) 400, M, and *R v Police Magistrate at South Brisbane and Keys* [1911] QWN 29, are cases where it has been held that the adjournment of a case because of the pendency of other litigation has amounted to a wrongful exercise of discretion.

In the course of argument before me, Mr Ormiston, for the informant, referred to three decisions, but only for the purpose of distinguishing them from the principle illustrated by *Lee v Saint*. These cases were *Ex parte Borg* [1928] NSWStRp 55; (1928) 28 SR (NSW) 564, *R v Smyth; Ex parte Godfrey* [1882] VicLawRp 79; (1882) 8 VLR (L) 141, and *Ex parte Green* [1888] NSWLawRp 39 (1888) 9 LR (NSW) 176. *Ex parte Borg* is an *autrefois* case, and of no assistance. In the other two cases, and also in *Ex parte Cooper* [1880] NSWLawRp 31; (1880) 1 LR (NSW) 143, the facts were very similar: in each instance while proceedings were pending, what were in effect cross-proceedings charging criminal offences were instituted against witnesses for the opposing party.

In *Smyth's Case* an accused had been committed and was awaiting trial for larceny and he laid an information for perjury against the principal witness for the Crown, the hearing of which information was adjourned by the justices because they thought it would needlessly prejudice the trial for larceny if at that time the principal witness for the Crown was under committal for trial for perjury. The Full Court refused to disturb the justices' order.

In *Green's Case* an accused was committed for trial for perjury; he then laid an information charging one of the Crown witnesses with forgery. The New South Wales Full Court, being of opinion that the laying of the information for perjury was not *bona fide* in the interests of justice, but had been done with a view to damaging the testimony of the Crown witness, restrained the proceedings on the information for forgery until after the perjury trial.

In *Cooper's Case*, while a civil suit was proceeding, an information for perjury was laid against one of the witnesses in respect of evidence given in the suit, and upon application to stay proceedings on the information the New South Wales Full Court held that the criminal prosecution of the witness while the suit was pending was an interference with the administration of justice and it restrained further proceedings in respect of the information.

It will be seen that in each of these three cases, the laying of the information was a tactical move designed to embarrass a witness whose evidence was evidently hostile to the informant's interests in a pending proceeding and was not *bona fide*, but was, as the Court in *Cooper's Case* expressed it, an interference with the administration of justice; thus, in one case the justices' order adjourning the hearing of the information was not interfered with, and in the other two cases injunctions were granted. The situation in each of those cases was entirely different from that obtaining in the present case, to which they have no application.

I think that at least grounds 1, 2, 4 and 5 of the order nisi have been made out. Ground 3 seems not quite to accord with what happened, but it is unnecessary to pursue this aspect further. In the circumstances, therefore, the appropriate order is that this order nisi be made absolute, that the order of the magistrates' court striking out the information against Pacholli be set aside, that the information be reinstated and that the magistrates' court at Coburg hear and determine the information according to law.

I order the defendant to pay the informant his taxed costs of this order to review including reserved costs, such taxed costs not to exceed $200, and I grant the defendant a certificate under the *Appeal Costs Fund Act*.

HOWARD v GALBRAITH

In Galbraith's case, the magistrate struck out the information for aiding and abetting for the same reasons as moved him in Pacholli's case and "as a matter of fairness" because of the striking out of the information against Pacholli. In so doing, I think the magistrate was in error, and the reasons for that view emerge from the reasons I have given in relation to Pacholli. There is an added consideration in Galbraith's case, for in *R v Kupferberg* (1918) 34 TLR 587; 13 Cr App R 166, it was held that an acquittal on a charge of conspiracy was not a bar to a subsequent charge of aiding and abetting.

Accordingly, the order which I make in Galbraith's case is that this order nisi be made absolute, that the order of the magistrates' court striking out the information against Galbraith be set aside, that the information be reinstated and that the magistrates' court at Coburg hear and determine the information according to law. In Galbraith's case, I think I should make no order for costs. Orders accordingly.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitor for the defendant Pacholli: William M Serong.
