27/82

SUPREME COURT OF TASMANIA

BRAND v McDONALD

Neasey J

26 August 1981 — [1981] Tas R 105

PRACTICE AND PROCEDURE – INDICTABLE OFFENCE TRIABLE SUMMARILY – CHARGE OF WILFUL AND UNLAWFUL DAMAGE – APPLICATION TO MAGISTRATE FOR MATTER TO BE DEALT WITH SUMMARILY – APPLICATION REFUSED – DEFENDANT COMMITTED FOR TRIAL – WHETHER MAGISTRATE IN ERROR: *ACTS INTERPRETATION ACT* 1901-1973 (CTH), S42; *CRIMES ACT* 1914-1973 (CTH) SS12, 29.

The defendant was charged with an offence of wilfully and unlawfully causing damage to property belonging to the Commonwealth. The applicant applied to have the charge dealt with summarily but the magistrate declined the application and committed the defendant for trial. Upon appeal—

HELD: Motion dismissed.
The broad rule is that offences of a serious kind ought to be tried on indictment and those less serious summarily. The wishes of the defendant though taken into account are entitled only to minor weight. The offence if proved was a very serious one of its type and ought to be tried on indictment.

NEASEY J: The applicant was charged on complaint in the Court of Petty Sessions at Launceston with an offence against a Commonwealth Act, namely s29 of the *Crimes Act* 1914-1973. The charge was that he "did wilfully and unlawfully damage, by the use of an explosive, certain property, to wit, Public Telephone Cabinet LNS *3230* and the mechanism therein, belonging to the Australian Telecommunications Commission, a public authority under the Commonwealth," When the matter came on for hearing, his counsel applied to the presiding Magistrate, Mr Elliott, to deal with the charge summarily, but after hearing argument the magistrate declined to do so and committed the applicant for trial, for reasons which he then stated. The applicant has now applied to this court pursuant to s107 of the *Justices Act* 1959 of Tasmania to review that order. It was conceded before me by counsel for the respondent that the magistrate's ruling was an "order" within the meaning of s107, and is amenable to proceedings by motion to review thereunder.

The substantive ground upon which review is sought is that the learned magistrate's discretion in deciding, pursuant to s12 of the *Crimes Act*, whether he should determine the charge summarily or commit the applicant for trial, miscarried; in that in exercising such discretion he took into account irrelevant matters, and did not give proper consideration to matters he should have considered.

There is first a minor procedural issue to resolve. In accordance with the provisions of s109 of the *Justices Act*, the "prescribed documents" relative to proceedings in the court below were forwarded to this court, and they include notes of his decision made by the magistrate. These read as follows:-

> "I have a wide discretion. I note that if this had been a State offence I would not have had jurisdiction. I do not know, nor is it proper for me to know whether the defendant has any prior record. In the event of conviction, however, it is at least possible that an appropriate penalty could be more than the penalty I would be empowered to impose. On balance I should not take a step which limits the potential sentencing options of the court."

However, counsel for the appellant on the motion, Mr Bishop, was also his counsel before the magistrate. When the decision was announced, Mr Bishop took notes of the reasons given and immediately returned to his office and had them typed up. He has filed an affidavit pursuant to s109(4) of the *Justices Act* setting out the content of those notes. They read:-

> "The complainant wished the defendant to be dealt with in the criminal court. The defendant wants

> summary trial. It was contended that in the exercise of my discretion I should give greater weight to the defendant's wishes, because if the defendant is committed for trial he will have a jury trial, which is primarily there for his benefit. The *Crimes Act* contains no guidelines. One factor does weigh heavily with me, that I would probably not have jurisdiction to adjudicate on a matter of this monetary value in an equivalent State proceeding. I don't know how strong the case is, or the antecedents of the defendant, nor should I know. The maximum penalty is two years. I am only empowered to impose a penalty of one year. Therefore in the event of the defendant being found guilty in this court the only sentence is 12 months. I emphasise that I have no feelings as to what sentence is appropriate. It is hypothetical, and I have no idea of his guilt. I should not take a step which limits the parliamentary discretion concerning penalty. In balance, I feel, for the reasons given above, that I should commit the defendant for trial in the Supreme Court."

It will be seen that the expression of reasons set out in counsel's note differs somewhat from the magistrate's own note; and counsel for the applicant contends that I should have regard to his note only, and disregard the magistrate's note. The reasons for judgment were those stated orally by the court, and there is no suggestion that these were not accurately recorded by counsel; and it is to the reasons as so recorded that I must have regard. But I infer that the magistrate's notes were made by him for his own assistance in delivering reasons; and that in the course of delivery he departed to some extent from them. They do have for me, however, the limited relevance of showing what matters his Worship had in mind when considering his decision; so that cannot be said that any matter mentioned therein was overlooked.

Section 42 of the Commonwealth *Acts Interpretation Act* 1901-1973 provides:

> "Offences against any act which are punishable by imprisonment for a period exceeding 6 months shall, unless the contrary intention appears be indictable offences."

Section 29 of the *Crimes Act* 1914-1973 provides:

> "Any person who wilfully and unlawfully destroys or damages any property, whether real or personal belonging to the Commonwealth or to any public authority under the Commonwealth, shall be guilty of an offence.
> Penalty: imprisonment for two years."

An offence under s29 would therefore be an indictable offence pursuant to s42 of the *Acts Interpretation Act*, "unless the contrary intention appears". However, s12 of the *Crimes Act* provides:-

> "(1) Offences against this Act, other than offences expressed to be indictable offences, shall be punishable either on indictment or on summary conviction.
>
> (2) Where proceedings for an offence against this Act are brought in a Court of Summary Jurisdiction, the Court may either determine the proceedings, or commit the defendant for trial.
>
> (3) A Court of Summary Jurisdiction may not impose a longer period of imprisonment than one year in respect of any offence against this Act."

Thus, s12 in respect of an offence under s29, does express a contrary intention to s42 of the *Acts Interpretation Act*, since an offence under s29 is not expressed to be an indictable offence, and is therefore not necessarily punishable on indictment. See *R v Archdall and Roskruge: Ex Parte Carrigan and Brown* [1928] HCA 18; (1928) 41 CLR 128 at p135; 34 ALR 297.

The *Crimes Act*, as the magistrate observed, lays down no specific guidelines as to how the discretion contained in s12(2), which is in terms unfettered, is to be exercised. But I think that the primary considerations are the apparent seriousness of the offence charged, and the range of penalties available. Offences against the Act which are expressed to be indictable offences, a matter to which s12(1) refers, are in general offences which are necessarily of a serious kind. Examples are:- an offence of judicial corruption under s32 of the Act; other offences under Part 3, such as giving false testimony under s35(1); intimidation of witnesses under s36A; corruption of witnesses under s37. On the other hand, offences against the Act which are not expressed by the Act to be indictable offences are in general those which may vary from relatively trivial to very serious, according to circumstances. An offence under s29, which is the case here, is a typical example.

Under s80 of the *Constitution*, the trial on indictment of any offence against any law of the Commonwealth is required to be by jury; and trial of indictable offences by jury is also, so far as I am aware, universal practice throughout the States of Australia. The trial of offences on indictment under Commonwealth law is governed by the provisions of ss69 to 77 of the *Judiciary Act* 1903-1973: see *Seaegg v R* [1932] HCA 47; (1932) 48 CLR 251 at p255. S12(1) of the *Crimes Act*, as set out above, provides that offence against the Act other than those expressed to be indictable offences are punishable either on indictment or summarily. S12(2) provides that where proceedings for an offence against the Act are brought in a court of summary jurisdiction, that court may either determine the proceedings or commit the defendant for trial. S27(d) of the *Acts Interpretation Act* 1901-1973 provides that:

> "The words 'committed for trial' used in relation to any person, shall mean committed to prison with the view of being tried before a judge and jury, or admitted to bail upon a recognisance to appear and be so tried.'

That is to say, the options under s12(2) are to set in motion the proceedings for trial on indictment, which means trial by jury, or to determine the proceedings summarily. It would seem to follow that the principal consideration for the court in exercising its discretion is, which form of trial appears to be the more suitable for the offence as charged. The broad rule, as I understand, is that offences of a serious or relatively serious kind ought to be tried on indictment, and those of a less serious or relatively trivial kind are suitable for summary trial. The range of penalties open to the court of summary jurisdiction compared with the apparent gravity or otherwise of the offence as charged may be an important factor. Those being the main considerations, the wishes of the defendant as to the form of trial, though they should be taken into account along with those of the complainant or prosecutor, of themselves are entitled in my opinion to relatively minor weight, unless the court's decision as to the form of trial is evenly balanced and the defendant wishes trial by jury. If that be the case, then I think his preference should be given weight, having regard to the value ordinarily placed in our system of administering justice upon a citizen's right to be tried by jury for a serious offence.

Of course, other matters may need to be considered also in the exercise of discretion. It would be unwise to attempt to catalogue them. It is convenient in this case to pass to a consideration of whether the learned magistrate's exercise of discretion miscarried in that "by reason of some error, whether of fact or law, the primary judge not only has taken a view different from that which the judges of the Court of Appeal would have taken if they had been in his place, but has failed properly to exercise the discretion committed to him" – *Mace v Murray* [1955] HCA 2; (1954-55) 92 CLR 370 at p378; and the cases cited at the end of that passage. In substance, the questions are whether he took into account extraneous matters, or failed to consider matters which he ought to have considered, or whether his actual decision was so clearly wrong as to indicate that in some way the discretion miscarried, even though it be not apparent.

The magistrate in giving reasons first referred to the fact that the defendant wished to have summary trial, and claimed that his wishes should be given greater weight than the prosecutor's wish for trial by jury. The defendant's argument was that the availability of trial by jury was primarily for his benefit, and therefore if he chose to waive that right his wishes should be given preference. The magistrate did not in his reasons deal specifically with this argument, but it is obvious that he did not accept it. In my opinion there was no error in that. The applicant had no right to trial by jury, nor any right to elect between that and summary trial.

The next part of the reasons for judgment, after noting that the *Crimes Act* contains no guideline as to the exercise of discretion, stated that a factor which weighed heavily with the magistrate was that he would "probably not have jurisdiction to adjudicate on a matter of this monetary value in an equivalent State proceedings." It is argued that he fell into error, both in fact and law, in taking that consideration into account, I do not think so. In the first place, he was right in fact in stating that he would probably not have jurisdiction in an equivalent State proceeding, because a charge of such an offence, allegedly involving the use of an explosive, and allegedly causing damage amounting to some $3,464 (which the magistrate was told as an agreed fact), would almost certainly have been tried on indictment.

Next, in my view, he was not in error in taking into account whether in equivalent State

proceedings such an offence would be likely to be tried on indictment or summarily. The practice in that regard may vary to some extent from State to State, but since the Commonwealth under the constitutional scheme is empowered to and does make extensive use of the machinery for administration of justice, in the various States for the prosecution of offences against commonwealth law, it would be unreasonable in my opinion to expect a judicial officer who is primarily an officer of the State to disregard practice and experience in his own State when making such discretionary decisions.

Such a matter was taken into account, in my respectful opinion quite properly, by White J in *Re Bullen* [1972-73] ALR 756; (1972) 19 FLR 418. Next, the magistrate said he did not know how strong the case against the applicant was, or his antecedents, "nor should I know". He was clearly right in that – see *Hall v Braybrook* [1956] HCA 30; (1956) 95 CLR 620; [1956] ALR 587. His Worship proceeded to consider that the maximum penalty under s29 is two years' imprisonment, whereas under s12(3) he would be empowered to impose a maximum of one year only upon conviction; and that he "should not take a step which limits parliamentary discretion concerning penalties". His own note on this reads:-

> "On balance I should not take a step which limits the potential sentencing options of the court.'

It is fair inference from what he said that his meaning, although not fully expressed, was that the nature of the offence is charged and the amount of the damages claimed were such as to indicate a serious offence of its kind, in respect of which, if the applicant were convicted, a sentence of more than 12 months' imprisonment might turn out to be appropriate. That was a legitimate consideration, and the magistrate rightly gave it proper weight.

Overall, I can see no miscarriage of the learned magistrate's discretion under s12(2). That view is reinforced by the fact that the decision he actually made, to commit the defendant for trial, was in my opinion clearly the right one. Damage to Commonwealth property allegedly brought about by the use of an explosive, causing a substantial amount of damage in the context, would be if proved a very serious offence of its type, and ought to be tried on indictment. The motion will be dismissed.
