42/84

SUPREME COURT OF VICTORIA

R v McGOWAN; ex parte MACKO & SANDERSON

Kaye J

24 July, 1 August 1984 — [1984] VicRp 78; [1984] VR 1000

PROCEDURE – INFORMATIONS IN ALTERNATIVE PROCEDURE – STRUCK OUT IN ERROR – WHETHER COURT CAN SET ASIDE ORDER AND RE-HEAR – EXPIRATION OF SPECIFIED DATE – WHETHER COURT CAN DEAL WITH INFORMATION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS76, 84.

In January 1984, certain informations against Spurling and Emmitt were struck out by the Court on the ground that the Court was without jurisdiction to hear the informations. Subsequently on the return of orders nisi, the Supreme Court held that the Magistrate was vested with jurisdiction to hear the informations and remitted the same for hearing and determination. When applications were later made to the Magistrate to set aside his original order and re-hear the informations, he dismissed the applications on the ground that the Court was not vested with jurisdiction to set aside an order striking out an information. On order nisi to show cause why writs of *certiorari* should not issue—

HELD: Orders absolute.
(1) A court of summary jurisdiction is vested with inherent power to set aside an order striking out a complaint or information which has been made in error.
***Thiessen v Fielding* [1890] VicLawRp 138; [1890] 16 VLR 666, applied.**

(2) Where an information in the alternative procedure is re-listed before the Magistrate following review proceedings in the Supreme Court, the Magistrate is vested with power to hear and determine the matter notwithstanding that the specified date in the alternative procedure has expired.

KAYE J: **[1]** By orders nisi the Stipendiary Magistrate, Patricia Anne Spurling and Wayne Emmitt are required to show cause why writs of *certiorari* should not issue calling up and quashing two orders made in the Magistrates' Court at Elsternwick. The orders the subject of the proceedings were made in connection with two similar applications. In the first application, Anthony Macko as informant sought an order setting aside a previous order striking out an information against Spurling as defendant and reinstating the information; in the second application, John Sanderson as informant sought an order setting aside a previous order made by way of alternative **[2]** procedure under Part VII of the *Magistrates (Summary Proceedings) Act* 1975 striking out an information against Emmitt as defendant and reinstating the information.

Events leading up to the orders striking out the informations are relevant to the present proceedings and were as follows. On 23rd January 1984 the Magistrates' Court at Elsternwick, struck out an information by John Sanderson against Rex Graham Sherry on the ground that the Court was without jurisdiction to hear the information, including an information against Spurling listed for hearing on that day. The orders striking out the informations were recorded in the Court Register. On 31st January 1984, the Magistrate, sitting in Chambers, made similar orders in relation to informations against other defendants, including Emmitt; the order in the Emmitt information was likewise recorded in the Court Register on the same day.

Subsequently, on 29th February 1984 on the return of an order nisi to review similar orders in the matter of *Stokes v Lucarelli* and on the return of an order nisi for writ of mandamus in the matter of *Sanderson v Sherry*, Hampel J held that the Magistrates' Court at Elsternwick was vested with jurisdiction to hear the informations and remitted the same for hearing and determination.

On 20th June 1984 the Magistrates' Court at Elsternwick, dismissed applications made by both Sanderson and Macko as informants to set aside the former order striking out the informations against Spurling and Emmitt and to re-hear the informations, and he did so on the ground that the Court was not vested with jurisdiction to set aside an order striking out an information.

Two grounds of each of the orders nisi are as follows:

> **[3]** (a) That the Stipendiary Magistrate erred in law in holding that he had no jurisdiction to reinstate the said information;
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> (b) That the learned Stipendiary Magistrate erred in law in holding that the Magistrates' Court at Elsternwick was not vested with an inherent jurisdiction to set aside an order striking out an information in circumstances where the order striking out the information was made contrary to law.

Whether a Magistrates' Court has power to set aside an order striking out an information depends upon the character of the order, and its character may be demonstrated by comparison with an order either convicting a defendant or dismissing an information. An information is terminated, subject to appeal or order to review, either upon summary hearing under Part VI of the Act or upon alternative procedure followed under Part VII of the Act. By s76(1)(1), the Court is required, after dismissing an information under either Part VI or Part VII, to give the defendant a certificate of dismissal, and by ss(1)(m) a certificate of dismissal, upon production, is a bar in any court to any other information alleging the same offence. The power of a Magistrates' Court to strike out an information for want of jurisdiction is provided for by s76(1)(o). It is significant that in connection with an information struck out under s76(1)(o), there is no provision analogous to ss(1)(m) barring a further information charging the same offence. It follows that an order striking out an information does not put an end to the proceedings. It is not a curial determination of the charge alleged; it is no more than a direction to remove the information from the list of matters for hearing and determination by the Court.

Notwithstanding that reported authorities are mainly concerned with matters within the civil jurisdiction of superior **[4]** courts, it is clear that the nature of an order striking out an information by a Magistrates' Court does not differ from a like order made by a court of unlimited jurisdiction. The nature of such an order is demonstrated by the reported submission of Counsel and orders made by Mann CJ in *Aiken v Aiken* [1941] VicLawRp 27; [1941] VLR 124; [1941] ALR 159. In that case, by notice of motion orders were sought in an administrative action following the failure of the defendant to perform a term of compromise which had been reached between the parties before the action came on for hearing, and the action was by consent struck out by the Judge taking the Causes List.

A summary of the submission in support of the motion which was made by Mr Barry of Counsel for the plaintiff (as His Honour then was) is explanatory of the reasons for judgment of Mann CJ, those reasons being confined to expression of orders which His Honour intended to make. The submission advanced by Counsel was that it is only possible to terminate an action by judgment or discontinuance, that therefore the action having been struck out was still pending, and that striking out an action means only that by consent of the parties and for the convenient arrangement of the Causes List the action is removed from the List. Mr Barry referred to, *inter alia*, the *Supreme Court Act* 1928, s61, ss(7) by which the Court, in the exercise of jurisdiction vested in it, in every cause or matter pending before it, shall grant all such remedies as any of the parties appears to be entitled to. From the substance of Mr Barry's submission and from the orders made, it is clear that the Chief Justice accepted Counsel's submission and recognised that the action was still extant notwithstanding the order striking it out.

Similarly, in *Miller v Hanson* [1891] Vic LawRp 135; [1891] 17 VLR 715 at 716 Hodges J contrasted a judgment for the defendant in default of appearance by the plaintiff with "a case having been struck out of the list", adding "if it had been that, very probably I could have restored it to the list". **[5]** The power to reinstate for trial an action which has been struck out was noted by Smith, J in *Roberts v Gippsland Agricultural and Earthmoving Contracting Co Pty Ltd* [1956] VicLawRp 86; [1956] VLR 555 at p565; [1957] ALR 71. In the absence of any statutory provision to the contrary, the power forms part of the inherent jurisdiction of the Court. In *Mason v Ryan* [1884] VicLawRp 115; (1884) 10 VLR (L) 335 at 340; 6 ALT 152, Higinbotham J, with whom Holroyd J agreed, stated that, though its jurisdiction is limited by what has been conferred by the legislature, the County Court has an inherent jurisdiction to prevent abuse of, and to correct irregularities in and frauds upon its rules and procedures, and for those purposes to set aside such of its proceedings as it may find to have been void or irregular. See also *Duncan v Lowenthal* [1969] VicRp 21; [1969] VR 180 at 182 and *Exell v Exell* [1984] VicRp 1; [1984] 1 VR 1 at 7.

Bramwell B in *Jennings v London General Omnibus Co (No. 2)* [1874] 30 LT (NS) 640 at 642 described the power to order re-entry of a cause which "by any misadventure has not been heard either by the plaintiff not appearing or from misfortune, or for any other good reason" as "almost incidental to the jurisdiction of any court, unless it has been taken away by statute". Hewitt LCJ in *Rackham v Tabrum* [1923] 39 TLR 380 at 381 referred to the principle that "where a summons or case has not been heard, but merely struck out, the court may, if it thinks fit, hear or entertain the summons or the case ..."

The situation, however, is otherwise if the court, having determined the matter on the merits, has made an order convicting the defendant or dismissing the information and the order has passed into the record, notwithstanding any irregularity: cf. *Gregory v Murphy* [1906] VicLawRp 11; [1906] VLR 71; 11 ALR 507; 51 ALJR 145; 27 ALT 138. The Full Court in *Thiessen v Fielding* [1890] VicLawRp 138; [1890] 16 VLR 666 upheld orders of justices setting aside a previous order by which **[6]** a default summons was struck out, and reinstating the complaint. The justices struck out the summons in the mistaken belief, induced by a solicitor who did not disclose his retainer by the defendant, that the defendant had not been served. Later on the same day, when the true facts concerning service were made known to them, the justices set aside the previous order and found against the defendant. The Full Court, after observing that at the time when they struck it out the justices did not investigate the claim, stated:

> "We are not aware of any principle, and no authority has been cited to show that the justices had not power to reinstate a case which was struck out under these circumstances, and which, when struck out, had not been dealt with on the merits. It is not as if the case had been heard in the absence of the defendant, and the justices on the evidence had decided either to make an order or refused to make an order against the defendant. But they struck out the case when the merits had not been enquired into, and they reinstated it on the same day and proceeded with it, the defendant appearing by his solicitor and endeavouring to substantiate his defence. We think the justices had jurisdiction to reinstate the case without notice of the reinstatement being served on the defendant."

The Court referred in some detail to and commented upon the facts which gave rise to the course which the justices had taken. Significant features of *Thiessen v Fielding* are that the order made by the justices was one striking out the proceedings, and that the Full Court acknowledged the power of justices to set it aside. Although the circumstance that the original order was made in the mistaken belief as to want of service of the summons, the Full Court's decision did not expressly or by implication limit the power of justices to set aside the orders which had been made in those particular circumstances. The principle emerging from *Thiessen v Fielding* is that a court of summary jurisdiction has power to set aside **[7]** an order striking out a complaint or information which has been made in error. The exercise of the power to set aside is not limited to the circumstance that the error resulted from a misrepresentation of fact made by the defendant or his legal advisor: *Mason v Ryan* (*supra*).

There is a line of authority that courts of limited jurisdiction in New South Wales did not possess inherent jurisdiction to restore to the list a case struck out; *Ex parte Bradley* [1865] 4 NSWR (1) 304; *Jones v Mitchell* [1964] 82 WN (NSW) Part I, 464; *McLachlan v Pilgrim* [1980] 2 NSWLR 422. Those decisions, however, depending upon statutory provisions from which the jurisdiction of particular courts are derived, therefore have no application to a court of summary jurisdiction in Victoria.

For these reasons, his former orders having been made for irregular reasons, the Magistrate is vested with inherent power to set aside his order striking out the informations and to order that the informations be reinstated. It follows that ground (a) was made out and that in the matter of Spurling the order nisi will be made absolute. The information against Emmitt, being by way of the alternative procedure, is subject to procedural requirements prescribed by s84. A requirement under s84(6) is that in the event of a defendant failing to advise of his election to appear, a Stipendiary Magistrate in Chambers may convict and impose a penalty on the defendant within one month of the day specified in the notice informing him of his entitlement to elect to appear. The date specified in the notice given to Emmitt was 1 January 1984. It was contended on his behalf by Mr Hammond of Counsel that, one month having expired since the specified day, Emmitt could no longer be convicted of the **[8]** offence charged, and that therefore there would be no utility in ordering the issue of a writ of *certiorari* in the proceedings against him.

However, s84(1) provides that the provisions of Part VII shall apply to the alternative procedure "but without prejudice to the application of so much of any other procedure as is not inconsistent therewith". Thus, an order upon a information made in the alternative procedure is subject to proceedings by way of appeal, order to review, and prerogative writs. It follows that an order in the alternative procedure convicting a defendant consequent upon any order made by this Court by way of such review proceedings may be made more than one month after the specified day. Moreover, there is nothing in the language of the several provisions of Part VII which warrants the conclusion that proceedings by way of the alternative procedure are not subject to review by this Court and consequential determination of an information according to law, notwithstanding the expiration of the time fixed by ss(6) for conviction and imposition of penalty.

The order nisi in the matter of Emmitt will also be made absolute. Accordingly, orders will be made that writs of *certiorari* issue to bring up the orders made in the Magistrates' Court at Elsternwick striking out the informations against Spurling and Emmitt and that thereupon the said order be quashed.

Solicitor for the applicants: RJ Lambert, Acting Crown Solicitor.
Solicitor for the respondent: GS Baker.
