19/96

SUPREME COURT OF VICTORIA

BUTTERISS v O'RILEY

Brooking, JD Phillips and Charles JJ A

2 May 1996

PRACTICE AND PROCEDURE – VALIDITY OF AUTHORITY TO PROSECUTE – REFERENCE IN CERTIFICATE TO INCORRECT YEAR – WHETHER A SLIP – CHANGE IN OFFICE OF DIRECTOR-GENERAL – WHETHER OFFICE ABOLISHED OR MERE CHANGE OF NAME: *CONSERVATION, FORESTS AND LANDS ACT* 1987, SS83, 96, 110(b).

O'R. laid 6 charges against B. for offences allegedly committed under the *Fisheries Act* 1968. At the hearing, the prosecutor tendered a certificate dated 8 May 1990 to establish his authority to prosecute. The certificate also referred to the *Fisheries Act* 1958 instead of 1968. B. submitted that the certificate was invalid because it purported to be given by a person (Director-General) who had since been replaced by another person (Secretary). Also, the name of the department had changed. The magistrate accepted this submission and dismissed all charges. B. subsequently appealed to a single judge of the Supreme Court who upheld the appeal and remitted the charges for further hearing by the magistrate. Upon appeal—

HELD: Appeal dismissed.

1. The certificate given under the *Conservation, Forests and Lands Act* 1987 made no provision for any appointment nor reference to the *Fisheries Act* 1958. Accordingly, the reference in the certificate to '1958' was plainly a slip which did not affect the prosecutor's authority nor justify the peremptory dismissal of the charges.

2. The events which occurred in relation to the personnel and the Department involved only a change of name. The submission that the office was abolished was not made out. Accordingly, the orders of dismissal were not justified.

BROOKING JA: [1] I will ask Phillips JA to deliver the first judgment.

JD PHILLIPS JA: These are six appeals, each from a like order of a Judge of this court allowing an appeal from the Magistrates' Court at Dromana. On 23 August 1993 a Magistrate dismissed six charges brought by the present respondent, as informant, against the present appellant, as defendant, for offences allegedly committed under the *Fisheries Act* 1968. The respondent appealed against that dismissal to this court under s92 of the *Magistrates' Court Act* 1989 and was successful. The orders of dismissal, which had been made before any evidence of the alleged offences had been led, were set aside and all six matters were remitted to be heard and determined according to law. It is from those orders that the defendant now appeals. The relevant offences were allegedly committed by the appellant on 27 October 1992. The proceedings were commenced by the filing of charges during 1992 (as to which see *Magistrates' Court Act* 1989 s26) and the charges came on for hearing on 23 August 1993. Kevin James Brown appeared on behalf of the informant to prosecute. According to the affidavits filed in this court, Mr Brown commenced by tendering certain relevant regulations and then tendered a certificate under the *Conservation, Forests and Lands Act* 1987, Act No 41 of 1987, to establish his authority to conduct the prosecutions. (That certificate has become exhibit KB2 to Mr Brown's affidavit sworn on 15 September 1993). Counsel for the defendant then submitted that the certificate was invalid and ineffective because it purported to be given **[2]** by the Director General of Conservation and Environment, who, it was said, had since been removed and replaced by the Secretary to the Department of Conservation and Natural Resources pursuant to notice in the *Victoria Government Gazette* of 9 October 1992. That notice predated the commission of the alleged offences and so predated also the commencement of the proceedings in the Magistrates' Court.

The Magistrate appears to have accepted the defendant's submission, for he thereupon dismissed all six charges and a certified extract from the register of the Dromana Magistrates' Court reads as follows:

> "Office of Director General abolished with effect from 6 October 1992. This alleged offence was committed on 27 October 1992 and informant relies on his appointment as an authorized officer from the Director General".

Although this extract mentions "the informant" and "his appointment", the certificate which is exhibit KB2 relates to the authority of the prosecuting officer, Mr Brown. But a like problem arises, as I understand it, in relation to both the authority of Mr Brown and that of the prosecutor, and nothing turns on any difference between them. The order of the Master which served to initiate these appeals under O58 of the Rules identified similar questions of law arising in relation to the prosecutor's authority and the informant's. The present appeals may be resolved (as were the appeals below) by reference to the certificate in relation to Mr Brown which is exhibit KB2.

First, I outline the operation of the relevant legislation. On 12 April 1978 under s51 of the *Fisheries Act 1968* the Public Service Board appointed **[3]** Mr Brown to be inspector of fisheries. On 21 January 1986, under the provisions of s6 of the same Act, he was appointed by the Governor-in-Council an honorary inspector of fisheries. His powers and duties as an inspector of fisheries, whether honorary or otherwise, do not now matter, but it was that appointment which in due course constituted him an "authorized officer" under the *Conservation, Forests and Lands Act* ("the 1987 Act"). So far as is now relevant, that statute came into force on 1 July 1987, and by s110(b) it is provided:

> "At the date of commencement of this section—
> (b) a person who was immediately before that date an Inspector under the *Fisheries Act* 1968 is deemed to be appointed an authorized officer for the purpose of that Act".

By s96 an "authorized officer" is empowered to take proceedings for an offence against a "relevant law", a term which is defined in s3. It is defined to include an Act specified in Schedule 1. The list of statutes contained in Schedule 1 includes the *Fisheries Act* 1968. Not surprisingly, it does not include the *Fisheries Act* 1958 which by 1987 had been repealed for nearly twenty years. The deeming provision in s110(b) is, in effect, a transitional provision. It occurs in Pt10, which is headed "Transitional Provisions". Under Pt9 of the 1987 Act, as enacted, the Director General of Conservation, Forests and Lands, which was a body corporate established under s6, was expressly empowered to appoint "authorized officers". That was provided for by s83(1). By s83(2) the instrument appointing an "authorized officer" had to specify "the relevant law for the purpose of which the person is appointed an authorised **[4]** officer", and under subs(5) the Director General was required to give to each authorized officer a certificate of appointment. Under s88 - and I omit some words in what I am about to say – "a certificate under the seal of the Director General to the effect that the person referred to in the certificate is an authorized officer is evidence of that fact".

Thus far there would seem to be no difficulty in concluding that Mr Brown was an authorized officer and that he had the necessary authority to appear to prosecute (and it may be supposed that the respondent likewise had the necessary authority to act as informant) under s96 of the 1987 Act, when read in conjunction with s110(b); and it might have been expected too, that the production of a certificate under the seal of the Director General to the effect just mentioned would be sufficient evidence of the fact under s88. The certificate that was tendered in this case (that is, the certificate that has since become exhibit KB2) was dated 8 May 1990. It refers to Kevin James Brown by name as an "authorized officer", and it names as "relevant laws" the "*Fisheries Act* 1958" (sic) and the *Wildlife Act* 1975. It purports to have been given under the seal of the Director General of Conservation and Environment. I have said that under Pt9 of the 1987 Act, as enacted, it was the Director General of Conservation, Forests and Lands who was empowered by s83(1) to appoint "authorized officers", and by s83(5) to give certificates. But by 8 May 1990, the date of the certificate here, the name of the department had apparently been changed to that of Conservation and Environment and the name of the Director **[5]** changed accordingly. At all events, no point was made on these appeals about that change of name and it may be put aside. As already indicated, the argument that was put to the Magistrate was that the certificate of 8 May 1990 was of no effect because on and from 6 October 1992 the office of the Director General had been abolished. This is the argument that was accepted by the Magistrate but rejected on appeal by the judge, who held that in any event, if, as was argued by the defendant, that abolition depended upon the Administrative Arrangements Order No 114 of 1992, CL8 of that Order "saved"

all that had gone before. His Honour held that that "saving" was achieved also by s12 of the *Crown Land Acts (Amendment) Act* 1993 (Act No 48 of 1993) – a statute which came into force on 1 June 1993.

On these appeals the appellant contended that the Magistrate had been correct to dismiss the charges as he did, and that his orders to that effect should be restored accordingly. Appellant's counsel was content, however, to argue three points only. First, he contended that the certificate of 8 May 1990 was inefficacious because it referred to the "*Fisheries Act 1958*" and not to the *Fisheries Act 1968*. Secondly, counsel repeated the submission that on 6 October 1992 or thereabouts (for on these appeals he fixed the date at 9 October 1992, but it does not matter) the office of Director General of Conservation and Environment was abolished, so that the certificate given under the seal of the Director General in May 1990 was thereafter of no effect. Thirdly, that being so, he contended that the position was not "saved" **[6]** by s12 of the *Crown Land Acts (Amendment) Act* 1933 or, indeed, by the terms of CL8 of the Administrative Arrangements Order No 114 of 1992 relied upon below. More particularly, the appellant formally abandoned ground 5 and grounds 6(a) and 6(c) of the Notices of Appeal dated 16 January 1995.

In relation to the first point, the reference in the certificate to the "*Fisheries Act* 1958" was all too plainly a slip. The certificate was given, as I have indicated, to be evidence that Mr Brown was an "authorized officer", and a person who is an authorised officer must have been appointed (or be deemed to have been appointed) in relation to a "relevant law". I have dealt with the definition of "relevant law" and it includes the *Fisheries Act* 1968 but for good reason it does not include the *Fisheries Act* 1958. It was submitted that the reference to the "*Fisheries Act* 1958" in the certificate could not be lightly set aside because there was no authority in the court to alter or amend a certificate once given. But alteration or amendment is not in issue. Under s88 of the 1987 Act the certificate is evidence of a fact, which is that the person named is an "authorized officer". In context that cannot involve appointment in relation to the *Fisheries Act* 1958, for in the 1987 Act there is no provision made for such an appointment, nor is there any reference to one. In context, the reference to 1958 in the certificate must be only a slip – and an obvious one – and the certificate can properly, in my view, be taken as evidence of Mr Brown's authority to act in relation to the *Fisheries Act* 1968. **[7]**

It is significant, I think, that this point was not raised before the Magistrate. Had objection been taken before the Magistrate and had the Magistrate considered that the certificate was on that account not evidence of authority in relation to the *Fisheries Act* 1968, the objection could have been overcome quite simply by a short adjournment to enable corrected certificates to be obtained. The point was taken for the first time before the judge on appeal, and perhaps the defendant was fortunate that His Honour was prepared to entertain the point at all. Be that as it may, the point was rejected, and in so rejecting the point I do not think that His Honour fell into error. I would add only this: that even had I thought that His Honour was in error in that regard, the orders made setting aside the dismissal of the charges would still have been appropriate; for the reference to 1958 in the certificate was not such as to have justified, in my opinion, the peremptory dismissal of the charges.

The second point argued on these appeals was that which concerned the so-called abolition of the office of the Director General of Conservation and Environment. Before us, that argument was a limited one. It was simply that the office had been abolished on and from 9 October 1992 by operation of the Administrative Arrangements Order No 114 of 1992, as published in the *Victoria Government Gazette* on 9 October 1992. The whole of that issue of the *Government Gazette* is reproduced in the Appeal Book, although we were told by respondent's counsel from the Bar table, without objection, that only one page had been put before the **[8]** Magistrate. Be that as it may, appellant's counsel relied only upon two portions of the document to establish his submission that the office of the Director General of Conservation and Environment had been abolished on and from 9 October. He relied first upon a direction in the *Government Gazette* by the Governor-in-Council under the *Public Service Act* 1974. So far as relevant, that direction (which was described as "with effect on and from 6 October 1992") reads as follows:

> "The Governor-in-Council, acting under s22, s23A and s23B of the *Public Service Act* 1974 amends Schedule 2 of that Act by...
> (20) Removing the office of 'Director General of Conservation and Environment' in column 2;

> (21) Adding in relation to the administration unit of 'Department of Conservation and Natural Resources' in column 1, the office of 'Secretary to the Department of Conservation and Natural Resources' in column 2."

It was boldly contended that in itself and without more this direction demonstrated and established that the office of Director General of Conservation and Environment was abolished from 9 October 1992, but, of course, it does no such thing. The direction might, I suppose, have reflected such an abolition, but it does not establish it and it is at least equally consistent with a simple change of name which was brought about at the time by an order under the *Administrative Arrangements Act* 1983. In argument we were directed to items 20 and 21, as though they were part of Administrative Arrangements Order No 114, but they are not. That Order appears next in the *Government Gazette*. It too is dated 6 October 1992 and the portion relied upon reads as follows: **[9]**

> "8(a) The body corporate established by s6(1) of the *Conservation, Forests and Lands Act* 1987 and called 'The Director General of Conservation and Environment' will hereafter be known as 'The Secretary to the Department of Conservation and Natural Resources'.
>
> (b) Any reference in s6 of the *Conservation Forests and Lands Act* 1987, or in any other provision of that Act, or in any provision of any other Act, or in any statutory or other instrument made under any provision of an Act to the body corporate called 'The Director General of Conservation and Environment' ('the old body') shall be construed as a reference to the body corporate known as 'The Secretary to the Department of Conservation and Natural Resources' ('the new body')."

To my mind, CL8(a) makes it plain beyond argument that what happened on 6 October, or alternatively on 9 October 1992, involved only a change of name and nothing more. As such, the appellant's submission about the abolition of the office in October 1992 is not made out and so the argument in relation to the certificate, which was built upon that submission, falls to the ground. It follows that, in my view, the orders of dismissal made by the Magistrate were unjustified and the orders setting aside that dismissal were properly made by the judge on appeal. The third point taken before us concerned CL8(b) of the Administrative Arrangements Order No 114 of 1992 and s12 of the *Crown Land Acts (Amendment) Act* 1993, which was a transitional provision.

It was submitted, contrary to the view of the learned judge below, that neither CL8(b) nor s12 was sufficient to "save" the certificate which was otherwise destroyed upon the abolition of the office of Director General on and from 6 or 9 October 1992. But, for the reasons already given, the abolition of the office is not established as having occurred as contended, and so it is unnecessary to say **[10]** anything further about the operation of CL8, or anything at all about s12. Appellant's counsel did suggest in the course of his argument that CL8(b) might go beyond the power conferred by s3 of the *Administrative Arrangements Act 1983*, but that too is a point which need not be pursued as, in my view, the respondent has no need to rely upon either CL8 or s12. What I have said is sufficient to dispose of the only points raised before us on these appeals. Accordingly I would dismiss the appeals.

BROOKING JA: I concur.

CHARLES JA: I agree.

BROOKING JA: The order of the court is that each of the six appeals is dismissed with costs.

APPEARANCES: For the appellant: Mr GD Wendler, counsel. Solicitors for the appellant: Allan McMonnies and Co. For the respondent: Mr TV Hurley, counsel. Solicitors for the respondent: Victorian Government Solicitor.
