37/97

SUPREME COURT OF VICTORIA

NGUYEN v THE COUNTY COURT OF VICTORIA and EAST (No. 2)

Chernov J

16, 17 June 1997

PROCEDURE – BREACH OF COMMUNITY-BASED ORDER – ORDER MADE BY COUNTY COURT – SUPERVISING COURT TO BE FIRST SATISFIED OF BREACHING OFFENCE BEFORE REMITTAL TO COUNTY COURT – NOTATION OF "PLEA RESERVED" IN COURT REGISTER BY SUPERVISING COURT – WHETHER SUPERVISING COURT RELEVANTLY SATISFIED: *SENTENCING ACT* 1991, S47(1)(2).

1. Section 47(2) of the *Sentencing Act* 1991 provides that if a supervising court is satisfied by "evidence on oath or otherwise" that an offender has committed a breach of a community-based order made by the County Court, the supervising court may refer the charge to the County Court.

2. Where a charge alleging breach of a community-based order made by the County Court came before the supervising court and was remitted to the County Court with the notation in the Court Register "Plea Reserved", the notation was not necessarily inconsistent with the Magistrate having been "otherwise" satisfied that the offender had committed the offence. For example, the magistrate may have been relevantly satisfied from material presented to the Court by the person laying the charge. Accordingly, the court record did not disclose on its face an error of law made by the supervising court.

CHERNOV J: **[1]** This is the return of a summons on an originating motion both filed on 6 June 1997. When the matter first came on for hearing on 6 June it was adjourned to enable the second defendant to file answering material. The originating motion filed sought orders in the nature of certiorari quashing orders of the Court made on 17 March 1997. *[His Honour referred to matters not relevant to this report and continued]*...**[2]** The principal basis of relief claimed by the **[3]** plaintiff was that the County Court, constituted by Chief Judge Waldron, on 17 March 1997 lacked jurisdiction to make the order that His Honour did make because there was no valid reference to it; that is to say, there was no valid referral to the County Court by the supervising court of the charge against the plaintiff under s47 of the *Sentencing Act* 1991.

It was submitted by Mr Lewis, who appeared for the plaintiff, that the supervising court was not satisfied at the relevant time that the plaintiff had committed an offence under sub-s1 of s47 and, therefore, the supervising court could not lawfully have referred the matter to the County Court. This error of law by the supervising court, so Mr Lewis submitted, was clear on the face of the record and consequently its decision was susceptible to be quashed by an order in the nature of *certiorari*. Section 47 is, so far as relevant: *[His Honour then set out the relevant provisions, referred to previous proceedings (see* Nguyen v County Court of Victoria and East *MC30/1997) and a certified extract of the court register and continued]*...**[6]** Mr Lewis submitted that the entry which made it plain that the supervising court had fallen into an error of law is that which appears towards the foot of the page opposite the word "Remarks", namely, the words "Plea Reserved".

It was submitted on behalf of the plaintiff that this showed that the Magistrates' Court remitted the matter to the County Court without first being satisfied, as it had to be before it lawfully remitted the matter, **[7]** that the plaintiff had committed the relevant offence. That the certified extract was part of the record was not disputed by Mr Burke, who also did not challenge, for the purposes of the argument before me, that before the supervising court can lawfully remit a matter to the County Court under sub-s(2)(d) it had to be satisfied that the offender had committed an offence under sub-s(1).

It seems to me that Mr Lewis is probably correct in his submission that the section requires the supervising court to have relevant satisfaction before it can remit a charge to the County Court. This was assumed to be the case by O'Bryan J in *Dung Che Nguyen v DPP and the County Court of Victoria*, unrep., 12 February 1996. Thus, the plaintiff contended that since the record showed that the plea by the plaintiff was reserved, it meant that no plea was taken by the

Magistrate. Having regard to the presumption of innocence, he must be taken to have regarded the plaintiff as innocent. It must follow, so Mr Lewis argued, that the supervising court did not satisfy itself that the plaintiff had committed the relevant offence. Hence, it was claimed, the order of the Magistrates' Court made on 11 March 1997 was a legal nullity and the Chief Judge had no power to make the order he did on 17 March 1997. On these bases the plaintiff sought the quashing of the order of the Magistrates' Court and that of the Chief Judge. He also sought declarations reflecting the unlawful order made by the Magistrates' Court.

In relation to the claim that orders in the nature of *certiorari* should be made, the plaintiff's case seems **[8]** to stand or fall on the contention that the Magistrates' Court was not relevantly satisfied because of the notation in the register. In my view, however, the notation that the plea was reserved is not necessarily inconsistent with the Magistrate having been "otherwise" satisfied that the plaintiff had committed the offence. For instance, as Mr Burke pointed out, he may have been relevantly satisfied, from material presented to him by the second defendant, as to the commission of the offence and merely recorded that the plea to be taken in the County Court was reserved. It may be no more than a reflection of the plaintiff telling the Magistrate that he also had nothing to say about his case being remitted to the County Court. There is no basis for assuming that the procedure contemplated in sub-s(2) of s47, insofar as it relates to the matter being remitted to the County Court, is akin to that which is to be followed in a summary offence proceeding and that a plea, or something akin to it, was or has to be taken in the supervising court where that court has chosen not to deal with the offence but has chosen to remit the hearing of the whole matter to the County Court.

The provision specifically enables the Magistrates' Court to be satisfied as to whether the offence was committed by means otherwise than evidence given in the usual way. That is relatively clear from the term "otherwise" appearing in sub-s (2).

This is to contrasted, for example, as pointed out by Mr Burke, with s31(5), which deals with a breach of suspended sentence, where the court has to be satisfied as to relevant matters on oath, affidavit or by admission. Hence when dealing with a plaintiff under s47(2) the **[9]** Magistrates' Court may well be satisfied from material before it such as a report of the second defendant that the plaintiff had breached the community based order. There is no requirement for the plaintiff to plead or otherwise respond to deliberations of the supervising court as to whether it should remit the matter to the County Court under s47(2)(d). It follows that in my view the notation "Plea Reserved" is not an intimation by the Magistrates' Court that it had not bothered to satisfy itself that the plaintiff had failed to comply with the community based order. Consequently, it is my view that the "record" as identified by the plaintiff, does not disclose on its face an error of law made by the supervising court on 11 March 1997.

Mr Burke contended that even of there was such an error of law, namely, failure by the Magistrate to have reached the relevant satisfaction required by s47(2), certiorari should not go because the order of that court to remit the matter did not have any discernible legal effect on the plaintiff's rights. He relied on the decision of the High Court in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; [1996] 3 Leg Rep 2. *[After considering this case, His Honour continued]*...

[10] It is common ground that the County Court was obliged to hear the matter so referred to it "de novo". Hence the decision of the supervising court did little more than transmit the matter to the higher court without any discernible or apparent legal effect upon the plaintiff's rights. There was no obligation or, indeed, ability by the higher court to take into consideration any relevant decision of the supervising court.

It follows in my view that in the circumstances of **[11]** this case certiorari does not lie in respect of the decision of the Magistrates' Court even if it were established that an error of law had been made by the Magistrate as contended for by Mr Lewis. *[His Honour then dealt with matters not relevant to this report]*.

APPEARANCES: For the Plaintiff: Mr A Lewis, counsel. Solicitors: Kuek & Associates. For the Defendant: Mr P Burke, counsel. Solicitor for Public Prosecutions.
