43/89

SUPREME COURT OF VICTORIA

AG for VICTORIA v AYRES; ex parte JUMEAU

Southwell J

29 May, 1 June 1989

CRIMINAL LAW – PLEA OF *AUTREFOIS ACQUIT* – DOUBLE JEOPARDY – ACQUITTAL DUE TO INVALID CONVICTION – WHETHER EXPOSED TO RISK OF A VALID CONVICTION – WHETHER IN DOUBLE JEOPARDY – ABUSE OF PROCESS – INORDINATE DELAY – ACCUSED AWARE OF NATURE OF CASE – NO PREJUDICE SUFFERED – WHETHER ABUSE OF PROCESS: *CRIMES ACT* 1914 (CTH.), SS31, 36A.

J, a Federal Police Officer, charged one Barker with the unlawful possession of contraband property pursuant to the *Summary Offences Act* 1966 (Vic.). During the hearing, it was alleged that A. threatened a prosecution witness, and subsequently, J laid a charge against A. pursuant to s36A of the *Crimes Act* 1914 (Cth.) This charge was heard in April 1988, A. found guilty and sentenced to a term of imprisonment. A. appealed, and in May 1988, the appeal was upheld on the ground that the information under s36A was inappropriate and the conviction set aside. A year later, the Attorney-General for Victoria caused the issue of an originating motion upon the hearing of which it was submitted that the proceedings should be stayed as they (i) exposed A. to double jeopardy; and (ii) were an abuse of process.

HELD: Submissions rejected.
(1) The rule that no person should be put in peril more than once for the same offence requires not only that the defendant be exposed to the risk of a valid conviction for the same offence as that alleged in the later proceedings, but also that the earlier proceedings should have resulted in an acquittal.
***Barnes v Gougousis* [1969] VicRp 123; (1969) VR 1019; and**
***Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27, applied.**

(2) As the information against A. disclosed no offence, A. was never exposed to the risk of a valid conviction and accordingly, cannot now be said to be in double jeopardy.

(3) Inordinate delay is a relevant factor when considering whether the circumstances constitute an abuse of process. In the present case, although there was an inordinate delay, A. was aware of the nature and extent of the case against him and it could not be said that the delay caused actual prejudice or that a fair trial could not now be had.

SOUTHWELL J: [1] There are two matters before the court – first, a summons upon an originating motion pursuant to Rules 75.05 and 75.06. Rule 75.05 applies to contempt proceedings, Rule 75.05(1)(c) applies to contempt of an inferior court. Rule 75.06(1) provides that "Application for punishment for the contempt shall be by summons or originating motion in accordance with this Rule". Rule 75.06(3) provides that "the application shall be made by originating motion which - (a) shall be entitled 'The Queen v' the respondent, 'on the application of' the applicant" and the other procedural directions follow. Second, there is a summons by the respondent to the first proceeding, Peter Edward Ayres, (who I shall call the respondent) whereby he seeks an order permanently staying the first proceeding on the basis that it is oppressive and constitutes an abuse of process.

At the time of issue of the first proceedings, the applicant was Detective Jumeau of the Federal Police. During the hearing, application was made by Mr Maguire, counsel for the applicant, to substitute as applicant the Attorney-General for the State of Victoria: there being no objection, the application was granted.

In the following statement of facts matters are included which were not referred to in the various affidavits but of which, without objection, counsel informed me from the Bar table. On 9 December 1987 one Rodney Barker appeared at the Geelong Magistrates' Court to answer an information under the Victorian *Summary Offences Act* 1966 relating to the alleged unlawful possession of a dog.

As it happened, members of the Federal Police Force were involved, the **[2]** allegation being

that the dog had been contraband property unlawfully removed from a pound. On that day one Wayne Evorall gave evidence as a witness called by the prosecution. His evidence concluded on that day, but the material before the court does not show whether he had been excused or whether there was any real possibility that he might be recalled.

Upon the resumed hearing on 11 December an incident occurred which is the subject of the present proceedings. The Crown case is that the respondent, with violent and obscene language, threatened Mr Evorall in a manner which was calculated to put any normal mortal in considerable fear. The threats referred to the burning down of Mr Evorall's house and intended physical violence.

Mr Evorall reported the matter to the police. On 14 December the respondent was arrested by Federal Police and Detective Jumeau laid an information charging that the respondent "Did on the 11th day of December, 1987 at Geelong, threaten a person, namely a Mr Wayne Evorall, who had appeared as a witness in a criminal proceeding at the Geelong Magistrates' Court on that day. Contrary to s36A of the *Crimes Act* 1914".

It is to be observed that s36A creates an offence in relation to witnesses in "judicial proceedings" rather than "criminal proceedings" and it may well be that the information disclosed no offence. I shall return to the history of that information.

The respondent was called as a defence witness in the Barker proceedings. In cross-examination questions going to his credit were put to the respondent, wherein it **[3]** was alleged that he had threatened Mr Evorall. Counsel informed me that the Magistrate intervened upon the basis that the respondent might be called upon to incriminate himself.

It appears that no complaint was made by the police to the Magistrate who took no action in respect of any alleged contempt. The information against the respondent was heard at the Geelong Magistrates' Court on 8 April 1988, where counsel appeared for the respondent. The issues of fact were contested. It appears that no point was taken that the information disclosed no offence. It was not contended that an information under s36A was inappropriate in that the earlier proceedings were not "judicial proceedings" within the meaning of s36A. In due course the respondent was convicted and was sentenced to six months' imprisonment. He appealed to the County Court.

Before the appeal came on for hearing, Mr A Howard of counsel, who had not appeared in the court below, succeeded in convincing officers of the Commonwealth Director of Public Prosecutions that the conviction was invalid in that the relevant proceedings in December, relating as they did to an offence against a Victorian Statute, were not "judicial proceedings" within the meaning of s36A. The Director of Public Prosecutions conceded the point, correctly, as the parties now agree, for the reason that s31 of the *Crimes Act* defines "judicial proceedings" in these words:

> "'judicial proceeding' means a proceeding in or before a Federal Court or Court exercising Federal jurisdiction, or Court of a Territory, and includes a proceeding before a body or person acting under the law of the Commonwealth, or of a Territory, in which evidence may be taken on oath."

[4] It was agreed with Mr Howard that upon the hearing of the appeal no evidence would be led; and so on 3 May 1988 His Honour Judge Nixon upheld the appeal and set aside the conviction. One would infer that the Federal Police were of the view that the matter should not rest there. On 20 June 1988 the AttorneyGeneral for the Commonwealth wrote to the Victorian Government Solicitor stating, "It would seem appropriate that you consider whether contempt of court proceedings should be brought before the Supreme Court in respect of Ayres conduct".

Then followed a meandering course of investigation and decision making. On 30 September the Victorian Government Solicitor recommended that the Attorney-General for Victoria should instruct the former to institute contempt proceedings in this court: this was done and on 2 November counsel was briefed to draw the necessary documents.

In March 1989, after a number of unsuccessful reminders to counsel, the brief was retrieved and in April Mr Maguire was briefed. He gave the matter prompt attention and on 5 May 1989 the

originating motion was issued. In this court, Mr Thompson (who did not appear in the Magistrates' Court) submitted that the proceedings should be stayed upon the bases that the respondent is exposed to double jeopardy and that the proceedings are an abuse of process.

Double jeopardy

Mr Thompson submitted that the respondent faces a second trial for the same offence, having once been acquitted (that is, by the order on appeal which, by **[5]** necessary implication from s75 of the *Magistrates' Courts Act* 1971 ("the Act") is a re-hearing). Mr Thompson referred to, *inter alia*, *Barnes v Gougousis* [1969] VicRp 123; (1969) VR 1019. In that case Adam J was dealing with somewhat complicated facts which I need not now summarise. It is sufficient to say that his Honour was called upon to consider what constituted an acquittal in earlier proceedings, which would give rise to a successful plea of *autrefois acquit*.

At p1022 His Honour said:

> "...a prior acquittal will not support the plea where the court lacked jurisdiction to convict, for then the accused would not in a legal sense have been in jeopardy on the former occasion."

[6] Later on the same page His Honour said:

> "Thus if before issue joined by a plea of not guilty or its equivalent an information is dismissed for want of prosecution, there would have been no such adjudication and so no dismissal 'on the merits': *Ward v Hodgkins* [1957] VicRp 103; [1957] VR 715; [1958] ALR 348. On the other hand, if after issue joined the court enters upon the process of adjudication and the information is dismissed for insufficiency of evidence, or indeed, in the absence of any evidence, there is an acquittal 'on the merits'. For an acquittal to be 'on the merits' an adjudication on the truth of the allegations contained in the charge is not required.
>
> The requirements of the rule against double jeopardy are satisfied in such a case because in the earlier proceeding the accused would have been exposed to the peril of conviction in the course of an adjudication as to his guilt or innocence upon such evidence as the prosecution could, or chose to, lead. The general principles applicable to this plea are clearly stated by Dixon J, as he then was, in *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, at p599; [1947] ALR 27, in the following passage: 'The rule against double jeopardy requires for its application not only an earlier proceeding 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 proceeding should have resulted in his discharge or acquittal.'" (Emphasis added)

I emphasise the word "valid" for the reason that in my opinion it demonstrates the distinguishing feature of the present case. It is true that the Magistrates' court has jurisdiction to hear an information laid under s36A of the Commonwealth *Crimes Act*: however, as has been earlier stated, it is common ground that the proceedings being conducted at the Geelong Magistrates' Court in December 1987 were not "judicial proceedings" within the meaning of s36A.

Accordingly the respondent was never exposed to the risk of a "valid" conviction upon the information laid against him. I acknowledge that it must come as a **[7]** surprise for a person who has been sentenced to six months' imprisonment to hear that he was never "exposed to the risk of a valid conviction": however there was in law no such risk, and if the prosecutor, or the Magistrate, or counsel for the respondent had looked at the matter a little more carefully, no hearing on the merits would ever have taken place, and, of course, no sentence would have been passed.

Since the respondent was not exposed to the risk of a "valid" conviction, he cannot now be said to be in double jeopardy.

Abuse of Process

Mr Thompson submitted that in all the very unusual circumstances of this case the Court should label these proceedings an abuse of process. It was said that the Magistrate could have dealt with the respondent pursuant to s46 of the Act, which provides in part:

> "(3) If any person -
> (a) ....
> (b) wrongly influences or attempts to influence ... any witness ... in relation to any ... criminal

> proceeding ... being heard ... by the Court
> the Chairman may orally or in writing direct the apprehension of any such person and if he thinks fit may commit him to prison for any time not exceeding 6 months or may impose upon him a fine of not more than 25 penalty units."

Before me there ensued considerable debate whether it would have been permissible for the informant in the Barker proceedings to cause an information to be issued against the respondent – see the decision by Lowe J in *R v Macindoe* [1938] VicLawRp 59; [1938] VLR 277; [1938] ALR 488 especially at VLR pp282-283.

[8] However no information was laid, and as I have said, the Magistrate took no action. It is somewhat unrealistic to think that in the circumstances such an information would be laid while the matter was "being heard by the Court" within the meaning of s46(3). It is even more unrealistic to think that the Attorney-General for Victoria could have caused such an information to issue during the hearing.

It is in my view unnecessary to decide whether any information could lawfully be laid under s46(3)(b): it was not done, and the respondent was not put in jeopardy. It was then said that there is a general discretion in this court to refuse to entertain a motion for contempt, reliance being placed upon s87(1) of the *Constitution Act* 1975 which provides:

> "Except as is provided by any Act or the rules of the Court the Court shall not be bound to exercise any jurisdictions powers or authorities in relation to any matters in respect of which jurisdiction is given by any Act to any other Court tribunal or body."

I cannot accept that this section can be of assistance to the respondent. In the first place, as earlier indicated, Rules 75.05 and 75.06 clearly give a person a right to make application to the Court in respect to contempt of a lower Court and, second, even were it to be held that the Magistrates' Court formerly had jurisdiction, the limitation period for the taking of proceedings for summary offences imposed by s165 of the *Magistrates (Summary Proceedings) Act* 1975 is twelve months. Thus, the period expired on 11 December 1988.

When this notice of motion was issued no other court had jurisdiction to entertain this "matter". **[9]** Even if there existed in the Court the general discretion to which Mr Thompson referred the Court cannot refuse to entertain an application properly brought before it, without good grounds. In my view there is no warrant for refusing to entertain the application; as it seems to me, once the matter came to the knowledge of the Attorney-General, and a decision was made that proceedings should be taken, it was open to the Attorney-General to form the opinion that it was not appropriate to lay an information against the respondent for an offence of using threatening words contrary to s17 of the *Summary Offences Act* 1966 (which provides for a maximum penalty of two months' imprisonment). There were then only two courses open – either to launch proceedings for the indictable offence of attempting to pervert the course of justice, or to take proceedings in this Court pursuant to Rule 75.06.

Without in any way pre-empting any finding which a Judge of this Court may see fit to make upon any later hearing, it is in my opinion quite inappropriate now to rule that the Attorney-General ought not to be permitted to proceed with this application, unless there are circumstances demonstrating, upon established principles, that to do so would constitute an abuse of process. As it seems to me, the only matter pressed by Mr Thompson which could come within established principles is that of inordinate delay. It is patently clear that there was inordinate delay: however, in the present case the principal issue of fact to be decided is whether the alleged words were spoken by the respondent. By his **[10]** arrest on 14 December the respondent had good cause to recall what was said: evidence was given about the matter in April 1988. It has not been shown that the delay has caused actual prejudice: or that a fair trial cannot now be had: as it seems to me the circumstances are not exceptional, within the meaning of *R v Clarkson* [1987] VicRp 80; [1987] VR 962; (1987) 25 A Crim R 277.

Other matters relied upon by Mr Thompson, and in particular the hardship, financial and mental, brought about by the renewed threat of proceedings after a considerable lapse of time do not in my opinion demonstrate an abuse of process: rather, they are matters to be considered in mitigation in the event of a finding that the respondent is guilty of contempt. As I have earlier

indicated, any litigant, including the Attorney-General, who brings proceedings in this Court in accordance with the rules, will not be denied access to the Court except upon good grounds. In my opinion the ground here relied upon – that the proceedings constitute an abuse of process – has not been made out. The position might be different if these late and expensive proceedings were taken in respect of a patently trivial matter. In my opinion there are grounds for suggesting that those advising the Attorney-General are using a sledge-hammer upon a tack. I confess that I would like to be able to say that "enough is enough" and that the respondent, who I have observed in this Court during the two part-days of this hearing, has by now suffered sufficient punishment. However, I do not regard **[11]** myself as at liberty to say that at this stage of the proceeding: as it seems to me I am empowered to stay these proceedings only if I find that they constitute an abuse of process, and for the reasons given, I do not make that finding.

Accordingly, the summons of the respondent must be dismissed. The summons upon the originating motion is referred to the Causes List to be given such priority as the Master sees fit. Costs are reserved.

APPEARANCES: For the applicant Jumeau: Mr GL Maguire, counsel. Victorian Government Solicitor. For the respondent Ayres: Mr LA Thompson, counsel. Verna A Cook, solicitor.
