39/92

SUPREME COURT OF VICTORIA

HODGETTS v TRENT

Gobbo J

4, 11 August 1992

PROCEDURE – APPLICATION TO REHEAR INFORMATIONS – APPLICATION GRANTED UPON CONDITION THAT APPLICANT/DEFENDANT PAY A SUBSTANTIAL AMOUNT INTO COURT – APPLICANT OF LIMITED FINANCIAL MEANS – UNABLE TO COMPLY WITH CONDITION IMPOSED – WHETHER POWER TO IMPOSE SUCH A CONDITION PROPERLY EXERCISED.

Upon an application to set aside convictions and orders made in respect of a number of informations, the magistrate, after hearing evidence as to the applicant/defendant's limited financial means, granted the application upon the condition that the applicant pay the total sum of $5,800. Upon appeal—

HELD: Appeal allowed. Order set aside.

1. The power to impose a condition must be such that it is ancillary to the power to grant the principal relief of the rehearing application. If the grant of the rehearing is contingent upon the performance of a condition which in substance is impossible of performance, the court's power has not been properly exercised.

2. Due to the applicant's limited financial resources, the condition imposed by the Court was in substance, impossible of performance and effectively denied the applicant a rehearing. In such circumstances, the court's power to impose a condition was not properly exercised.

GOBBO J: **[1]** This matter comes before me as a summons in an Originating Motion seeking relief under Order 56, that is relief by way of judicial review. The substance of the application is founded on three grounds of judicial review, namely error on the face of the record, want of jurisdiction and denial of natural justice.

I should say at the outset that there is no basis at all for the attempted reliance on denial of natural justice, and I confine myself to the first two grounds of judicial relief. The background for the matter is that the applicant was convicted at the Kyneton Magistrates' Court on 4 March, 1992 of a number of offences and was sentenced to a term of imprisonment of 12 months. The applicant did not attend and there is material to the effect that on the day in question he was before the Supreme Court at Melbourne before Teague J on another matter and that it is said by the affidavit that he was unaware that he was required to attend at the Kyneton Magistrates' Court on 4 March 1992.

The applicant apparently filed a notice of appeal to the County Court and also an application for rehearing. That application for rehearing at first was struck out because of the County Court appeal, but eventually when the County Court appeal was abandoned on 21 May 1992, the application for rehearing proceeded and came on for hearing on 1 July 1992 at Kyneton. The applicant appeared and gave evidence and was represented at such hearing before the learned magistrate. The learned magistrate made an order in these terms and I set out the full order appearing in the certified extract **[2]** of the order:

> "Conditional upon payment by the applicant on or before 5 August 1992 of:
> 1. $4,500 security for costs which necessarily will be incurred by the prosecution in the event of a rehearing; and
> 2. $650 costs ordered on 15.5.92 to be paid by him; and
> 3. $650 costs of this application, the application to set aside the orders of this court made 4.3.92 is granted, the information to be reheard before a magistrate other than me at a date and court to be determined by further mention on 5 August 1992.
> Remanded to 5.8.92 at Kyneton Magistrates' Court for further application. Bail fixed in the defendant's own undertaking. Application granted."

The order for rehearing which was first adjourned to 5 August 1992, has been further adjourned as a result of this application before this court, to the Magistrates' Court at Ballarat on 13 August, and bail has been extended until that date.

The substance of the application for judicial review as at first argued was founded upon the proposition that the learned magistrate's order was effectively an order for security for costs and that in the light of well established authority that the impecuniosity of an individual litigant as opposed to a corporate litigant is no basis for granting security for costs.

In my view that way in which the matter was put was misconceived as the magistrate's order was not an order for security for costs. It was an order for a rehearing. It is true it uses the terminology "security for costs" in the order, but the order has to be seen as **[3]** an exercise of a statutory power in relation to a rehearing, and in my view, it is a misconception to convert the order for a rehearing on conditions into a direction and solely a direction that there be security for costs. It is, however, still the situation that the order made by the learned magistrate was such as to contain a condition that effectively there was to be no rehearing unless a substantial sum of money referred to in the order was paid into court.

The learned magistrate did not give reasons when he made his order so that one has to rely upon what may be gleaned from the conduct of the hearing before him in order to ascertain the issues that were before him and what led the magistrate to make the order that he did. Certainly the learned magistrate must have been concerned by the evidence that had been put forward on behalf of the informant that a rehearing would compel the informant to have to return from the United States at considerable cost to Royal Society for the Prevention of Cruelty to Animals which had been responsible for the prosecution.

There was some evidence before the learned magistrate about the means of the applicant. It is not entirely satisfactory because it appears in an indirect form, but this much is clear, namely that at the rehearing application the applicant gave evidence that he was not able to meet previous orders as to costs because he could not afford to meet those orders. **[5]** There is also a basis for a finding that he also had disclosed at the hearing that he was in receipt of legal aid, that he was a pensioner with no tangible assets and that he had an income of $291.30 per fortnight from the pension.

There are two views as to what occurred: either the only evidence as to the means of the applicant to meet an order as to costs was that evidence which I just referred to, or there was no evidence at all. The former seems to be the case on the material before me. If the former was the case, then the only evidence about the means of the applicant was all one way, and the only apparent inference open on that evidence was that the applicant could not effectively comply with such an order.

In my view, the power to impose a condition must be such that it is ancillary to the power to grant the principal relief of the rehearing. If the grant of the rehearing is contingent upon the performance of a condition which is in substance impossible of performance, then in my view the power has not been exercised, and such an order would be an error on the face of the record or an order beyond jurisdiction.

I am troubled greatly by this case because there are many aspects about the way in which the applicant has behaved that give cause for suspicion and concern. I include amongst those his legal adviser's peculiar decision not to proceed with the appeal to the County Court which, of course, would not have required any conditions to be complied with, other than presumably the normal conditions about pursuing the appeal with reasonable expedition.

At the end of the day, however, I am left with a situation that there was a rehearing **[6]** application, the learned magistrate purported to grant a rehearing but on a condition which on the evidence apparently before him was effectively impossible or nearly impossible of fulfilment and, accordingly, the hearing was in a sense going to be an abortive one.

In these circumstances I am of the view that the learned magistrate's order cannot stand and should be set aside and that the application for a rehearing should then proceed with no

order in place and, of course, with leave to either party to put whatever further considerations are appropriate before the magistrate. I had a number of courses canvassed before me, but it may be prudent that I do not myself include those in these short reasons for judgment and that I leave the field clear, as it were, in the hope that some practical and sensible formula can be arrived at that meets the difficulties created by this case, both for the applicant and for the informant. I will make that order therefore.

APPEARANCES: For the plaintiff Hodgetts: Mr D Pannifax, counsel. Julian Teh, solicitor. For the defendant Trent: Mr TJ Walker, counsel. Anderson Rice, solicitors.
