02/86

SUPREME COURT OF VICTORIA

KING v ROWLINGS

McGarvie J

27 June 1985; 6 March 1986 — [1987] VicRp 2; [1987] VR 20

PROCEDURE – CONVICTION FOR UNLAWFUL POSSESSION OF MONEY – DEFENDANT CLAIMANT TO MONEY AS RIGHTFUL OWNER – APPLICATION MADE FOR DISPOSAL OF MONEY – DEFENDANT UNAWARE OF PROCEEDINGS – MONEY ORDERED TO BE PAID TO CONSOLIDATED FUND – PRE-CONDITION FOR ORDER – WHETHER RIGHTFUL OWNER ENTITLED TO NOTICE OF APPLICATION WHERE PROPERTY IS MONEY – NATURE OF NOTICE – WHETHER DEFENDANT HAS STANDING TO APPLY FOR A REHEARING: *SUMMARY OFFENCES ACT* 1966, SS26, 33; MAGISTRATES *(SUMMARY PROCEEDINGS) ACT* 1975, SS3, 152.

K. was convicted of unlawfully possessing the sum of $88,134. Following the seizure of the money from K., the Deputy Commissioner of Taxation amended the assessment of K.'s income tax, adding an additional amount including penalties. Subsequently, K.'s solicitors wrote to the Chief Commissioner of Police claiming the moneys as his own property and seeking a refund in full or payment of the moneys seized to the Deputy Commissioner of Taxation. The Chief Commissioner refused to follow either course. Two months later, an order that the money be paid into the Consolidated Fund was made by a Magistrates' Court in the absence of K. who was unaware of the proceedings. When K. subsequently applied to have the order set aside and the application reheard, the Magistrate held that K. had no right to be heard and accordingly struck out the rehearing application with costs. Upon order nisi to review—

HELD: Order absolute. Order striking out rehearing application set aside with a direction that that application be reheard according to law.
(1) Although the ordinary meaning is otherwise, s33(4) of the *Summary Offences Act* 1966 is to be read as requiring an order of a Court before money, whether the original property or the proceeds of sale of the original property, is paid into the Consolidated Fund.

(2) Before the Court may order the money be paid into the Consolidated Fund, it must be satisfied that the rightful owner has not been discovered within six months of the conviction. As such an order has the effect of extinguishing the interest of the rightful owner, and as K. claimed to be the rightful owner, he was entitled under the principles of natural justice to be given adequate notice of the hearing of the application and an adequate opportunity of being heard. Depending on what, in all the circumstances, is fair and reasonable, it is for the Court in an individual case to ensure that adequate notice of the application is given.

(3) Section 152 of the *Magistrates (Summary Proceedings) Act* 1975 gives a party who does not appear when a conviction or order is made against him a right to have it set aside and reheard. As "Order" in s3(1) of the *Magistrates (Summary Proceedings) Act* 1975 includes the grant or refusal of any application, and as K. was a person with an interest in opposing the application, he was entitled to appear and had standing to apply for an order to set aside and rehear.
[Note: This case supersedes King v Rawlings *(SM 56/1984), Ed.]*

McGARVIE J: [1] This return of an order to review the order of a Magistrate which refused an application for rehearing, turns mainly on the construction of s33(4) of the *Summary Offences Act* 1966. In October 1982 several members of the Victoria Police including the respondent, Senior Detective Rowlings, took from the applicant, Peter Lawrence King, a sum of $88,134.00 which he had in his actual possession. Senior Detective Rowlings charged the applicant under s26 of the *Summary Offences Act* 1966 with having the money in his actual possession, it being reasonably suspected of being stolen or unlawfully obtained. The applicant was convicted of the charge at the Magistrates' Court at Melbourne. An appeal to the County Court against the conviction was dismissed on 6th October 1983.

[2] Following the seizure of the money from the applicant the Deputy Commissioner of Taxation amended the assessment of the applicant's income tax, adding an additional amount of $103,718.18 including penalties. Under s218 of the *Income Tax Assessment Act* 1936 the Deputy

Commissioner of Taxation, by notice in writing, required the Chief Commissioner of Police to pay from moneys held for the applicant moneys due by the applicant in respect of tax. On 16 December 1983 King's solicitors wrote to the Chief Commissioner of Police stating that he claimed the moneys as his own property and requiring the Chief Commissioner to indicate his position in relation to that claim. The letter said, that unless within seven days the Chief Commissioner confirmed that the funds would be paid to King or to the Deputy Commissioner of Taxation, Supreme Court proceedings would be initiated. The solicitors said they assumed that those who had seized the money were acting with the Chief Commissioner's authority and that it was the Chief Commissioner rather than the individual police officers who held the funds. The letter requested that the solicitors promptly be informed if that assumption was incorrect, as they proposed to name the Chief Commissioner as defendant in any proceedings. The applicant's solicitors wrote another letter to the Chief Commissioner of Police on 27th January 1984 requiring a response to the earlier letter. On 7th February 1984 a Deputy Commissioner of Police sent the following letter to the solicitors:

> "Re: Peter Lawrence King
> I refer to your letter of 27th January 1984 and earlier correspondence regarding your **[3]** client's claim to certain monies seized by police. It is considered, because of the conviction recorded against Mr King, that he has no legal claim to the sum of $88,134.00 and, accordingly, an application will be made to a Stipendiary Magistrate for that money to be paid to the Consolidated Revenue Fund under the provisions of Section 33(4) of the *Summary Offences Act*. A copy of the application will be served on your client in due course. The amount of $17,500.00 was paid to the Deputy Commissioner of Taxation upon notice under Section 218 of the *Income Tax Assessment Act* 1936."

Obviously, the $17,500.00 was paid to the Deputy Commissioner of Taxation from other moneys than those in issue in these proceedings. The next information that Mr King or his solicitors received was contained in a letter from another Deputy Commissioner of Police dated 7th May 1984 which said:

> "Re: Peter Lawrence King
> I refer to Mr Millar's letter of 7th February 1984. As you are no doubt aware, the application for the sum of $88,134.80 to be paid to the Consolidated Revenue Fund was determined at the Melbourne Magistrates' Court on 10th April 1984. An Order having been made that money be paid into Consolidated Revenue, the matter has now been finalized. No further action is proposed."

The evidence before me is that a written application dated 17th January 1984 was filed with the Magistrates' Court which, after reciting King's conviction and that the rightful owner of the property had not been discovered within six months of conviction, stated:

> "Application is hereby made for an order of the Melbourne Magistrates' Court on the 10th day of April 1984 at 10.00 in the forenoon that the said property be sold and the **[4]** proceeds of such sale be paid to the Treasurer of the State of Victoria and form part of the Consolidated Revenue."

The material shows that no notice of the application was given to Mr King or his solicitors. An order was made by a Magistrate on 10th April 1984 that the money be paid into the Consolidated Revenue. Neither Mr King nor his solicitors were aware of this order until after receipt of the letter of 7th May 1984. By a notice of application dated 29th June 1984 the applicant, King, by his solicitors, gave notice of intention to apply to the Magistrates' Court on 20th July 1984 for an order that the order of 10th April 1984 be set aside, and that the application for an order of payment of the money into the Consolidated Revenue be reheard.

Both parties were represented by counsel on that application for rehearing. Counsel for the applicant, King, submitted that King was entitled to notice of the application for an order that the money be paid into Consolidated Revenue. Counsel for the respondent, Rowlings, argued that the order was administrative and not judicial in nature and that under the *Magistrates (Summary Proceedings) Act* 1975 the applicant was given no right to have the order set aside and obtain a rehearing. The learned Magistrate raised the question whether the applicant, King, had any rights in respect of the money, having been convicted of unlawfully possessing it.

The Magistrate held that the applicant, King, had no standing in the proceedings heard on 10th April 1984 and would have had no standing if he had been served with a notice of the application. As the applicant had no right to be heard on that application the Magistrate held that

he **[5]** had no power to entertain his application for a rehearing. He struck out the application for a rehearing and ordered the applicant, King, to pay $250.00 costs.

On an appeal against the refusal of a Master to grant an order nisi to review, Gray J granted such an order on 29th August 1984. When the application came on for hearing before Southwell J, there was no appearance for Rowlings and the Judge made an order absolute. It later appears that although the order nisi had been left at Rowling's place of work it had never come to his notice and he was unaware of the proceedings. On application to Southwell J before his order was passed and entered, he vacated it.

The relevant parts of s26 of the *Summary Offences Act* 1966 provides:

> "26(1) Any person having in his actual possession or conveying in any manner any personal property whatsoever reasonably suspected of being stolen or unlawfully obtained in any State or Territory of the Commonwealth may be arrested either with or without warrant and brought before a Magistrates' Court, or may be summoned to appear before a Magistrates' Court.
> (2) If such person does not in the opinion of the court give a satisfactory account as to how he came by such property he shall be guilty of an offence.
> Penalty: Imprisonment for one year."

Sub-section (1) and (2) of s33 of that Act provide that when it appears to a Court hearing a charge under s26 (or other specified sections), that other persons have been in possession of the property, the Court may have other persons brought before it or another Court and dealt with on the charge. The section proceeds:

> "(3) If satisfactory proof of the ownership of any such property is given to the court before which the offender is convicted the court may thereupon order the restitution of the property forthwith to the rightful owner or his representative.
>
> **[6]** (4) If the rightful owner of any such property is not discovered within six months from the conviction of the offender the property may by order of the court be sold and the proceeds of the sale or, in the case of money, the money shall be paid into and form part of the Consolidated Fund."

The main submission advanced before me by Mr Boaden for the respondent, Rowlings, is that in this case the application for an order that the money be paid into the Consolidated Fund was misconceived. He submits that s33(4) does not require an order of the Court except for the sale of property other than money. In the present case he submits that it was the administrative duty of whoever possessed the money to pay it into the Consolidated Fund if the rightful owner was not discovered within six months of the conviction. He argued that this was a convenient way of keeping the money which would not affect the rightful owner's title to it. If the rightful owner established title to the money he would be entitled to recover it from the Consolidated Fund.

Mr Bowditch for the applicant, King, argued that the money was not to be paid into the Consolidated Fund without an order and that his client had been entitled to notice and an opportunity of being heard before such an order was made. A literal reading of the words of s33(4) supports Mr Boaden's submission that no order of the Court for payment into the Consolidated Fund is contemplated. The natural, grammatical meaning of the words is that it is only the sale of property that requires a court order and no court order at all is contemplated where the property seized was, as in this case, money.

[7] After careful reflection, I have decided that this is one of those singular cases in which it is necessary to depart from the literal meaning of the words in order to effectuate Parliament's intention. I have reached this conclusion because I consider that the result of giving the words their ordinary meaning is so irrational and so unlikely to have been intended by Parliament that I am forced to the conclusion that the draftsman has made a mistake. In my opinion, the construction of the words according to their ordinary meaning and grammatical sense is to be displaced in this case because the operation of the legislation in accordance with that construction was unintended, and would lead the Parliamentary intention to miscarry. See *Cooper Brookes (Wollongong) Pty Ltd v FCT* [1981] HCA 26; [1981] 147 CLR 297; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434.

In my view, sub-ss(3) and (4) of s33 constitute a statutory scheme by which the

Magistrates' Court which convicts of an offence to which the section applies may, by order, dispose of the property, the subject of the conviction. The Court may, upon convicting or upon later application, order the restitution of the property to the person proved to be its rightful owner or his representative. If the Court is satisfied that the rightful owner of the property has not been discovered within six months of the conviction it may make other orders for its disposition. If the property is not money, it may order its sale or both its sale and the payment of the proceeds into the Consolidated Fund. If the property is money, it may order its payment into the Consolidated Fund.

[8] A strong reason leading me to the view that property which is money is only to be paid into the Consolidated Fund upon a Court order is that I have concluded that once it is paid into that fund it remains part of it and is lost to its rightful owner. The section shows a legislative concern for the interest of the rightful owner in the property. Sub-section (3) facilitates restitution of the property to the rightful owner. Sub-section (4) shows unequivocal concern for the interest of the rightful owner, interposing the need for a Court order before property may be converted into money by sale. Yet, the natural grammatical meaning of the words is that money, whether the original property or the proceeds of the sale of property, should be paid into the Consolidated Fund and lost to the rightful owner without any Court order.

On that meaning of the words the interest of the rightful owner in the property or proceeds of the property is to be automatically confiscated to the State without any obligation on anyone to discover or seek to discover the rightful owner or to give the rightful owner the opportunity of identifying himself or herself. A blameless owner, already wronged by loss of possession of the goods, could be liable to have his or her interest forfeited. That result could follow without any misconduct on the part of the police officer in possession of the property. An overworked police officer, not having had the opportunity to seek to discover the rightful owner of money within the six months, would on the literal meaning of the words be obliged to pay it into the Consolidated Fund on the expiration of that period.

[9] In this case I think I am entitled to have regard to the legislative habits of Parliament and to conclude that it is extremely improbable that Parliament would have intended to reach the results which the words on their natural meaning would produce. cf. *Chertsey Urban District Council v Mixnams Properties Ltd* [1965] AC 735 at 751; [1964] 1 QB 214; [1964] 2 All ER 627 per Lord Reid. Accordingly, although the words of the equivalent provisions in the *Police Offences Act* 1928 and the *Police Offences Act* 1958 to which I was referred, expressed at least as clearly the natural meaning of the present sub-section, I am satisfied that it was not what Parliament intended.

In my opinion, the sub-section will accord with Parliament's intention if it is read as requiring an order of the Court before money, whether the original property or the proceeds of sale of the original property, is paid into the Consolidated Fund. I consider that the sub-section is to be construed as though words such as those I have added and underlined in the text below were read into it:

> "(4) If the rightful owner of any such property is not discovered within six months from the conviction of the offender the property may by order of the Court be sold and <u>if the court so orders</u> the proceeds of the sale or, in the case of money, the money shall be paid into and form part of the Consolidated Fund."

As mentioned earlier, I consider that money which under s33(4) is paid into and forms part of the Consolidated Fund is not paid into the Consolidated Fund on the basis that it will be re-imbursed if a claim is made out by the true owner. The Consolidated Fund is an account kept in the Treasury to which the moneys forming part of the Consolidated Revenue under the *Constitution Act* 1975 **[10]** and certain other money are to be credited. See: *Public Account Act* 1958, s4; *Constitution Act* 1975, Part V, Division I.

I have not been referred to any provision which authorizes the making of a payment from the Consolidated Fund or from any other source to a person who establishes that he was the rightful owner of money which was, or property, the proceeds of which were, paid into the Consolidated Fund under s33(4). Where there is a right to make such a payment in consequence of a payment into the Consolidated Fund it is conferred expressly. See for example *Public Account Act* 1958,

s21A (*Bona Vacantia*); *Unclaimed Moneys Act* 1962, ss8 and 14; and *Disposal of Uncollected Goods Act* 1961, s11(3).

In *Auckland Harbour Board v R* [1923] UKPC 92; [1924] AC 318 at p326-7 the Privy Council said:

> " ... it has been a principle of the British Constitution now for more than two centuries ... that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced."

That principle was held to be inherited in the Constitution of New Zealand. The principle has been regarded as inherent in the Constitution of The Commonwealth of Australia (*Commonwealth v Burns* [1971] VicRp 100; [1971] VR 825; [1972] ALR 154) and in the Constitution of New South Wales (*Attorney-General v Gray* [1977] 1 NSWLR 406; 7 ACLR 889; 14 ATR 241). It is also inherent in the Constitution of Victoria. **[11]** It follows that, once the money is paid into the Consolidated Fund under s33(4) it is lost to its rightful owner. The position of an owner is similar when, usually upon the direction of the Chief Commissioner of Police and after notice of sale, unclaimed goods in the possession of a member of the Police Force are sold and the proceeds paid into the Consolidated Fund under s122 of the *Police Regulation Act* 1958.

It is my opinion, that for an order to be made in this case on the application that the money be paid into and form part of the Consolidated Fund, the Court must be satisfied that the rightful owner was not discovered within six months of the conviction and must exercise its discretion to order such payment. The conviction of King does not of itself affect any title he may have to the money. Even assuming the conviction under s26 raises issue estoppels between Rowlings and King, all it could establish is that King had the money in his actual possession, that the money was reasonably suspected of being stolen or unlawfully obtained and that King did not give a satisfactory account of how he came by the property. King's title to the money will depend on evidence.

It is not necessary to express any view upon the meaning of the words "rightful owner" in s33(4). As an order of the Court under s33(4) would have the effect of extinguishing the interest of the rightful owner of the money and as King, from whose possession the money had been taken, claimed to be the rightful owner, he was entitled under the principles of natural justice to an **[12]** adequate opportunity of being heard: The *Commissioner of Police v Tanos* [1958] HCA 6; (1958) 98 CLR 383 at 395-6; [1958] ALR (CN) 1057.

In the circumstances he should have been given adequate notice of the hearing. Neither the *Summary Offences Act*, nor any other legislation prescribes who is to be given notice of such an application and it is for the Court in an individual case to ensure that adequate notice is given. See the passage in the judgment of Barwick CJ in *Twist v Randwick Municipal Council* [1976] HCA 58; [1976] 136 CLR 106 at 109-110; (1976) 12 ALR 379; (1976) 51 ALJR 193; (1976) 36 LGRA 443 which was cited with approval by Aickin J (with whom Stephen and Mason JJ agreed) in *Heatley v Tasmanian Racing and Gaming Commission* [1977] HCA 39; [1977] 137 CLR 487 at 498-9; (1977) 14 ALR 519; (1977) 51 ALJR 703. What is in practice required to comply with the principles of natural justice depends on all the circumstances of a particular case. *R v The Commonwealth Conciliation and Arbitration Commission; ex parte The Angliss Group* [1969] HCA 10; [1969] 127 CLR 546 at 552; 43 ALJR 150; *Wisemin v Bornemin* [1971] AC 297; [1971] 3 All ER 275. The notice which a court should insist on being given will depend on the circumstances of each particular case; *re Allen (deceased)* [1982] VicRp 42; [1982] VR 429 at 431-2. Sometimes it will be obvious that the person or persons who have made claim to ownership are the only persons with a claim. In other cases steps may need to be taken to give those with a claim to rightful ownership a reasonable prospect of knowing that an application has been made and an adequate opportunity of being heard. There may be cases where the only practical way of doing this is by way of advertisement or the like. It will all depend on what, in all the circumstances, is fair and reasonable. **[13]** The Court which is to hear the application is in a position to insist that the applicant take such steps as it directs to comply with the principles of natural justice before it hears the application.

It was not argued for the respondent, Rowlings, before me, although it was argued before the Magistrate who heard the application for rehearing, that s152 of the *Magistrates (Summary Proceedings) Act* 1975 did not empower the Magistrate to order a rehearing. However, there would be no point in my returning the application to the Magistrates' Court unless that Court has power to order a rehearing. Section 152 provides:

> "Where a conviction or order is made by a Magistrates' Court or by a justice or justices not sitting as a Magistrates' Court when one party does not appear, the party who does not appear may subject to and in accordance with the provisions of this Part apply to the Court or, in the case of a conviction or order by a justice or justices not sitting as a Magistrates' Court, the Court in which the conviction or order is recorded for an order that the conviction or order be set aside and that the information or complaint on which it was made be reheard."

The argument was first, that only an information or complaint could be ordered to be reheard under s152 and the application under s33(4) was neither of these, and secondly, that King was not a party to the application for the order for payment into the Consolidated Revenue and only a party could obtain a rehearing. Section 152 gives a party who did not appear a right to make the application and sub-ss (2) and (3) of s154 give the Court power to set aside the conviction or order and to conduct a rehearing. Under the definition of "Order" in s3(1) it includes the grant or refusal of any application. I think that the dominant objective of s152 **[14]** is to give a party who did not appear when a conviction or order was made the right to apply to have it set aside. The rehearing is consequential to such a setting aside. The section does not limit the right to apply to those cases where a conviction or order has been made on an information or complaint. It gives the right in respect of any conviction or order. The reference to information or complaint is made when the sections deal with the rehearing. Reference is made to the rehearing of the information or complaint on which the order was made. I regard that as merely a way of referring to the proceedings on which the order was made, whatever they were.

When it refers comprehensively to all the procedures on which orders may be made, the *Magistrates (Summary Proceedings) Act* sometimes uses the word "application" (e.g. in the first part of the definition of "Order" in s3(1)) sometimes refers to informations, complaints and applications (e.g. at the end of the definition of "Order", and in s76) and sometimes refers to informations and complaints (e.g. in ss8(3) and 8(4) and 97(a)). It would be only a sterile and automatic construction which would limit the provisions in ss8(3) and 8(4) for subpoenaing witnesses and the provision in s97(a) and (b) for the award of costs as not applying, where the procedure is not in a strict sense, an information or complaint. It is to be noted that by the definition in s3(1) "Defendant" includes respondent and any person opposing an application or duly served with notice of an application.

[15] The other question raised at the application for rehearing, but not raised before me, is whether King was a party to the application for the order for payment into the Consolidated Fund who did not appear. In my opinion, he was. On the printed form filed with the Court by which Rowlings applied for that order, Rowlings was named as informant and King as defendant. If the descriptions "Informant" and "Defendant" were not the appropriate ones that was merely a technical defect and not one which would affect the fact that King was named as a party (see s157 of the *Magistrates (Summary Proceedings) Act*). Further, King was a person with an interest in opposing the application, who in the circumstances was clearly entitled to be there (cf. *Burke v Copper* [1962] 2 All ER 14; [1962] 1 WLR 700 at 703-704). I do not consider that the fact that King was not given notice of the application deprived him of his standing as a party (cf. *In re B., An Infant* [1958] 1 QB 12 at 16-17; [1957] 3 All ER 193).

Accordingly, I have concluded that the Magistrate was wrong in holding that the applicant, King, had no standing to apply under s152 of the *Magistrates (Summary Proceedings) Act* for an order to set aside the order made in his absence on 10 April 1984 and to order that the application be reheard. It was submitted to me on behalf of King that if I decided that a ground of the order to review had been established I should make orders which would have the effect of determining the outcome of both the application for rehearing and the application for the payment of the money into the Consolidated Fund. It was submitted that I had power under the *Magistrates' Courts Act* 1971 s93 to **[16]** make such orders. I do not need to consider whether I have the power because in any event, I do not regard it as appropriate to do more than set aside the order striking out the application for rehearing and direct that that application be heard according to law.