30/77

SUPREME COURT OF VICTORIA

APEX HOSPITALS & MANAGEMENT PTY LTD v DEAN

Murray J

15 February 1977

PRACTICE AND PROCEDURE – APPLICATION TO MAGISTRATE IN COURT TO PROVE A MATTER BY AFFIDAVIT – APPLICATION REFUSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – PROOFS FOR LEAVE TO PROCEED ORDERING JURISDICTION NOT TO BE MADE BY AFFIDAVIT – DOCTRINE OF INCONSISTENCY – WHETHER COMMONWEALTH ACT COVERS THE FIELD: *SERVICE AND EXECUTION OF PROCESS ACT* 1901-1973, S11.

HELD: Order nisi discharged.
1. In relation to the submission that the provisions of s11 of the *Service and Execution of Process Act* have the effect of making any state provisions which would prevent proof of the matters required to be proved under s11 by affidavit inoperative as being inconsistent with the provisions of s11, before any such conclusion can be made, one must be satisfied that s11 is intended to cover the field or, to put the doctrine of inconsistency into a more modern terminology, is intended to be the only law on the subject.

2. On perusal of the Act generally, and certainly of s11, no impression in given that it is intended to be the only law on the subject. One could, however, properly spell out from the provisions of s11 that an application for leave to proceed may be made *ex parte*. Consequently a state law which required any application for leave to proceed to be made on summons might well be held to be inconsistent with the provision of s11; but all s11 talks about is that it is necessary for the complainant or the plaintiff to make certain matters appear to the court and the magistrate was quite right in then passing to the provisions of state law to operate in controlling and governing the method in which a matter is made to appear to the court.

3. The Magistrate having considered the matter, applied the ordinary rule, namely that in the absence of some special statutory provision or some special provision under the Rules, he was not able to accept proof by affidavit. For these reasons the Magistrate was quite right, and the order nisi was discharged.

MURRAY J: The first matter which I must consider in this Order to Review is whether the Master had any power to grant the order nisi. Mr Sundberg, without arguing the matter, was good enough to direct my attention to the provisions of s96 of the *Magistrates' Court Act* which, at first sight, suggests that its provisions would apply to a case such as this. However, in the brief time I have had to look at the authorities on s96, it appears to me to be fairly clear that s96 is intended to be used where a justice refuses to exercise the duties of his office and therefore refuses to enter upon a matter.

In the present case, the magistrate in fact did enter upon the matter, heard argument, received written submissions and made an order whereby he rightly or wrongly refused to admit evidence in a certain form and adjourned the matter *sine die*. Under those circumstances it appears to me that the correct procedure would be under s88, by way of Order to Review.

However, I am by no means satisfied that the form of the order nisi complies with the intention of s88. Section 88 in terms appears to me to relate to orders *inter partes*, and provides that an order may be issued calling

> 'on the informant, complainant, defendant or other party interested in maintaining the conviction, order or warrant (as the case may be), and also, if the judge thinks fit, calling upon the members of the Magistrates' Court or upon the justice or clerk to show cause why the conviction order or warrant should not be reviewed'.

The word 'also' gives me the impression that what is intended is that there may be certain

circumstances in which one party obtains an order nisi directed to the other part and because of particular circumstances the order nisi is also directed to members of the court or upon a justice or a clerk.

The order nisi in the present case is plainly directed at the magistrate. No doubt this was because the proceedings were *ex parte* and it might have been thought inappropriate to direct the order against the defendant. But nevertheless I feel considerable doubt as to whether the order nisi complies with the provisions of s88. However, in the outcome, it does not matter because in my opinion the order nisi must be discharged.

It has been argued that the provisions of s11 of the *Service and Execution of Process Act* have the effect of making any state provisions which would prevent proof of the matters required to be proved under s11 by affidavit inoperative as being inconsistent with the provisions of s11. Before I could come to any such conclusion I must be satisfied that s11 is intended to cover the field or, to put the doctrine of inconsistency into a more modern terminology, is intended to be the only law on the subject.

On perusal of the Act generally, and certainly of s11, it gives me no impression at all that it is intended to be the only law on the subject. One could, however, in my opinion, properly spell out from the provisions of s11 that an application for leave to proceed may be made *ex parte*. Consequently a state law which required any application for leave to proceed to be made on summons might well be held to be inconsistent with the provision of s11; but all s11 talks about is that it is necessary for the complainant or the plaintiff to make certain matters appear to the court and in my opinion the magistrate was quite right in then passing to the provisions of state law to operate in controlling and governing the method in which a matter is made to appear to the court.

I therefore reject any argument arising from the doctrine of inconsistency under the provisions of s109 of the *Constitution*.

There being no specific provision in the *Justices Act*, the relevant provisions appear to be in the rules made under the Act and it is significant that Rule 79 expressly provides that —

> 'Except where otherwise provided by any Act or by these Rules, the evidence of witnesses shall be taken orally on oath in accordance with the usual practice on the hearing of ordinary complaints in courts of petty sessions'.

In my opinion, s79(1) is plainly in terms limited to the special jurisdiction but it contains an implicit recognition of the fact that the ordinary common law principles of evidence being given orally and upon oath in the absence of special provisions, usually apply in courts of petty sessions — or Magistrates' Courts, as they now are.

If one then turns to the provisions of the Rules relating to proceedings in chambers, namely Rules 111 to 116, one does find references to the use of affidavits. However, Chapter 3, in which those rules appear, is limited to the special jurisdiction unless the context or subject matter otherwise requires.

In the Magistrate's reasons, he referred to the fact that there is no history of proceedings in chambers in the ordinary jurisdiction of Magistrates' Courts, and the words 'unless the context or subject matter otherwise requires' appear to me to involve that unless one can show affirmatively that a rule must be intended to apply to the ordinary jurisdiction, one can get no help from the rules, which are terms limited in application to the special jurisdiction. At the outset, therefore, I do not see how the applicant in this case can gain any assistance from Rules 111 to 116, but even in relation to those Rules, if those Rules do require to be applied to the ordinary jurisdiction, it appears to me that the use of affidavits as contemplated in those Rules, are affidavits in support of summonses and affidavits which must be served upon the other side.

I do not agree that a state law, which permits proof by affidavit but only on terms that the affidavit shall be served on the other side, would be inconsistent with the *Service and Execution of Process Act*. It appears to me that the Commonwealth law requires that applications for leave to proceed may be made *ex parte*, but it would not be inconsistent with that law if the state law says, 'By all

means make it *ex parte*, but support the application by evidence on oath or alternatively, if you wish to use an affidavit, show that a copy of that affidavit has been served'.

In this case oddly enough there appears to have been no formal application to the Magistrate to treat the matter as in Chambers. There was no application that the Magistrate should otherwise direct under Rule 113, and no application for an order by him dispensing, if he has any power of dispensation, with the provisions of Rule 116. In those circumstances it appears to me that divorced from all the complications which have been involved in this argument, the Magistrate was faced, contrary to the practice which to his knowledge had been followed for some 25 years, with an application to prove a matter by affidavit. He was faced with this application when he was sitting in court, and there was no suggestion that the matter was a chamber matter. There was a suggestion that it was an *ex parte* matter. As I have already pointed out, I do not think that answers the problem.

The Magistrate then, in my opinion, having considered the matter, applied the ordinary rule, namely that in the absence of some special statutory provision or some special provision under the Rules, he was not able to accept proof by affidavit. For these reasons, in my opinion, the Magistrate was quite right, and the order nisi will be discharged.

My mind has wavered considerably on the question of what order for costs I should make. On the one hand, if the applicant had been successful, he could not have obtained an order that the Magistrate pay his costs; but no doubt some consideration should be given in thinking about that to the to the fact that under s88 this order nisi to review should, in my opinion, have been directed to the defendant and not to the Magistrate.

Another consideration which I take into account in that there was no necessity for the Magistrate to appear. In fact in the great majority of orders to review the Magistrate, whose decision is called into question, does not even think it appropriate to file an affidavit and leaves it to the parties to argue the matter out. In this particular case a special invitation was extended to the Magistrate by way of an order nisi directed against him, and my mind has wavered on that basis between ordering the applicant to pay costs and taking the other view that this was a case in which the applicant could not have succeeded in obtaining costs and fairness might require that I make no order for costs. In the end, and not without a considerable amount of doubt, I have come to the conclusion that in the particular circumstances of this case justice will be done if I make no order for costs. Accordingly the order nisi will be discharged with no order for costs."
