43/85

SUPREME COURT OF VICTORIA

FLANAGAN v PITT

Fullagar J

22 August 1985 — [1986] VicRp 12; [1986] VR 112

PROCEDURE – BREACH OF CONDITION OF RECOGNIZANCE – EFFECT OF – PROCEDURE TO BE FOLLOWED BY COURT – WHETHER AMOUNT FORFEITED A "DUTY": *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S80; *MAGISTRATES' COURTS ACT* 1971, S51(2); *CROWN PROCEEDINGS ACT* 1958, S5.

Section 5(1) of the *Crown Proceedings Act* 1958 is mandatory upon all Courts. Where a Court is satisfied that a defendant has failed to observe a condition of a recognizance to Her Majesty, the Court is bound to declare the recognizance to be forfeited and to order the amount to be paid to the clerk of the court forthwith or within such time as the court allows, and bound to order that in default of payment, the defendant be imprisoned for a term not exceeding two years.

FULLAGAR J: **[1]** This is the return of an order to review the decision of a stipendiary magistrate given on 14th October 1983 at Camberwell whereby the defendant/applicant was found in breach of his own recognizance, and the recognizance was forfeited, and it was ordered that in default of payment by 16th December 1983 of the sum of $400 payable thereunder the defendant/applicant be imprisoned for eight days.

On 7th May 1982 the applicant committed two offences at Surrey Hills, one of possessing Indian Hemp and one of smoking Indian Hemp. On 1st October 1982 informations charging these offences came on for hearing before the Magistrates' Court at Camberwell and it is sufficient to say that the Court was constituted by Magistrate A, because it is a relevant fact that various court hearings relevant to this order to review took place before different magistrates. The Court found the offences proved, and exercised its powers under section 80 of the **[2]** *Magistrates (Summary Proceedings) Act* 1975, which I shall call the MSP Act. The Court adjourned the further hearing of the informations to the Magistrates' Court at Camberwell on 30 September 1983, and allowed the applicant to go at large upon his entering into a recognizance, for $400 without surety, conditioned for his appearance at that Court "on the 30th day of September 1983 at 10 a.m. if required", and for his good behaviour in the meantime, and further conditioned that he pay $400 to the Poor Box within one month.

It may perhaps be doubted whether such a recognizance is "conditioned for his appearance at the time and place so fixed", within the meaning of section 80(1) of the MSP Act as it stood in October 1982, because the words "if required" seem to destroy that which would otherwise be the condition at the time of its creation, but the point does not arise, because it does not fall within the grounds taken in the order nisi to review and I have refused to allow it to be taken by amendment of the grounds. The applicant complied with all the conditions of the recognizance up until the last few days of its duration, but on 27th September 1983 he was convicted at the Magistrates' Court at Prahran, constituted by Magistrate B, of three new offences, of smoking Indian Hemp and self-administering heroin and driving a motor car whilst unlicensed. As soon as these convictions were pronounced the sum of $400 became owing by the applicant to Her Majesty by force of the recognizance itself, and the relevance of this consequence appears later. In my opinion the sum became *debitum in praesenti* and could be sued for by the Crown, subject to statute law.

[3] On 30th September 1983 the original informations which had been adjourned on 1st October 1982 came on for hearing at the Magistrates' Court at Camberwell constituted by Magistrate C. It seems a proper inference from the material before the Supreme Court that on 30th September 1983 someone appeared for the informant but that no-one appeared for the defendant/applicant. Magistrate C then further adjourned the hearing of the original informations to the

Camberwell Court on 14th October 1983. On 3rd October 1983 there was sworn and issued an information on oath which deposed that there had been a breach of the recognizance by reason of the convictions of the applicant for the second lot of offences at Prahran Magistrates' Court on 27th September 1983. This information had attached thereto a summons by which the applicant was summoned to appear on 14th October 1983 at 10 a.m. at the Camberwell Magistrates' Court "to answer the said information" (i.e. the said information on oath) "and be further dealt with according to law". The applicant swears that this is the information and summons which was served upon him, "and which brought me before the Court on 14th October 1983".

Mr Harrison of Counsel appeared on that day for the applicant, and appeared for him before me on these proceedings. Before the Magistrate, again Magistrate C, he said that he and his client appeared under protest, and contended that the Justice had had no power to issue the summons portion of the information and summons of 3rd October 1983, because no information on oath was prepared before 30th September 1983 – see the opening words of section 80(3) of the MSP Act.

The next step of the argument was that, within the meaning of section 80(4), the **[4]** Magistrates' Court at Camberwell was not the "Magistrates' Court before which a person is summoned or brought under sub-section (3)", and therefore the Court had no jurisdiction under section 80(4) either to declare the recognizance forfeited or to hear and determine the original informations for the offences of 7th May 1982. Counsel contended that, as there was no information on oath until after 30th September 1983, "the proceedings were a nullity and (the applicant) was not properly brought before the Court". He contended that the Court "had no jurisdiction to proceed".

The Magistrate ruled that he did have power to hear and determine both an application for forfeiture of the amount of the recognizance and the further hearing of the original informations. He said that section 80 was "only one method of disposing of the matter", and that he had required the applicant's attendance. Applicant's counsel conceded that the Magistrate had power to require such attendance but maintained there was no power to make the orders sought. These submissions were overruled. The prosecution then adduced evidence of the original adjournment and of the recognizance being entered into and of the convictions at Prahran on the second lot of informations. The Magistrate announced he would forfeit the amount of the recognizance, and then said he would rehear the informations – applicant's counsel then pleaded not guilty to smoking Indian Hemp and guilty to possessing Indian Hemp, and the former charge was withdrawn. The admissions earlier made were proved. The Magistrate said he found the latter charge proved. The Magistrate then made formal orders as follows -

> **[5]** "I find the defendant is in breach of his bond by reason of conviction and I order same to be forfeited and in default of payment of the sum of $400 payable thereunder by 16/12/83 he is to be imprisoned for 8 days. Order that charges herein be heard herein *de novo*. Convicted and fined thirty dollars in default to be imprisoned for one day."

See Exhibit C to the affidavit of the applicant sworn 4th November 1983. The applicant has obtained this order nisi to review that decision on 14th October 1983 of Magistrate C, upon the following grounds -

> "(a) There was no information before the said Magistrates' Court that the Applicant had failed to observe any of the conditions of the said recognizance and laid prior to the 30th day of September 1983 or at any time.
>
> (b) The Applicant was not before the said Magistrates' Court pursuant to any Summons or Warrant issued pursuant to Section 80(3) of the *Magistrates (Summary Proceedings) Act* 1975.
>
> (c) On the 14th day of October 1983 the said Magistrates' Court was without jurisdiction to declare the said recognizance of the Applicant to be forfeited."

In ground (a), the words "laid prior to" qualify "information". It is in my opinion quite clear that the Magistrate on 14th October 1983 had no jurisdiction under section 80(4) of the MSP Act to declare the recognizance forfeited, but in my opinion Mr Golombek of Counsel for the respondent is right in his contention that the Magistrate had jurisdiction to do this under section 5(1) of the

Crown Proceedings Act 1958. Section 5(1) is mandatory upon all courts, and it expressly mentions the Magistrates' Court. In the present case Magistrate C on 14th October 1983 constituted a court, and he was satisfied that the applicant had failed to observe a condition of a recognizance to **[6]** Her Majesty. He was therefore bound to declare the recognizance to be forfeited, and to order that the amount be paid to the clerk of the court forthwith or within such time as the court allowed, and bound to order that in default of payment as aforesaid the applicant be imprisoned for a term (not exceeding two years) fixed by the order. Since the commencement of the *Interpretation of Legislation Act* 1984 there could be no doubt that the duty was mandatory, and in my opinion it would be construed as a mandatory duty even in the absence of the latter statute.

Mr Harrison contended that the Magistrate purported to act under section 80 of the MSP Act and that he was therefore bound by the limits of that power. I reject that submission. The Magistrate's order may be justified under any head of power, and section 5 of the *Crown Proceedings Act* was mandatory, imposing upon him a duty. Moreover, I do not accept that the Magistrate "purported to act under section 80" of the MSP Act; he ordered imprisonment in default of payment, and Mr Harrison could point to no head of power in section 80 of the MSP Act to order that. Mr Harrison contended that section 51(2)(a) of the *Magistrates' Courts Act* 1971 excluded from the Magistrates' Court all jurisdiction to declare the recognizance forfeited. But this argument should be rejected because the amount owing on the recognizance was not a duty taken to Her Majesty within the meaning of section 51(2)(a).

I think the word "duty" in that provision means some duty which is exacted by the Crown from the subject in the same way as a tax is, and that the word duty does not include a merely contractual debt or a mere specialty debt. The word duty would, of course, include a stamp duty and gift duty and **[7]** death duty and succession duty and (subject however to the federal constitution) an excise duty and a customs duty. But I am clearly of opinion that none of the proceedings before the Magistrate on 14th October 1983 related to the taking to Her Majesty of any duty within the meaning of section 51(2)(a) of the *Magistrates' Courts Act*.

Mr Harrison contended that the order of 14th October was not in the prescribed form as required by section 5(2) of the *Crown Proceedings Act*. But this ground is outside the grounds of the order nisi to review. Mr Harrison contended that, as the information on oath alleging breach of the recognizance was not authorised by any provision of the MSP Act, the summons to attend attached to it was a nullity, and therefore the applicant should be treated as not properly before the Court. In my opinion this argument should be rejected even if it falls within the grounds of the order nisi, which I doubt. The applicant was there in Court, and the recognizance and its breach were clearly proved in his presence, and on the facts proved and found the Court was under a mandatory duty to declare the forfeiture and to order the payment and to order imprisonment in default.

Mr Harrison did not seek to amend the grounds of the order nisi to allege a denial of natural justice in that the applicant was given no opportunity to appreciate that section 5 of the *Crown Proceedings Act* was relied on, and thus no opportunity of directing his attention to the question of the sub-section's application on the facts as a matter of law. But if he had sought such an amendment, and even if I had then allowed such a ground to be taken, still it would appear quite clear that on the admitted facts the Magistrate not merely had jurisdiction to make **[8]** the orders but was bound to do so, that is to say, he had no option but to make the order on the admitted facts whatever the applicant or his counsel might contend.

For these reasons the order nisi should be discharged. Subject to any submissions as to form the orders will be in accordance with the following minutes –

(1) Order nisi discharged.

(2) Order that the costs of the respondent of this application be taxed and when so taxed be paid by the applicant.

Solicitors for the defendant: Robert C Taylor and Son.
Solicitor for the informant: R J Lambert, Crown Solicitor.
