09/71

SUPREME COURT OF VICTORIA

NISBET v KLAASEN

Nelson J

19 March 1971

PRACTICE AND PROCEDURE – DEFENDANT CHARGED WITH USING INSULTING WORDS IN A MAGISTRATES' COURT – PLEA OF GUILTY ENTERED – MAGISTRATE EXPRESSED SOME DOUBTS WHETHER THE MAGISTRATES' COURT WAS A PUBLIC PLACE – CASE ADJOURNED AND LISTED BEFORE ANOTHER MAGISTRATE – CHARGE DISMISSED ON THE GROUND THAT THE CONDUCT CONSTITUTED CONTEMPT OF COURT – WHETHER CONDUCT CONSTITUTING CONTEMPT OF COURT PRECLUDES PROCEEDINGS BEING TAKEN UNDER ANY OTHER ACT – WHETHER MAGISTRATE IN ERROR: *ACTS INTERPRETATION ACT* 1958, S28; *SUMMARY OFFENCES ACT* 1966, S17(1)(d); *JUSTICES ACT* 1958, SS92, 211, 212.

HELD: Order nisi absolute. Information remitted to the Magistrates' Court for rehearing.

1. The fact that conduct constitutes a contempt of Court does not preclude proceedings being taken against the offender under any other Act, if the conduct also constitutes a breach of that Act. Section 28 of the *Acts Interpretation Act* 1958, provides that where an Act or omission constitutes an offence under two or more Acts, the offender shall unless the contrary intention appears be liable to be prosecuted and punished under either or any of those Acts but shall not be liable to be punished twice for the same offence.

2. It is clear that no such contrary intention appeared in the *Summary Offences Act*, nor could any such contrary intention be discovered as appearing in ss211 or 212 of the *Justices Act* 1958. The fact that the Court had the right to accept an apology and remit any penalty for an offence under s211 did not indicate a legislative intention that conduct which constituted an offence both under that section and also under some other law should be punishable only under s211. It related only to the powers of the Court to deal with the offence created by that section, namely, contempt of court.

3. When in a Magistrates' Court a plea is taken but before evidence has been entered into the matter is adjourned to a later date and the parties then proceed with the matter *de novo* before a Court which is differently constituted and a complete hearing takes place before that Court, the subsequent Court has jurisdiction to hear the matter, and any order made following the hearing is a proper exercise of its jurisdiction.

4. In this case the defendant appeared on the second occasion, and pleaded to the information, and his counsel took part in the proceedings from the beginning to end. Even if his counsel were necessary for a differently constituted Court to hear the matter, there was no doubt that the defendant was consenting to the course which was adopted on that occasion.

5. Even if the mere taking of a plea without the commencement of evidence could in any circumstances be said to be a commencement of the hearing, so that any adjournment thereafter was during and not before the hearing, the course adopted in this case was recognised by s92 of the *Justices Act* as a proper course and there was no irregularity in the proceedings.

NELSON J: This is an order to review a decision of the Magistrates' Court at Geelong given on 29 September 1970. The Court was constituted by a Stipendiary Magistrate. An information was laid by the informant against the defendant for an offence under s17(1)(c) of the *Summary Offences Act* 1966, alleging that he had used insulting words in a public place, to wit the Magistrates' Court. After hearing arguments the Magistrate adjourned the matter for seven days and on the resumption of the Court dismissed the information.

It was not contested in the proceedings before the Magistrate and it was not contested before me, that the defendant had in fact used words which would constitute insulting words within the meaning of the Act in the Magistrates' Court at Geelong, and although it was argued before the Magistrate that the Magistrates' Court did not constitute a public place within the

meaning of the Act, the Magistrate decided that it did, and that decision of the Magistrate is also not contested before me.

The Magistrate, however, dismissed the information on the ground that the conduct which was the subject of the charge constituted wilful misbehaviour within the meaning of s211 of the *Justices Act*, and consequently constituted contempt of Court. He took the view that in that section and in the following section s212, which provided that an apology could be accepted for the misconduct and the penalty or punishment could be remitted in whole or in part, the legislature as he expressed it had recognised that during Court proceedings members of the public tend to become emotional and say and do things which under normal circumstances they would not say or do. He went on to say,

> "It is regarded preferable that they should be dealt with there and then by the tribunal for the offence that they have committed, namely, contempt of court, and further, that they should be given an opportunity of tendering an apology. It is obvious that if proceeded against under the *Summary Offences Act,* they would lose the right of apologising to the Court and the Court the right of accepting an apology and remitting the penalty. It is my decision then that since it is a specific offence to misbehave before a Magistrates' Court, such conduct does not constitute the offence of using insulting words in a public place within the meaning of section 17 of the *Summary Offences Act*".

This view of the effect of ss211 and 212 of the *Justices Act* upon an offence committed under s17 of the *Summary Offences Act* was valiantly supported before me by Mr Rolfe, but in my opinion the Magistrate was in error in taking that view.

The fact that conduct constitutes a contempt of Court does not, in my opinion, preclude proceedings being taken against the offender under any other Act, if the conduct also constitutes a breach of that Act. Section 28 of the *Acts Interpretation Act* 1958, provides that where an Act or omission constitutes an offence under two or more Acts, the offender shall unless the contrary intention appears be liable to be prosecuted and punished under either or any of those Acts but shall not be liable to be punished twice for the same offence. It is clear that no such contrary intention appears in the *Summary Offences Act*, nor can I discover any such contrary intention appearing in ss211 or 212 of the *Justices Act* 1958. The fact that the Court has the right to accept an apology and remit any penalty for an offence under s211 does not indicate a legislative intention that conduct which constitutes an offence both under that section and also under some other law should be punishable only under s211. It relates only to the powers of the Court to deal with the offence created by that section, namely, contempt of court.

That would suffice to dispose of this matter were it not for another interesting argument which was raised by Mr Rolfe and which would not benefit his client by supporting the present order which was made by the Court, but which, if it were sound, would affect the form of order I should make. The argument advanced by Mr Rolfe was that the Stipendiary Magistrate who heard this matter on 29 September had no jurisdiction to hear it.

The material before me shows that the information first came before the Court then constituted by Mr Thompson SM on 15 September, and that on that occasion the defendant appeared and pleaded guilty, but immediately after his plea the Magistrate inquired of the prosecutor if he wanted to proceed with the information and was told by the prosecutor that he did, and the Magistrate then said that he had some doubts as to whether the Magistrates' Court was a public place within the meaning of the Act. At that stage the prosecutor requested and was granted an adjournment of the matter for seven days. On 22 September, the Court was constituted by Mr Gude SM and the matter was commenced *de novo*, The defendant appeared and pleaded, the evidence was heard at length, and at the completion of the evidence and of argument the Magistrate reserved his decision.

Mr Rolfe's argument was that at the first hearing Mr Thompson was seized of the case and that any adjourned hearing had to be heard by him, and that the Court when differently constituted on the date to which the matter was adjourned had no jurisdiction to hear it. This, as I have said, is an interesting point, but I am satisfied that it is an unsound point. I am satisfied that when in a Magistrates' Court a plea is taken but before evidence has been entered into the matter is adjourned to a later date and the parties then proceed with the matter *de novo* before a Court which is differently constituted and a complete hearing takes place before that Court, the subsequent Court has jurisdiction to hear the matter, and any order made following the hearing is a proper exercise of its jurisdiction. In this case the defendant appeared on the second occasion,

and pleaded to the information, and his counsel took part in the proceedings from the beginning to end.

Even if his counsel were necessary for a differently constituted Court to hear the matter, and I do not think it was, there is no doubt that the defendant was consenting to the course which was adopted on that occasion. Section 92 of the *Justices Act* 1958 provides for rules to be observed in respect to adjournment of the proceedings in a Court. Sub-section (2) provides that either before or during the hearing of an information the Justices present in their discretion may adjourn the hearing to an appointed time and place. The section however thereafter only purports to deal with what should happen on the adjourned hearing in the event of either or both of the parties who had appeared in the matter not appearing on the adjourned hearing. That matter is dealt with in sub-section (3). But in setting out the procedure to apply in the event of one or both of the parties not then being present, the sub-section says that "the Court or Justices then and there present may proceed to such hearing or further hearing as if such party or parties were present".

Then in exemplification of what may be done on the assumption that such party or parties were present it goes on to say, "that is to say, if the Justices then and there present include any justice before whom the hearing up to the time of the adjournment did not take place, such justice shall withdraw, or the justices then and there present may proceed with the hearing as if the hearing had not been commenced". The sub-section therefore, although it is specifically dealing with the procedure in the case of one party or the other not appearing on the adjournment, sets out the procedure which is to be adopted if both parties do appear.

In this case the Court as it was then constituted did proceed with the hearing as if the hearing had not been commenced, and in doing so, it was accepting a course which the sub-section in terms described as applicable in the case when both parties appear upon the adjourned hearing. Even if the mere taking of a plea without the commencement of evidence could in any circumstances be said to be a commencement of the hearing, so that any adjournment thereafter was during and not before the hearing, (a matter upon which it is unnecessary for me to express any opinion) the course adopted in this case was recognised by s92 of the *Justices Act* as a proper course and there was no irregularity in the proceedings.

The order nisi will be made absolute and the order of the Court dismissing the information will be set aside. The information will be remitted to the Magistrates' Court for hearing in the light of my reasons for judgment. The defendant is to pay the informant's costs of the order to review to be taxed but not to exceed the statutory limit. There will be a certificate to defendant under the *Appeal Costs Fund Act* in relation to such costs and as to his own costs of this Order to review.

APPEARANCES: For the informant/applicant Nisbet: Mr D Bennett, counsel. John Downey, State Crown Solicitor. For the defendant/respondent Klaasen: Mr BV Rolfe, counsel. Ainsworth & Co, solicitors.
