34/84

SUPREME COURT OF VICTORIA

PUGH v UNGER

Crockett J

11 May 1984

INCOME TAX – RETURN OF INCOME NOT PROVIDED – INFORMATION REQUESTED BY DEPUTY COMMISSIONER OF TAXATION - INFORMATION NOT SUPPLIED – INFORMATIONS ISSUED – WHO CAN LAY INFORMATIONS – EFFECT OF AVERMENTS IN INFORMATIONS – PRESUMPTION OF REGULARITY – WHETHER INSPECTOR IMMUNE FROM ANSWERING QUESTIONS: *INCOME TAX ASSESSMENT ACT* 1936, SS16(3), 244(1); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S5(1).

For the 3 years ending 30 June 1982, P. had not provided a return of income, and for the 4 successive years prior to 1979-80, U, the Deputy Commissioner of Taxation served on P. an assets betterment statement which, in, effect, attributed to P. a notional taxable income. In respect of these matters, U. required P. to provide certain information within a time stipulated; however, P. failed to comply with the requirement and he was subsequently charged with failing to provide that information and 3 counts of failing to provide returns of income. The informations were issued in U.'s name as informant but were signed by a person purporting to be an officer of the Australian Taxation Office, and allegedly authorised by U. to lay the informations. At the hearing, U. relied upon the averments of facts within the informations, following which P. submitted that there was no case to answer. He was put to his election and decided to call evidence from an inspector of the Australian Taxation Office who, when sworn, sought immunity from answering questions pursuant to s16(3) of the *Income Tax Assessment Act* ("Act"). The magistrate upheld the officer's claim and subsequently convicted P. and imposed a penalty in each case. Upon orders nisi to review—

HELD: Orders discharged save for the substitution of fresh periods within which P. was ordered to comply with the relevant requirements.
(1) The departure from the requirement of s5(1) of the *Magistrates (Summary Proceedings) Act* 1975 that an information be signed by the informant is permitted by the deeming provision in s244(1) of the Act.

(2) The presumption of regularity may be called in aid to presume that the officer who signed the informations was an officer properly appointed and acting lawfully in accordance with the requirements of his office.

(3) The inspector was not required to answer the questions put to him because they were either irrelevant or sought to obtain information which had already been proved or was provable from other sources.

(4) Whilst the ultimate burden of establishing the offences was on the informant, the averments cast an evidentiary burden upon the defendant to produce sufficient evidence whereby it could be said that the burden had been discharged.

(5) On the evidence as it stood, it was not possible for the magistrate to have come to any conclusion other than he did.

CROCKETT J: *[After setting out the facts and aspects of the orders nisi His Honour continued]:* … **[4]** The first ground is that the information was invalid because it was not signed by the informant as required by s5(1) of the *Magistrates (Summary Proceedings) Act* 1975. That section provides that, in the absence of some other statutory provision permitting some different course to be adopted, an information is to be signed by the informant. In the present case, the informations read:

> The information of Eric John Unger, Deputy Commissioner of Taxation of 350 Collins Street, **[5]** Melbourne, in the State of Victoria by the undersigned, an officer of the Australian Taxation Office, stationed at 350 Collins Street, Melbourne, as aforesaid, the person authorised by the said Deputy Commissioner of Taxation to lay this information in his name … " etc.

The informant is thus the Deputy Commissioner, Eric John Unger. He is not the person who has signed the informations. They were signed by a person purporting to be P Hartigan and who, each information alleges, is the person authorised by the Deputy Commissioner to lay

the information on his behalf. This departure from the requirements of s5(1) of the *Magistrates (Summary Proceedings) Act* 1975, is said by the respondent to be permitted by s244(1) of the *Income Tax Assessment Act* which states that, where any taxation prosecution has been instituted by an officer in the name of the Commissioner or a Deputy Commissioner, the prosecution shall, unless the contrary is proved, be deemed to have been instituted by the authority or the Commissioner of the Deputy Commissioner as the case may be. Accordingly, if, as it was conceded they were, the proceedings with which I am concerned were taxation prosecutions, then it would appear that the right of Hartigan to lay the information on behalf of Unger, the informant, is permitted by the deeming provision to be found in sub-s(1) of s244 of the Act and the ground, therefore, must be held not to have been made out.

However, late in his argument, applicant's counsel contended that s244 has not authorised a deeming that a person said to be an officer is in fact an officer of the Australian Taxation Office. Also, it was said that in the **[6]** circumstances there was no justification for deeming that Eric John Unger was the Deputy Commissioner of Taxation, or that the person said to be "the undersigned", namely P Hartigan, was in fact P Hartigan or that P Hartigan was authorised by the Deputy Commissioner to lay the information. I think it is plain with respect to all but the first of those submissions that the amplitude of sub-s(1) of s244 is sufficient to allow the facts averred, to be found to be established by virtue of the deeming provision. However, whether the person said to be an officer is, in fact, established as being an officer of the Australian Taxation Office by virtue of the deeming provision may be another matter. In this connection, it was said by the applicant's counsel that there is a deficiency in the proof of each of the offences by failure to establish that a person said to be an officer of the Australian Taxation Office was, in fact, such an officer. On the face of it, it would appear that there is no ground in the order to review to accommodate such an argument. It was said, however, that the ground to which I have already referred is sufficiently wide to allow this contention to be relied upon.

It was said that in order for the respondent to show that s5(1) of the *Magistrates (Summary Proceedings) Act* 1975 does not have to be complied with, it is necessary to turn to s244(1) of the *Income Tax Assessment Act* and to apply the deeming provisions to be found there to the informations and, when that is done, it is seen that there is no provision deeming an officer purporting to be an officer of the Australian Taxation Office to be, in fact, such an officer. **[7]** On reflection I am disposed to think that there is something to be said for the view that an extended meaning should properly be given to the ground to permit this particular argument to be relied upon. Taking that view, it is unnecessary for me to consider whether I ought to accede to an application to amend the grounds to permit a specific ground to be added to those found in the order nisi in order to accommodate this particular argument.

Had it been necessary to consider that application, I think *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866, might have provided a considerable obstacle to the success of the application, notwithstanding the two later single instance judgments to which my attention was directed by the applicant's counsel. However, assuming that the argument may legitimately be considered on its merits I think that it is answered by the argument relied upon by the respondent. That is, that, in the circumstances, it is appropriate and permissible to call in aid the presumption of regularity. It is said that, where a person is acting in a public office, the presumption is that that person was properly appointed and acting lawfully in accordance with the requirements of his office.

The issue of the informations was an act of a person in a public office and, accordingly, if the presumption is applicable, then it will be sufficient to support the contention that it ought to be assumed that the person said to be an officer of the Australian Taxation Office, as appears in each information, is, in fact, such an officer. Accordingly, I find ground (a) in respect to all the arguments encompassed by it, to be not sustainable.

[8] Grounds (h) and (c), I think, may be looked at together. They read as follows:

> "(b) The Stipendiary Magistrate erred in law in not permitting counsel for the defendant to make a submission of no case to answer upon the closure of the case for the informant, without it being put to his election.
>
> (c) The Stipendiary Magistrate erred in law in ruling that this was a civil proceeding and that the standard of proof in criminal proceedings did not apply."

After submissions had been made to him and authorities cited, the Stipendiary Magistrate apparently ruled that the proceedings were in the nature of civil proceedings. On its face this would appear to be a startling conclusion. It was said, however, that there is authority to support such a view. But, having regard to the opinion I have formed in relation to these grounds, I find it unnecessary further to consider the matter. Accordingly, I expressly abstain from offering any opinion on the Magistrate's ruling.

The question of the classification of the nature of the proceeding arose by reason of two considerations. One was, of course, to determine the appropriate standard of proof. The other was in connection with the submission that there was no case for the applicant to answer. As I have indicated, upon counsel for the applicant's indicating his desire to make such a submission, he was told that he would be put to his election, whereupon counsel indicated that, as the proceeding was a criminal proceeding, he had a right as a matter of law then and there to make the submission and the court was without power to impose the obligation to exercise an option upon him. In the event, the Magistrate did require counsel to elect. Counsel thereupon determined that he would call evidence.

As I have already **[9]** said, it was at this point that he called the witness Hughes. However, regardless of whether counsel was put to his election or not, the only conclusion that was open to the Magistrate at the time counsel was insisting that he could make his submission without the consequence of being precluded from calling evidence if his submission was unsuccessful, was that there was an unanswerable case put before him in respect to all four informations. Furthermore, by being required to make his election at the time and in the circumstances then existing it could in no way be said that counsel had been disadvantaged. He did not call the defendant or the defendant's accountant or solicitor. Indeed, as I have already stated, he adduced no evidence other than that which came his way, as it were, by way of concession whilst he was attempting to elicit evidence from the witness, Hughes, from the respondent's counsel. Accordingly, even if the Magistrate were wrong in relation to the question of election no miscarriage has occurred by reason of that error and there is thus no ground for interfering with the ultimate result to which the Magistrate came on account of any such alleged error.

So, too, if the arguments upon which applicant's counsel sought to rely in order to persuade the Magistrate to dismiss the informations or any one or more of them was without substance, the case with which the Magistrate was left was one with regard to which – regardless of whether the standard of proof he was required to apply was that of satisfaction beyond reasonable doubt or merely proof on the balance of probabilities – in my view, he could have come to no conclusion other than that to which he did come.

[10] In elaboration of what I have just said I should say that, as far as the standard of proof is concerned, it made no difference what the standard was having regard to the way that the matter was conducted. This is so because the state of the evidence as constituted by the averments was really not contradicted save, perhaps, it might be said that the averment that the time, in which, in one case, material had to be supplied and, in the other three cases, returns of income had to be supplied, was a reasonable time was disputed by the applicant.

What the applicant said in relation to No. 8581 was that he ought not to have been required to provide the information sought until the resolution of the dispute between the parties concerning the betterment statement. The question then is, whether, if that argument be correct, no matter what the time fixed should be it would not be a reasonable time unless it be a time after settlement between the parties of the contents of the betterment statement; or, if that argument be not correct, then fourteen days, was a reasonable time. It was only in that sense that there was any contradiction of the assertions to be found in the averments and if, as the Magistrate was ultimately to do, he ruled that there was no evidence to allow him to reach the conclusion that the Commissioner had not fixed a reasonable time in fixing fourteen days as that within which the information sought was to be supplied, then, I repeat, it would not matter what the standard was. The evidence was all one way and the offence had to be found as being proved.

I think the same line of reasoning has to be applied to the remaining three informations. Four months was the time **[11]** given for the provision of returns of income for the relevant years and in respect of which it was averred that the time given was reasonable. The argument relied

upon to show that that time was not reasonable was either correct as a matter of law or it was not. The question of standard of proof was irrelevant to that consideration. If the argument were not correct, then, once again, the evidence was all one way and there was no justification for not acting upon the averments and, accordingly, finding the offences to have been proved. For those reasons I find that grounds (b) and (c) have not been made out. I turn to the next ground which is as follows:

> "(d) The Stipendiary Magistrate erred in law in upholding the objections of the witness, Hughes, to answer questions put to him."

The objection taken was one which appealed to the provisions of s16(3) of the *Income Tax Assessment Act*. They read as follows:

> "An officer shall not be required to produce in court any return, assessment, or notice of assessment or to divulge or to communicate to any court any matter or thing coming under his notice in the performance of his duties as an officer, except when it is necessary to do so for the purpose of carrying in to effect the provisions of this Act ... "

The High Court, in *O'Flaherty v McBride* [1920] HCA 60; [1920] 28 CLR at 283; 27 ALR 26, held that the requirement was absolute. However, because of a subsequent decision of the Privy Council and one of the House of Lords, Walsh J, sitting as single judge in the High Court in *Krew v FCT* (1971) 45 ALJR 324; [1971] ATC 4,213; (1971) 2 ATR 230, did not feel himself bound to follow the full High Court decision. **[12]** From what appears in Walsh J's reasons for his decision, it would seem that, in interpreting the sub-section so as to ascertain whether the exception applies, it is necessary in order to ascertain if such disclosure is for the purpose of carrying into effect the provisions of the Act, to ask the question – how would the public interest be served by requiring the witness to give the evidence rather than to require the taxpayer or others to provide the evidence in the ordinary way.

That is to say, the test is – is the information being sought exclusively within the knowledge of the officer who is seeking to rely upon the immunity? Accepting this to be the test, it is necessary to examine the evidence to see if there is any other way in which the information sought can be provided. It would be proper in such circumstances for the court to examine the documentation sought by a respondent to be received into evidence so that, by reference to its internal evidence, a decision could be reached by the judge as to whether it does or it does not comply with the test. I see no reason why, on a *voir dire* in the absence of the respondent, the judge could not perform the same function in relation to evidence which would, if permitted to be led in the proceeding, be given orally. Such questions do not arise on the facts of the present case because, on an examination of the questions asked of the witness Hughes, I have reached the conclusion – notwithstanding an argument to the contrary put with regard to some of those questions – that they are either irrelevant or, insofar as relevant, are seeking to obtain material or information that had already been proved or, quite clearly, was provable *aliunde*.

[13] I think, therefore, that, having regard to the provisions of s16(3), the Magistrate was correct in the decision to which he came that the witness should not be required to answer the questions put to him. Another answer to this particular ground was relied upon by the respondent's counsel. It was that the facts sought from the witness claiming the exemption were facts which it was hoped would support the defence that the time given for the supply of information pursuant to request and for the filing of returns of income was not reasonable. But, it was said, that information could not have been provided by the officer, even if one assumed that those facts would establish a want of reasonable time in the sense to which I have earlier referred. I think there is a good deal of substance in this particular contention but it is unnecessary for the disposal of ground (d) finally to rule on it and, accordingly, I think the preferable course is to express no further opinion concerning it. *[His Honour then considered other grounds of the Orders nisi, and concluded that the failure to provide the returns of income could not be said not to have been a "failure" within the meaning of the relevant section of the Act. He continued]:* **[18]** The only remaining ground relating to – and which is one peculiar to – Order Nisi 8581 is in these terms:

> "(d) The Stipendiary Magistrate erred in law in holding that the onus was on the defendant to prove that time allowed for compliance with the requirements of the said notice, was not reasonable."

This ground rests upon a statement by the Magistrate in the material before me. The words attributed to him were: "The defence has not demonstrated that the short time allowed was not reasonable". This, it is said, indicated that the Magistrate was applying a wrong onus. It is beyond question that with the use of averments to raise a *prima facie* case, there is thus an evidentiary burden placed upon a defendant. That burden requires the defendant, in respect of any one or more components of an offence with respect to which he wishes to raise some contest, to place before the court sufficient material to require some resolution of that contest. In such a circumstance the matter is to be resolved on the basis that the ultimate burden of establishing the offence is on the informant.

What has been said on behalf of the informant is that, in the context in which the passage quoted appears, all **[19]** the Magistrate should be inferred as having been intending to refer to, was that, in respect of the information relating to failure to provide material in conformity with a request, the defence had not discharged the evidentiary burden resting upon it. That is to say, by its contention that no failure to comply should be found to have occurred until the dispute concerning the assets betterment scheme had been resolved, it had not sufficiently raised the reasonableness of the time given as a matter in issue. I think there is a good deal to be said for this submission. It is difficult to believe that, in relation to such an elementary matter, the Magistrate could have been intending other than that. If that is what he meant, he was probably correct.

It may be conceded that the applicant had produced evidence of the existence of a dispute between him and the Department concerning the final state which the assets betterment statement should take. But, in my view, the Magistrate would have been right in holding that the defendant had not produced sufficient evidence so as to have elevated the issue of non-compliance to a level where it could be considered that there had been a discharge of the evidentiary burden. Accordingly, it is probable that it was to that and that alone that the Magistrate was referring. However, lest I should be wrong in that interpretation of the Magistrate's observation, the fact remains that, even if he misdirected himself on the question of on whom the onus lay, I should say that on the evidence as it stood it would not have been possible for him to have come to any conclusion other than he did on the ultimate question. In consequence, it cannot be said that there has been any such miscarriage in **[20]** the conduct of the hearing by reason of any such misdirection – as is alleged – as ought to lead to the setting aside of the order of conviction...
