42/90

SUPREME COURT OF VICTORIA

KENNEDY v OSMAN

Brooking J

17, 19 October 1990

CRIMINAL LAW – SENTENCE PRONOUNCED AND ENTRIES MADE IN COURT REGISTER – REALISATION THAT NECESSARY CONSENT TO PROSECUTION NOT OBTAINED – WHETHER CONVICTIONS AND ORDERS NULLITIES – CONSENT OBTAINED – WHETHER MAGISTRATE HAD JURISDICTION TO HEAR CHARGES: *CRIMES (AIRCRAFT) ACT* 1963 (CTH.), SS6(1)(c), 21(1).

Where, prior to certain offences being dealt with summarily the necessary consent of the Attorney-General to the prosecution had not been obtained, the hearing, convictions and orders were nullities notwithstanding that a record had been made in the Court register. Accordingly, once the Attorney-General's consent was given, a court was not precluded from assuming jurisdiction to hear and determine the charges.

***R v Brattoli* [1971] VicRp 55; (1971) VR 446, applied.**

BROOKING J: [1] In February of last year, a man named Memduh Osman was on a Qantas flight from Sydney to Bangkok. He seems to have behaved badly; at all events, in the following May he was arrested and charged with two offences of assault and two of offensive or insulting behaviour said to have been committed on the aircraft. The aircraft was caught by para. (c) of s6, subsection (1) of the Commonwealth *Crimes (Aircraft) Act* 1963, and the effect of s7, subsection (1) of that Act was to apply the *Crimes Act* 1990 of New South Wales to it at the relevant time. The result of the legislation was also that the offences might be dealt with summarily. It was not until 12 December 1989 that the case came on for hearing. The defendant pleaded not guilty but was, on 13 December, convicted of each offence and fined a total of $3,000. Very shortly after this the solicitor for the informant realized that the convictions were bad in that the consent of the Attorney-General of the Commonwealth to the prosecution had not been obtained. Section 21, subsection (1) of the *Crimes (Aircraft*) Act provides that proceedings for the commitment of a person for trial, or his summary prosecution for an offence against the Act, shall not be instituted without the written consent of the AttorneyGeneral.

By subsection (2), notwithstanding the absence of that consent, a person may be charged and arrested and remanded in custody or on bail, but no further step in the proceedings may be taken until the consent has been obtained. In December, 1989, the informant's solicitor notified the Magistrates' Court that at the time of the hearing there had been no consent and asked that no steps be **[2]** taken to enforce the orders. He also informed the defendant's solicitor. On 23 March, 1990, by arrangement with the Court and the defendant's solicitor, the matter was mentioned to the magistrate by whom the information had been heard, both solicitors being present. The informant's solicitor submitted that the convictions and orders were void and of no effect and asked that the charges be listed again for hearing. He referred to *R v Brattoli* [1971] VicRp 55; (1971) VR 446, and submitted that the Court was not *functus officio*. His Worship was, however, of the view that, the defendant having been convicted and the orders having been made and the convictions and orders having been recorded by the Court, the case could not be re-opened in the absence of some direction from a superior court. He was asked to note in the register the fact that the matter had been mentioned and that an application had been made to have the charges listed for hearing and his decision on that application, but declined to do so, observing that a formal application was necessary before any notation could be made in the Court register.

On 23 April, application was made by the informant's solicitor to Master Evans for an order to review, and on 11 May the Master granted an order to review what was described as an order refusing to hear the charges contained in the information. It is arguable that what took place on 23 March was rather a refusal to fix the charges for hearing and determination, for it was not on that date suggested that they should be heard immediately, but if this view were

taken, I do not think it would prevent my considering the substance of the case. **[3]** The refusal of an application for an order fixing the charges for hearing and determination was, in my view, a reviewable order, having regard to the definition of "order" in s3 of the *Magistrates' Courts* Act 1971 as including the refusal of an application. I consider that on this view of what took place an application was sufficiently made notwithstanding the absence of any formal written application. And the Master may well have been right in treating what took place as in substance a refusal to hear and determine the application, in which event that part of the definition of "order" which refers to "any refusal ... to hear or determine any information" would be applicable.

I should add that s150 of the *Magistrates' Court Act* 1989 and clause 12 of Schedule 8 to that Act preserve the operation of the repealed Act for present purposes. The Order Nisi was granted on two grounds:

> "• That the Magistrate was wrong in holding that by reason of the fact that he had, on 13 December 1989, convicted the respondent on the said charges, and sentenced him in respect thereof, and that his orders had gone into the Court records, he had now power to hear the said charges.
>
> • That the Magistrate should have held that the said conviction and sentence and their entry into the Court records were a complete nullity and that he was obliged to hear the said charges."

Reading the second ground in the sense that the appropriate course was to fix the charges for hearing and determination rather than hear them immediately, I think that both these grounds have been made out. The failure to obtain the consent of the Attorney-General deprived the Court of jurisdiction to hear and **[4]** determine the charges *R v Bates* (1911) 1 KB 964; *Berwin v Donohoe* [1915] HCA 79; (1915) 21 CLR 1 at p25 per Isaacs J, at p27 per Higgins J, and at p38 per Powers J; *R v Cullen* [1951] VicLawRp 47; (1951) VLR 335 at p338 per O'Bryan J, speaking in effect for the Full Court; *R v Harrison* [1957] VicRp 15; [1957] VR 117 at p121; [1957] ALR 92 per Barry J, similarly speaking in effect for the Full Court. As a result, the whole of the hearing was a nullity and so were the convictions and orders *(R v West* (1964) 1 QB 15; *R v Angel* (1968) 52 Cr App R 280; (1968) 2 All ER 607; [1968] 1 WLR 669). Since there was no jurisdiction to hear and determine the charges, the register recording the convictions and orders cannot advance the matter: compare *R v West supra* at p26. The convictions and orders recorded in it are not given force by being so recorded. This follows from the decision of the Full Court in *R v Brattoli* [1971] VicRp 55; (1971) VR 446, where the signing of what was in those days "the triplicate", was held to have no validating effect on a sentence which was beyond the powers of the sentencing judge. Just as the sentencing judge in *Brattoli*, having passed the sentence that was wholly invalid as being in excess of power, had not exercised his sentencing power and was free to do so notwithstanding the triplicate, so in the present case the Court, not having exercised a jurisdiction to hear and determine the charges, which jurisdiction it did not possess on 12 and 13 December, 1989, by reason of the absence of the Attorney-General's consent, was not precluded by the earlier proceedings, which were a nullity, or by the record made in the register, from assuming jurisdiction to hear and determine the charges once the Attorney-General's consent was given. See, too, **[5]** *R v Judge Bland; Ex parte DPP* [1987] VicRp 17; (1987) VR 225.

The affidavits on which the order to review was granted do not disclose whether, by the time the matter was mentioned in the Magistrates' Court on 23 March, the written consent of the Attorney-General had been obtained, although Dr Sundberg informed me that on his instructions it had. The letter of 22 December 1989, from the Deputy Director of Public Prosecutions of the Commonwealth, informing the Court that the convictions were bad for want of consent, contained this paragraph:

> "I intend to arrange for the re-listing of the matter in the new year once a written consent to prosecution has been obtained. Mr Tait has been advised of this."

Mr Tait was the defendant's solicitor. No evidence was called on 23 March to show either that the consent had not been given by the time of the December hearing or that it had been obtained by 23 March. It seems to me that the solicitors proceeded on the basis that it was common ground that no consent had existed in December. It may be that they also proceeded on the basis that it was common ground that the necessary consent had since been obtained. On the whole, I think that the material warrants the view that on 23 March the informant's solicitor was, by implication, asserting that the necessary consent had been obtained but I doubt whether it warrants

the view that the defendant's solicitor was, by implication, conceding that the consent had been obtained. Nevertheless, I do not think that the failure on 23 March to prove, or obtain from the defendant's solicitor an admission of, the giving of the consent, made it appropriate to refuse to fix a date for the **[6]** hearing of the charges, having regard to the view that has consistently been taken, notwithstanding differences in the legislative provisions and in the applicable procedure, of the effect of provisions like s21 of the *Crimes (Aircraft) Act* (1983). I refer to *R v Waller* (1910) 1 KB 364; 26 TLR 42; *Price v Humphries* (1958) 2 QB 353; [1958] 2 All ER 725; (1958) 3 WLR 304; *Berwin v Donohoe* [1915] HCA 79; (1915) 21 CLR 1 at p25, per Isaacs J, and at p38 per Powers J; *R v Harkins* [1958] VicRp 86; [1958] VR 543 at p545; [1958] ALR 461. Since the convictions are nullities, a plea of *autrefois convict* will not avail the defendant on the re-hearing, and so it cannot be said that the order should not be made absolute in view of the availability of this plea. (*R v Marsham* (1912) 2 KB 362; *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at p595; [1947] ALR 27 per Starke J and at pp599-602 per Dixon J; *Barnes v Gougousis* [1969] VicRp 123; (1969) VR 1019 at pp1022-3.)

The existing convictions being nullities, it is unfortunate that the register of the Court should continue to record them with no additional entry. I may add that as at present advised I see no reason why the Magistrate by whom the charges were originally heard should not give an administrative direction that it be noted in that part of the register which records the earlier convictions that those convictions were on 19 October 1990, held by the Supreme Court to be void. The order should be made absolute and the case remitted to the Magistrates' Court with a direction to fix the case for hearing. No doubt the informant will see that the defendant is given notice of the new date. No order for costs is sought by the applicant.
