

52/91

SUPREME COURT OF VICTORIA

SCROFANI v DUKE

Ashley J

25 September 1991

PROCEDURE – INDICTABLE OFFENCES TRIABLE SUMMARILY – APPLICATION FOR SUMMARY HEARING – NUMBER OF DRUG OFFENCES INCLUDING TRAFFICKING – OFFENCES APPARENTLY SERIOUS – WHETHER APPROPRIATE TO REFUSE APPLICATION: MAGISTRATES' COURT ACT 1989, ss53, 54.

Where a person was charged with 13 offences relating to a variety of drugs (of which 5 related to trafficking) it was open to a magistrate to consider that the offences were apparently serious and refuse an application by the defendant for a summary hearing.

ASHLEY J: [1] This is an appeal under Rule 77.05 from a decision of the Master refusing to make an order under Rule 58.09. The Master must make an order under the latter rule if an appellant shows to him an arguable case for appeal on a question of law from a decision made in the Magistrates' Court. The right of appeal itself is given by s92 of the *Magistrates' Court Act* 1989 which provides by ss1:

"A party to a criminal proceeding other than a committal proceeding in the court may appeal to the Supreme Court on a question of law from a final order in the court in that proceeding."

Before me, by reason of Rule 77.05(7) the appeal is by way of hearing *de novo*. It appears that the appellant, Phillip Scrofani, was charged in April of this year with 13 drugs offences of which five relate to trafficking and eight to use and possession. On 2 August 1991 the matters were brought on before a magistrate. Mr Ryan, solicitor for Scrofani, made an application under s54(1) of the *Magistrates' Court Act* 1989. That application was for a summary hearing under s53(1) of that Act. The Magistrate refused the application and gave reasons. The appeal which is now sought to be pursued is an appeal from the refusal of the Magistrate to accede to the application made under s54(1) of the *Magistrates' Court Act*. I should refer first to s53(1) of that Act. It reads as follows:

"If a defendant is charged before the court in any offence referred to in schedule 4 the court may hear and determine a charge summarily if—

- (a) the court is of opinion that the charge is appropriate to be determined summarily; and
- (b) the defendant consents to a summary hearing."

[2] Section 54(1) is in these terms:

"The Informant or the defendant may apply for a summary hearing under s53(1)."

The first submission made in support of the appeal now sought to be pursued is that no application for a summary hearing was made by the defendant in that the defendant did not personally make the application but did so through his solicitor who appeared as counsel before the Magistrate. It was submitted by Mr Ryan that the application should therefore be treated as never having been properly instituted so that it could not have been the subject of determination by the Magistrate.

That is really an attack on jurisdiction and the appropriate remedy, if remedy lay, would I think be by way of prerogative writ rather than by appeal because appeal assumes the existence of jurisdiction. However I would make it very clear that in my opinion there is no substance to the submission that was made. It appears to me to fly in the face of the concept that a defendant

may be represented by counsel, except that it be necessary for a defendant personally to make application under s54 either orally or in writing.

That brings me to the second basis upon which it was said that an arguable case for appeal could be demonstrated. It was said by Mr Ryan that the Magistrate's discretion had miscarried; by that I mean the discretion that is given to the Magistrates' Court under s53(1)(a). In this matter the Magistrate clearly determined that it was inappropriate that the charges against Mr Scrofani be determined summarily. There are available [3] written reasons for the exercise of the discretion. The Magistrate said this:

"The five trafficking charges relate to the following:

1. \$7879.25; 2. \$19,393.95; 3. \$1153 and 4. \$1250. There is a further charge relating to a quantity of drugs which are awaiting analysis. In exercising my discretion I refuse the defendant's application for the following reasons; First, the prevalence of the finance (offences) in the community. Secondly, the professionalism with which it was carried out. Thirdly, the number of the transactions. Fourthly, the number of clients. Fifthly, the type and variety of drugs, mainly Amphetamines, LSD, Ecstasy, and Qualudes. It is my view that the charges are extremely serious and more appropriately dealt with in the County Court. The penalty may not be adequate given the seriousness of the offences."

Mr Ryan submitted that these were charges where, despite the limiting effect of Item 49 of Schedule 4 of the *Magistrates' Court Act* 1989, the penalties likely to be imposed upon the accused man in the event of his being convicted would be well within the range of penalties to be expected to be imposed by a Magistrates' Court. He also submitted that it was at least arguably the case that any pecuniary penalty orders that might be made under the *Crimes (Confiscation of Profits) Act* 1986 could be made in a Magistrates' Court. He directed my attention to two authorities, *Brand v McDonald* [1981] Tas R 105, and *Hall v Braybrook* [1956] HCA 30; 95 CLR 620; [1956] ALR 587. In particular he referred me to passages of the judgment of Neasey J in *Brand v McDonald*. That was a case [4] in which the propriety of a magistrate dealing with certain offences was under consideration. His Honour said first:

"But I think the primary considerations are the apparent seriousness of the offence charged, and the range of penalties available."

His Honour further said at p110:

"It would seem to follow that the principal consideration for the court in exercising its discretion is, which form of trial appears to be the more suitable for the offence as charged. The broad rule, as I understand, is that offences of a serious or relatively serious kind ought to be tried on indictment, and those of a less serious or relatively trivial kind are suitable for summary trial. The range of penalties open to the court of summary jurisdiction compared with the apparent gravity or otherwise of the offence as charged may be an important factor."

His Honour went on to say:

"Of course, other matters may need to be considered also in the exercise of discretion. It would be unwise to attempt to catalogue them."

Finally, His Honour said, in the passage relied upon by Mr Ryan, and referring to what the Magistrate had said in the case before him:

"It is a fair inference from what he said that his meaning, although not fully expressed, was that the nature of the offence as charged and the amount of damages claimed were such as to indicate a serious offence of its kind, in respect of which, if the applicant were convicted, a sentence of more than twelve months' imprisonment might turn out to be appropriate. That was a legitimate consideration, and the magistrate rightly gave it proper weight."

In the present matter I do not believe that there is an arguable case that the Magistrate's discretion miscarried. I do not lightly dismiss the submission that the range of penalties that might be expected to be imposed could be within the range imposed from time to time by a Magistrates' Court, nor do I ignore the submission that any pecuniary penalty order which might be made could in the circumstances be within the jurisdiction [5] of a Magistrates' Court, but in my opinion the Magistrate did raise a number of very relevant considerations which cumulatively justified the course that she took. In particular she addressed the seriousness, as she perceived it, of the offences with which the accused was charged. Thus she was influenced by the professionalism of

the offences, the number of transactions, the number of clients, and the variety and type of drugs dealt with. All those matters in my opinion properly fall within the preeminent matter referred to by Neasey J in *Brand v McDonald*, that is, the apparent seriousness of the offence charged. It may be as Mr Ryan has submitted and as I have recognised, that at the end of the day the penalty imposed would not exceed what which a Magistrates' Court would impose. But that is by means clear, and having regard to the matters to which the Magistrate referred I think it was altogether appropriate that she exercised discretion as she did. In consequence I would dismiss the appeal.

APPEARANCE: For the applicant Scrofani: Mr BRE Ryan, counsel. Brett RE Ryan, solicitor.
