

43/92

SUPREME COURT OF VICTORIA

TERRY v BANKS

JD Phillips J

22, 28 October 1992

PROCEDURE – ADJOURNMENT OF INFORMATION PENDING DECISION OF APPEAL COURT – WHETHER ADJOURNMENT APPROPRIATE: MAGISTRATES' COURT ACT 1989, S30.

Where the Full Court of the Supreme Court of Victoria stood adjourned after argument on an appeal from a decision of a single Judge of the Supreme Court in relation to the provisions of s30(2) of the *Magistrates' Court Act 1989*, it was open to a Magistrate to grant an application for an adjournment in order to await the outcome of the decision of the Full Court.

JD PHILLIPS J: [1] This is an application for judicial review under Order 56 of Chapter 1 of the Rules which came before me for hearing and determination in the Practice Court first on 22 October 1992. The application was by originating motion and by summons in conjunction therewith, the summons having been made returnable before a Judge in the first instance. I granted special leave under rule 77.03(2)(b). The plaintiff required also authority under Rule 45.05(2) to commence this proceeding in Form 5C and also a dispensation from the requirements of Rules 5.03(1) and 8.02. As the parties are represented before me I grant that authority and that dispensation.

The plaintiff, one Michael Paul Terry, was the defendant to charges brought against him in the Magistrates' Court. The charge sheet alleged four offences against Mr Terry arising out of the driving of a motor vehicle in Northcote on 1 September 1991. When these charges came on for hearing and determination before the Magistrates' Court at Heidelberg on 22 September 1992 the Magistrate adjourned the matter after submissions. Although the matter was at first adjourned until 15 February 1993, in the end the matter stood adjourned until 22 October for further mention and on that date (I was told from the Bar table) the matter was further adjourned until a date in November next. By counsel, Mr Terry submits that the Magistrate ought not to have adjourned the hearing of the charges against him on 22 September, but should have dismissed them then and there. It is on that point that the plaintiff now seeks judicial review.

The circumstances in which the Magistrate came to adjourn the charges against Mr Terry on 22 September [2] should now be explained. In support of the application for judicial review there is an affidavit sworn by the plaintiff on 12 October 1992, and according to that affidavit the summons in this matter was issued under s30 of the *Magistrates' Court Act 1989*. That section relates to any "prescribed summary offence" and permits in such a case "a prescribed person" to issue a summons at the time of signing the charge sheet. If that procedure is used, then under s30(2)(a) the informant "must file a charge and original summons with the appropriate Registrar within 7 days after signing the charge sheet", and in default of compliance "the proceeding is a nullity but the court may award costs against the informant": see s30(3).

These provisions have been the subject of decision in this court, first by Mr Justice Smith on 10 July 1992, and then on appeal by a Full Court, of which I was a member, on 5 October 1992. Mr Justice Smith had held that s30(2)(a) required the informant personally to see to the filing of the charge sheet and summons (which comprise the one document) and if he or she did not attend at the relevant registry for that purpose, the proceeding was a nullity and the Magistrates' Court lacked jurisdiction to entertain the charges. This decision was reversed by the Full Court when we held that s30(2)(a) did not require the informant to attend personally at the relevant registry to see to the filing of the charge sheet and summons; it was enough if he or she caused it to be done within the seven days prescribed. It followed, in our view, that a failure by the informant to attend himself at the registry did not render the procedure a "nullity", whatever that expression [3] might mean.

Mr Justice Smith gave his decision, as I have said, on 10 July 1992. The appeal was argued in the Full Court on 31 August and the Full Court handed down its decision on 5 October. Thus, on 22 September 1992 when the charges against Mr Terry came on for hearing in the Magistrates' Court at Heidelberg, the appeal against Mr Justice Smith's decision stood adjourned after argument, awaiting decision. On that account, the prosecutor immediately applied for an adjournment. I quote from paragraph 8(c) of the affidavit of Mr Terry:

"(i) The Prosecutor said to the learned Magistrate words to the effect or substantially to the effect that the Prosecutor could not prove or show that the Charge and Summons was filed personally by the prescribed person, Constable Banks, and further, that Constable Banks could not give evidence to the effect that he had filed the charge and summons personally because he did not know who filed it. (ii) The Prosecutor further said words to the effect or substantially to the effect that because the Full Court was considering this issue, as he understood it in the case of *Chamberlain v Spry*, which was argued on the 31st August 1992 and not yet handed down, that an adjournment was required to clarify the issue; the Prosecutor then indicated the first available date for hearing to be 15th February 1993 and applied for an adjournment to that date."

I should say, perhaps, that the Constable Banks referred to is the second-named defendant in this proceeding, Michael Robert Banks, the informant in relation to the charges laid against Mr Terry. The application for adjournment was opposed by counsel for Mr Terry. He submitted that as matters stood the law was laid down by the decision of Mr Justice Smith and that according to that decision the proceedings were a nullity for want of compliance with s30(2)(a) of the *Magistrates' Court Act* and could not be adjourned; on the [4] admissions made on behalf of the informant the proceeding was simply a nullity by virtue of s30(3). Counsel further submitted that if the charges were dismissed the informant might have a right to appeal under s92 of the *Magistrates' Court Act*, but that was another matter and not presently relevant. The Magistrate rejected these submissions. Instead he adjourned the proceeding as I have described, pending the decision of the Full Court.

The argument on behalf of Mr Terry as plaintiff in this proceeding is that on 22 September 1992 the Magistrate was bound to apply the decision of Mr Justice Smith and the Magistrate erred in not doing so. Further, or alternatively, it was submitted that the proceeding was a "nullity" according to the law as it stood on 22 September 1992 and was therefore not capable of sustaining any order save for dismissal and, if thought appropriate, costs under s30(3). In support of these propositions, I was referred to a number of cases dealing with the question of nullity and its consequences. I mention *Posner v Collector of Interstate Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461; [1947] ALR 61; *Macfoy v United Africa Co Ltd* [1962] AC 152; [1961] 3 All ER 1169, especially at 1172; *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745; *Prior v Hannaford* [1970] VicRp 94; [1970] VR 772; *Re Pritchard* [1963] 1 Ch 502; [1963] 1 All ER 873; and *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; [1970] VR 625.

[5] When the matter was first mentioned to me in the Practice Court on 22nd October 1992 there was insufficient time for the argument to be completed and the proceeding was stood down then and at the request of the parties the argument was not resumed until 28th October. In the meantime I took the opportunity of considering the cases I have just referred to. Having done so and having heard the further submissions put today when counsel for Mr Terry completed his submissions, I find myself not persuaded by the argument on behalf of the plaintiff. I see no error in what the Magistrate did and I think that the plaintiff's claim for judicial review must, therefore, be refused.

However attractive the plaintiff's proposition about the duty of the Magistrate as at 22nd September 1992, it is, if I may say so, simplistic. First, it cannot be said in the light of the Full Court decision – and I am now considering the matter in the light of that decision – that the Magistrate was wrong in law. According to the Full Court decision, the proceeding before the Magistrate was not affected by s30(3) of the *Magistrates' Court Act* for failure to comply with the requirement as to filing in s30(2)(a). The fact that the informant himself had not attended at the relevant registry for the purpose of filing the document, being the charge sheet and summons, did not in itself amount to non-compliance with s30(2)(a) and, therefore, the proceeding was not "a nullity" under s30(3) (whatever the expression "a nullity" might mean). The Magistrate, therefore, had power on 22nd September to adjourn the matter, as he did. Whether or not he was to adjourn it and for how long were matters within his discretion.

[6] The argument for the plaintiff must, therefore, be that in granting any adjournment the Magistrate erred in the exercise of his discretion. On the plaintiff's submission, he erred in not applying the decision of Smith J, which, it was submitted, the Magistrate was constrained to apply according to the principle of *stare decisis*. It was submitted that, otherwise, Magistrates would be encouraged to ignore the law as laid down by the superior courts, preferring their own views and thus introducing uncertainty where there should be certainty.

But, in my view, this submission should be rejected. It was a matter for the Magistrate on 22nd September whether to grant an adjournment pending the outcome of the appeal to the Full Court against the decision of Smith J, and I am not persuaded that in exercising that discretion the Magistrate made any error, let alone such error as might sustain judicial review. It was open to the Magistrate, in my view, to grant the adjournment in order to await the outcome of the Full Court decision. Of course, the Magistrate was not bound to do so. It was a matter for him. But he is not shown to have fallen into relevant error simply because he granted the adjournment in order to await the outcome of the Full Court decision. In my view, there is nothing inconsistent with this in the decisions to which I was referred on the point: *R v The Public Service Board, ex parte McDonald* [1948] VicLawRp 53; [1948] VLR 310, particularly at p313; [1948] 2 ALR 405; *Tucker v Clisby Pty Ltd* (unreported, Gobbo J, 9th September 1983, a copy of which was supplied to me by counsel); and *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121, especially at p127.

[7] There is, I think, an air of unreality about the plaintiff's submission. Counsel accepted and, indeed, he said as much to the Magistrate, that, had the Magistrate accepted his submission that the proceeding was "a nullity" and should on that account be dismissed, it would have been open to the informant to appeal under s92 of the *Magistrates' Court Act*. Although plaintiff's counsel went on to submit to the Magistrate that that was all irrelevant, I think not. Had the Magistrate refused the adjournment and dismissed the charges as sought on behalf of Mr Terry, the informant could have kept the matter alive by exercising the right of appeal under s92 of the *Magistrates' Court Act*.

An appeal would have lain on a question of law, being the proper meaning and effect of s30(2)(a) and s30(3) of the *Magistrates' Court Act* – the essence of the matter already before the Full Court. In this Court, that appeal would have been decided only in the light of the Full Court decision. Although the appeal itself might, perhaps, have required adjournment to await the Full Court decision, in the event no adjournment would have been necessary, for the Full Court decision was handed down less than two weeks after the Magistrate's decision. But whether or not the appeal would have required adjournment in order to await the outcome of the Full Court decision, the appeal would, as we now know, have been allowed and the matter remitted to the Magistrates' Court for further hearing and determination. That the Magistrate should have simply adjourned the proceeding before him in order to avoid such unnecessary waste of time and money was, to my mind, a perfectly proper exercise of judicial discretion.

[8] Towards the end of his submission, counsel raised for the first time a different point, namely, that the evidence given by the prosecutor by admission, and which I have already quoted from the affidavit in support, justified an inference that the informant could not prove even that he had caused the charge sheet and summons to be filed. There was no issue but that the document had been filed within the seven days referred to in s30(2)(a) and at the appropriate registry. But, it was said, this was consistent with accidental filing or even, it was suggested, a filing contrary to express instructions that had been overlooked or ignored.

I am satisfied that the evidence, such as it was given by way of admission, does not justify the inference that the informant did not cause the relevant document to be filed. If nothing more appeared but the facts that the document was filed within the time and at the place required and that the informant appeared in support of the charges laid, that might well justify an inference that the informant had caused the charge sheet and summons to be filed. But once the primary submission is rejected, the matter remains part-heard in the Magistrates' Court at Heidelberg and it is inappropriate for this Court to enter any further upon the question last raised. If it were to become necessary, the question could be explored in due course. As to that, I say nothing at all.

The application for judicial review will be refused. It is, therefore, unnecessary for me to

consider the application by the plaintiff to amend the originating motion to include a prayer for a declaration that the [9] proceeding in the Magistrates' Court was and is a nullity. Even if added, the relief sought would be refused.

APPEARANCES: For the plaintiff Terry: Mr P Billings, counsel. DM Robinson & Associates, solicitors. For the defendant Banks: Mr J Atkins, counsel. Victorian Government Solicitor.
