23/71

SUPREME COURT OF VICTORIA

BRAYBROOK and ANOR v GIASOUMI

Lush J

20 October 1971

LOCAL GOVERNMENT – LOCAL COUNCILLOR'S ACTIONS IN VOTING UPON AN APPLICATION FOR APPROVAL OF A STRATA SUBDIVISION – COUNCILLOR CHARGED WITH THREE OFFENCES – ALLEGED THAT THE COUNCILLOR HAD GIVEN MONEY TO ANOTHER PERSON TO BUY THE PROPERTY IN QUESTION – MAGISTRATE REJECTED A 'NO CASE' SUBMISSION BUT STRUCK OUT THE INFORMATIONS ON THE GROUND THAT HE HAD NO JURISDICTION BECAUSE THE TITLE TO LAND WAS *BONA FIDE* IN QUESTION – INFORMATIONS FAILED TO IDENTIFY THE COUNCIL CONCERNED OR TO ALLEGE OF WHAT COUNCIL THE DEFENDANT WAS A COUNCILLOR – WHETHER INFORMATIONS SHOULD HAVE BEEN AMENDED – WHETHER INFORMATIONS BAD FOR DUPLICITY – WHETHER MAGISTRATE IN ERROR: *LOCAL GOVERNMENT ACT* S181; *JUSTICES ACT* 1958, 72, 73(1).

HELD: Order nisi discharged.

1. Even if no other jurisdiction than the Magistrates' Courts were available for the trial of informations alleging offences under s181 of the *Local Government Act* 1958 in which a question of title arose, that consideration would still not justify a decision that the provisions of s72 of the *Justices Act* 1958 were expressly excluded by the legislation referred to.

2. The question whether the informations should have been amended was to be determined as a matter of degree. The informations as drawn showed plainly what it was that the defendant was to be charged with; and that, in fact, the correct appreciation of the situation was shown by counsel who appeared for the defendant in the Magistrates' Court, when he asked that particulars should be given identifying the Council. The introduction of the Council's name into the information was the kind of amendment which could have been made after the expiry of 12 months from the offences.

3. The second amendment had the effect of eliminating a duplicity. It was conceded that the informations were originally duplex because they alleged both that the defendant voted on the matters before the Council, and that he took part in the discussion on the matters before the Council. That duplicity was corrected, in each case, by eliminating the reference to taking part in the discussion.

LUSH J: This is the return of three orders nisi to review. They deal with three informations laying charges under s181 of the *Local Government Act* as it stood before amendment by Act 6695 and before amendment by Act 7968. The informations were struck out of the Magistrates' Court, Prahran.

The offences are alleged to have occurred on 6 April, 4 May and 11 May 1970. On the first two of those dates an application for approval of a strata subdivision in respect of property known as 20-22 Stewart Street, Windsor, was at successive stages before the Public Works and Housing Committee of the Prahran City Council and on the third it was before the Council itself. The defendant was a Councillor on the relevant occasions and voted upon it.

The evidence given at the hearing was extensive. The question of interest turned upon a sum of $2,600, part of the purchase money paid by Mrs Velonis, who entered into a contract to buy 20-22 Stewart Street in February 1970 for the price of $12,000 and who made the application before the committee and the Council.

The prosecuting police officers gave evidence designed to show that the $2,600 in question was money of the defendant, who had contributed that sum to the purchase of the property. Other possibilities appearing in the evidence were (a) that the sum was a loan or part of a loan by the defendant to Mrs Velonis and (b) that it was a loan or part of a loan by a Mrs Tsourikis to Mrs Velonis which had been passed through the defendant's hands in order to provide proof of the loan.

The information which was the direct subject of the debate before me was that which alleged an offence on 4 May. After amendment at the hearing this information finally read as follows:

> "That the defendant on 4 May 1970 at Prahran in the said State did whilst a Councillor vote upon a matter before the Public Works and Housing Committee of the Prahran Municipal Council, to wit a strata subdivision application for 20-22 Stewart Street, Windsor, in which the said Councillor Giascoumi had an interest."

At the hearing, particulars were given in these terms:

> "That a cheque for $3,189.74 made payable to Mr Giascoumi by one Marika Tsourikis was deposited into a bank account conducted by one Dimitria Velonis which account prior to that day had a credit of 20 cents. That shortly thereafter an amount of $2,600 by way of bank cheque made payable to Mr EK O'Donnell was withdrawn from this account by Dimitria Velonis. That Mr EK O'Donnell was the solicitor for the vendor of premises known as 20-22 Stewart Street, Prahran. That the amount of $2,600 represented part of the deposit payable by the purchaser of those premises. That an application for subdivision of the premises came before the Prahran Municipal Council and a committee thereof on three separate occasions, and that Mr Giascoumi was involved in transactions concerning the property prior to the subdivision."

In my opinion these particulars are very far from satisfactory. They fail to assert that the cheque for $3,189.74 referred to or its proceeds were the property of the defendant, though this may be implicit. They do not say whether the depositing of the cheque in the account of Mrs Velonis was a gift or a loan or the entrusting of funds to an agent or part of a transaction of some other kind.

They consequently do not identify the ownership, legal or equitable, of the $2,600 at the time when it was paid as part of the deposit. They are, of course, particulars only, to be read with the substantive charge, but in my opinion they should not have been accepted by the defence or by the Court. In the light of the evidence they cover two different situations which the prosecution says involve an interest within the meaning of s181 – if the money was the defendant's he contributed to the purchase price; alternatively if the money was lent by the defendant to Mrs Velonis the defendant had an interest in the matter before the Council, a proposition maintained by the prosecution though not supported with any great enthusiasm by Mr Graham, who appeared to move the orders absolute.

The Stipendiary Magistrate, at the close of the prosecution case, rejected an argument that there was no case to answer, but ordered that the informations be struck out because his Court had no jurisdiction (*Justices Act* 1958 s91(18). He had no jurisdiction because "the title to land was *bona fide* in question" (*Justices Act* 1958 s72).

Orders nisi to review were obtained in each case on four grounds. The grounds were these:

> 1. The Stipendiary Magistrate should have held that no question, or alternatively no *bona fide* question as to the title to any land had arisen.
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> 2. The Stipendiary Magistrate should have held upon the evidence before him that no question, or alternatively no *bona fide* question as to the title to any land had arisen.
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> 3. The Stipendiary Magistrate should have held that by reason of s892 of the *Local Government Act* 1958, and/or by reason of the terms of s101 of that Act, he had jurisdiction to hear and determine the said information, being an information for an offence under the said s181 of that Act, when a *bona fide* question as to title to land had arisen upon the hearing thereof, notwithstanding the provisions of s72 of the *Justices Act* 1958.
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> 4. The Stipendiary Magistrate should have held that s72 of the *Justices Act* 1958 applied only in respect of his Jurisdiction to hear complaints, and not in respect of his jurisdiction to hear informations.

The fourth of these grounds was not argued before me.

Mr Graham argued ground 3 first. His submission was that s161, when read with s892 of the *Local Government Act*, and/or with s73 of the *Justices Act*, constituted an expressly enacted exception to s72. The terms of s72 are these:

> "Except where otherwise expressly enacted no Magistrates' Court shall have cognisance of any complaint under this Act in any Civil case in which a County Court has not cognisance of an action for the same cause, or in any case in which the title to any land is *bona fide* in question."

Section 181 of the *Local Government Act* consists of a prohibition in subsection (1) and a penalty in subsection (2). It is in these terms:

> (1) "A Councillor shall not take part in the discussion of or vote upon any matter in or before the Council or any committee of the Council in which that Councillor has directly or indirectly by himself or his partners any pecuniary or other valuable interest."

Then follows a series of provisos.

> (2)"Every Councillor who knowingly offends against this section shall for every offence be liable to a penalty of not more than $200."

Section 892, so far as it is relevant, provides that any penalty payable in respect of any offence against the *Local Government Act* may be recovered before any Magistrates' Court. There is no other section in the *Local Government Act* dealing with the jurisdiction to hear cases in which penalties may be imposed.

Section 73(2) of the *Justices Act* provides that when by any Act provision is made for punishment by fine or penalty, but the Act does not state by what Court the fine or penalty may or shall be imposed, then such persons shall, on conviction before a Magistrates' Court be liable to, or punishable by such fine and all proceedings necessary for hearing and determining any information for each offence may be taken before any Magistrates' Court.

It will be noted that both s892 of the *Local Government Act* and s73(2) of the *Justices Act*, use the word "may" when authorising the hearing of the relevant informations by Magistrates' Courts. They do not use the expression "only before a Magistrates' Court" to be found in s73(1) of the *Justices Act*.

Mr Graham at first relied upon s73(2) as the source in the *Justices Act* of jurisdiction if that source was not to be found in s892 of the *Local Government Act*. In his reply he relied also on s73(1) in order to obtain the benefit of the expression which I have quoted. However s73(1) itself contains the phrase "except where otherwise expressly enacted" and apart from the considerations relating to s73(1), that phrase prevents cases which fall within s72 being allotted exclusively to the jurisdiction of Magistrates' Courts by s73.

I do not find it necessary to examine the precise scope of subsections (1) and (2) of s73 or to examine the question whether in some matters, they overlap. In my opinion, the informant cannot take his case in this regard further than that in permissive but not exclusive terms, either s892 of the *Local Government Act* or s73(2) of the *Justices Act* confers jurisdiction on Magistrates' Courts to deal with offences under s181 of the *Local Government Act*.

This consideration is close to decisive of the question raised in the third ground. The test to be applied in deciding whether there is in the *Local Government Act* provisions, with or without the aid of s73 of the *Justices Act*, and express enactment excluding the operation of s72 of the *Justices Act* is that laid down in *Rose v Hvric* [1963] HCA 13; (1963) 108 CLR 353; [1963] ALR 560; (1963) 37 ALJR 1. A reference in terms to s72 is not required. The manifestation of a clear intention that all cases under s181, whether they involve questions of title to land or not, were to be tried in Magistrates' Courts would be sufficient. What is required however, is an implication and not a mere inference that it may have been logical so to provide. It must appear that s181 and the related sections are inconsistent in meaning and therefore in operation with s72.

It was argued that s181 necessarily and in its provisos, especially provisos (e) and (h) is concerned with situations in which the relevant interest may take the form of an interest in land. It was argued that the intention of the legislature must have been that all cases under s181 should be justiciable before the same courts, and therefore before Magistrates' Courts.

I am not persuaded by this argument. It may be turned upon itself by saying that there is

a wide range of matters under s181 which do not raise questions of title to land, and that in many cases when a matter of title is alleged it will not come into dispute, and the related jurisdictional provisions therefore have scope for operation without being given application to the cases covered by s72. To state the same thing in another way, I think that there is no inconsistency between a general direction that such cases may be tried before Magistrates' Courts, and a statutory exception to that direction to be found in s72.

I was referred to many cases dealing with the ouster of the jurisdiction of justices by the emergence of a question of title. The subject is extensively discussed in *Clarkson v Aspinall; ex parte Aspinall* [1950] St RQd 79, where many cases are reviewed. The difference between the members of the Court in that case appears to be a difference as to the degree of precision or clarity of intention which must be found before a statute will be held to displace the Common Law ouster rules. If a specific subject necessarily involving questions of title is submitted to the justices, they have jurisdiction. If exclusive jurisdiction in an area is given to justices, or if imperative terms that the justices shall have jurisdiction are used, it is likely that they will be held to have jurisdiction in cases within that area when questions of title arise. See the later cases of *Duplex Settled Investment Trust Ltd v Worthing Borough Council* [1952] 1 All ER 545; *R v Ogden; ex parte Long Ashton Rural District Council* [1963] 1 WLR 274. The availability of an alternative jurisdiction is a relevant consideration – see the cases cited in *Burton v Hudson* [1909] 2 KB 564, but not a decisive one – see the dissenting judgment of Philp J in *Clarkson v Aspinall*, *supra*.

It was put to me that if a Magistrates' Court had no jurisdiction over the present informations, then the charges laid in them could not be tried anywhere. The matter was not fully argued, but I think that it is probable that a presentment could be made for the common law misdemeanour of breach of a public statute – see *R v Hall* [1891] 1 QB 747, and *R v Watt; ex parte Slade* [1912] VicLawRp 43; [1912] VLR 225; 18 ALR 96; 33 ALT 222.

In *Ogden's case* above, there was an imperative provision that offences should be punishable on summary conviction, but Ashworth J did not regard this as excluding the possibility that other procedures were also available. I think that even if no other jurisdiction than the Magistrates' Courts were available for the trial of informations alleging offences under s181 in which a question of title arose, that consideration would still not justify a decision that the provisions of s72 were expressly excluded by the legislation to which I have referred. I therefore do not uphold the third ground of the order nisi.

The first and second grounds of the order raised the problem, did a question of title arise, and if so had it arisen at the stage when the hearing ended at the close of the Crown case.

If the Crown case was that the defendant had an equitable interest in the Stewart Street property, an issue as to title was tendered by the Crown. The questions are, however, did the Crown tender such an issue and had that issue been joined, so that title was *bona fide* in question at the close of the prosecution case.

I have already said, in substance, that the police prosecutors appear to have thought that they were alleging an interest through the payment of part of the purchase money and the Stipendiary Magistrate appears to have thought so too. In an answering affidavit he is recorded as saying, after the particulars had been given:

> "Stated shortly, the allegation is that monies in the possession of the defendant were applied in the chain of circumstances for the buying of the property."

This statement may be equivocal, but it seems to me to indicate the understanding which I have described. I think that is impossible to say that the fact that a Councillor has made an unsecured loan to a person who applied to the Council for a permit gives the Councillor, at any rate when nothing more is shown, a pecuniary or other valuable interest in the application before the Council. The Councillor does not stand to gain or lose anything now or in the future immediately or remotely, by the decision on the application. The words "pecuniary or other interest" are very wide, as the cases show, and I intend nothing that would give them a narrow construction. But I know of no authority, and none was cited to me to show that they were wide enough to cover the situation I am speaking of. It must always be a question of fact whether a person has an interest

in the relevant sense, and it may be that in some cases evidence might show that the repayment of the loan depended on or was affected by the Council's decision. No such suggestion was made here.

If this is right then the particulars given in this case can only support the charge in the intimation if they are read as alleging that the $2,600 paid as part of the deposit was the defendant's money paid on the defendant's own behalf. If it was, he had an interest in the matter before the Council because he was a part owner in equity of the property concerned, and might stand to gain if the permit is granted, because he was part owner in equity. It follows that the prosecution was proffering an issue whether he was part owner or not.

I, at one time, considered and discussed with counsel the question whether the issue was whether the $2,600 was the defendant's money, the circumstance that if it was the defendant had an interest in the Stewart Street property being classified as a consequence, and not as the question in issue. I think, however, that the true analysis of the situation is that the informant's essential allegation was that the defendant had an equitable interest in the property, and if this allegation was traversed an issue as to title to land arose.

Mr Graham submitted that for the purposes of s72 a question as to title to land could only arise between parties, each of whom asserted a relevant title in himself. I think the analysis of the issue which I have set out rebuts this.

The remaining question was whether the Stipendiary Magistrate's finding that at the close of the Crown case the title to land was *bona fide* in question could stand. Mr Graham submitted that an assertion that the informant's allegation would be denied was not enough; the matter would not really come into question until the defence entered upon evidence.

Mr Fagan, on the other hand, submitted that it was the informant's case that indicated the possibilities that the $2,600 had been lent to Mrs Velonis, either by Mrs Tsourikis or by the defendant; in either of which cases the prosecution failed, as well as the possibility that it was the defendant's contribution of purchase money, in which case the prosecution might succeed. The situation had been reached in which the Stipendiary Magistrate had to decide whether the last possibility as against the first two was established beyond reasonable doubt; and therefore the question of title had arisen.

I do not accept either of these arguments. Dealing first with Mr Fagan's, the question referred to in s72 must arise as an issue between the parties, not as a matter of conflict between witnesses. The fact, however, that there was a conflict between witnesses is one of the elements which could relevantly be considered in deciding whether a *bona fide* question had arisen. As to Mr Graham's submission, the question I think is whether the Stipendiary Magistrate was entitled to take the view on the evidence and on the conduct of the case, that there was a *bona fide* question of title at the relevant point of time.

The plea of not guilty did not itself raise such a question. Nor would a statement from the bar table necessarily raise it. But I think that in reaching this conclusion the Stipendiary Magistrate was entitled to consider the conflicting evidence already given, particularly Mrs Velonis's evidence that the money was a loan from Mrs Tsourikis, the history of the source of the money, which I have not endeavoured to set out, the cross-examination which he heard, and of which I have only a summary in the affidavits, and the conduct of the case generally.

I think that a Magistrates' Court is not bound to accept a professional assurance that a particular defence will be raised, but equally, I do not think that a Court should force a defendant into the witness box if it is in fact already satisfied that there is in the case a question of title, and that that question is raised *bona fide*. Compare *Avery v Byrne* [1889] VicLawRp 104; (1889) 15 VLR 519. It is a matter on which the Court must make a decision and that decision will not be reversed in Order to Review proceedings unless it can be said that the decision was one which could not reasonably be reached in the circumstances. I do not find myself able to say that in the present case.

Accordingly all the grounds of the order nisi fail. I should note very briefly further arguments

submitted to me by Mr Fagan. One was that, in respect of the informations relating to the two earlier dates, the Magistrate was wrong in permitting amendments designed to regularise the Informations.

The two earlier informations related to dates more than a year before the hearing, and Mr Fagan's submission was, in substance, that the prosecution should not be allowed to put its house in order at a point of time when the statutory limitation had run against it. Two amendments were involved. The informations, as they were originally drawn, failed to identify the Council concerned, or to allege of what Council the defendant was a Councillor. Mr Fagan said that in the absence of these matters, the informations were meaningless and disclosed no offence.

The authority cited to me *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at p601; [1947] ALR 27 showed that this question is to be determined as a matter of degree, and I think that the informations as drawn showed plainly what it was that the defendant was to be charged with; and that, in fact, the correct appreciation of the situation was shown by counsel who appeared for the defendant in the Magistrates' Court, when he asked that particulars should be given identifying the Council.

I do not think that the introduction of the Council's name into the information is the kind of amendment which should not have been made after the expiry of 12 months from the offences.

The second amendment had the effect of eliminating a duplicity. It was conceded that the informations were originally duplex because they alleged both that the defendant voted on the matters before the Council, and that he took part in the discussion on the matters before the Council. That duplicity was corrected, in each case, by eliminating the reference to taking part in the discussion.

Mr Fagan conceded that he was not able to point to any authority in which it had been said that duplicity could not be corrected by amendment after the expiration of a period of limitation, and it does not appear to me that, in principle, this should be so. The difficulty about duplicity is that two charges are laid in the one information. An amendment to eliminate duplicity means that one of the two charges is removed from the information, and the situation is therefore not one in which a charge is brought after the period of limitation has expired.

Mr Fagan's other submission was that the Magistrate should have held that there was no case to answer. I indicated during the course of argument that I would not uphold this submission, and I do not find it necessary in view of what I have already said to go into the matter at this stage.

In Purcell's case, the order nisi will be discharged with costs, which I fix at $200. In the two Braybrook cases, the order nisi will be discharged with costs to be taxed.

APPEARANCES: For the informant Braybrook: Mr D Graham, counsel. John Downey, State Crown Solicitor. For the defendant Giasoumi: Mr WC Fagan, counsel. Fairlie, Goldenberg & Sullivan, solicitors.
