20/11; [2011] VSC 316

SUPREME COURT OF VICTORIA

TATANA v DPP (CTH)

Mukhtar AsJ

7-8, 11 July 2011

PRACTICE AND PROCEDURE — APPEAL FROM MAGISTRATES' COURT ON A QUESTION OF LAW — ONLY FINAL ORDER CAPABLE OF APPEAL — WHETHER ORDER STRIKING OUT PROCEEDING WITHOUT ADJUDICATION IS FINAL: *CRIMINAL PROCEDURE ACT* (VIC) (NO 7 OF 2009), S272.

CRIMINAL LAW — PRIVATE PROSECUTION — DPP TAKING OVER THE PROSECUTION — CHARGES WITHDRAWN — WHETHER PRIVATE PROSECUTOR REMAINS A PARTY TO A CRIMINAL PROCEEDING FOR APPEAL PURPOSES: *CRIMINAL PROCEDURE ACT* (VIC) (NO 7 OF 2009), S272; *DIRECTOR OF PUBLIC PROSECUTIONS ACT* (CTH) (NO 113 OF 1983), SS9(5), 14.

T., who was not legally represented, laid a multitude of charges against 17 persons under the *Criminal Code Act* 1995. These charges ranged from perverting the judicial power of the Commonwealth, making false and misleading statements and conspiracy to defraud. The Commonwealth DPP decided to take over the proceedings and when the matters were listed before the Magistrates' Court, the DPP indicated that he would not be proceeding with the charges and accordingly they were struck out by the Magistrate as being withdrawn. T. appealed against the Magistrate's decision—

HELD: Appeal dismissed.
1. T. had no standing to bring the appeal because he was not a party to a criminal proceeding as required by s272 of the *Criminal Procedure Act* 2009.

2. When the DPP takes over a matter, he does so to the exclusion of the former prosecutor. Therefore, the former prosecutor has no standing and becomes entirely removed from being a party to the action. It was no longer the prior prosecutor's "matter" at all and the only powers of appeal were vested in the Director, faithful to the whole idea that the taking over of the prosecution is done to instil the independence of the office of the Director.
***Price v Ferris* (1994) 34 NSWLR 704; (1994) 74 A Crim R 127, followed.**

3. It is now established that a decision to strike out a proceeding is not an adjudication of the merits of the proceeding, and is therefore not a final order. Although the words "final order" in section 272 of the *Criminal Procedure Act* are not defined, much judicial discourse has taken place on the issue when it comes to a distinction between a final order and its antonym, the interlocutory order. The distinction is not always easy to draw but the determinative test is whether the order finally determines the rights of the parties having regard to the legal, rather than the practical effect of the judgment or order.

4. In the present case T's appeal was not legally competent because the Magistrate's order in striking out the charges was not a final order.

MUKHTAR AsJ:

1. Let me commence with what was well said about the Court's approach to litigants in person in *Alhaus v Australian Meat Holdings Pty Ltd*:[1]

> The court is always anxious ensure that plaintiffs who do not have the benefit of legal representation should have every opportunity to present a viable claim if they have one. The court is always reluctant to strike out an appeal where the defects may be extricable by the inability of a layman to articulate a reasonable argument. That having been said, however, unrepresented plaintiffs cannot be allowed to abuse the processes of the court by using them as a vehicle for oppression or as an instrument of vexation.

2. The applicant, who appears in person, seeks to appeal to this Court from orders made by the Magistrates' Court at Melbourne on 22 February 2011. On that day, the Magistrates' Court struck out a multitude of charges filed by the applicant ostensibly as a "Commonwealth

Public Official" against 17 persons under the *Criminal Code Act* 1995. The charges ranged from perverting the judicial power of the Commonwealth, producing false and misleading documents to a Commonwealth entity, making false and misleading statements and documents to a Commonwealth entity, obtaining by deception property belonging to a Commonwealth entity, conspiracy to defraud a Commonwealth entity, obstructing a Commonwealth public official and obtaining a financial advantage by deception from a Commonwealth entity.

3. The charges and the ostensible grounds of appeal have a striking similarity to another case in this Court *Donohue v Bourke*[2] in which I dismissed the appeal as being hopeless and an abuse of process. I gather from what Mr Tatana has said in this case, as in the other, Mr Tatana sought to bring criminal charges against various people, somehow involved in the repossession by a bank of a mortgagor's property, not his. The persons targeted are usually local police who attend to keep the peace when the mortgagee actually takes possession, lawyers involved in the repossession estate agents and maybe others. Mr Tatana filed those charges on 16 December 2010 in the Magistrates' Court at Melbourne. They were based explicitly on Commonwealth crimes. In circumstances I shall explain later, the Magistrate on 22 February 2011 struck out all of those charges on the application of the Commonwealth Director of Public Prosecutions who had, in exercise of statutory powers, taken over the conduct of the proceedings. The applicant seeks to appeal each of those orders. His notice of appeal was out of time by one day. For good reason the time limits are strict in this field, but the *Criminal Procedure Act* permits the Court to extend time for "exceptional circumstances".

4. On 8 July 2011, I refused leave to appeal out of time, as I was bound to under the statute because I could not form the opinion there were exceptional circumstance. However, I also decided that that the appeal in any event was legally incompetent because first, Mr Tatana he had no right of appeal as the DPP had displaced him as prosecutor and therefore had no standing. Secondly, the Magistrates' order to strike out was not a "final" order and was thus not amenable to appeal. Thirdly, and in any case, the appeal was bound to fail because the notice of appeal disclosed no question of law, and what it posed unintelligibly showed it to be frivolous, vexatious and an abuse of process. My reasons follow.

5. Section 272 of the *Criminal Procedure Act* 2009 (Vic) says:

> A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to the Supreme Court on a question of law, from a final order of the Magistrates' Court in that proceeding.

6. An appeal under that sub section is commenced by filing a notice of appeal within 28 days after the day on which the order complained of was made. In this case, the notice of appeal was filed one day late, on 23 March 2011. In order to give leave to appeal out of time, section 272(8) of the Act requires the Court to form an opinion that the failure to file in time "was due to exceptional circumstances" and that the case of any other parties to the appeal would not be materially prejudiced because of the delay. The rules of court required him to file an affidavit stating why leave to appeal should be given. I am told that on the last directions hearing on 3 May, his attention was drawn to the need to obtain leave and he was given further opportunity to swear an affidavit explaining himself by 10 May 2011.

7. There are some differences of view, but the preponderant and, I think, better view is that the exceptional circumstances must relate solely (even though the statute does not use that word) to the failure to institute the appeal within time. That is what the statute means because it does not say that in forming an opinion the Court can also have regard to the general circumstances surrounding the appeal or its merits.[3]

8. Mr Tatana has not filed any affidavit explaining the late filing of his notice of appeal. He does not claim ignorance or mistake. I think to any judge, a delay of one day naturally arouses a natural sense of beneficence in the interests of justice, and a preference to look at the substance of the appeal. The difficulty here is the statute compels me to look for evidence of exceptional circumstances before I can give leave. I cannot dispense with that statutory requirement, as I can with a procedural rule of Court. I was willing to dispense with the requirements under the rules for an affidavit and pressed Mr Tatana for an explanation. He claims it was the fault of the Litigants in Person Co-ordinator at the Supreme Court Registry. That person is devoted to the

difficult and sometimes stressful task of assisting litigants in person in Supreme Court litigation. I would not wish this question to come to turn on a *voir dire* on what court staff told Mr Tatana, or how he interpreted them. Mr Tatana says he attended the Registry on the 21st day but then changed that to the 28th day. He says he was told by the Co-ordinator that his notice had to be edited. He does not tell me in what way it had to be modified. He does not recall what he did. He seemed to regard the Court's questioning as not being impartial.

9. Mr Tatana is not without confidence. This Court tried to elicit an explanation and relieve him from having to swear to the facts, but in the end I am afraid to say he was evasive in giving an explanation. Harsh as it may sound, I am bound by the statute to say that there being no satisfactory explanation I cannot form the opinion, as the statute requires me, that there are exceptional circumstances. The rules require me refuse leave to appeal and to dismiss the appeal.[4] And that is what I have done.

10. But I hasten to say that even if there had been a satisfactory explanation for the late filing I would have no hesitation in any event to dismiss this appeal under the Rules[5] on the grounds argued by the Director.

11. I would hold that Mr Tatana has no standing to bring this appeal because he was not "a party to a criminal proceeding" under s272. Of course, generally speaking it is open for a citizen to file a criminal charge against a person for violation of (in this case) a Commonwealth law and conduct a private prosecution. That is what the plaintiff did. But the Director can take it over under s9(5) of the Director of Public Prosecutions Act 1983 (Cth) which says:

> For the purposes of the performance of his or her functions, the Director may take over a proceeding that was instituted or is being carried on by another person, being a proceeding: . . .
> (b) for the summary conviction of a person in respect of an offence against a law of the Commonwealth
>
> and where the Director takes over such a proceeding, he or she may decline to carry it on further.

12. On 20 January 2011, the Director wrote to Mr Tatana and told him of the Director's powers to intervene. He told him he was considering taking over the criminal proceedings. He asked him to provide certain information concerning the alleged offences by 4 February 2011. There is no evidence of a response having been received.

13. Under s14 of the Act, where the Director decides to take over a prosecution or proceeding, the Director is required as soon as practicable, by notice in writing, to inform the Registrar of the court in which the prosecution is proceeding that the Director has taken over the prosecution. When that occurs section 14(2) states that "The Director shall . . . be deemed for all purposes [my emphasis] to be the prosecutor, informant or complainant, as the case requires, in that prosecution or proceeding." Such a notice was given by the Director of Public Prosecutions, Christopher Bruce Craigie SC, on 14 February 2011.

14. On 17 February 2011, the Director informed the Magistrates' Court criminal co-ordinator that he would decline to carry on with the 17 prosecutions, due to be listed for a mention in the Magistrates' Court on 22 February 2011. By letter of the same date, Mr Tatana was told about that decision. Accordingly, come 22 February 2011, the Magistrate struck out all charges because they were all withdrawn. The next step was the filing of the notice of appeal on 23 March 2011.

15. The New South Wales Court of Appeal in *Price v Ferris*[6] held that under equivalent legislation before the Court, when the Director takes over a matter, he does so to the exclusion of the former prosecutor. Therefore, the former prosecutor has no standing and becomes entirely removed from being a party to the action. In that case, the prior prosecutor sought to have a case stated to the Court of Appeal but because he lacked standing, the Court held he could not do so.

16. On a proper construction of the Act, it was held by the majority (Kirby P and Meagher JA) that to find that the private prosecutor somehow retained powers and privileges of his own (including to appeal) was completely incompatible with the scheme of the Act. It was no longer the prior prosecutor's "matter" at all and the only powers of appeal were vested in the Director, faithful to the whole idea that the taking over of the prosecution is done to instil the independence of the office of the Director. There was a dissenting opinion of Priestly JA who doubted whether

on a construction of the Act the Director actually became the prosecutor in name or as a party. Nevertheless, the law as it stands, is that as stated by the majority in *Price v Ferris*. And I am bound to follow it as would the Victorian Court of Appeal unless it was thought to be clearly wrong.

17. Thus I would dismiss this appeal on the ground that Mr Tatana has no standing.

18. Secondly, in any event, it is now established that a decision to strike out a proceeding is not an adjudication of the merits of the proceeding, and is therefore not a final order. Although the words "final order" in section 272 of the *Criminal Procedure Act* are not defined much judicial discourse has taken place on the issue when it comes to a distinction between a final order and its antonym, the interlocutory order. The distinction is not always easy to draw but the determinative test is whether the order finally determines the rights of the parties having regard to the legal, rather than the practical effect of the judgment or order: see the discussion and collection of authorities by Kellam J in *DPP v Sabransky*.[7] In that case, the Court decided that the striking out of charges brought by the Victorian Director of Public Prosecutions in the Magistrates' Court put an end to the proceeding from a practical point of view, but did not deal with the substantial issue leading either to conviction or to dismissal of the charges. Therefore, so His Honour held, as I would in this case, there was not a final order that was legally dispositive of the case and therefore, appeal was not legally competent. The only recourse is for judicial review, if that be open.

19. The question was revisited in *DPP v Moore*[8] a case involving a drink driving charge. The facts are not important. But the judgment of Batt JA with whom Chernov and Eames JJA affirmed the test as I have stated and decided that *DPP v Sabransky* was correctly decided.[9] If additional support be needed, the decision of Kaye J in *R v McGowan*,[10] decided that an order striking out an information in the Magistrates' Court does not put an end to the proceeding as it is not a curial determination of the charge. Likewise, Williams J in *DPP v Hogg*[11] followed, as Her Honour was bound to, the decision in *Moore* in a case concerning charges in the Magistrates' Court. Indeed, in that case, Her Honour decided that having struck out charges, a magistrate erred in concluding that he had no power to reinstate the charges. That is a demonstration of the principle that to strike out does not mean a legal adjudication.

20. And so it is in this case. The Magistrate has done no more than strike out the charges because the DPP, as the entity in whom the prosecution vested, so to speak, asked for them to be withdrawn. I think it is plain that for this additional reason, the appeal is not legally competent as the order was not final.

21. Thirdly, I shall not say a great deal about the notice of appeal. The references to Chapter III of the Constitution and the judicial power of the Commonwealth make no sense, the references to Mr Tatana being a Commonwealth public official are silly, and the balance seems to be directed at impeaching the judicial authority of court and the significance of the Commonwealth referendum of 1999. It is simply not possible to distil from the notice of appeal any question of law. When I pressed Mr Tatana to understand his grievance what emerged was the same protest as had been made in the *Donoghue v Bourke* case concerning the enactment of the *Courts and Tribunals Legislation (Further Amendment) Act* 2000 (Vic). He complains that Act removed the requirement under the *Legal Practice Act* 1996 to make an oath of allegiance to the Queen. He says that was invalid under the Commonwealth Constitution or invalid without a Federal referendum to amend the Constitution. From there he says, as I understand it, that all Courts are acting outside the law including the Magistrate that struck out the charges, as is this Court (yet it is the same Court to which he brought his appeal). He says it is treason.

22. I am afraid to say this all nonsensical and cannot be taken seriously.

23. For those reasons, I would have dismissed this appeal under r3A.05(8) of the *Supreme Court (Criminal Procedure) Rules* even if leave to file the notice of appeal out of time were to be given.

24. Finally, lest this matter go further, I should record certain happenings. At the conclusion of the submissions for the DPP, Mr Tatana asked for a two-week adjournment to consider the materials that had been prepared in support of this application. I shall not go into details, but

after much probing, I concluded that the DPP had not in any way conducted itself so as to short serve or somehow make things difficult for Mr Tatana to properly consider the materials for this application. As Mr Tatana will not give an address for service but only a Post Office box number, the DPP served in reasonable time and manner including the use of express post.

25. By 27 June 2011, Mr Tatana had been sent by express post the summons and the supporting affidavit. They were emailed by 30 June 2011. By 1 July 2011, the submissions and a folder of authorities was made available for him to collect (which he declined) and Mr Tatana was notified by the post office on 4 July 2011 that the material were there to collect. But, he said that he was on holidays and should not have to work on holidays. Indeed he unwrapped the package of materials in Court before me.

26. Mr Tatana sought an adjournment as he wished to consult a Constitution lawyer from Western Australia to help him to answer the case. In my view, these were just delaying tactics as the questions, as I have exposed them, did not call for any understanding of Constitutional law.

27. Furthermore, having given him until 2.15 the following day for an adjournment, I was asked to recuse myself on two grounds. First, that as a judicial officer of this Court, I was sitting without constitutional authority because the previous Attorney-General of this State Government removed the oath of allegiance from the *Legal Practice Act*. That was said to invalidate my ability to sit as a Judge of this Court. That is just ridiculous and I gave it no attention. Then I was asked if I had any charges pending against me. This was referable I think to charges of treason. Then I was asked to recuse myself on the grounds of bias. I could not tell if this was actual or apprehended bias. But it seemed to flow back to the question about the removal of the oath of allegiance. I refused to recuse.

28. On the resumed hearing, Mr Tatana repeatedly asked for an adjournment on no new or different grounds than I had already rejected.

29. Accordingly, I ordered that leave to appeal be refused and that the appeal be dismissed under rule 3A.05.7(b). The DPP as first respondent did not seek costs, but I reserved liberty to apply to the remaining respondents to seek costs.

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[1] [2009] QCA 221 at [20].
[2] (Unreported, No. S CI 2011 01373, 10 May 2011).
[3] See *Burlock v Wellington Street Investments Pty Ltd* [2009] VSC 565.
[4] See r3A.05(7)(b) of the *Supreme Court (Criminal Procedure) Rules*.
[5] See r3A.05(8).
[6] (1994) 34 NSWLR 704; (1994) 74 A Crim R 127.
[7] (2002) VSC 143.
[8] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[9] At 438 [21].
[10] [1984] VicRp 78; (1984) VR 1000 at 1002; (2003) 39 MVR 323.
[11] (2006) VSC 257.

APPEARANCES: For the Plaintiff Tatana: In Person. For the first defendant DPP (Cwth): Mr D Lane, counsel. Director of Public Prosecutions (Cth).
