22/99; [1999] VSC 548

SUPREME COURT OF VICTORIA

HELFENBAUM v SATTLER & ANOR

Beach J

14, 16 December 1999 — [1999] 3 VR 583; (1999) 109 A Crim R 134

PRACTICE AND PROCEDURE – CONVICTIONS IMPOSED IN MAGISTRATES' COURT – APPEAL TO COUNTY COURT – APPEAL ABANDONED AND CONVICTIONS CONFIRMED – WHETHER MAGISTRATE *FUNCTUS OFFICIO* – WHETHER MAGISTRATE HAS JURISDICTION TO ENTERTAIN APPLICATION SUBSEQUENT TO APPEAL: *MAGISTRATES' COURT ACT* 1989, S86.

H. was convicted in the Magistrates' Court of a number of charges of deception and sentenced to an aggregate term of imprisonment. The magistrate declined to deduct the period H. spent in custody prior to the hearing. H. appealed to the County Court in respect of the convictions and sentence but subsequently, the appeal was abandoned and the convictions and sentence imposed in the Magistrates' Court confirmed. At a later date H. applied to the magistrate who imposed the sentence to deduct the period of pre-sentence detention. The magistrate refused the application on the ground that there was no jurisdiction to entertain the application. Upon an order in the nature of *certiorari* to quash and an order in the nature of mandamus to hear—

HELD: Proceeding dismissed.
When the appeal came on for hearing in the County Court, the orders made by the Magistrates' Court were set aside and the County Court was then empowered to make such order as it thought fit. The appeal was a hearing *de novo* and there was no longer any order on foot. When the appeal was struck out, the magistrate who made the original orders was *functus officio* and the Magistrates' Court no longer had jurisdiction to hear any application in relation to the original orders.
***DPP & Anor v His Honour Judge Fricke* [1993] VicRp 27; [1993] 1 VR 369, applied.**

BEACH J:

1. This is the return of an originating motion filed in the court by the plaintiff whereby the plaintiff seeks the following orders:

> 1. An order in the nature of *certiorari* quashing the order of the second defendant dated 10 December 1999 dismissing the application of the Plaintiff made pursuant to section 18(7) of the *Sentencing Act* 1991 on the ground that the Second Defendant erred in finding that it had no jurisdiction to hear the application.
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> 2. An order in the nature of mandamus directing the Second Defendant to hear the application of the Plaintiff pursuant to section 18(7) of the *Sentencing Act* 1991 and to deal with it according to law.

2. The first defendant to the proceeding is Helen Mary Sattler, a detective senior constable of police. The second defendant is the Magistrates' Court of Victoria.

3. The background to the proceeding may be summarised as follows:

4. On 6 March 1999 the plaintiff was charged by Detective Senior Constable Sattler (*inter alia*) with some 41 different offences which for present purposes can conveniently be described as charges of deception.

5. The charges were dealt with in the Melbourne Magistrates Court by his Worship Mr Hender. The plaintiff was convicted of a significant number of them and on 10 March 1999 was sentenced to an aggregate sentence of four months' imprisonment. It is now said on behalf of the plaintiff that the plaintiff had spent a significant number of days in prison prior to being dealt with that day but that, as a result of error, no time was declared to be reckoned as having been served in respect of the sentence for the purpose of s18 of the *Sentencing Act* 1991.

6. That assertion is challenged by counsel for the first-named defendant. It is said on her behalf that the fact that the plaintiff had spent some time in prison awaiting the hearing of the

charges was drawn to the magistrate's attention but that the magistrate declined to deduct any period of time from the sentence he had imposed, as he was entitled to do.

7. At all events later the same day the plaintiff lodged an appeal to the County Court in respect of both the convictions and sentences.

8. The hearing of the appeals commenced before His Honour Judge O'Shea on 22 November 1999. On 8 December 1999 his Honour gave the plaintiff leave to abandon his appeals and then made the following orders in respect of them:

> "1. The appeal be struck out.
>
> 2. The convictions and sentences ordered at the Melbourne Magistrates' Court on 10 March 1999 be confirmed."

9. Prior to pronouncing the orders he did in the matter there was the following discussion between counsel for the plaintiff and his Honour:

> "MR MELLAS: An appeal against conviction was on foot, but it was abandoned in relation to those matters. So, ultimately the - although there was consideration of the time in custody at the time the matter came before the Magistrates' Court, ultimately on appeal that order was set aside and a community based order was considered to be an appropriate disposition, having regard to a range of factors. So, it would be my submission, sir, that ultimately that time that was spent in custody between 6 March 1998 and 29 June 1998, ultimately not having been considered or allocated in relation to any other offence, is time which is available to be considered for a declaration pursuant to s18(4). In the event that the appeal against sentence were allowed to continue on that very narrow footing, the sentence in all the circumstances is appropriate, but that that time that has been spent in custody be considered. Now, obviously my friend has some arguments against that proposition occurring, or against Your Honour taking that course in relation to the time served. But what I'm indicating, sir, is that certainly what I'd seek is leave to abandon the appeal against conviction because we are in the running, although not affected by the new rules, but that Your Honour consider, having regard to the fact that the appeal against conviction is now at an end, if you allow that course to be taken, that we then turn our minds to whether or not the time that has been spent in custody is taken into account in relation to the sentence that was imposed in the Magistrates' Court. And I understand that this is a hearing de novo, and that the penalty is at large, so to speak. But that really is a - - - HIS HONOUR: I don't think I'd be prepared to give you leave to continue your appeal against sentence on a limited basis. MR MELLAS: Not so much on a limited basis, sir, because other - - - HIS HONOUR: I think if you can abandon your appeal against - - - MR MELLAS: If the appeal is abandoned, it's abandoned. HIS HONOUR: Yes. MR MELLAS: Then the appeal is struck out. HIS HONOUR: That's right. MR MELLAS: The alternative - - - HIS HONOUR: And the reason I say that is, the Full Court has recently made it clear that offences of this type will carry very heavy penalties, and in my view, it wouldn't be a matter of months I'd be sentencing him to - could be quantified in much longer periods. MR MELLAS: Yes, sir. HIS HONOUR: If you want to abandon the appeal in toto, well then, that's one thing. MR MELLAS: Yes, sir. HIS HONOUR: But I wouldn't allow you to abandon the appeal against sentence on the basis that – or leave the appeal against sentence to stand, but I tie my hands on a - to a limited way of dealing with it. MR MELLAS: I see. I thank you for that indication. It was simply that the alternative would be that if the matter is – if the appeal is abandoned in toto, then certainly the appellant has the option of taking the matter back before the magistrate who sentenced him, given that the original decision not to take into account the time served was made in error, in effect, because the magistrate made his decision based on the assumption that, Your Honour perhaps picked up on that, he was already in custody in relation to those other matters, and that the time simply wasn't available for him to consider so that he might - - - HIS HONOUR: Well, I don't know that you can go back before the magistrate. I would doubt that you can. I should think he'd be *functus officio*."

10. At all events counsel for the plaintiff did not pursue the matter further and the orders to which I have referred were then made.

11. On 10 December 1999 the plaintiff made application to His Worship Mr Hender to make an order pursuant to s18 of the *Sentencing Act* to take account of the period of time the plaintiff alleged he had spent in custody prior to the hearing on 10 March 1999.

12. The magistrate held that the Magistrates' Court had no jurisdiction to entertain the application and on that basis dismissed it.

13. The plaintiff now seeks a review of the magistrate's decision by this court.

14. Resolution of the issues raised by this proceeding requires a consideration of the provisions of s86 of the *Magistrates' Court Act* 1989 and clause 6 of Schedule 6 to the Act as they stood at 10 March 1999.

15. Section 86 of the Act then read:

> "**86. Powers of County Court on appeal**
> (1) On the hearing of an appeal under section 83 or 84, the County Court—
> (a) must set aside the order of the Magistrates' Court; and
> (b) may make any order which the County Court thinks just and which the Magistrates' Court made or could have made; and
>
> (c) may exercise any power which the Magistrates' Court exercised or could have exercised.
>
> (1A) The County Court may backdate an order made under sub-section (1) to a date not earlier than the date of the order of the Magistrates' Court that was set aside on the appeal.
>
> (2) An order made under sub-section (1) is for all purposes to be regarded as an order of the County Court, except for the purposes of section 74 of the *County Court Act* 1958.
>
> (3) If an appellant—
> (a) fails to appear at the time listed for the hearing of the appeal; or
> (b) abandons the appeal in accordance with clause 6 of Schedule 6—
> the County Court must strike out the appeal.
>
> (4) If an appeal is struck out under sub-section (3), the order of the Magistrates' Court may be enforced as if an appeal had not been made but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay."

16. Clause 6 of the Schedule then read:

> "**6. Abandonment of appeal**
> (1) An appellant may abandon an appeal against a sentencing order under which a term of imprisonment or detention was imposed—
> (a) if the appellant is not in custody, by surrendering to the registrar of the County Court and immediately filing with the registrar a notice in the form prescribed by the rules of the County Court; or
> (b) if the appellant is in custody, by filing with the registrar of the County Court a notice referred to in paragraph (a).
> (2) An appellant may abandon an appeal against any other sentencing order by filing with the registrar of the County Court a notice in the form prescribed by the rules of the County Court.
> (3) If an appeal is struck out under section 86(3), the registrar of the County Court must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal.
> (4) The making of an order striking out an appeal discharges the undertaking of the appellant to prosecute the appeal."

17. Immediately after counsel for the plaintiff had informed His Honour Judge O'Shea that the plaintiff wished to abandon his appeals, the plaintiff filed with the registrar the notice required by sub-para 1(b) of clause 6.

18. It was agreed by counsel for the parties that the plaintiff had complied therefore with sub-s(3)(b) of the Act and that his Honour had quite properly struck out the appeals.

19. What was argued by counsel for the plaintiff, however, is that once the plaintiff's appeals were struck out the orders made by the Magistrates' Court remained on foot and that thereafter the Magistrates' Court still had jurisdiction in relation to them. It is said that that interpretation of the situation is supported by the provisions of sub-s(4) of s86 of the Act.

20. But in my opinion sub-s(4) does no more than provide for the enforcement of orders previously made by the Magistrates' Court in those cases where a person affected by the orders appeals against them to the County Court and then abandons his or her appeal. In my opinion one cannot overlook the provisions of sub-s(1) of s86.

21. On the hearing of an appeal the County Court must set aside the orders of the Magistrates' Court. That requirement is mandatory. In that regard see my unreported decision of 15 March 1994 in *Maher v His Honour Judge GD Lewis and Anor.*

22. To my mind the real question to be determined in this case concerns the time at which that order is made. It is argued on behalf of the first defendant that the order is deemed to be made when the hearing of the appeal commences. For the plaintiff it is argued that the order is not made until the hearing of the appeal has concluded, the judge has made his determination concerning the fate of the appeal, and appropriate orders including an order setting aside the orders of the Magistrates' Court are then made.

23. I think that the correct view of the matter is that when the hearing of the appeal commences, and it must be borne in mind that it is a hearing "*de novo*", the order of the Magistrates' Court should be either formally set aside or at the least be deemed to be set aside. I say that for the reason that as the hearing is a hearing *de novo* and regardless of the outcome the order of the Magistrates' Court must be set aside there should no longer be any order on foot in respect of the matter at the time the hearing of the appeal commences before the County Court.

24. Support for that proposition is to be found in the decision of the Full Court in *Director of Public Prosecutions and Anor v His Honour Judge Fricke* [1993] VicRp 27; [1993] 1 VR 369. In that case the court was also considering the effect of s86 of the *Magistrates' Court Act* as it was in 1992 and 1993. Although there have been amendments to the section since that time, the provisions I am here concerned with have remained unaltered. At p375 the Court said:

> " It is to be noted that, on the hearing of an appeal under s83, the County Court is bound by virtue of s86(1)(a) to set aside the order of the Magistrates' Court. The County Court is then empowered to make such order as it thinks fit if it could have been made below. Apparently it is envisaged that on any appeal, at least if the appellant does not fail to appear, the order below will be set aside and replaced by an order of the County Court."

Later on the same page:

> "The terms of the order made by the County Court judge appear to have been surrounded by some confusion. The order 'conviction quashed' seems not to be appropriate in view of the terms of s86 of the *Magistrates' Court Act*. The correct order, on any view, was first to set aside the order of the Magistrates' Court: s86(1)(a) of the Act required that to be done and it should be understood to have been done, whether in express terms or not. The slate would then have been clean. When the judge embarked on his task to hear the appeal he was bound in any event to approach it as though the order of the Magistrates' Court had gone. What was appropriate was that the County Court conduct a re-hearing. Upon such a re-hearing it was open to the judge – indeed he was required – to dismiss the charge or uphold it, and to make such other order as was appropriate."

25. If the view I have taken in relation to the matter is correct it follows that once the hearing of an appeal commences in the County Court the magistrate who made the orders in question is *functus officio* and the Magistrates' Court no longer has jurisdiction to hear any application in relation to the orders. Indeed it could be said that that fact is reflected in the form of order made by His Honour Judge O'Shea whereby his Honour formally confirmed the orders of the Magistrates' Court.

26. In my opinion if any application is to be made by the plaintiff in relation to the orders it must be made to the County Court.

27. As to whether the County Court would now hear such an application in the present case is a totally different matter. I make that observation having regard to the remarks made by his Honour shortly prior to the appeal being abandoned and which are set out in my reasons for judgment.

28. The proceeding will be dismissed with costs to be taxed, including any reserved costs, and paid by the plaintiff.

APPEARANCES: For the plaintiff Helfenbaum: Mr R Bourke, counsel. Melasecca Zayler, solicitors. For the first defendant Sattler: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions.