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SUPREME COURT OF VICTORIA

HANSFORD v McMILLAN

Anderson J

18, 21 November, 16 December 1975 — [1976] VicRp 80; [1976] VR 743

PRACTICE AND PROCEDURE – PRISONER ESCAPING FROM PRISON – PROOF OF 'PRISONER' AND 'PENTRIDGE A PLACE OF LAWFUL DETENTION' – WHETHER PROVED THAT PENTRIDGE WAS A PRISON – *GOVERNMENT GAZETTE* NOT TENDERED TO THE COURT TO PROVE GAZETTAL OF PENTRIDGE AS A PRISON – APPLICATION BY PROSECUTION TO RE-OPEN CASE AND TENDER PROOF – APPLICATION REFUSED BY APPEAL JUDGE – WHETHER JUDGE IN ERROR: *SOCIAL WELFARE ACT* 1970, SS138, 152(3).

Hansford, a prisoner at Pentridge Gaol, was convicted and sentenced before the Visiting Justice of attempting to escape. He appealed to the County Court. After the close of the informant's case, two points were raised on behalf of the appellant, namely, first that the informant had not proved that Hansford was a prisoner, and secondly, the informant had not proved that Pentridge Gaol was a place of lawful detention or that Hansford was lawfully detained. Counsel for the informant sought leave to re-open his case to prove Pentridge was a lawful place of detention. His Honour refused leave. Upon Order nisi to Review—

HELD: Judge in error in not allowing the informant to re-open the case.

1. Implicit in the offence of attempting to escape is the concept of escape from something or somewhere. That the evidence in this case showed that Hansford had attempted to escape from the custody he was in, cannot be denied. It is not necessary to refer to s132 to provide that it is a prison from which the attempt to escape has been made, for s138(1) is dealing with attempted escape by a "prisoner" who is defined by s3 as including "any person detained in a prison or police gaol irrespective of the cause of such detention". The definition of "prisoner" in s3 makes it clear that the reason for a person's detention is immaterial to give him the status of being a "prisoner". S138(1), dealing with a prisoner, deals with a person in detention whether he be on remand or duly serving a sentence or, indeed, it may be even if he be unlawfully detained. S132, on the other hand, deals only with a person who is serving a sentence. S138(1) is not read as relating to prisoners other than those serving a lawfully imposed sentence. The section deals with all prisoners, irrespective of the reason for their detention.

2. While it may be appreciated that arguments may be advanced that judicial notice may not be taken of the subject-matter of a proclamation and that regular production of a proclamation is necessary for its formal proof, it would seem that, in the circumstances of that case, the visiting justice and subsequently Harris J in *R v Visiting Justice at Pentridge; ex parte Walker* [1954] VicRp 86; [1975] VR 833 introduced an element of common sense into the conduct of summary proceedings of a special and limited kind.

3. There is a very substantial weight of authority to the effect that an informant may reopen his case to meet an objection that some formal proof of a matter that really does not admit of denial has been overlooked. The common case is where regulations have not been tendered as part of the informant's case, and it has repeatedly been held that the informant may cure this deficiency in his case after he has closed it, even to the extent of tendering such formal proof on the return of an order nisi to review. In relatively recent times the Supreme Court has allowed the curing of such deficiency in proof, almost without comment. The reason for allowing such deficiency in proof to be repaired is obvious. Though justice is said to be blind, like Janus she looks both ways and while looking to the interests of an accused person to ensure that all elements of an offence are proved, she does not close her eyes to the injustice to the prosecutor when a technicality which virtually does not admit of challenge has been overlooked.

4. In the result, the County Court Judge was in error at least in not allowing the informant to reopen his case, and he should have stated the facts for the determination of this Court when application was made to him. However, in the exercise of discretion, the application to make an order under s152(3) was refused, which normally would have been made. It was thus a pyrrhic victory for all concerned.

ANDERSON J: ... It was in Hansford's interest that the order nisi before me should be discharged, and Mr McGarvie submitted various arguments in support of his argument that no order be made under s152(3). His primary submission was that the informant had failed to prove several essential elements of the real offence with which Hansford had been charged. This involved a consideration of the nature of and the elements in the charge, Mr McGarvie contending that s138(1) of the *Social Welfare Act* 1970 under which the information purported to charge Hansford did not create any offence at all, but merely gave to the visiting justice jurisdiction to deal summarily with the indictable offence created by s132 of the Act.

The information in fact purported to charge him under s138(1) of the *Social Welfare Act* 1970 with attempting to escape, that section providing that:

> "A visiting justice may inquire in a summary way into any charge of attempting to escape idleness insolence refusal to work disobedience of orders, use of indecent abusive or improper language or breach of any rule or regulation or any other misconduct brought against a prisoner."

S138(2) provides for a penalty of not more than six months' imprisonment.

S132 provides that:

> "Every person lawfully imprisoned for an offence by the sentence of a court of competent jurisdiction who escapes, attempts to escape or without lawful authority is absent from a prison or from the custody of a member of the police force in whose custody he is shall be guilty of an indictable offence and being lawfully convicted thereof shall be liable to imprisonment for a term of not more than five years."

Mr McGarvie submitted that the informant must prove, both before the visiting justice and on appeal, that the person charged was lawfully imprisoned, and that he was so lawfully imprisoned in a prison and he referred to s113 of the Act which though it does not precisely define a "prison" deals with the proclamation in the *Government Gazette* of buildings and premises as "prisons and police gaols", which are called "prisons" in the Act.

I do not accept the first part of Mr McGarvie's submission that s138(1) does not create the offence of attempting to escape. The section deals with various kinds of misconduct by prisoners, e.g. idleness, insolence, refusal to work and disobedience of orders, which nowhere else in the law, so far as I am aware, are dealt with as substantive offences. I think that they are created as offences by s138(1), and it could not sensibly be suggested that, whereas such kinds of misconduct were substantive offences, their companion misconduct in the same section, namely, "attempting to escape", was not also a substantive offence. Implicit in the offence of attempting to escape is the concept of escape from something or somewhere. That the evidence in this case showed that he had attempted to escape from the custody he was in, cannot be denied. It is not necessary to refer to s132 to provide that it is a prison from which the attempt to escape has been made, for s138(1) is dealing with attempted escape by a "prisoner" who is defined by s3 as including "any person detained in a prison or police gaol irrespective of the cause of such detention". It is to be noted that s138(1) deals with an offence by a "prisoner", whereas s132 does not use the word "prisoner", but deals with a convicted "person", lawfully imprisoned, who attempts to escape from a prison. The definition of "prisoner" in s3 makes it clear that the reason for a person's detention is immaterial to give him the status of being a "prisoner". S138(1), dealing with a prisoner, deals with a person in detention whether he be on remand or duly serving a sentence or, indeed, it may be even if he be unlawfully detained. S132, on the other hand, deals only with a person who is serving a sentence. I do not read s138(1) as relating to prisoners other than those serving a lawfully imposed sentence. I think the section deals with all prisoners, irrespective of the reason for their detention.

The second part of Mr McGarvie's submission went really to the heart of the matter. It was that, even if it was under s138(1) that Hansford was charged, it was necessary to prove that the place in which Hansford was detained and from which he had attempted to escape was a prison as described in s113, for "prisoner" was defined as a person detained in a "prison". For practical purposes this meant that proof was necessary of the due proclamation in the *Government Gazette* of Pentridge as a prison. This matter was inferentially dealt with by Harris J in *R v Visiting Justice at Pentridge; Ex parte Walker* [1975] VicRp 86; [1975] VR 883, at p896. In that case, His Honour

was dealing with a number of questions which arose out of proceedings before the visiting justice at Pentridge. The main matter which arose for decision was the right of a prisoner being summarily dealt with to have legal representation. In the course of his judgment. His Honour dealt briefly with the question of proof that Pentridge was a prison in these words:

> "The submission made by the applicant that the information should be dismissed because it was not proved that he was a prisoner or that Pentridge was a prison, was properly rejected by the visiting justice, who was quite entitled, in the circumstances, to say that he had taken due notice of those matters. It was not seriously suggested in this Court that there was any substance in the points taken, in view of the place where the visiting justice sat and in view of the way in which the applicant was brought before the visiting justice and the way in which the witnesses referred to him in their evidence."

His Honour was of course referring to the proceedings before the visiting justice before whom the hearing took place within the walls of Pentridge itself, and the visiting justice was exercising a jurisdiction exercisable by him only if he was a Justice of the Peace, specially appointed as a visiting justice and it was as such he was functioning and it was in a prison that he was officiating (see s120). While I appreciate that arguments may be advanced that judicial notice may not be taken of the subject-matter of a proclamation and that regular production of a proclamation is necessary for its formal proof, it would seem that, in the circumstances of that case, the visiting justice and subsequently Harris, J introduced an element of common sense into the conduct of summary proceedings of a special and limited kind. It is appreciated that the case now under consideration by me does not deal with proceedings before the visiting justice at Pentridge but deals with an appeal from a conviction before such a justice, and the hearing of the appeal did not take place in the grim surroundings of Pentridge. On the other hand, the appeal which the learned County Court Judge was hearing was an appeal from the summary conviction of a justice (see s141 of *Justices Act* 1958), and such an appeal is a hearing *de novo* of the charge (*Gurner v St. Kilda* (1863) 2 W and W (L) 124; *Shaw v Phillips* (1866) 3 WW and a'B (L) 155); and whether or not an appellant may be entitled to make an objection on appeal which he did not make before the justice (as to which see *O'Sullivan v Friebe* [1956] SASR 89) it would be strange if upon the summary proceeding before the visiting justice proof that Pentridge was a prison was not necessary, yet on the re-hearing of the charge in the County Court such proof was necessary.

Independently, however, of the question whether proof was required of the fact that Pentridge was a prison, there is the question whether, in the circumstances of this case, the informant should have been allowed to reopen his case and prove by formal evidence the gazettal of Pentridge as a prison. Assuming that such proof was necessary, it had been overlooked by the informant, whose counsel, when the deficiency was pointed out to him, sought to remedy the deficiency. It was within the discretion of the learned Judge to grant or refuse the application, and His Honour purported to exercise his discretion by refusing to allow the case to be reopened. The reasons given by the learned Judge for refusing to allow the reopening of the case were, as I understand them, that the law which was to be applied to the matter in hand was applicable both to judge and jury cases and to where judges sit alone, and that he considered in all the circumstances that it would be manifestly unjust to reopen the case especially bearing in mind that the appellant was unrepresented, and His Honour said that in coming to his decision he particularly had in mind *R v Langer* [1972] VicRp 112; [1972] VR 973.

I do not think that the matter is advanced by observing that the same law is applicable whether proceedings are before judge and jury or before judge alone. Whatever the "law" may be, obviously particular rules of law are applicable before judge and jury but can have no application to proceedings before a judge alone, being designed specifically to deal with the presence of a jury. And the converse equally applies: there may be rules applicable only to proceedings before a judge alone. I think, in the circumstances of this case, that the fact that Hansford was unrepresented was irrelevant. The same rules apply whether a party is legally represented or not, though it is obvious that a judge in a case where a party is not legally represented takes care to ensure that his not being represented will not operate adversely to that party. But that does not involve the judge becoming in effect the advocate of that party, nor does it bestow upon that party advantages or treatment which would not be his if he had been legally represented. The same impartiality is required of the Court, whether a party is represented or not, and the prosecution should not be at a disadvantage or subject to stricter rules or extra restraints because the accused is not represented. In the present case, as I say, I think it was irrelevant that Hansford was not represented. The

points which he took that there was no proof of lawful detention and that Pentridge had not been proved to be a place of lawful detention he was, of course, entitled to take, but he took them at least as effectively as counsel could have done, and they deserved no more consideration and were entitled to no greater weight than if counsel had appeared and taken them.

There is a very substantial weight of authority to the effect that an informant may reopen his case to meet an objection that some formal proof of a matter that really does not admit of denial has been overlooked. The common case is where regulations have not been tendered as part of the informant's case, and it has repeatedly been held that the informant may cure this deficiency in his case after he has closed it, even to the extent of tendering such formal proof on the return of an order nisi to review. In relatively recent times this Court has allowed the curing of such deficiency in proof, almost without comment: see *Lee v Irish* [1949] VicLawRp 29; [1949] VLR 166; *Nash v Stielow* [1950] VicLawRp 10; [1950] VLR 39, at p43; *Anderson v Chigwidden* [1961] VicRp 89; [1961] VR 564; *Schuett v McKenzie* [1968] VicRp 24; [1968] VR 225; *Kennett v Holt* [1974] VicRp 79; [1974] VR 644. The reason for allowing such deficiency in proof to be repaired is obvious. Though justice is said to be blind, like Janus she looks both ways and while looking to the interests of an accused person to ensure that all elements of an offence are proved, she does not close her eyes to the injustice to the prosecutor when a technicality which virtually does not admit of challenge has been overlooked. In view of the course taken in this case, it is instructive to observe the eloquence of earlier judges upon this aspect. In *In Re Kendrick (No.2)* [1903] VicLawRp 69; (1903) 28 VLR 472, Hood J, dealing with the question of whether a Court of Marine Inquiry should have allowed the reopening of a case to prove that Hendricks had a master's certificate and that notice of the charge had been served upon him, said, at p475:

> "It would be a scandal on the administration of justice if every court had not the jurisdiction to allow a party to cure a slip. I have no doubt that, if necessary, the Court had jurisdiction to reopen the whole matter. It is a question of discretion entirely. As to not allowing a slip to be cured, it would be monstrous if a party could be defeated because his counsel had overlooked some little point."

The observations of Madden CJ in *Webb v Rooney* [1895] VicLawRp 75; (1895) 21 VLR 355, at pp357-8, are to the same effect. The Chief Justice there said:

> "It was also contended that the magistrates had no right to call further evidence after the case for the prosecution had closed. I do not think so. I think it is a matter for the discretion of every Court to allow a case to be reopened and new evidence called. If the proposed new evidence was merely technical proof of an undoubted fact – e.g., whether Korumburra was within or without a certain point – such evidence ought always to be admitted. The object of Courts is the administration of justice. There is no legal or moral obligation upon justices to afford facilities to any person to escape conviction for his offence. They should hesitate where the evidence relates to the pinch of the case. In such a case reopening the case offers temptation to witnesses to commit perjury or to give inaccurate evidence. In the present case the magistrates, having a discretion, have rightly exercised it, so far as the question of practice is concerned."

This case is also reported in [1948] VicLawRp 23; (1895) 1 ALR 83, and though His Honour's judgment as reported at (ALR) p84 is in places at variance with the judgment as reported in the Victorian Law Reports, the tenor is precisely the same. In the Argus Law Reports, His Honour is reported as saying: "... it must be remembered that Courts of Justice do not exist merely to give effect to ingenious objections of counsel, but to administer justice, and there is no obligation to afford facilities to get off the consequences of offences on technical grounds." One idly wonders which is the edited version of His Honour's remarks. The observations of the learned Chief Justice are as apposite today as they were eighty years ago, whether the ingenious objections taken be of counsel present in Court or not.

It appears that Hansford referred the learned County Court Judge to *Cartledge's Case*, and His Honour himself referred to *R v Langer*. Presumably *Cartledge's Case* is *R v Cartledge* [1959] VicRp 37; [1959] VR 221, and *R v Langer* is the case reported at [1972] VicRp 112; [1972] VR 973. *R v Cartledge* was a case where, at the close of the defendant's case, two Crown witnesses were recalled to give further evidence, in circumstances which on appeal were held not to be objectionable. The facts of *R v Langer* bear no resemblance to those in this case, and the decision in that case, following *Shaw v R* [1952] HCA 18; (1952) 85 CLR 365; 59 ALR 257, illustrates a totally different proposition from what is involved in the delayed tendering of some formal or technical proof. In *Langer's Case*, the Crown sought to recall the accused after he and his witnesses had given

evidence and his case had been closed, in order to cross-examine him concerning a document which had just come into the hands of the Crown and had earlier formed no part of its case. Leave was granted to recall the accused and to cross-examine him on the document, and on appeal it was held that the trial Judge had wrongly exercised his discretion. See also, *Shaw v R*, *supra*, and many other similar cases, where it has been stressed that it is only in exceptional circumstances that the Crown should be allowed to reopen its case and adduce fresh evidence after the close of the case for the defence. Those cases are concerned with circumstances quite different from those obtaining here, and illustrate a principle which is not applicable to the present case.

Though the learned County Court Judge had a discretion as to whether to allow the reopening of the Crown case, it appears to me that that discretion miscarried, for at least two reasons; first, he appears to have taken the view that a point taken by the appellant who is not legally represented has greater weight and validity, and, secondly, he appears not to have applied his mind to the proper principles governing the admission of proof of formal matters after the close of the case for the informant. This emerges, *inter alia*, from his apparent reliance on *R v Langer* which, in my opinion, was irrelevant to any issue before him.

[His Honour then dealt with the question of delay and continued] ... In the result, I consider that the learned County Court Judge was in error at least in not allowing the informant to reopen his case, and I also consider that he should have stated the facts for the determination of this Court when application was made to him. However, I consider that in the exercise of my discretion I should now refuse to make an order under s152(3), which normally would have been made. My reasons for so doing are set out above. It is thus a pyrrhic victory for all concerned. Application refused.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the respondent: Michael Niall and Co.
