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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

KEATING v GRESHAM

Gallop J

13 May, 7 June 1985 — (1985) 63 ACTR 19; (1985) 79 FLR 4; (1985) 17 A Crim R 234

PROCEDURE – PLEA OF *AUTREFOIS ACQUIT* – APPEAL AGAINST FIRST CONVICTION – DEFECT IN INFORMATION – APPEAL UPHELD AND CONVICTION QUASHED – INFORMATION RE-LAID CORRECTLY – WHETHER PLEA AVAILABLE ON SECOND INFORMATION.

Where a prior information is so defective as not to support a valid conviction, a defendant later charged by information which would support a conviction cannot rely upon the rule of double jeopardy.
***Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27, applied.**

GALLOP J: *[After setting out the nature of the information and the circumstances concerning the setting aside of the first information, His Honour continued]* … **[17 A Crim R 235]** The rule against double jeopardy requires for its application, not only an earlier proceeding in which the defendant was exposed to the risk of a valid conviction for the same offence as that alleged against him in the later proceedings, but that the earlier proceeding should have resulted in his discharge or acquittal. This last requirement may be satisfied by something less than an actual adjudication upon the truth of the allegations contained in the charge or upon the existence of some exculpatory fact (*Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, per Dixon J, as he then was, at 599; [1947] ALR 27).

For the purposes of the plea in this appeal, there is no doubt that the original charge upon which the appellant was ultimately acquitted by order of this court did not pursue the language of s34(2(b). It averred that he had not been granted a licence in pursuance of an order of the court under Pt.V of the said Ordinance, whereas it should have averred that he had not been granted a licence in pursuance of an order of a court under Pt. VI of the said Ordinance. Unless the original information had been amended that defect is such that a conviction in its terms could not have been sustained. How then, could it be said that the rule of double jeopardy could apply in relation to this appeal? It seems to me that, as was the case in *Broome v Chenoweth*, the adjudication made upon the footing that the information remained unamended was that the information should be dismissed because in its defective form it did not disclose an offence known to the law. The form of the information was enough to account for the dismissal. The appellant was **[236]** never in jeopardy of a valid conviction on that information and therefore, the plea is not sustainable. In deference to the carefully presented arguments of counsel for the appellant, it is necessary that I deal with his submission that the rule of double jeopardy applies, because the appellant was at risk of a valid conviction on the prior occasion if this Court had allowed the amendment to the information. It was submitted that, even though this Court exercised its discretionary power of amendment in such a way as not to allow the amendment sought, the appellant was in jeopardy subject to the exercise of that discretion. He could have been convicted if the amendment had been allowed, and it was submitted that in those circumstances the rule of double jeopardy applies.

The authority relied upon was *Curyer v Foote* (1939) SASR 203. In that case, the appellant had been charged with the commission of offences on 12 September. The evidence showed that if the offences had occurred they had occurred on 13 September. Counsel for the prosecution applied to the justices the amend the complaint by substituting the correct date. The justices refused to amendment and dismissed the complaint on the ground that a mistake had been made in the date. New complaints for the same offence were laid with the correct date. The appellant was then convicted by the same justices who heard the original complaint rejecting the plea of *autrefois acquit*.

On appeal the Supreme Court held that as the defendant might have been convicted on the first occasion he was not liable to be tried again and the convictions were set aside. In holding

that the defendant might have been convicted on the first occasion Murray CJ referred to the provisions of the *Justices Act* 1921 (SA) empowering justices to amend an information where there is a variance between the form of the information and evidence adduced in its support. The Chief Justice observed that in the instance case it was the duty of the justices not to dismiss the complaints for the defect or variance and that their proper course was to have amended the complaints as counsel for the prosecution had asked. He noted that good causes of complaint had been laid under the relevant section of the offence-creating legislation and that no prejudice would have been occasioned to the defendant by the proposed amendment. In those circumstances the Chief Justice held that the defendant could have been convicted of the offence charged in the first prosecution, notwithstanding that the date was proved to have been the 13th instead of the 12th and for that reason he was in jeopardy of being convicted on that occasion.

I have carefully considered counsel's submission about the applicability of *Curyer v Foote*. Dixon J referred to that case in *Broome v Chenoweth* at 602 and said:

> "Suppose an application to amend the information had been made and refused and, thereupon, the prosecutor had submitted to the dismissal of the information as too defective to support a conviction. In that case I should think that the defendant could not avail himself of his discharge upon the bad information as an answer to the later charge. The principle upon which the case of *R v Susannah Green* [1856] EngR 46; 169 ER 940; [1856] Dears & B 113 depends would apply. If that had happened in *Halsted v Clark* [1944] KB 250; [1944] 1 All ER 270, it is difficult to suppose that the same decision would have been **[237]** given. Nor does it appear that Murray CJ would have decided *Curyer v Foote* (1939) SASR 203 as he did, if the information had been bad and the amendment there refused had been essential to its sufficiency to support a conviction."

The principle upon which the case of *Green* depends was earlier referred to by Dixon J at 601 where he observed that in that case the judges upon a case reserved, decided that upon a plea of *autrefois acquit*, they should consider the former indictment as it was and not as it might have been made by amendment. It seems to me that Dixon J was not giving absolute support to the decision of *Curyer v Foote* and that its correctness should be confined to its particular facts and the South Australian legislation upon which it was decided. *Broome v Chenoweth* (*supra*) is clear authority for the proposition that if the prior information was so defective as not to support a valid conviction, a defendant charged by information which would support a valid conviction cannot rely upon the rule of double jeopardy.

Counsel for the appellant also referred to length at the various judgments of the High Court in *Davern v Messel* [1984] HCA 34; (1984) 155 CLR 21; 53 ALR 1; 58 ALJR 321. The rule against double jeopardy is restated in the various judgments of the members of the Court. I have carefully considered all those judgments and have come to the view that for cases like the present appeal, the High Court has not laid down any new principle for the application of the rule (see in particular per Gibbs CJ at 324, per Mason and Brennan JJ at 333, Murphy J at 338 and Deane J at 340). For these reasons, I reject the plea of *autrefois acquit* and require the appellant to plead further to the information ....

[His Honour then dealt with another matter not relevant to this Report].
