11/69

SUPREME COURT OF VICTORIA — FULL COURT

PHELAN v ALLEN

Winneke CJ, Smith and Gowans JJ

29-30, 31 October 1969 — [1970] VicRp 28; [1970] VR 219

PRACTICE AND PROCEDURE – DEFENDANT CHARGED BEFORE A MAGISTRATE WITH THE INDICTABLE OFFENCE OF FORGERY – PRIOR TO THE MATTER PROCEEDING A SUBMISSION WAS MADE BY THE DEFENDANT'S SOLICITOR THAT THE FACTS WOULD NOT IN LAW SUPPORT THE CHARGE LAID – MAGISTRATE STRUCK OUT THE INFORMATION – WHETHER COURT'S ORDER JUDICIAL OR MINISTERIAL – "PERSON WHO FEELS AGGRIEVED" – "ORDER" – WHETHER COURT'S ORDER REVIEWABLE: *CRIMES ACT* 1914-1966 (CTH), S63(1)(c).

HELD: Order nisi set aside with costs. Order not reviewable.
1. It has long been established doctrine that in one respect a limitation is to be imposed upon the scope of the definition of the word "order", namely, that it is to be construed as applying only to decisions which are judicial, and not merely ministerial. The cases upon which this doctrine rests have established, also, that in proceedings before justices with respect to an indictable offence a committal for trial and a dismissal of the information are ministerial, not judicial, orders.

2. Orders committing or refusing to commit had for a very long time been regarded as ministerial, and, therefore, as not subject to judicial supervision. And it seemed unlikely that the legislature, in 1907, would have introduced a provision making it possible for every informant who was refused a committal order, and every accused who was committed for trial, to apply for an order to review the ministerial decision. If such a major change had been intended, one would have expected it to be brought about by a provision dealing directly with what was now s155(1), or with the definition of "order" which was now in s3. And one would have expected the new provision to make it clear that orders committing persons for trial and orders refusing to commit were reviewable orders.

3. Accordingly, the argument as to the effect of the introduction of the definition of "person who feels aggrieved" and whether the Magistrate's order was reviewable was rejected.

WINNEKE CJ: I will ask Smith J to give the first judgment in this case.

SMITH J: On 6 August of this year, the Stipendiary Magistrate at the Court of Petty Sessions at Hawthorn, sitting in federal jurisdiction, had brought before him an information charging the defendant with an indictable offence. The offence charged was that the defendant, between 26 January 1968 and 1 February 1968, at Hawthorn, contrary to s67(b) of the *Crimes Act* 1914-1966 (Com.) did forge a document deliverable to a public authority under the Commonwealth, the Reserve Bank of Australia, namely, a Taxation Department cheque No. 74005198 in the sum of $14.07 made payable to Kathleen M. Turner. The charge arose out of the act, alleged to have been committed by the defendant, of endorsing the name of the payee upon the cheque referred to in the information, which was a cheque payable to a named payee or order, crossed not negotiable, and drawn by the Commonwealth on the Reserve Bank.

The charge was read to the defendant. As it was a charge of an indictable offence, he did not plead it. His solicitor, Mr Dunn, then made a preliminary submission based on the assumption that the Crown proved the facts it relied on in support of the charge, and he said that if his preliminary submission failed the defendant would contest those facts. The preliminary submission was that the facts intended to be proved by the informant were those appearing in the information, plus the additional fact that the defendant wrote the payee's name on the cheque as an endorsement, and that those facts would not in law support the charge laid. The magistrate heard argument on behalf of the defendant and on behalf of the informant regarding this preliminary submission, and it appears that the magistrate during the course of that argument expressed the following views: first, that the endorsement on the cheque did not constitute an alteration of the cheque, within the meaning of s63(1)(d) of the *Crimes Act*: secondly, that the endorsement did not make

the instrument a false one, within the meaning of s63(1)(c) of the *Crimes Act*; and, thirdly, that the instrument was not one "deliverable to" the Reserve Bank, in the sense alleged in the information.

At the conclusion of the argument on the preliminary point the magistrate gave a decision, which is described in the material before this Court in these terms:

> "The magistrate ruled that, the elements of the charge being agreed, the prosecution arose out of the forgery of a signature on a Taxation Department cheque drawn on the Reserve Bank of Australia in favour of Kathleen M Turner as payee, the matter must be struck out. He found that there was no offence shown by the information which the court could hear."

An application was made on behalf of the informant to one of the masters of this Court for an order nisi to review that decision by the magistrate. The master refused to grant the order nisi. An application was then made in the Practice Court, by way of appeal from the master's decision, and on that application an order nisi granted to review the magistrate's decision on five grounds specified in the order. It is not necessary for present purposes to detail those grounds, but it is relevant to say that the order was one to show cause why the order striking out the information should not be reviewed.

The order nisi was returnable before the Full Court, and this Court has now been moved on behalf of the defendant, upon a notice of motion, for an order setting aside or rescinding the order nisi to review on the grounds that the striking out by the magistrate was not an "order" within the meaning of s155(1) of the *Justices Act* 1958, and was, therefore, not a proper subject for the granting of an order nisi to review under that section. The motion also sought to have times abridged, and the Court has abridged times accordingly to enable the motion to be argued as the first step in its consideration of this matter.

In support of the motion Mr Tadgell, for the defendant, contended that the only order made in this case by the magistrate was an order finally disposing of the committal proceedings by refusing to commit the defendant for trial. He said that although the magistrate had stated that the information must be struck out, and although this expression may not have been entirely apt, it was quite clear that, in effect, what the magistrate did was a ministerial order disposing of ministerial proceedings; and he said that the cases have established that such an order does not fall within the definition of "order" in s3 of the *Justices Act* 1958, and, consequently, is outside s155(1) of that Act, and is not reviewable.

In support of these submissions he relied on the following authorities amongst others: *R v Carden* (1879) 5 QBD 1; *Cox v Millidge* [1893] VicLawRp 85; (1893) 19 VLR 527; *Kennedy v Purser* [1898] VicLawRp 113; (1898) 23 VLR 530; 4 ALR 54; *Cox v Duke* [1920] VicLawRp 32; [1920] VLR 152; 26 ALR 82; *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145; 63 WN (NSW) 228; *Hall v Braybrook* [1956] HCA 30; (1956) 95 CLR 620, per Dixon CJ at p635; [1956] ALR 587, and *Byrne v Baker* [1964] VicRp 57; [1964] VR 443, at p464.

The passage thus relied upon in the case last cited is in these terms:

> "It has long been established doctrine that in one respect a limitation is to be imposed upon the scope of the definition, namely, that it is to be construed as applying only to decisions which are judicial, and not merely ministerial. The cases upon which this doctrine rests have established, also, that in proceedings before justices with respect to an indictable offence a committal for trial and a dismissal of the information are ministerial, not judicial, orders."

Mr Kaye, for the informant, sought to meet these submissions by a number of alternative contentions.

He contended that the authorities referred to by Mr Tadgell were inapplicable to this case because here what the magistrate did amounted to a refusal to hear the information, and this, Mr Kaye contended, was a reviewable order. This argument, however, proceeds upon a misapprehension of the facts. The magistrate did not refuse to hear. He was asked by the defendant to adopt a mode of hearing which, it was suggested, might shorten the hearing, and the informant by his conduct clearly acquiesced in the adoption of the suggested mode of hearing. What was done was that the magistrate was told what were the facts of which the informant would call evidence, that he heard argument from each party as to whether those facts, if established, would make out the

offence charged, and that he then acceded to the defendant's argument and rejected that of the informant and gave his decision in the terms which have already been stated. It is impossible to characterize this as a refusal to hear the information. It is, therefore, unnecessary to go on and consider whether a refusal to hear an information for an indictable offence would fall outside the authorities referred to by Mr Tadgell and would constitute a reviewable order.

Mr Kaye further contended that the rulings on questions of law which were given by the magistrate before pronouncing his decision were "determinations" within the meaning of the definition of "order" in s3 of the *Justices Act* 1958 and within s155(4) of that Act and, therefore, constituted separate reviewable orders. This argument, however, fails to recognize the distinction between, on the one hand, a determination of an ultimate question or issue which a tribunal is given authority to decide as between parties and, on the other hand, conclusions reached as steps in a chain of reasoning which brings a tribunal to the point of making a determination that it is so authorized to make. The rulings in question were not "determinations" in the relevant sense and, therefore, were not reviewable. They were merely the expression of conclusions reached by the magistrate which led him to decide that a case for committal had not been made out. It may be added that, even if those rulings had constituted determinations in the relevant sense, they would not have been covered by the order nisi.

It was further submitted that, even if the rulings in question were not themselves reviewable orders, the fact that the order striking out the information was based upon, and, therefore, in a sense included, those rulings on questions of law took that order outside the authorities relied on by the defendant and made it a reviewable order. This attempted distinction however, is not well founded. The magistrate was not entrusted with authority to determine as between the parties any of the questions of law to which the rulings related. His function was a ministerial one of deciding whether, having regard to the law as he understood it and the facts placed before him, there was, or was not, a case against the defendant which warranted a committal. The fact that the magistrate found it necessary or proper to form and express definite views on legal questions relevant to the charge laid, did not in any way alter the fact that his functions, and his decision to strike out the information, were ministerial and not judicial.

It was then submitted that this Court should not regard itself as bound by the authorities cited by Mr Tadgell and should hold that, even though an order committing a defendant for trial for an indictable offence, and an order refusing to do so, are ministerial only, nevertheless they are reviewable orders. It was said that, whatever may have been the legal situation before 1907, the introduction in that year into the legislation relating to orders to review of the definition of "any person who feels aggrieved" which now appears in s155(4) of the *Justices Act* 1958 had the effect of making such ministerial orders reviewable; and it was put that *Cox v Duke*, *supra*, and later cases had failed to recognize the necessary effect of the addition of that provision upon the meaning and effect of the other provisions now contained in s155. In particular, it was urged that the introduction of that definition must have been intended to make orders committing or refusing to commit reviewable, because otherwise, it was said, the references in the definition to informants and defendants to informations charging indictable offences would have been nugatory or substantially so.

This view may, at first sight, seem persuasive, but, when the history of the matter is examined, its attraction does not survive. As was pointed out in the judgment in *Byrne v Baker*, *supra*, p463, the introduction of this definition in 1907 was due to the fact that certain doubts had been raised by the proceedings in *Foss v Best* [1906] 2 KB 105, and *Lucas v Graham* [1907] HCA 46; (1907) 5 CLR 188, at p189. But any doubts that were so raised would not have been in relation to the ministerial character of orders committing for trial or refusing to commit, nor in relation to the correctness of the law as laid down by this Court in *Kennedy v Purser*, *supra*. They would have been in relation to the question whether an informant to an information for an offence tried summarily could say that he was aggrieved by an acquittal of the defendant and so bring himself within the provisions of what is now s155(1) of the *Justices Act* 1958. For those cases indicated that general words in an appeal provision might have to be read down in the light of the then generally accepted principle that a person tried and acquitted should not be pursued further.

The reason for the introduction in 1907 of the new definition of "a person who feels

aggrieved" would appear, therefore, to have been to remove those particular doubts; but if the new provision had merely said that the expression "a person who feels aggrieved" included "as well as a defendant any informant to an information charging an...offence punishable upon summary conviction" (omitting the words "indictable offence or") this would have been inadequate to deal with all convictions and acquittals for criminal offences in courts of petty sessions or before justices. For under s67 of the *Crimes Act* 1890 an information for larceny, the commonest of indictable offences, could in many cases result in a summary conviction or acquittal. Under that section, upon an information charging larceny, the justices, in addition to their powers as committing magistrates to commit for trial or to discharge from custody, had power, if, in their judgment, the defendant was not over 16 at the time of the alleged offence or the value of the goods did not exceed £2, to hear and determine the charge in a summary way and themselves convict or acquit.

It is perfectly understandable, therefore, that the legislature in 1907 should have included, as it did, in the new definition of "person who feels aggrieved" the words "indictable offence or", and that it should have done so with the object, not of altering the meaning of the word "order" by making it cover ministerial orders, but with the object of ensuring that informants to informations for indictable offences were placed in a position corresponding with that of defendants to such informations by being authorized to review summary acquittals on charges of indictable offences and also to review other orders of a judicial character made in proceedings initiated by informations for such offences.

Instances of provisions authorizing such orders are provided by the facts in *Hall v Braybrook*, *supra*, and by the facts in *Weppner v Arnold* [1923] VicLawRp 17; [1923] VLR 127; 29 ALR 82. The following provisions of the *Justices Act* 1958 may also provide instances: s37, under which orders may be made for the return of property to the accused; s39, under which orders may be made for the preservation of property; s44, under which orders may be made in relation to the examination of a witness who is ill; s46, under which an order may be made committing or fining a witness refusing to be examined or produce documents; s207, under which orders may be made for the inspection of property; and s211, under which orders may be made punishing contempts. Most, though not all, of the provisions referred to were represented by corresponding provisions in force in 1907.

Moreover, orders committing or refusing to commit had for a very long time been regarded as ministerial, and, therefore, as not subject to judicial supervision. And it seems unlikely that the legislature, in 1907, would have introduced a provision making it possible for every informant who was refused a committal order, and every accused who was committed for trial, to apply for an order to review the ministerial decision. At least it can hardly be supposed that the legislature, if it had intended to make such a substantial change in the legal system, would have done so by the indirect method of introducing into the section which is now s155 of the *Justices Act* 1958 a definition of "person who feels aggrieved". If such a major change had been intended, one would have expected it to be brought about by a provision dealing directly with what is now s155(1), or with the definition of "order" which is now in s3. And one would have expected the new provision to make it clear that orders committing persons for trial and orders refusing to commit were reviewable orders.

For these reasons, the argument as to the effect of the introduction of the definition of "person who feels aggrieved" must, in my view, be rejected.

Two further points may be mentioned briefly. One is that it was sought to maintain that the defendant, when before the magistrate, applied to have the information struck out as being defective in form in that the particulars did not support the offence charged; and it was said that the magistrate, by his order, was granting that application. In fact, however, no such application was made or granted. The other is that Mr Kaye sought to equate the situation in the present case with that in *Byrne v Baker*, *supra*, by maintaining that there was here a proceeding separate from the original information—a separate proceeding consisting of an application made at an early stage of the hearing to have the information dismissed. There is, however, the vital distinction that in *Byrne v Baker*, *supra*, the application made was for a judicial determination, whereas here the application was, in my view, for a ministerial order refusing to commit.

For these reasons, I am of opinion that the motion should be granted.

WINNEKE CJ: I agree. There is nothing I desire to add.

GOWANS J: I agree.

WINNEKE CJ: The order of the Court is that on the motion of the defendant the order nisi is set aside with costs to be taxed and paid by the informant.

Solicitor for the informant: H Renfree, Commonwealth Crown Solicitor.
Solicitor for the defendant: RH Dunn.
