

55/88

SUPREME COURT OF VICTORIA

ENRIGHT v McINTOSH

McGarvie J

30 June 1988

PROCEDURE – INFORMATION – DIFFERENCE BETWEEN DISMISSAL AND STRIKING OUT – ONUS ON DEFENDANT TO PROVE PRIOR DISMISSAL – REGISTER ENTRY UNCLEAR – WHETHER DEFENDANT'S ONUS DISCHARGED.

When an information came before a Magistrates' Court, the following entry was made in the Register by the presiding magistrate: "Prosecutor refuses to seek adjournment. Prosecution not in a position to proceed. Evidence on oath of def that did not get any notice regarding new procedure and if wish to defend to be present. Order \$100.00 costs against informant." When the same information subsequently came before the court, the presiding magistrate upheld the defence that the information had been previously dismissed, and ordered that the information be struck out. Upon order nisi to review—

HELD: Order nisi absolute.

1. **Where an information is dismissed, that has the effect, if there has been a hearing on the merits, of ending the cause of action in a civil case or the right to prosecute a charge in a criminal case. The onus of proving there has been a dismissal is on the defendant.**

2. **In the present case, nowhere in the court Register was it stated that the information was dismissed or struck out. Accordingly, the defendant was unable to discharge the onus of proving the dismissal and the magistrate was in error in holding that there had been an order of dismissal on the earlier occasion.**

McGARVIE J: [1] This is the return of an order to review a decision of the Magistrates' Court at Heidelberg made on 18th August 1987. The information had been laid by the informant Enright against the defendant McIntosh for driving a motor car carelessly on Newmans Road, Templestowe, on 21st August 1986. [2] When that information came on for hearing before a Magistrate on 18th August, Sergeant Ryan appeared to prosecute and Mr Blanden represented the defendant. Mr Blanden submitted to the Magistrate that the matter should not be permitted to proceed because the charge which was made had already been dismissed by that Court on 12th March 1987. Mr Blanden relied on provisions of s78(1) of the *Magistrates (Summary Proceedings) Act 1975*, in particular paragraph (1), which provides:

"If the Court dismisses the information, complaint, set-off, or counterclaim, the Court shall make an order of dismissal and shall give the defendant or complainant (as the case may be) in that behalf a certificate of dismissal signed by the adjudicating justices or one of them or by the clerk of the Court if the certificate is demanded;"

and paragraph (m):

"A certificate of dismissal given under paragraph (1) shall upon its production be a bar to any other information complaint action or legal proceedings in any Court (other than proceedings in the nature of or following on appeal or order to review) for the same matters respectively against the same party."

Mr Blanden produced to the Magistrate a certificate which is Exhibit "C McI 2" before me.

That certificate was headed:

"CERTIFY OF DISMISSAL OF INFORMATION COMPLAINT GENERAL HEADING FORM 1
This is to certify that an Information at the suit of Peter Raymond Enright of of in the State of Victoria against Christiana McIntosh of in the State of Victoria for that the Defendant drove a motor vehicle carelessly was this day considered by the above named Magistrates' Court and was dismissed And it was ordered that the informant pay to the defendant the sum of \$100 for costs."

"Dated at the above mentioned Court the 17th day of August, 1987."

[3] It is signed and the signatory is described as "Clerk of the Magistrates' Court". There is nothing in the certificate to indicate which Magistrates' court the certificate refers to. There was before the Magistrate on 18th August some discussion as to the effect of that certificate. Mr Blanden made it clear that he was relying on s78(1)(m) of the *Magistrates (Summary Proceedings) Act* in making the application which he did, that the information should not proceed. There was some discussion as to the efficacy and the completeness of the certificate, but the learned Magistrate then looked at the register of that Court. The register showed that there had been a proceeding and the particular outcome of it. A copy of the register is contained in Exhibit "JJR3" before me, and it relates to 12th March, 1987. The register showed that there was a plea of not guilty and it is recorded, "Prosecutor refuses to seek adjournment. Prosecution not in a position to proceed. Evidence on oath of def that did not get any notice regarding new procedure and if wish to defend to be present. Order \$100 - costs against informant." The passage which I have quoted is in handwriting, and I am satisfied that is its effect. Nowhere on the register is it stated whether the information was dismissed or was struck out. Before the Magistrate on 18th August assertions were made by the prosecuting sergeant and by counsel for the defendant as to what had occurred before the Court on 12th March 1987. I will refer later to those assertions.

There are a number of grounds in the order to review. The first ground which has to do with natural justice was not pursued before me. I have heard good [4] argument from Mr Ginnane who appears for the applicant/informant, and Mr Goldberg who appears for the respondent/defendant before me. The arguments have dealt with several points of law. It is, however, my view that this proceeding may be determined by reference to only one of the points which was argued. Ground (ii) C in the order to review is, "The learned Magistrate erred in law in holding that there had been an order of dismissal made as certified in the certificate of dismissal."

It is my view, and I understand counsel not to contest that view, that in order to make out a defence to the information which came before the Magistrate on 18th August, it was necessary for the defendant to show that on the earlier occasion, the 12th March, the information had been dismissed as distinct from struck out. If one looks at the certificate which was tendered before the Magistrate, it was defective in that it contained no adequate description of the offence, nor of the date or location of the offence which was charged. Further, it did not identify the court before which the earlier information had come. The learned Magistrate decided, in the circumstances, that he should look at the court register, it being common ground that the information had come before that court. In my opinion, in the circumstances, the Magistrate was entitled to do so.

There were difficulties, however, which followed from an inspection of the register. While the certificate said that on the earlier occasion the information was considered and was dismissed, the statement in it that the [5] information was dismissed was part of a typed or printed form which was to be filled out in handwriting. When the register was looked at, as I mentioned, there was no indication at all whether the information had been dismissed or had been struck out. On 18th August, there were assertions made to the Magistrate by Mr Blanden and by the prosecuting sergeant. Mr Blanden asserted that on the earlier occasion the information had been dismissed. The prosecuting sergeant asserted that on the earlier occasion it had been struck out. It is in my view open to a Magistrate to act upon common assertions made before the Court by both parties, or an assertion by one party uncontradicted by the other.

I refer to what I said in *Paroukas & Anor v Katsaris* [1987] VicRp 4; [1987] VR 39 at p40. I also refer to some other authorities mentioned by me in a judgment given in an order to review last Tuesday, 28th June, *Karall v Winch*. However in this case the assertions as to the way in which the information had been disposed of on the earlier occasion conflict, and in those circumstances it was not open to the Magistrate to rely on assertions made before him. The position then was that he was left with the certificate which, in the typed or printed part of it, stated that the information had been dismissed, but the register to which it had been necessary for him to refer so as to supplement and complete the certificate showed nothing to indicate whether in fact the information had been dismissed or struck out. [6] In my view there was no material before the learned Magistrate which enabled him to decide whether the information had earlier been dismissed or had been struck out. The onus of proof in relying on that defence was on the defendant to establish dismissal.

Mr Goldberg referred me to a decision in *Banco* of the Supreme Court of New South Wales,

Ex parte Toomey (1901) 18 WN NSW 42; 1 SR (NSW) 24. That was a case in which in maintenance proceedings a Magistrate, after hearing evidence, made an order which was described by his endorsement of the papers "no order made". Further proceedings for maintenance were issued, and later a second Magistrate made a maintenance order. The matter went to the Court *in Banco* upon prohibition. An important question was whether the Magistrate should be regarded as having dismissed the information or not. The Court decided that under the relevant legislation the Magistrate had the alternatives of making an order or dismissing the information. It treated the endorsement "no order made" as equivalent to a refusal to make an order and held that that amounted to a dismissal. In the present case it is necessary to say something briefly about the difference between a dismissal of an information and the striking out of an information. If an information is dismissed, that has the effect, if there has been a hearing on the merits, of ending the cause of action in a civil case or the right to prosecute a charge of crime in a criminal case. To strike out an information is to take a course described by the expression "strike out" [7] which is not a word of art with a distinct legal meaning. Often it means that the proceeding which is struck out loses its place in a list of proceedings which are to be heard by the court. It is not uncommon for a civil action in this Court to be struck out and later, if terms of settlement in the action have not been complied with, it is open to a party to bring proceedings on motion in the action for judgment.

Another use of the expression drawn to my attention by Mr Goldberg appears in s78(1)(o), where a Magistrates' Court without jurisdiction to hear and determine an information or complaint is to order it to be struck out. Without in any way seeking to define what is meant and what is the legal effect of striking out an information, it is in my view clearly less than a dismissal of the information. It is of interest to note that in the order which is the subject of this order to review, the learned Magistrate on 18th August ordered that the information be struck out.

In my view, this is not a case as was *Toomey's* in which, from an examination of the circumstances and the legislation, it may be said that whatever was the order made by the Magistrate on the earlier occasion, it amounted to a dismissal. I mention a separate argument. Mr Ginnane objected to paragraphs 2 to 5 of the affidavit of Christiana McIntosh, sworn on 9th December, 1987. Paragraphs 2 to 4 deal directly with what occurred on the earlier occasion [8] on 12th March before the Court. Mr Ginnane submitted that it was not material to which I could have regard in determining the outcome of this order to review. Mr Goldberg submitted that those paragraphs were relevant to an issue which arose on ground (ii) B. Ground (ii) B is that, "The learned Magistrate erred in law in holding that the certificate of dismissal was validly granted." Mr Goldberg referred me to authority in support of that view. I assume, without it being necessary to decide, that Mr Goldberg's submission is correct.

It follows, however, that while that evidence is admissible on that issue, it is admissible only for that limited purpose. The question for me is whether, on the material which was before the learned Magistrate on the second occasion, the 18th August, he was in error in holding that there had been an order of dismissal made on the earlier occasion. For reasons which I have put, I am of the view that on the material before him he was not entitled to come to that conclusion and, accordingly, the order to review succeeds. Solely in order to avoid any embarrassment to the Magistrate whose order is the subject of these proceedings for review, I direct that the information be heard by another Magistrate.