04/69

SUPREME COURT OF VICTORIA

BARNES v GOUGOUSIS

Adam J

13, 20 August 1969 — [1969] VicRp 123; [1969] VR 1019

PRACTICE AND PROCEDURE – DEFENDANT INDICATED HIS INTENTION TO PLEAD GUILTY – INFORMANT NOT IN COURT BUT HAD TO APPEAR AT ANOTHER COURT – ON THE HEARING THE DEFENDANT CHANGED HIS PLEA TO 'NOT GUILTY' – ADJOURNMENT SOUGHT – REFUSED BY THE MAGISTRATE – INFORMATION DISMISSED FOR WANT OF PROSECUTION – NEW CHARGE LAID – CLAIM MADE BY DEFENDANT THAT CHARGE BARRED ON THE GROUNDS OF *AUTREFOIS ACQUIT* – SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER A HEARING "ON THE MERITS" – WHETHER MAGISTRATE IN ERROR.

HELD: Order absolute. Dismissal set aside. Matter remitted to the Magistrates' Court to be heard and determined by another Magistrate.

1. The general principle underlying the defence of *autrefois acquit*—prior acquittal—is one founded on public policy. No man should be put in peril more than once for the same offence—the rule against double jeopardy, as it is termed. The rule applies in all jurisdictions, whether the prior acquittal be on the verdict of a jury or takes the form of a dismissal of an information by a court exercising summary jurisdiction.

2. By the dismissal of the information without allowing the available evidence in support of the charge against him to be called there was no adjudication on the issue of guilt or innocence and the defendant was never in jeopardy of a conviction.

3. The dismissal of the information in the circumstances was not a dismissal on the merits which could found a defence of *autrefois acquit*.

ADAM J: This is the return of an order nisi to review an order of the Court of Petty Sessions at Port Melbourne made on 3 April 1969 dismissing an information against the defendant, George Gougousis.

The information charged that the defendant did break and enter a shop in Bay Street, Port Melbourne, and steal certain property therein valued at $392. The information was dealt with summarily and dismissed on the ground that the dismissal of an information for the like offence by the same court on 20 March 1969 established a defence of *autrefois acquit*.

The later proceedings on 3 April, now subject to review, took the following course.

After an unsuccessful application by defence counsel to have the information heard summarily, depositions were taken as on committal proceedings. When the evidence of the first witness—the occupier of the shop and the owner of the property, one Mandos—had concluded, defence counsel renewed his application and it was then granted. The charge was then read to the defendant who by his counsel pleaded not guilty. Counsel then submitted a plea of *autrefois acquit* on the basis of facts stated by him, without objection, from the Bar table. These were that an information for the same offence had been dismissed by the court previously on 20 March. Without tendering the relevant extract, counsel referred to an entry in the court register of convictions, orders and other proceedings in respect of that date, which showed that upon the information of one Sergeant Denis Payne in respect of the same offence the charge had been "dismissed for want of prosecution (the informant not being present at court)".

A certified extract of this entry has been exhibited to the affidavit in support of this order nisi to review.

Sergeant Platfuss, who prosecuted below, then supplemented such account of the previous

proceedings also by a statement from the Bar table, which was accepted without objection and treated as accurate. This disclosed that some time before the hearing of the information on the prior occasion the then prosecuting officer—one Detective Barnes—had informed the defendant's solicitor that he would be seeking an adjournment because the informant was required to be at Castlemaine court on 20 March. Defendant's solicitor, however, requested that the case proceed on 20 March as his client was not on bail and would be pleading guilty. Detective Barnes agreed on the understanding that the defendant would plead guilty, but made it clear that otherwise he would be compelled to seek an adjournment.

At the court on 20 March counsel appeared for the defendant. After learning that the defendant had signed a record of police interview he confirmed that the defendant would be pleading guilty. On the case being called on, the court granted an application by the prosecutor for the information to be dealt with summarily. On the charge being read to the defendant his counsel announced:

"My client instructs me he pleads not guilty."

Detective Barnes immediately applied for an adjournment on the ground that he had been informed that the defendant would be pleading guilty and that the informant, Sergeant Payne, was attending the Castlemaine court. This adjournment was refused and defence counsel then submitted that as the informant was not present in court the information should be dismissed for want of prosecution. A last minute request by Detective Barnes that the matter proceed as for an indictable offence and depositions taken from such witnesses as were available in court was refused as the prosecutor had previously requested the matter to be dealt with summarily.

Upon the magistrate intimating that he would dismiss the information for want of prosecution, Detective Barnes asserted that he was entitled to represent the absent informant, pursuant to s205 of the *Justices Act* 1958, and in fact appeared for him, but all to no avail, as the presiding magistrate then made the formal order that the information be dismissed for want of prosecution (the informant not being present at court). The prosecutor was thereby prevented from calling evidence in support of the information which he had then available—that of Mandos and his own evidence.

In the later proceedings, now subject to review, the Court of Petty Sessions, similarly constituted, upheld the plea of *autrefois acquit* based on such prior dismissal of the information.

Mr Brooking appeared before me on behalf of the informant to move the order absolute; there was no appearance for the respondent. I am indebted to Mr Brooking for his helpful argument presented with typical fairness in the absence of any opponent.

The first two grounds of the order nisi were that the court was in error in holding that in the circumstances the plea of *autrefois acquit* was available to the defendant; the defendant did not discharge the onus of proving the plea of *autrefois acquit*. The onus clearly lay on the defendant to establish this defence, and on the facts relating to the dismissal of the information in the earlier proceeding as accepted by the parties on the hearing below I am satisfied that the defence of *autrefois acquit* was not made out.

The general principle underlying the defence of *autrefois acquit*—prior acquittal—is one founded on public policy. No man should be put in peril more than once for the same offence—the rule against double jeopardy, as it is termed. The rule applies in all jurisdictions, whether the prior acquittal be on the verdict of a jury or takes the form of a dismissal of an information by a court exercising summary jurisdiction.

The general principle justifying the defence serves no doubt to explain its limits, but leaves unresolved the positive requirements which must be satisfied to establish the plea. Thus an accused may be considered to have been exposed to the peril or jeopardy of a conviction in earlier proceedings which in fact ended with a jury disagreement, but it is well settled that the defence has no application unless the prior proceeding resulted in an acquittal: see *DPP v Nasralla* [1967] UKPC 3; [1967] AC 238; [1967] 2 All ER 161; [1967] 3 WLR 13. On the other hand, a prior acquittal will not support the plea where the court lacked jurisdiction to convict, for then the accused would not in a legal sense have been in jeopardy on the former occasion.

Mr Brooking attacked the order of dismissal founded on *autrefois acquit* on two distinct grounds: the one that the prior dismissal of the information was not of such a character that it provided any foundation for the plea; the other that in the earlier proceeding the court was not a court competent to convict.

As to the first ground his submission was that the prior dismissal was not "on the merits" and that this requirement has been established by many authorities: see, e.g. *Stimac v Nicol* [1942] VicLawRp 15; [1942] VLR 66; [1942] ALR 88; *Ward v Hodgkins* [1957] VicRp 103; [1957] VR 715; [1958] ALR 348; *R v Galvin (No 2)* [1961] VicRp 114; [1961] VR 740, to mention but a few. Whatever the full import of the expression "on the merits", it connotes an adjudication on the issue of guilt or innocence. Thus if before issue joined by a plea of not guilty or its equivalent an information is dismissed for want of prosecution, there would have been no such adjudication and so no dismissal "on the merits": *Ward v Hodgkins*, *supra*. On the other hand, if after issue is joined the court enters upon the process of adjudication and the information is dismissed for insufficiency of evidence, or indeed, in the absence of any evidence, there is an acquittal "on the merits". For an acquittal to be "on the merits" an adjudication on the truth of the allegations contained in the charge is not required. The requirements of the rule against double jeopardy are satisfied in such a case because in the earlier proceeding the accused would have been exposed to the peril of conviction in the course of an adjudication as to his guilt or innocence upon such evidence as the prosecution could, or chose to, lead.

The general principles applicable to this plea are clearly stated by Dixon J, as he then was, in *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, at p599; [1947] ALR 27, in the following passage:

> "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. It may be enough if the judgment or order pronounced in favour of the person who stands in jeopardy must, according to its legal construction, imply a failure upon the part of the prosecution to make out the charge or some ingredient therein, or even a preliminary condition legally indispensable to a conviction, that is if the condition is of a kind that cannot be fulfilled after the failure of the earlier charge and before the laying of the later charge. In the present case the proceedings had advanced to a stage when it became incumbent upon the prosecutor to support his information by proof or evidentiary presumption in order to avoid a dismissal. That being so, I see no reason why the actual order dismissing the information, although expressed to be for want of prosecution, should not amount to a sufficient discharge affording a bar to further prosecution if the other requirements are satisfied upon which a defence of prior acquittal depends."

In support of his submission that the earlier proceedings on 20 March did not result in an acquittal on the merits, Mr Brooking relied in particular upon *Ward v Hodgkins*, *supra*. In that case the prosecutor had applied for an adjournment because the informant, who was an essential witness, had been too ill to attend the court. An adjournment was refused. Given the choice of withdrawing the charge and paying the costs or submitting to the charge being dismissed for want of prosecution, the prosecutor chose the latter alternative. The defendant was not required to plead and the information was dismissed for want of prosecution. That case differs from the present because in that case issue had not been joined on the charge by a plea of not guilty before it was dismissed; whereas in the present case it had. Is this a material distinction in the circumstances of the present case?

At (VR) p718; (ALR) p351, Herring CJ, in rejecting the plea of *autrefois acquit*, said:

> "... in order to determine whether the dismissal of an information can be relied upon as the basis for a plea of *autrefois acquit* it is necessary to go behind the dismissal and see how far the proceedings have gone. A dismissal in other words *per se* may not be sufficient. It may take place before issue joined or before there is any question of an adjudication being embarked upon with regard to the guilt or innocence of the defendant, and if it does, it will not, in my opinion, afford a basis for the plea";

and at (VR) p719; (ALR) p352:

> "The question, of course, is what is meant by a dismissal on the merits. I can understand it being said there is no dismissal 'on the merits' when a case is dismissed for non-appearance of the informant. But can it be said of a case where before dismissal issue has been joined and the adjudication entered upon? Clearly it will be a dismissal 'on the merits' in such a case if the informant calls evidence which proves insufficient to establish his case. I should have thought the position would be the same if the dismissal resulted from his failure to call any evidence at all".

From these observations it appears that the learned Chief Justice considered that two conditions must be fulfilled before the dismissal of an information in earlier proceedings would support a plea of *autrefois acquit* in later proceedings—issue joined between the parties by a plea of not guilty and after issue joined, an adjudication of guilt or innocence embarked upon. In such a case the mere failure of the prosecutor to call any or any sufficient evidence to justify a conviction would not prevent the resulting dismissal of the information, whether described as a dismissal for want of prosecution or not, from operating on a dismissal "on the merits" for the present purposes.

Not surprisingly, there appears to be little or no authority on the status of the dismissal of an information for present purposes where after issue has been joined by a plea of not guilty the court has declined to hear any evidence, contrary to the wishes of the prosecutor. There appears to me to be no justification in law for such a dismissal of an information, whether expressed to be for want of prosecution or otherwise. The only possible justification that I can see for the dismissal of the information on 20 March lies in what I consider to be an erroneous interpretation of s91(10) of the *Justices Act* in its application to the circumstances here existing.

The position was that the informant, Sergeant Payne, was not at the court. The person who announced his appearance for the informant was neither counsel nor a solicitor, but another member of the police force. In terms, s91(10) requires a Court of Petty Sessions to dismiss or adjourn the hearing of an information where the defendant is present but "the informant does not appear by himself, his counsel or solicitor". Section 205 of the *Justices Act*, a statutory provision first introduced into the legislation in 1896 (see s3 of Act No. 1458) authorizes an informant, if a member of the police force, to prosecute by any other member of the police force. Section 91(2) of the Act imposes a duty on a Court of Petty Sessions "if both parties appear either personally or by their respective counsel or solicitors or other persons by law empowered to appear for them" to proceed to hear and determine an information.

Apart altogether from authority, I would have thought that when read with s91(2) and s205, s91(10), which warrants the dismissal of an information in the absence of the informant, had no application where an informant being a member of the police force duly appeared by another member of the police force as authorized by law. This conclusion is strongly confirmed by the reasoning in such cases as *McGrath v Dobie* [1890] VicLawRp 133; (1890) 16 VLR 646; *Ritter v Charlton* [1904] VicLawRp 75; (1904) 29 VLR 588; 10 ALR 38; *Hayes v Wooten* [1929] VicLawRp 48; [1929] VLR 260; [1929] ALR 210, and *O'Toole v Scott* [1965] AC 939; [1965] 2 All ER 240; [1965] 2 WLR 1160. It would appear that s91(2) in its original form was amended to add after the words "counsel or solicitor" the expression "or other persons by law empowered to appear for them" after the enactment of the forerunner of s205 in 1896, but through some drafting oversight s91(10) was not similarly amended.

The erroneous interpretation evidently given to s91(10) led to the strange result that for the purpose of entertaining Detective Barnes's application for a summary hearing of the information, the court apparently gave him the status of a prosecutor authorized to represent the informant, and on this basis took from defendant's counsel a plea of not guilty, but thereafter proceeded as if the informant had not appeared and for this reason dismissed the information without embarking on any adjudication of guilt or innocence, and indeed refusing to proceed to any such adjudication on the available evidence.

On principle, I have no hesitation in concluding that the dismissal of the information in these circumstances was not a dismissal on the merits which could found a defence of *autrefois acquit*.

I might add that even had I concluded that s91(10) warranted a dismissal of the information on the ground expressed by the court—"want of prosecution (the informant not being present at

court)"—I would have considered that such dismissal of the information was, for present purposes, clearly not one "on the merits", notwithstanding joinder or issue by the plea of not guilty. By the dismissal of the information without allowing the available evidence in support of the charge against him to be called there was no adjudication on the issue of guilt or innocence and the defendant was never in jeopardy of a conviction.

A further submission by Mr Brooking was that the defendant had not discharged the onus of establishing that in the earlier proceedings on 20 March the Court of Petty Sessions had jurisdiction to convict him.

The information having charged him with an indictable offence, he could have been convicted by the court only if the procedure as laid down in s102(B) of the *Justices Act* for dealing with the charge summarily had been strictly complied with: *Hacking v Keith* [1966] VicRp 50; [1966] VR 364. One procedural requirement was that before deciding upon a summary hearing of the information the defendant should have been specifically asked by the court whether he consented to the charge against him being tried by the Court of Petty Sessions or desired that it should be sent for trial by a jury. The point taken by Mr Brooking was that it nowhere appeared from the material on these review proceedings that the defendant had been asked any such question.

If the fate of these review proceedings depended on this particular submission, I would have been disposed to have sought further information as to the procedure in fact followed on 20 March from the magistrate himself. As I uphold the submission of Mr Brooking on the first two grounds of the order nisi independently of this last submission, suffice it for me to say that on the material before me I would have upheld this submission also.

A final submission by Mr Brooking was of a highly technical character. It was that it was not open to the court to entertain the plea of *autrefois acquit*, whatever the merits of that plea, because his counsel had previously pleaded not guilty on his behalf. For support, Mr Brooking relied upon *R v Banks* [1911] 2 KB 1095; *Chenoweth v Broome* [1947] VicLawRp 1; [1947] VLR 1, at p6, and *R v Holland* (1914) 33 NZLR 931.

As I have heard no argument in answer to this submission and it has become unnecessary for me to rule upon it. I would prefer to leave this point open until a more appropriate occasion, particularly as I have some reservations about its being an inflexible rule at least as applied to the relatively informal proceeding of courts petty sessions.

A third ground that the order nisi was that having regard to the provisions of s102(A) and s102(B) of the *Justices Act*, and to the course of events before the court below, that court had no jurisdiction to dispose of the case summarily on 3 April by dismissing the information.

Under this ground Mr Brooking, as I understood him, sought to contend that the plea of *autrefois acquit* was not available at all when the court was exercising its summary jurisdiction pursuant to s102(A); and, further, that in such proceedings a plea of not guilty is required to be made personally by a defendant and not, as in the present case, by his counsel on his behalf. Suffice it for me to say that as at present advised I would not be prepared to accept either of these contentions, but again, as any decision has become unnecessary, and I have heard no argument to the contrary, I am content to leave them open until a more appropriate occasion arises for decision.

The order nisi will be made absolute on grounds 1 and 2. The order of dismissal will be set aside and the information remitted to the Court of Petty Sessions for rehearing. Without intending in any way to reflect on the integrity of any member of the Bench, it would seem desirable that the information which has twice been dealt with by the same Bench should be reheard before a Bench differently constituted.

APPEARANCES: For the informant/applicant Barnes: Mr R Brooking, counsel. Thomas F Mornane, State Crown Solicitor. No appearance of or for the defendant/respondent Gougousis.