48/76

SUPREME COURT OF VICTORIA

R v STIPENDIARY MAGISTRATE at BENALLA: ex parte HEDDINGTON & TUPPER

Fullagar J

29 August 1975

PRACTICE AND PROCEDURE – MATTER PROCEEDING BEFORE MAGISTRATE – AT END OF PROSECUTION CASE MAGISTRATE APPRISED THE ACCUSED ORALLY OF THEIR RIGHTS – STATUTE REQUIRED CAUTION TO BE HAND-WRITTEN AND GIVEN TO ACCUSED – COMPLIANCE WITH SECTION – WHETHER SECTION MANDATORY OR DIRECTORY – WHETHER BREACH OF NATURAL JUSTICE – WHETHER APPROPRIATE TO GRANT *CERTIORARI*: *CRIMES ACT* 1958, S398.

A magistrate hearing charges against three accused gave oral notice of the rights of accused to give evidence or to make unsworn statements rather than written caution under Section 398 *Crimes Act.* Upon application for a writ of *certiorari*—

HELD: Prerogative writ of *certiorari* refused.
1. Section 398 of the *Crimes Act* is directory only, in the sense that non-compliance with it does not necessarily and always invalidate the trial. The mere failure of the Court to comply with the requirements of s398 did not necessarily have the result that a conviction must be quashed.

2. Having regard to the affidavits of what transpired before the magistrate, all that they disclosed was that the accuseds' rights as to making an unsworn statement or giving sworn evidence were conveyed to the applicants indirectly, by way of the Magistrate conveying the situation to their co-accused before turning to the applicants later on and asking them whether they had anything to add.

3. The failure to comply with the precise mode stipulated by the statute did not amount to anything analogous to lack or excess of jurisdiction and in particular did not amount to a denial of natural justice.

FULLAGAR J: ... In the first place I consider that s398 of the *Crimes Act* is directory only, in the sense that non-compliance with it does not necessarily and always invalidate the trial. In the second place I am of opinion that this is not a proper case for extension of relief by way of the prerogative writ of *certiorari.* I wish to make it clear that it is for those reasons only that I do not now actually allow the amendment sought.

In my opinion the mere failure of the Court to comply with the requirements of s398 of the *Crimes Act* 1958 does not necessarily have the result that a conviction must be quashed. To hand a written caution to a blind accused person would be pointless; to hand a card bearing the prescribed words of English to an accused foreigner who spoke no English, or a card bearing the words in any language to an accused person known to be completely illiterate, would also serve no useful purpose. If s398 is not complied with, it may or may not result in a situation where the appropriate remedy is *certiorari*, depending upon the circumstances, in particular, in a case of this kind, depending upon whether in the circumstances there was what is loosely called a denial of natural justice. But the circumstances of the present case fall short, in my opinion, of any denial of natural justice.

In the present case the affidavit of Mr Cooper (a detective who was present in the Court below) deposes that, at the conclusion of the prosecution case, the Stipendiary Magistrate addressed all three defendants in words to the following effect:—

> 'You have each heard the evidence against you; do you wish to be called as a witness and give sworn evidence in answer to the charge? You are not obliged to be called and give evidence unless you wish, but if you are called you will be liable to be cross-examined. If you do not wish to be called as a witness, you may if you wish make an unworn statement. Do you understand that?'

One of the accused, namely that one of the three who is not one of the present applicants, then gave sworn evidence and was cross-examined; that is John Heddington. Thereafter the Stipendiary Magistrate asked the applicants 'whether they wished to give sworn evidence or make a statement from where they stood'. Each then made some short statement denying any complicity in the offence, whereupon the Magistrate then said, 'Do any of you wish to call any witnesses or to give evidence on your own behalf?' and each of the applicants answered 'No.'

The affidavits of the applicants (each of whom was at the time of the trial on a bond in respect of an offence committed prior to the offence for which they were then being tried) give a significantly different version of events, but in all the circumstances of the present proceedings I think I should accept the evidence in the answering affidavit of the police officer. If I thought that the affidavits of the applicants disclosed a *prima facie* case of a denial of natural justice, I would take a different view altogether; I would on that view have encouraged cross-examination of the deponents and I would further have taken the view that *certiorari* was an apt procedure for determination of the question whether there had been a denial of natural justice. But in all the circumstances of the present case I am of opinion that the affidavits of the applicants themselves do not disclose a denial of natural justice, or a *prima facie* case of any circumstance of a kind in respect of which the remedy by way of *certiorari* is ordinarily extended. All that they disclose is that their rights as to making an unsworn statement or giving sworn evidence were conveyed to the applicants indirectly, by way of the Magistrate conveying the situation to their co-accused before turning to the applicants later on and asking them whether they had anything to add.

In all the circumstances, therefore, I consider the proper course is to accept the affidavit evidence (which appears to me to be eminently probably) contained in the very full affidavit of the police officer (Mr Cooper).

In my opinion, the facts so ascertained disclose quite clearly that there was no denial of natural justice, and that there was nothing else analogous to a defect in jurisdiction in the Court to make and record the conviction. In my opinion, it is erroneous to say that the trial is invalid simply because, or that the conviction must be quashed simply because, there was not handed to the applicants any notice in writing as required by s398 of the *Crimes Act*. If the circumstances at the trial were such that the accused were never apprised of their rights as to giving evidence and as to making an unsworn statement, or as to the different consequence in relation to cross-examination, then that would, in most circumstances constitute a denial of natural justice, and *certiorari* would lie and would be granted – that would be a case of the kind dealt with by the Court of Appeal in *R v Wandsworth Justices: Ex parte Read* (1942)1 KB 281, and of the kind dealt with by the Full Court of this Court in *R v Chairman of General Sessions* [1959] VicRp 101; (1959) VR 800, a kind of case analogous to want of jurisdiction because the inferior tribunal has so far departed from normal procedure as to have failed to exercise its jurisdiction to hear, try and determine the case according to law. In the present case the Magistrate apprised the accused persons of their rights, albeit orally and not by the writing as stipulated by the procedural s398 of the *Crimes Act*, (and indeed partly, I think, by implication).

In the circumstances of the present case I am of the opinion that the failure to comply with the precise mode stipulated by the statute did not amount to anything analogous to lack or excess of jurisdiction and in particular did not amount to a denial of natural justice. Of course, even such a departure as here occurred could amount in some circumstances to a denial of natural justice. For example, if the trial in the inferior court had been before a jury, an oral indication of the accused person's rights in the presence of the jury might be so worded as to amount, if the accused elected to make an unsworn statement, to an impermissible comment upon their failure to give evidence or otherwise operate unfairly to prejudice them in the eyes of the jury; but it is unnecessary for me to go into any such question here.

The circumstances in which *certiorari* will lie are certainly not closed, but the kinds of case in which the writ will be granted are as follows: error on the face of the record, lack of jurisdiction, denial of natural justice, bias by interest in the tribunal, and where the decision is obtained by fraud or perjury — see e.g. *Halsbury's Laws of England* 3rd Ed. Vol. 11 pp142-145. In my opinion the circumstances of the present case are such that it does not fall within any of these classes of case.

In the present case, if I had concluded on the facts that there was in truth a denial of natural

justice in the circumstances — or if I had thought that strict compliance with s398 of the *Crimes Act* was mandatory in all cases in the sense that non-compliance must of necessity vitiate any conviction — then in either case I would have thought the proper exercise of the discretion was to grant *certiorari*, rather than leave the applicant to his relief by way of appeal to the County Court.
