01/93

SUPREME COURT OF VICTORIA

DOUGLAS v BIRT

Hedigan J

18, 19 August, 1 October 1992

PROCEDURE – *AUTREFOIS ACQUIT* – ADJOURNMENT REFUSED – PLEAS TAKEN – NO EVIDENCE CALLED – INFORMATION DISMISSED – RECORDED AS "STRUCK OUT" – INFORMATION SUBSEQUENTLY RE-LISTED – WHETHER DEFENCE OF PRIOR ACQUITTAL AVAILABLE – WHETHER INFORMATION SHOULD BE DISMISSED OR STRUCK OUT: *MAGISTRATES' COURT ACT* 1989, Sched. 2 Cl. 4.

1. Where a magistrate refused an application for an adjournment of informations, took pleas of not guilty and dismissed the charges when the prosecution called no evidence, the informations were dismissed on their merits notwithstanding that the Court Register recorded that the informations had been struck out. Accordingly, when the informations were subsequently relisted before another Magistrate, the Magistrate was in error in refusing to uphold the defence of *autrefois acquit* .

2. Where the hearing of an information is not adjourned, the magistrate has an obligation to hear and determine the information. If no evidence is called in support of the charge, the magistrate should dismiss it rather than strike it out.

HEDIGAN J: *[After setting out the facts, His Honour continued]* ... **[12]** It is to the relevant law and the submissions made, that I now turn. The first submission made by Mr Marzella for the plaintiff was that the second magistrate ought to have found that the first magistrate dismissed the informations. This submission was linked to the consequence contended for, namely that a dismissal of the informations constituted a bar to any attempt to bring them on for adjudication again. I reject the submission that the second magistrate had to so find. The one unequivocal conflict between the police and the defence in the material is over what the first magistrate said in disposing of the informations. The police position is and always was that he said they were struck out; the defence position was that it was dismissed. The computerized register of the Court recorded the informations as struck out. In those circumstances, it was open to the second magistrate to conclude that that was the order that was made.

The plaintiff's second submission was that even if the informations had been struck out and not dismissed the second magistrate should have concluded, having regard to the whole of the circumstances outlined to him by Mr Walsh, that **[13]** that constituted a sufficient adjudication of the information to found a plea of *autrefois acquit.* Linked to that submission was a submission that the magistrate clearly intended the informations to be dismissed, but, even if he did not, the striking out method of disposal, in the circumstances in which the plaintiff had been called upon and had pleaded not guilty, and the prosecution was called upon to call its evidence, was sufficient to constitute a final adjudication upon the matter.

Before embarking upon an examination of the relevant legal principles, it is necessary to refer to clause 4 of Schedule 2 of the *Magistrates' Court Act* 1989 which provides as follows:

> "4. Non-appearance of informant
> If the informant does not appear on the hearing date, the Court may—
> (a) dismiss the charge; or
> (b) adjourn the proceeding on any terms that it thinks fit."

Schedule 8, clause 7, provides as follows;

> "7. A criminal proceeding in the Court must, despite anything in any Act or subordinate instrument, be conducted in accordance with this Act and not otherwise."

It was presumably upon the basis of clause 4 of the Second Schedule that Mr Walsh had

submitted to the second magistrate that the first magistrate had either to dismiss the charge or adjourn it. However, Schedule 2 clause 4 deals with what is to happen in the case of the non-appearance of the informant. Section 38 of the Act provides that a party to a criminal proceeding may appear **[14]** "(c) In the case of an informant who is a member of the police force, by a police prosecutor."

Mr Marzella submitted that, notwithstanding the language of clause 4, the correct construction of clause 4 involved a consideration of what course a magistrate may take in circumstances where a magistrate is confronted with a contested hearing. He submitted that on a contested hearing, the informant has to appear in person, not simply through the prosecutor, and that the rules should thereby be construed in the case of a contested hearing, where the informant did not appear personally, as offering the magistrate two alternatives only, namely, either to adjourn the proceeding information or strike it out. For the present purpose, I do not find it necessary to construe this clause.

Counsel for the appellant's submissions require the reading into it of much that is not there. But, in any event, it seems to me that even if the submission were wrong, that is, even it were arguable that because clause 4 does not apply a magistrate has a power to strike out as well as dismiss, there was absolutely no point in the first magistrate striking out the informations. It was assumed, correctly I think, in the course of the argument before me that the effect of striking out an information or any other process was merely to strike it out from the list of cases within the Court Register awaiting hearing, so to speak, and that such an order did not have the effect of detaching a proceeding permanently from the business of the Court and did not constitute a final determination of it.

[15] It seems to me highly unlikely that the first magistrate intended to do that. If he were simply taking these informations out of the Court's adjudicatory process for the time being, then he would have adjourned the proceedings. In those circumstances, it would not have been necessary to have had the charges read to the plaintiff, nor to ask him to plead to them. Even if the magistrate did, as the police witnesses claim and the Court Register shows, strike out the informations, everything that occurred prior to the pronouncement of the order, including the refusal to adjourn the proceeding and the matter to which I have referred, indicates that the magistrate's intention was finally to adjudicate upon them on that day. The fact that he was aware from what the police prosecutor said that the police would not be able to adduce evidence does not effect any alteration of my evaluation of the matter. Had he thought that was of significance, he would have granted the adjournment.

Accordingly, I am satisfied that the first magistrate did intend to dispose of these charges. I find it impossible to decide as a fact whether he stated that they were dismissed or struck out but I have little doubt that he intended finally to dispose of them, that is, that he intended to dismiss them. That leads directly to a consideration of the issue as to the effect of the order made, whether it was a dismissal or whether it was said to be a strike-out. I regard as uncontroverted facts that the charges were read to the plaintiff who pleaded not guilty to them both through his **[16]** counsel and that the police were called upon to call their evidence. This is not simply an issue of considering whether or not there was a dismissal "on the merits". If it were, I would be of the view that it was dismissed on the merits, namely, that there was no evidence presented and led against the defendant on the two informations. This is the most effective defence of all, namely, that there was no evidence against the accused. I will, in this context, subsequently refer to *Enright* and *McGowan*, the authorities cited to the second magistrate.

A convenient commencing point is *Ward v Hodgkins* [1957] VicRp 103; [1957] VR 715; [1958] ALR 348, a decision and judgment of the then Chief Justice, Sir Edmund Herring. Hodgkins had been charged by a police officer, Ward, on three separate informations including assault and resisting a police officer in the execution of his duty. The charges at Sunshine Court were twice adjourned because of the inability of Ward to attend due to his injuries occasioned at the hands of Hodgkins. On the third occasion, Ward was again unavailable and the magistrate refused any further adjournment, offering the prosecutor the choice of withdrawing the charges with costs or having them dismissed for want of prosecution. The prosecutor chose to have the charges dismissed, they were and a certificate of dismissal was obtained. These charges were brought back on some two months later and the defendant, through his counsel, relied upon the plea of

autrefois acquit and the certificate of dismissal. The second Court accepted that plea as a bar and dismissed the informations.

It was **[17]** that decision of the second Court that was reviewed by the Chief Justice in *Ward*. The Chief Justice stated that in order to determine whether the dismissal of an information can be relied upon as the basis of a plea of *autrefois acquit*, it is necessary to go beyond the dismissal pronounced and to see how far the proceedings went in the earlier hearing. He concluded that a dismissal which took place before issue was joined or before there was any question of adjudication being embarked upon with regard to the guilt or innocence of the defendant could not afford a basis for the plea. In so deciding, he relied upon *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27 and other authorities.

The first proposition justifies the course of going beyond the formal court order to consider what had happened in the earlier proceeding. This authority, not cited to the second magistrate, obliged him to consider the circumstances of the hearing before the first magistrate. As I have already described, the facts as to that were stated to him from the Bar table, with but one matter not in agreement. In the circumstances, the second magistrate was obliged to consider the matters put before him in order to evaluate the basis and merit of the plea of *autrefois acquit*. I am satisfied that he did not, but guided himself on the formal record of the Court Register only. In so doing, the second magistrate was clearly in error, an error induced at least in part by the failure of counsel to refer him to *Ward* and other authorities. However, sitting here, I am able, as the Chief Justice in *Ward* was, to evaluate the real facts of the matter, as they have all been put before me as part of the **[18]** appeal process. I do not find it necessary to send this issue back to the magistrate but will decide it myself, being in no worse position (indeed, in a better position because of the supplemented material) than was the magistrate.

The second valuable proposition derivable from *Ward* is the Court's consideration of the judgment of Dixon J (as he then was) in *Broome v Chenoweth* (*supra*). It is not necessary to advert to the complex facts in *Broome* but it is clear that Dixon J expressed the view that dealing with the relevant information at an earlier time could found a plea of *autrefois acquit* on the basis that the informant had failed to support the information, the requirement to do so being capable of being 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. Dixon J had said:

> "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."

As the prosecutor had not done this, it followed that the dismissal could properly be regarded as a discharge or acquittal on which the defendant could rely in support of his plea of *autrefois acquit*, provided that the other requirements of that plea were satisfied. In *Ward*, those principles were of no assistance to Hodgkins because there had been no embarkation upon the hearing. The defendant was never asked to plead and did not do so. Accordingly, as the Chief Justice held, the informations were dismissed before issue was joined between the parties, in other words, the **[19]** hearing never began. He was also of the view that, even if resort to the consideration of whether there was a dismissal "on the merits" was had, it would be a dismissal on the merits if the dismissal resulted from the failure of the prosecution to call any evidence at all. In *Ward* the Chief Justice concluded that the Supreme Court, on order to review, had power to enquire into the validity of the certificate of dismissal relied upon a Court of Petty Sessions as barrier to an information, and to consider whether the Court below acted within its jurisdiction in giving it. Such a power of inquiry, in my judgment, must also include the power to conclude that the Court below had acted within its jurisdiction in dismissing an information.

Ward and *Broome* were both applied in *Barnes v Gougousis* [1969] VicRp 123; (1969) VR 1019. In that case, in the earlier hearing the defendant had been asked to plead and had pleaded not guilty. The prosecutor had applied for an adjournment because of the absence of a police witness and, on this being refused, the information was dismissed for want of prosecution. A plea of *autrefois acquit* was raised when the defendant was charged on another information for the same offence before the same court. At the earlier hearing the prosecutor had two witnesses who were present in court. He sought to have the matter proceed. Moreover, the prosecutor had

sought to represent the absent informant, pursuant to the then s205 of the *Justices Act* 1958. But, as Adam J found, all to no avail as the presiding magistrate then made the formal order that the information be dismissed for want of **[20]** prosecution, the informant not being present in court. The prosecutor was thereby prevented from calling evidence in support of the information which he had then available – that of a witness and his own evidence. It was stated by Adam J (1021):

> "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 ..."

As to a submission that the prior dismissal was not "on the merits" His Honour stated: (at p1022)

> "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 be no such adjudication and so no dismissal 'on the merits'; *Ward v Hodgkins*. On the other hand, if after issue 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*, (my emphasis), 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."

He otherwise adopted and approved the statements of Herring CJ in *Ward*. In *Barnes*, the plea was not upheld because the dismissal was not a dismissal on the merits as the Court had refused to permit the informant to embark on the calling of **[21]** the evidence, evidence which he had there and then present. *Ward* and *Barnes* were followed in *Vick v Drysdale & Anor* (1981) WAR 321. See also *Metropolitan Police Commissioner v Meller* [1963] Crim LR 856; (1963) 107 Sol Jo 831; *Snowball v Harper & Anor*, 5 ALR 190; 21 ALT 15 (in which in a civil proceeding a'Beckett J held that it was improper for justices to strike out a failed application instead of dismissing it, stating that they should not concern themselves with the consequences of dismissal): *R v Swansea Justices ex parte Purvis* (1981) 145 JP 252; (1981) LGR Rep 253, Donaldson LJ (as he then was) concluding that dismissal after a plea of not guilty and the failure of the prosecution to call evidence was an adjudication upon the merits, underpinning subsequent plea of *autrefois acquit* and *Ex parte Toomey* 18 WN (NSW) 42; 1 SR (NSW) 24.

There were cited to the second magistrate, *McGowan* and *Enright*. In *McGowan* [1984] VicRp 78; (1984) VR 1000 Kaye J had to consider the effect of a striking out order in the circumstances of that case. The magistrate had struck out certain informations on basis that he had no jurisdiction. A Supreme Court decision having decided that there was jurisdiction, the magistrate refused to set aside the formal orders striking out the informations and to re-hear them on the basis that the Court was not vested with jurisdiction to set aside an order striking out an information. Kaye J held that an order striking out an information was not a curial determination of the merits of the charge alleged, and therefore did not put an end to the proceedings, concluding that until such time that a court determined on its merits, and records an order **[22]** convicting a defendant or dismissing the information, an order striking it out is no more than a direction to remove from a list of matters for hearing and determination of the court. Clearly however, the statements by his Honour do not apply to a case where the matter has been determined on its merits, even if an order for striking out were made.

The authorities to which I have already referred clearly establish that the dismissal of an information after plea and the calling on of evidence is a dismissal on the merits. Moreover, it must be said that his Honour was dealing with a case in which the original strike-out had been done on the basis the Court had no jurisdiction, albeit a mistaken basis. His Honour stated that his observations concerning the effect of a striking out of a summons or information did not apply if the matter had been determined on the merits. This reinforces, if anything, the inappropriateness of making a strike-out order in the circumstances where a final adjudication has been made.

I find that the first magistrate did intend a final determination and, even if he did order that informations be struck out, an examination of the circumstances would indicate that the true character of the order was to dismiss the informations. As I have stated, it would be inexplicable if, given the circumstances, the first magistrate had intended the matter in effect to be brought on for hearing again, either as a consequence of an adjournment or a non-meritorious striking out. There was no plea entered in *McGowan*. In any event, Kaye J reached his conclusions on **[23]** the basis of an examination of the then s78(1) of the *Magistrates (Summary Proceedings) Act* 1975 reinforcing the supposition that his Honour intended his observations to be limited to a case in which there was a strike-out on the mistaken jurisdictional basis.

In *Enright v McIntosh* (MC55/1988) McGarvie J held that the defendant had failed to discharge the burden of establishing that there had been a dismissal in the previous proceeding. Counsel for the defendant raising a plea of *autrefois acquit* had founded his submissions on s78(1) of the Act, previously referred to, and advanced no argument adverting to the common law principles to which I have referred. The decision in *Enright* is doubtless correct on its own facts, since the Register failed to record either that the proceeding had been dismissed or struck out, reliance being simply placed upon the relevant certificate. McGarvie J specifically held that there was no material before the second magistrate who upheld the plea to enable him to decide whether the information had earlier been dismissed or struck out.

This is not the case here, as there was an ample description of the history of the proceeding before the first magistrate. The second magistrate was aware that at the very least the informations had been struck out, after plea and the failure of the police to call evidence. Mr Newton, who appeared for the respondents strongly contended that there was no error of law, that the burden of proof that there was a dismissal rather than the striking out had not been discharged and that the assertions of prosecutor and counsel conflicted and therefore could not **[24]** be relied on: (*Enright*). I have already explained that I hold the view that the assertions made before the second magistrate as to the events which had occurred before the first magistrate were substantially uncontradicted, save as to the order pronounced. Notwithstanding Mr Newton's contentions, I regard *McGowan* and *Enright* as distinguishable. In my view, on the whole of the circumstances the magistrate ought to have concluded that the defence of *autrefois acquit* was open and ought to have been upheld.

Whilst I have not found it necessary to express a concluded view as to whether clause 4 Schedule 2 applies in a case where the informant does not appear to give evidence in the contested matter, notwithstanding there was a police prosecutor by whom he may appear as informant rather than witness, it should be said that it would be as a general rule very unsatisfactory that a strike out order, which permits an information to be struck back in, should be made in cases of this kind. There had been a long history of adjournments, a contested hearing date had been given, the defendant was ready to proceed and the prosecution was not. The intention of Schedule 2 Clause 4 must have been that the prompt and reasonable dispatch of informations requires the prosecution to be ready to proceed or face the possible consequence of dismissal. If the matter is not to be adjourned, it would seem to me that the magistrate has an obligation to hear and determine the charges and, absent any evidence being called, to proceed to dismiss it. Any other orders would promote uncertainty in the disposition of these important proceedings in Magistrates' Courts.

[25] Counsel for the appellant argued that the order that was made ought to be stayed on the basis of abuse of process. Essentially, he relied upon the principles pronounced in *Jago v The District Court of New South Wales and Ors* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307. *Jago* confirmed that the courts possess inherent power to prevent their processes being used in a manner which gives rise to injustice, and to prevent abuse of process. The exercise of that power is discretionary and, as the High Court has told us, will only be used in exceptional circumstances to order that a criminal prosecution be stayed. The issues of the reasons for delays, the accused's responsibilities and prejudice suffered all fall within the ambit of matters to be considered.

In view of the conclusions that I have reached as to the defendant of *autrefois acquit*, it is unnecessary for me to consider this matter further other than to say that my strong impression is that the defendant was at least as much to blame for the delays in the matter as the police,

save for the last few adjournments. Moreover, the second magistrate made no reference to abuse of process and it is by no means clear that the matter was ever argued before him. It being a discretionary power, if the magistrate did consider it and decide it, it could only be interfered with in accordance with the principles that apply to the appellate court review of inferior courts' exercise of discretion. There is very little material on which any conclusion could be reached one way or the other about that. However, I do not find it necessary to pursue this matter further.

Accordingly, I make the following orders:

[26] (a) I grant *certiorari* and order and direct that the order made by the magistrate, in the following matters namely Case No. B0051338 charge No. 1 and charge No. 2 in which Andrew Michael Birt is informant and Stewart Wayne Douglas is defendant on 15th August 1991, that the cases referred to be adjourned to 4th February 1992, be quashed and that any orders made by the Magistrates' Court at Prahran further adjourning the said proceedings be quashed.

(b) I grant an order for prohibition restraining the Magistrates' Court of Victoria in respect of the cases referred to from proceeding to hear and determine either information or the charges thereon.

(c) I grant an order for mandamus directing the Magistrates' Court of Victoria at Prahran to record in respect of each information that each information stand dismissed.

(d) I order that the defendants pay the costs of this proceeding.

APPEARANCES: For the plaintiff Douglas: Mr P Marzella, counsel. Brennan & Georgio, solicitors. For the defendant Birt and Anor: Mr S Newton, counsel. Victorian Government Solicitor.
