

41/88

SUPREME COURT OF VICTORIA

REIFFEL v HEGGIE

O'Bryan J

8 June 1988

PROCEDURE – INFORMATIONS – WITHDRAWAL OF SOUGHT – WHETHER COURT SHOULD ENTER "WITHDRAWN" OR "STRUCK OUT" – WHETHER COURT MAY SUBSEQUENTLY ADJOURN A CHARGE "STRUCK OUT": MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, SS78, 103.

1. Where a Magistrate consents to a party's withdrawing an information which is before the Court, the appropriate entry to make in the Court Register is "struck out" or "struck out for want of prosecution".
2. Once the entry is made, the charge is no longer before the Court and thereafter, there is no jurisdiction in the Court to recall the charge and substitute an order adjourning it.

O'BRYAN J: [1] Order nisi to review two orders made by the Magistrates' Court at Dandenong on 13th August 1987 in respect of an Information wherein the respondent was informant and the applicant was defendant. The information charged the applicant as follows:

"(1) That between the 13th July 1987 and the 16th July 1987 at Bayswater not being authorised by or licensed under the *Drugs, Poisons and Controlled Substances Act* 1981 did traffick in a drug of dependence namely Cannabis L contrary to s71(1).

(2) That on the 16th day of July 1987 at Dandenong not being authorised by or licensed under the *Drugs, Poisons and Controlled Substances Act* 1981 did have in his possession a drug of dependence namely Cannabis L. contrary to s73(1).

[2] (3) That on the 16th day of July 1987 at Dandenong not being authorised by or licensed under the *Drugs, Poisons and Controlled Substances Act* 1981 did traffick in a drug of dependence namely Amphetamines contrary to s71(1) of the said Act.

(4) That between 18th March 1987 and 2nd July 1987 at Sassafra not being authorised by or licensed under the *Drugs, Poisons and Controlled Substances Act* 1981 did cultivate a narcotic plant namely Cannabis L contrary to s72(1) of the said Act.

(5) That between the 10th July 1987 and the 16th July 1987 at Bayswater did conspire with other persons namely Garry Wall and Stirling Johnstone to traffick in a drug of dependence contrary to s79".

When the matter was called on for hearing Senior Constable Heron, a police prosecutor, announced that the charge of conspiracy to traffick in a drug of dependence would be withdrawn. (Charge numbered (5) above.) The learned Magistrate then entered in the Court register in a column headed - Decision, Memo of Conviction, or Order - "withdrawn". Apparently this form of entry is commonly made in the Court register in such circumstances. One might suggest that a more appropriate entry would be – "struck out" or "struck out for want of prosecution" to reflect the decision or order of the Court. When a party desires to withdraw an information which is before the Court the Magistrate must decide whether to permit such a course. Should a Magistrate consent to a charge being withdrawn the appropriate order to make is "struck out". **[3]** An entry in the register, "struck out" more accurately records the decision or order of the Court. The *Magistrates (Summary Proceedings) Act* 1975, s78 does not contemplate "withdrawal" of an Information or a charge contained in an Information although a complaint or set-off for a debt or liquidated demand may be withdrawn or discontinued (s78(N)). A Magistrates' Court may strike out a complaint or information for want of jurisdiction (s78(0)).

The applicant consented to the remaining four charges being dealt with summarily and heard together. The applicant then pleaded guilty to the four charges and the Prosecutor gave the Court a summary of the evidence at the conclusion of which the learned Magistrate invited the

Prosecutor to withdraw the charge of trafficking in amphetamines (charge numbered (3) above) apparently upon the basis of paucity of evidence to support the charge. The Prosecutor accepted the invitation and the learned Magistrate entered the word "withdrawn" in the Court register. Counsel for the applicant then proceeded to make a plea in mitigation of penalty in respect of the three remaining charges of the plea. At the conclusion the learned Magistrate announced that the applicant would be convicted on the charge of trafficking in a drug of dependence namely, Cannabis L, between 13th July and 16th July 1987, contrary to s71(1) of the Act. (Charge numbered (1) above). Clearly, of the three charges still before the Court, this charge was the most serious.

The learned Magistrate then invited the Prosecutor to withdraw the charges numbered (2) and (4) [4] above. This invitation was accepted and the learned Magistrate made an entry in the register in respect of each charge – "withdrawn". When the entry was made the two charges were no longer before the Court because, in effect, each charge was struck out by order of the Court and the Court was without jurisdiction.

In *Bishop v Cody* [1939] VicLawRp 37; (1939) VLR 246; [1939] ALR 315 Lowe J at VLR 250 doubted whether the *Justices Act* 1928 permitted "withdrawal" of an information, at least after a hearing has been entered upon. The decision in *Bishop* is applicable to the events in the present case. Neither in the *Magistrates' Courts Act* 1971 nor in the *Magistrates (Summary Proceedings) Act* 1975 is provision made to enter "withdrawn" in the Court register.

The learned Magistrate proceeded to announce a penalty in respect of the remaining trafficking offence, a term of imprisonment. Shortly afterwards the applicant gave notice of appeal and applied to the Court to be released on bail pending appeal. Whereupon, but not at the invitation of the Prosecutor or with the consent of Counsel for the applicant, the learned magistrate made another order in respect of the charges numbered (2) and (4) marked withdrawn. He altered the entry in the register by crossing out the word "withdrawn" and wrote in the column headed – Decision, Memo of Conviction, Order - "Adjourned sine die." The applicant is aggrieved by these orders that he might possibly be called before the Court on a later date and dealt with in respect of two charges to which he pleaded guilty.

[5] An order nisi was granted on two grounds. It is necessary to consider only the second ground:

"The learned magistrate had no power or alternatively committed an error of law in adjourning *sine die* the charges the subject of the said amendment upon the ground that the applicant lodged an appeal to the County Court of Victoria against the learned magistrate's order that the applicant be imprisoned for an offence other than those which had been adjourned."

Counsel for the applicant submitted that when the two charges were "withdrawn" by the Prosecutor at the invitation of the Magistrate, the Court had no jurisdiction thereafter to recall the orders and substitute orders adjourning the charges. An order made in the Magistrates' Court adjourning a proceeding may be the subject of review in this Court. Cf. *Matheson v Matheson* [1952] VicLawRp 6; (1952) VLR 27 at 30; [1952] ALR 58; *Lee v Saint* [1958] VicRp 25; [1958] VR 126 at 130; [1958] ALR 545; *Howard v Pacholli* [1973] VicRp 83; (1973) VR 833.

During the presentation of argument in this Court it became apparent to Counsel for the respondent that the orders made adjourning two of the charges really could not be sustained. In my opinion, counsel for the respondent very properly no longer seeks to support the orders made in the Court below in respect of the two charges adjourned *sine die*.

In my opinion, when the learned Magistrate permitted the Prosecutor to withdraw the two charges he had no jurisdiction to deal further with them. The power to amend an order conferred by s103 of the *Magistrates (Summary Proceedings) Act* 1975 could not be invoked by the Magistrate because no omission or mistake had been made. [6] The orders made when the two charges were "withdrawn", once made, should have stood as the orders of the Court. The applicant is still in jeopardy by the subsequent orders which adjourned the charges *sine die* and is entitled to have the orders reversed.

When this matter was argued before me on 1st June 1988 I made the following orders and indicated that I would publish my reasons in due course. These are my reasons. The order

nisi is made absolute. Order that in lieu of the orders made adjourning the charges numbered (2) and (4) *sine die* an entry "struck out" shall be made in the register of the Magistrates' Court at Dandenong. The matter is remitted to the Magistrates' Court to be dealt with according to law. Order that the applicant's costs be taxed and paid by the respondent.
