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SUPREME COURT OF VICTORIA

FIELD v BONNER

Harris J

8 December 1977

PROCEDURE – WHETHER CONVICTION BY ALTERNATIVE PROCEDURE IS A CONVICTION FOR PURPOSES OF A REHEARING UNDER S152 – WHETHER A PERSON MAY APPLY FOR A REHEARING OF A PENALTY IMPOSED IN CHAMBERS: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT*, SS84(6), 87(5), 152.

The question was whether there is a jurisdictional right under s152 for a rehearing — it was argued that a conviction by a Stipendiary Magistrate in Chambers under s84(6) was not a conviction by a Magistrates' Court as required in s152 as it was not a hearing at which the defendant was entitled to appear — the filing of the election gave the right of hearing.

HELD: Dismissal of application for rehearing set aside.
Having regard to the provisions of the *Magistrates (Summary Proceedings) Act* 1975 one should construe it as entitling a person who has been convicted by proceedings which have followed the course set out in s84(6) to apply for the conviction to be set aside under s152 and for a rehearing of the information. Parliament may have thought that unless those prefatory words were included in sub-s(5) then the express provision that is contained in the remainder of the sub-section might have led to it being thought that this was a case where the *expressio unius* rule should be invoked. Parliament made it clear that that was not the case and, therefore, the prefatory words are of assistance in fortifying the conclusion which is to be derived otherwise from the words of the Act.

HARRIS J: *[After referring to s86* Magistrates (Summary Proceedings) Act*, His Honour continued:]* … Section 86 makes it plain that although the conviction which is imposed and the penalty which is imposed where the alternative procedure is adopted and no election has been received or no leave to defend has been granted, is made by a magistrate sitting in Chambers, nevertheless it is to be deemed for all purposes to have been imposed by a duly appointed sitting of a Magistrates' Court. By virtue of that section it must follow that s152 is applicable to a case where the conviction and penalty has been imposed pursuant to s84 sub-s6 because that conviction must be a conviction made by a Magistrates' Court for the purposes of s152 in view of the deeming provision contained in s86.

The other matter which influenced the magistrate's view about Part XVII arises from the fact that he would seem to have taken the view that where the matter has been disposed of under s84 sub-s6 there has not been a hearing of the information and consequently that there could not be a rehearing of something that had not been heard at all.

There is a somewhat analogous procedure laid down with regard to what are called default summonses in the civil jurisdiction of the Magistrates' Court. The legislature has seen fit to make express provision that there can be a rehearing of a complaint on a default summons notwithstanding the fact that it might have been thought there never had been an original hearing, when an order had been made for payment of the amount claimed, there not having been any notice of intention to defend given. The difficulty about that point of view is, as I see it, a threefold one. The first point is that the definition only states that 'rehearing' includes hearing a complaint upon which a default summons was issued and in respect of which notice of intention to defend was not given. Thus, it is only a definition of the kind which makes express provision with regard to a particular matter. It does not follow from a definition of that kind that it excludes other matters, even other matters which are of a similar nature. In my opinion, at all events in this case, the definition section does not give rise to a proper application of the *expressio unius* principle of the construction of statutes.

The second difficulty about adopting the Magistrate's view is that if it is correct, as I have held it is,

that a conviction which has been imposed under s84(6) can be made the subject of an application under s152, it would seem a very strange result for the legislature to have intended that although a person who had been convicted in that way could apply for an order that the conviction be set aside and the information be reheard, nevertheless, the Magistrate could not make any order for a 'rehearing' of such a matter. In my opinion, although, generally speaking, the expression 'rehearing' involves hearing again something which has already been the subject of a hearing in open court, is not necessarily so limited. It, in my opinion, is wide enough to cover a case such as the hearing in open court of a matter which has been disposed of in Chambers pursuant to s84(6).

The third of the difficulties which lie in the way of adopting the Magistrate's view arises from a clear indication of the intention of the legislature which is given by a provision to which I have not yet referred; The provision is s87(5). Section 87 is concerned with the proof of prior convictions where the alternative procedure is adopted. It contains this provision in sub-s(5):

> 'Without in any way limiting the generality of the provisions of this Act with respect to the rehearing of informations it is hereby declared that where evidence of prior convictions is tendered pursuant to the provisions of this section the court may set aside on such terms as to costs or otherwise as the court thinks just, any conviction or order if it has reasonable ground to believe that the document tendered in evidence would not, in fact, have been brought to the notice of the defendant or that the defendant was not, in fact, convicted of the offences as alleged in the document.'

That sub-section contains an express provision empowering the Magistrates' Court to set aside orders in the particular cases dealt with in the sub-section, but also contains, in the words with which the sub-section is prefaced a clear indication that Parliament left open to defendants convicted under s84(6) the provisions with respect to the rehearing of informations which are contained in Part XVII of the Act. Those words, 'without in any way limiting the generality of the provisions of this Act with respect to the rehearing of informations' are, to any mind, a clear indication of such an intention.

On the view I take of the Act one should construe it as entitling a person who has been convicted by proceedings which have followed the course set out in s84(6) to apply for the conviction to be set aside under s152 and for a rehearing of the information. Parliament may have thought that unless those prefatory words were included in sub-s(5) then the express provision that is contained in the remainder of the sub-section might have led to it being thought that this was a case where the *expressio unius* rule should be invoked. Parliament made it clear that that was not the case and, therefore, the prefatory words are of assistance in fortifying the conclusion which is to be derived otherwise from the words of the Act. I am satisfied that the Magistrate was in error in the view that he has taken.
