M287/75

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

409

BETWEEN DAVID JOHN EVERITT
Appellant

AND MICHAEL ANTHONY BROWN
First Respondent

AND THE POLICE
Second Respondent

Hearing: 30 July 1975
Judgment: 4/8/75

Counsel: C.R. Carruthers and P.C. Bowling for Appellant
P.J. Keane for First Respondent
J.H.C. Larsen for Second Respondent (given leave to withdraw)

JUDGMENT OF COOKE J.

This case comes before the Court on a notice of general appeal purporting to be filed under the Summary Proceedings Act 1957, s.116, against what is described therein as a determination of title to property in the possession of the police. It arises out of an application dated 19 May 1975 made to the Magistrate's Court at Wellington by a detective constable for what was likewise described in the application as a determination of title to property, namely a certain 1962 Jaguar motor car in the possession of the police. The application was made under s.199(3) of the Summary Proceedings Act. It is common ground that paragraph (b) of that subsection must have been the one invoked. In a supporting affidavit the constable stated that the car, which was suspected to have been used for the purposes of a burglary in Dannevirke, was stopped in Wellington a few days later and that the driver, one Brownlie, admitted committing the burglary and was arrested. It was further stated that Brownlie had

implicated the present first respondent as being a co-offender but that the first respondent had not been charged. Brownlie, however, had been dealt with for his part in the burglary. The affidavit did not show in what Court proceedings had been taken against Brownlie, but from the memorandum now lodged by counsel for the appellant it appears that the proceedings were not in the Wellington Magistrate's Court. The affidavit showed that the car was seized under a search warrant issued pursuant to s.198 of the Summary Proceedings Act and was at the Taranaki Street Police Station and no longer required by the police. The constable went on to say that competing claims had been laid to the car by the present appellant and the present first respondent, and that application was accordingly made for an order for the delivery of the car to the person entitled to possession. Section 199(3) to (6) provide :

> (3) If the thing seized is a thing to which subsection (2) of this section does not apply, the following provisions shall apply :
>
> (a) In any proceedings for an offence relating to the thing, the Court may order, either at the trial or hearing or on a subsequent application, that the thing be delivered to the person appearing to the Court to be entitled to it, or that it be otherwise disposed of in such manner as the Court thinks fit:
>
> (b) Any constable may at any time, unless an order has been made under paragraph (a) of this subsection, return the thing to the person from whom it was seized, or apply to a Magistrate for an order as to its disposal; and on any such application the Magistrate may make any order that a Court may make under paragraph (a) of this subsection:
>
> (c) If proceedings for an offence relating to the thing are not brought within a period of three months after the date of the seizure, any person claiming to be entitled to the thing may, after the expiration of that period, apply to a Magistrate for an order that it be delivered to him; and on any such application the Magistrate may adjourn the application, on such terms as he thinks fit, for proceedings to be brought, or may make any order that a Court may make under paragraph (a) of this subsection.

> (4) Where any person is convicted in any proceedings for an offence relating to any thing to which this section applies, and any order is made under this section, the operation of the order shall be suspended -
>
> (a) In any case until the expiration of the time prescribed by this Act or, as the case may require, the time prescribed by the Crimes Act 1961 for the filing of notice of appeal or of an application for leave to appeal; and
>
> (b) Where notice of appeal is filed within the time so prescribed, until the determination of the appeal;
>
> and
>
> (c) Where application for leave to appeal is filed within the time so prescribed, until the application is determined and, where leave to appeal is granted, until the determination of the appeal.
>
> (5) Where the operation of any such order is suspended until the determination of the appeal, the Court determining the appeal may by order annul or vary the order made under this section; and that order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.
>
> (6) In this section the term "Court" includes the Supreme Court.

It is to be noted that these provisions authorise an order for delivery of a thing to the person appearing to the Court to be entitled to it, or for disposal of the thing in some other manner. I think that the purpose is to provide summary machinery for dealing with possession, and that orders under the section are not intended to be final determinations of rights as to either title or possession. In that respect the section has some analogy with the Police Act 1958, s.58, although the wording differs.

The application was served on the present appellant and the present first respondent. At the hearing before the Magistrate at Wellington, the police were represented, the appellant appeared by counsel, and the first respondent

(who came from prison) appeared in person. Evidence was given by the appellant, by a young woman who was a friend of his, and by the first respondent. I gather that counsel for the appellant was prepared to present argument to the Magistrate on the relevant legal principles but the Magistrate apparently took the view that this could be dispensed with. He dealt with the matter in an oral decision in the course of which he said :

> . . . according to the civil law on payment of the deposit and receipt of delivery the purchaser becomes legally entitled to that article, subject of course to the fact that he owes the vendor certain monies. From that point in time the vehicle belongs to him, and can only be taken from him pursuant to some legal process. Had there been an agreement providing for repossession of the vehicle on certain default, and provisions as to what would happen after repossession, then Mr Everitt's position would have been infinitely stronger, but unfortunately for Mr Everitt the position seems to me to be quite clear by law and he at the present time is in a situation whereby he has actually sold the vehicle and is owed something like $1,000 from Brown. Not very satisfactory from Mr Everitt's point of view but that is quite clearly the law on the subject. . . .

On this footing the Magistrate purported to direct that the vehicle belonged to the first respondent; and he ordered delivery accordingly.

When the appeal came on for hearing, although counsel for the first respondent did not initially take any point as to jurisdiction I entertained doubt about whether an appeal lay. It was arranged that the appeal be heard on the merits and that counsel for the appellant be given leave to lodge written submissions on jurisdiction. These are now to hand.

The provision as to appeal is s.115(1) of the Summary Proceedings Act :

> (1) Except as expressly provided by this Act or by any other enactment, where on the determination by a Magistrate's Court of any information or complaint any defendant is convicted or any order is made other than for the payment of costs on the dismissal of the information or complaint, or where any order for the estreat of a bond is made by any such Court, the person may appeal to the Supreme Court.

Having studied the written submissions, I do not consider that there is any right of appeal in this case. Here, some time after summary proceedings had been concluded in one Magistrate's Court, an application was made under s.199(3)(b) to another Magistrate, sitting in a different Court. I do not think that the order made on this application was made, within the meaning of s.115(1), 'on the determination by a Magistrate's Court of any information or complaint'. It was not even made 'in any proceedings for an offence relating to the thing', within the meaning of s.199(3)(a) : that is why the application has to be regarded as based on (b). Several authorities are cited in the written submissions lodged for the appellant, namely : Harris v. Harris 1950 N.Z.L.R. 785, Tuohy v. Police 1959 N.Z.L.R. 865, Burton v. Police 1961 N.Z.L.R. 698, Port Line Ltd v. Browning 1962 N.Z.L.R. 509 and 739, Transport Department v. Cole 1966 N.Z.L.R. 609, and S. v. Police 1968 N.Z.L.R. 798. None of those cases is directly in point. The most helpful, however, is Tuohy's case, where Turner J. pointed out that Parliament has refrained from giving a single comprehensive right of appeal against any determination or order whatever made by a Magistrate in criminal proceedings. Instead s.115(1) has a wording carefully limited. The Judge held that in that subsection 'on the determination of any information or complaint' means 'in determining any information or complaint' and that the conviction or order against which the section gives an appeal is

one made in the course of the determination of the information or complaint. That view was followed by Macarthur J. in Cole's case. It seems to me that an order under s.199(3)(b) is not an order made in or in the course of determining an information or complaint. Moreover, even apart from what was said by Turner J. and Macarthur J., I think that the relevant words in s.115(1) on their natural reading are concerned with orders made when the Court is dealing with an information or complaint. That is not the case with an order under s.199(3)(b). Nor is it surprising that there should be no right of appeal from an order which does not finally determine any rights. It is not necessary to decide whether there would be a right of appeal if an order were made under s.199(3)(a) on the determination of an information or complaint.

Had this Court been concerned in these proceedings to consider whether the Magistrate was right in his view about title, I would have been at least hesitant to reach the same conclusion. The principles are codified in ss.19 and 20 of the Sale of Goods Act 1908. The proposition of civil law formulated by the Magistrate would produce in this case the same result as Rule 1 in s.20. But the two sections make it clear that the crucial question in every case is the intention of the parties. Here the agreed price was $2200, of which $600 was paid as a deposit and the balance was to be paid by weekly instalments of $150. There was evidence suggesting that the intention of the parties may have been that the property was not to pass until the car had been fully paid for. In his evidence the first respondent agreed with the evidence of the appellant that the appellant had said that he was going to retain the ownership papers until full payment had been made. A certificate of registration of a motor vehicle is not a document of title;

but in dealings between laymen an agreement that the certificate be retained until payment has been completed does tend to suggest, in my view, that ownership is not to pass until then. That would not be the only factor for consideration. Another factor telling in the same direction is that there was evidence by the appellant and his witness that he had said at the time of the bargain that he would retake possession of the car if any payment was missed. That evidence was not contradicted by the first respondent. On the other hand, the first respondent was not represented by counsel nor was a friend of his who was a witness to the bargain, one Keogh, called to give evidence. A factor which might point in another direction is that there is no suggestion in the evidence of any agreement about what was to happen in the event of repossession after much of the purchase money had been paid. The first respondent claimed that he had paid some $1350 and complained of the repair costs he had incurred; the appellant admitted receipt of $1150. The appellant said that he had made an unsuccessful attempt to repossess the car and that if he had succeeded he would have had a discussion with the first respondent to try to reach agreement about the fate of what had been paid. A possible view is that the whole arrangement was too uncertain to constitute a contract of sale. But that was not the way in which Mr Carruthers sought to found the appellant's case. His argument was that there was a contract of sale whereunder property was not to pass until payments had been completed. Certain authorities cited by counsel do lend some support to that argument : R.V. Ward Ltd v. Bignall 1967 1 Q.B. 534, Cheetham & Co. Ltd v. Thornham Spinning Co. Ltd 1964 2 Lloyd's Rep.17, Lambert v. G. & C. Finance Corporation Ltd (1963) 107 S.J. 666. Having regard to the view already expressed on the jurisdiction point, it would not be right for me to express any concluded opinion on the merits, and especially so

when there are some gaps in the evidence which might yet be filled.

For those reasons the appeal will be dismissed for want of jurisdiction. There will be no order for costs. As previously indicated, I do not consider that the Magistrate had jurisdiction on this application to determine finally any question of title. Therefore it is open to the appellant, if he wishes, to take civil proceedings in the ordinary way to have the question resolved.

R B Cooke J.

Solicitors:
Chapman Tripp & Co., Wellington, for Appellant
Weston, Ward, Lascelles, Christchurch, for First Respondent
Crown Solicitor, Wellington, for Police