IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

Reported

642

M.No.642/81

IN THE MATTER of section 4 of the Judicature Amendment Act 1972 (as amended by the Judicature Amendment Act 1977)

BETWEEN HAROLD JAMES EVANS, of Christchurch, Retired Stipendiary Magistrate

Applicant

A N D NOEL LIAM BRADFORD of Christchurch, District Court Judge

First Respondent

A N D THE POLICE

Second Respondent

Hearing: 29 March 1982

Counsel: Appellant in person
N. W. Williamson for Respondent

Judgment:

JUDGMENT OF HARDIE BOYS J.

On 29 October 1981 the applicant, Mr Evans, appeared before Judge Bradford, the first respondent, in the District Court at Christchurch on a charge of obstructing a carriageway. He pleaded guilty and was discharged without conviction pursuant to s 42 of the Criminal Justice Act 1954. In this application for review, brought under s 4 of the Judicature Amendment Act 1972, he asks that the discharge be set aside and that there be a rehearing in respect of sentence. He alleges that the sentence was imposed in breach of natural justice, in that he was not afforded a proper opportunity of being heard before it was passed. He does not however complain of the sentence itself, for it was in fact the very thing he asked for.

The charge arose out of a demonstration protesting against a tour of New Zealand by a rugby football team from

South Africa. Mr Evans along with a great many of his fellow citizens had strong if not outraged feelings on the subject. He joined the demonstration, both in order to express the depth of those feelings, and in the hope that a realisation of the extent to which they were shared throughout the community might persuade the authorities to intervene and stop the tour. By participating, he was prepared in a peaceable and responsible way to offend against the law and to risk the imposition of the appropriate penalty for so doing.

Having been arrested and then bailed pending his appearance in the District Court on 29 October, on 28 October Mr Evans filed in the Court an affidavit. It comprised 19 pages and had attached to it 29 exhibits comprising a further 60 pages. It commenced with an intimation that Mr Evans intended to accept the correctness of the summary of facts which he understood was to be read to the Court the next day by the prosecutor, that he intended to plead guilty and that he desired to make submissions, both by means of the affidavit and orally, that in the circumstances set forth in the affidavit the case was a proper one for a discharge without conviction. The Judge, it appears, read the affidavit before the case was called the next morning. When it was called, close to midday, Mr Evans appeared in person. He came forward carrying not only books and papers but also a furled banner which, at the direction of the Judge, was removed. Mr Evans pleaded guilty, and in doing so expressly asked that he be heard following the reading of the summary of facts. However, after the summary of facts had been read, the Judge said that in the light of the contents of Mr Evans' affidavit he saw no reason to treat him differently from other offenders who had appeared before him charged with the same offence. He therefore did not need to receive any further submissions, as he was disposed forthwith to comply with the request that Mr Evans be discharged under s 42. Notwithstanding this intimation, Mr Evans persisted in expressing his desire to address the Court. As a result, the matter was adjourned for discussion in Chambers. There, the Judge asked Mr Evans what more he wished to say and was

informed that there were two matters. The first was that som anti-tour protestors who had pleaded not guilty had been treated differently from those who had pleaded guilty. The second was the duty of a Judge to give reasons for his decision, even when granting a s 42 discharge. The Judge then agreed that he would hear what Mr Evans wished to say. Having been informed that this would take approximately half an hour, the Judge agreed to hear him following the mid-afternoon break. The case was therefore called again at 4pm. But when Mr Evans rose to his feet to make his submissions, the Judge asked him to wait, called in a stenographer and began to deliver his sentence. He did not explain why he was not allowing Mr Evans to address him. He did however refer to the discussion in Chambers and to the need for reasons to be given. He went on to give his reasons, and directed the discharge. Mr Evans protested at this manner of proceeding, but his protests were cut short and the hearing came to an end.

It is ~~of course~~ a fundamental principle that every person accused of an offence is entitled to be heard in his own defence. The principle applies not only to that part of the judicial process which is concerned to ascertain whether or not the accused person is guilty as charged but also to that part which is concerned with determining the proper penalty to be imposed consequent upon a finding or acknowledgment of guilt. As Denning L.J., delivering the judgment of the Court in Jones v National Coal Board [1957] 2 QB 55, 67, said so succinctly:

> "There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the Judge."

In New South Wales it has been held that the failure of a Magistrate to give a defendant any opportunity to be heard at all before pronouncing sentence was a denial of natural justice which rendered the pronouncement a nullity: Ex parte Kent [1969] 2 NSWR 184.

Mr Williamson argued that Mr Evans had had the opportunity to put his case properly before the Judge, because he had presented a lengthy affidavit which the Judge had read. Mr Williamson referred to several cases dealing with the requirement to observe natural justice in the conduct of quasi-judicial or administrative proceedings. Thus in Wiseman v Borneman [1969] 3 All ER 275 Lord Morris of Borth-y-Gest said:

> "The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action.'" (p 278)

Again, in Furnell v Whangarei High Schools Board [1973] 2 NZLR 705, Lord Morris delivering the majority judgment of the Privy Council, referred to the speeches in Wiseman v Borneman and added that "the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration." On the basis of observations such as these, Mr Williamson argued that the Judge had done all that justice and fairness required in the particular circumstances before him.

I do not consider it is particularly helpful to refer to cases such as these when one is considering the obligation of a Judge presiding in a criminal Court. For these cases are applications, in accordance with the requirements of the particular circumstances, of the more fundamental principle by which the procedures of the Courts themselves are governed. This is apparent from the judgment in Green v Blake [1948] IR 242, 268, referred to in De Smith's Judicial Review of Administrative Action 4th Ed p 156:

> "The rules [of natural justice] are not 'ex necessitate those of Courts of justice' but rather 'those desiderata which... we regard as essential, in contradistinction from the many extra precautions, helpful to justice, but not indispensable to it, which by their rules of evidence and procedure, our courts have made obligatory in actual trials before themselves'".

Thus whilst written submissions may in some circumstances be sufficient to discharge the obligations of natural justice (see R v Amphlett /1915/ 2 KB 223, 238) in a Court I have no doubt whatever but that an accused person has a right to be heard orally. (See De Smith pp 201 and 212). The accused person may of course waive that right and agree to present written submissions, but that is not this case. Although Mr Evans presented written submissions, he made it quite clear that he wished to supplement those with oral submissions. The learned Judge's refusal to grant him that opportunity was in my opinion the denial of the right to a full and proper trial to which Mr Evans was entitled as a matter of basic constitutional principle.

I can of course sympathise with the Judge. Whilst Mr Evans assured me it was not his intention, his affidavit gives the impression that he wished to urge upon the Judge that he should discharge him in a way that amounted to approbation of the views which prompted the anti-tour demonstrations. For in his affidavit, Mr Evans said that his plea for a discharge was not based on the fact that he had pleaded guilty or on the trivial nature of the charge or on the fact of his previous unblemished record. Indeed he asked the Court not to discharge him for any of those reasons, but instead, and solely, in the light of the total circumstances, which he went on to describe in considerable detail. These included particularly the efforts he and others had made to persuade the Governor-General and the Government to intervene and stop the tour. Mr Evans assured me that his intention was that the Judge should discharge him because of the sincerity of the views which led him to commit the offence and which he had demonstrated in the ways described in the affidavit. I naturally accept that that was his intention, but it seems to me that the intention was not so readily apparent from the affidavit itself. Moreover, any concern that Mr Evans intended to use the occasion of his appearance in Court in order to advance the anti-tour cause would have been increased by his action in bringing a banner into Court with him. It is of course merely surmise that this was the reason for the

District Court Judge's action. But if the surmise is correct, that emphasises the injustice done to Mr Evans. For had he been heard, he would have explained that these were not in fact his motives, and he would thus have cleared himself of the suspicion - more damaging in the case of one with his background - that he was using the occasion for an inappropriate purpose.

It is not necessary for me in this judgment to discuss the extent to which a Court should be prepared to allow its procedures to be used for the advancement of a particular cause which a defendant may have at heart. But a comment may be helpful. "The Court's task is to administer justice according to law. There are other fora for political and philosophical debate. However the distinction between mere debate and a relevant plea is not always easy to draw. Many great scenes in the drama of our constitutional history have been enacted on the courtroom floor. The way in which proceedings are to be conducted is very much in the discretion of the presiding Judge, provided of course that he observes the minimum and essential requirement demanded of any court of law. That requirement is, in the words of Lord Denning which I have referred to, that the accused have full opportunity to put his case properly. The Court is entitled to insist that what is said is relevant to the matter before it, for there is also a wider interest than that of the particular accused. The Court has to be able to get on with its work." As Lord Reid said in Wiseman v Borneman (p 278):

> "Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant...."

The fact that Mr Evans has been partially deprived of his right to be heard does not necessarily mean that he is entitled to relief. This Court has a discretion whether or not to intervene. Mr Williamson submitted that that discretion should be exercised against Mr Evans, on the grounds that the order sought would not serve a useful purpose, for it would produce in the end no different

result. Mr Evans asked for a s 42 discharge and he received one. If the imposition of sentence were to be re-opened, Mr Evans would again seek a discharge and I have no doubt but that his request would be granted. The only difference would be that he would have the opportunity to put to the presiding District Court Judge the matters which he wished to go into on the previous occasion; or at least to the extent to which they may be relevant to the matter in hand. The only possible difference in result would be that the expressed reasons for the discharge might be different from or additional to those given at the earlier hearing.

In response to this submission, Mr Evans drew attention to what Denning LJ said in Jones v National Coal Board in rejecting the submission of counsel for the successful party that the decision reached by the Judge was the inevitable decision:

> "No cause is lost until the Judge has found it so; and he cannot find it without a fair trial, nor can we affirm it."

That however was a rather different situation from the present. That was a claim for damages heard by a Judge alone. The way in which the trial had been conducted meant that the scope of the evidence had been limited in various respects. All that Denning LJ was saying was that unless there had been an opportunity for the evidence to be gone into fully, it was impossible for a Court on appeal to conclude that the decision reached by the trial Judge was the right one. The difference between that and the present case of course is that the conclusion the District Judge reached here was the one which the applicant himself sought. The inevitability of the same outcome if a rehearing were granted is patent (unless of course the presiding Judge thought a fine or some other penalty more appropriate: a possibility which neither Mr Evans nor Mr Williamson thought needed mention).

In the present case I consider that I should apply the principle discussed by Speight J in Wislang v Medical Practitioners Disciplinary Committee [1974] 1 NZLR 29, 42, who adopted the words of T.A. Gresson J in McCarthy v Grant [1959] NZLR 1014, 1020 - "There must be a real likelihood - not certainty - of prejudice," - and said:

> "So that in this case, it is failure to consider defences which, in my view, would have to be unsuccessful. This alone, of course, would not be sufficient to refuse to exercise the discretion for all defences, even those without merit, should be considered, but the fact that it is not likely to have produced a different result is not irrelevant."

There is however a further matter. As mentioned, Mr Evans made it clear that one of his objects was to persuade the Judge to discharge him only on the grounds of his personal sincerity in espousing the anti-tour cause, and to give reasons showing that that was so. In the unreported Court of Appeal case of Chisholm v Turner CA 75/77, 18 May 1978, Richardson J discussed the nature of the discretion conferred on the Court by s 42 of the Criminal Justice Act. He said:

> "In the exercise of that discretion the Court must take all relevant consideration into account and must ignore all irrelevant considerations .... it must have due regard to the nature of the offence and the gravity with which it is viewed by Parliament; to the seriousness of the particular offending; to the circumstances of the particular offender in terms of the effect on his career, his pocket, his reputation and any civil disabilities consequential upon conviction, and to any other relevant circumstances. And if the direct and indirect consequences of the conviction are, in the Court's judgment, out of all proportion to the gravity of the offence, it is proper for a discharge to be given under s 42."

The submission which Mr Evans wished to urge on the learned Judge was that he should limit the exercise of the discretion conferred upon him by the statute and confine his consideration to but one of the many matters which in the interests both of the defendant and the community he was required by law to consider. The exercise of jurisdiction in a criminal cause is more than a personal matter, for it greatly involves the public interest. The public interest is as relevant to the question of penalty as it is to the question of guilt. Therefore, even had Mr Evans been given the opportunity of addressing to the Judge the remarks he wished to make, the Judge was under no obligation to give effect to them. Indeed it was his obligation not to do so. The Judge clearly had this in mind, for when he made his remarks at the conclusion of the hearing he referre to Chisholm v Turner, to the wider community interests involved and he properly directed himself "that s 42 itself requires a consideration of all the circumstances."

For these reasons I am satisfied that I ought not to grant the relief sought in these proceedings. The applicant has made his point as to his right to be heard and he has this Court's full acceptance that his protest was made out of the depth of his sincere and genuine feelings concerning the rugby tour.

Having regard to the circumstances, I make no order as to costs.

Solicitors:

Appellant in person
Crown Solicitor, Christchurch, for Respondent.