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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.267/84

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BETWEEN THE POLICE

Appellant

A N D N

MURPHY

Respondent

In Chambers: 7 September 1984

Counsel: N.W. Williamson for Appellant
C.M. Ruane for Respondent

Judgment: 7 September 1984

ORAL JUDGMENT OF HOLLAND, J.

The informant in these proceedings commenced in the District Court at Christchurch, a member of the New Zealand police force, seeks leave to appeal to the Court of Appeal under the provisions of section 144 of the Summary Proceedings Act 1957. The informant was successful in the District Court and a conviction was entered against Murphy for breach of section 45 of the Matrimonial Property Act 1976. He appealed against that conviction and in an oral judgment given in this Court his appeal was allowed and the conviction quashed.

Leave is sought to appeal to the Court of Appeal on a question of law arising in the appeal, namely whether proceedings are pending for the purposes of section 45 of the Matrimonial Property Act 1976 when the only legal proceedings in issue between the complainant and the defendant are an order made ex parte under the provisions of section 45 of the Matrimonial Property Act that without the leave of

the Court, or the consent in writing of the other party, the defendant should not sell, charge or dispose of any of the family chattels, or remove from the matrimonial home or homes any of the family chattels which are household appliances or effects or which form part of the furniture of that home or those homes. The learned Judge in this Court in allowing the appeal did say:-

"In my view there were no proceedings pending at the time of sale as required of s.45 in the sense that there were no proceedings on foot and awaiting hearing. I cannot accept that the issue of the restraining order in itself amounted to 'proceedings pending' for the purpose of s.45."

I am satisfied that counsel for the informant in support of this motion is on sound ground in submitting that that is an issue of considerable general and public importance and one in respect of which it may be appropriate to obtain a determination of the Court of Appeal. I am, however, quite satisfied that this is certainly not an appropriate case for such a ruling to be sought.

In the course of his brief oral judgment the Judge referred to the fact that the facts possibly did not establish a sale as was alleged in the information and may more appropriately have amounted to a charge. The District Court Judge refused to amend the proceedings and entered a conviction on the basis of a sale. In this Court there is no ruling as to whether in fact the information should have been amended to read charge instead of sale. There is no evidence called by the prosecution to prove the date of service of the order. It may well be that the defendant knew of the order but if a prosecution were to be brought relying on the order one would have thought that a necessary prerequisite was proof of service of the

order prior to the date of the alleged sale. More importantly than that, however, the order which was proved to be in existence and which is the only matter capable of being proceedings between the complainant and the defendant, is that the defendant "be restrained from disposing of the family chattels situated at 10 Roche Avenue, Christchurch". This motor car that was sold was undoubtedly a family chattel but it is common ground that at the time the order was made the car had been physically taken by the defendant and was not situated at Christchurch.

I am satisfied that for several reasons on the evidence, including in particular the doubt as to whether the order referred to the motor car in question, the defendant should have had the charge dismissed. This also was the view of the Judge who heard the appeal.

It is quite unjust, in my view, for this matter accordingly to be referred to the Court of Appeal when in the view of this Court whatever answer the Court of Appeal gives to the question of law raised by the informant the result must still amount to an acquittal of the defendant. I note that the judgment of this Court has already been published in Current Law. The Judge whose judgment is in issue is at present out of the country but I am quite sure that I can speak with confidence on his behalf in indicating that this was not the type of judgment which he would have expected to have been recorded for posterity. He was resolving the issues speedily and justly between the parties. It is unfortunate that he has clearly said what he did by way of interpretation of s.45 of the Matrimonial Property Act 1976 and it would be impossible to argue that what he said was not a binding decision in so far as the District Court is

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concerned. If it is to be challenged, however, by the prosecution it must be challenged on a factual basis sounder than the present. Leave to appeal is refused.

The respondent applies for costs. I am of the view that the application for leave to appeal in these circumstances was ill advised. As I have already said, I am satisfied that on the evidence produced against the respondent for several reasons the result which now stands that he be acquitted should inevitably stand. He is entitled to costs. Counsel for the respondent has properly indicated that the legal costs involved on the application for leave to appeal have not been considerable. There will be an order that the applicant pay the respondent costs of \$50.

A. D. Holland