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IN THE HIGH COURT OF NEW ZEALAND LTD
AUCKLAND REGISTRY

A.671/81

IN THE MATTER of Part 1 of the Judicature Amendment Act 1972

BETWEEN NICHOLAS PHILIP ANDERSON, of Auckland, Policeman

Applicant

AND THE ATTORNEY GENERAL OF NEW ZEALAND on behalf of the Ministry of Transport

First Respondent

AND ALASTAIR PACEY DUGDALE, of Mt Roskill, Traffic Officer

Second Respondent

AND BRYAN OSBORNE NICHOLSON of Auckland, District Court Judge

Third Respondent

AND STANLEY LAKE YOUNG of Wellington, Superintendent

Fourth Respondent

Hearing: 12/13 March 1934

Counsel: Illingworth and Rogers for Applicant
Ruffin for Respondents

Judgment: 22nd March 1984

JUDGMENT OF SINCLAIR, J.

This application for judicial review has had a chequered history: the original motion was filed on 9th July, 1981 and the proceedings have meandered through the years until finally the hearing was commenced on 12th March last. In the meantime the proceedings had to survive an application to strike out because of delay and while the Judge who heard that application back in 1982 considered that there had been

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inordinate delay, he nevertheless exercised his discretion in favour of the Applicant and allowed the proceedings to continue. Even then the proceedings were not placed on the ready list until December, 1982 and despite the nature of the issues involved no attempt was made by the Applicant or his advisers to have the matter dealt with urgently and there is no record on the file of an application under Rule 250B of the Code of Civil Procedure seeking a priority fixture.

I mention these matters now because had it been necessary to consider some of the arguments which have been put forward on behalf of the Applicant, it may well have been that because of the delay which has resulted the Court would have exercised its discretion against granting any relief to the Applicant. Those who are involved in proceedings of a nature similar to the present proceedings ought to bear in mind that the proceedings should be disposed of expeditiously.

At the commencement of the hearing of the application the Third Respondent indicated through his counsel that he would abide by the decision of the Court. That, of course, was a proper attitude for him to adopt.

The fourth amended statement of claim disclosed that on 20th September, 1980 the Applicant was arrested without warrant by a traffic officer on an offence related to the driving of a motor vehicle, the nature of the offence being a refusal to supply a sample of blood. After being arrested the Applicant was released on bail pursuant to S.51 of the Summary Proceedings Act 1957 and was required to appear in the District Court at Auckland on Monday 22nd September, 1980

On the morning of 22nd September the affidavits disclose that the Applicant was called to the offices of the Transport Department in Auckland and was there informed by Mr McKimmie, who was a chief traffic officer, that because he considered there were certain deficiencies in the procedures which had been adopted by the traffic officer at the time of the Applicant's arrest, no prosecution was to follow and Mr McKimmie acknowledges that he so informed the Applicant in the presence of Mr Bridge who was then the Superintendent of Traffic for the Ministry of Transport in Auckland. Mr Bridge deposed to the fact that he was present when that conversation took place and that he endorsed the action taken by Mr McKimmie. He acknowledged that he had the authority to overrule Mr McKimmie's decision, but having regard to the facts he considered that the right action was being taken.

In consequence the Applicant did not appear at the District Court on 22nd September, 1980 nor was any charge sheet lodged in relation to the particular offence upon which the Applicant had been arrested. Some time later the non-prosecution of the Applicant received certain publicity in a weekly newspaper and that resulted in further consideration being given to the facts in Wellington, in consequence of which Mr Young, the Chief Traffic Superintendent of the Ministry of Transport, called for the file and on perusing it came to the conclusion that the action taken in Auckland by Mr McKimmie ought not to have been taken and he directed that an information be lodged in respect of the offence on which the Applicant had been arrested.

The information was filed on 17th October, 1980 and

was served on Mr Anderson on 1st December, 1980; the first date of hearing was for 16th December of that year. There were a number of adjournments, but in due course an application was filed in the District Court on behalf of the Applicant challenging the jurisdiction of that Court to hear the information on the basis that the filing of the information amounted to an abuse of the judicial process. In due course the application was heard in the District Court on 2nd June, 1981 and after hearing evidence and the submissions which were then made the District Court Judge decided that there had been no abuse of the judicial process and directed that the hearing of the information proceed. I record now that the basis on which the matter was argued before the District Court was entirely different from the basis on which the matter was argued in this Court. Had the matters which were raised in this Court been raised in the District Court it may well be that that Court would have come to a different conclusion.

Following the decision of the District Court the present proceedings were filed and on 10th August, 1981 an interim order was made by this Court prohibiting the District Court, until the hearing of the substantive application, from proceeding to hear and deal with the information. There virtually matters have remained until this hearing.

The fourth amended statement of claim raised a number of matters which can be listed as follows:

(a) That the decision to lodge the information against the Applicant amounted to an exercise of discretion so unreasonable that no reasonable prosecuting authority or traffic officer could make such a

(b) That the decision to lodge the information was arbitrary and capricious.

(c) That the decision to prosecute was made in bad faith.

(d) That the decision to prosecute was made in breach of principles of natural justice and or fairness.

(e) That the decision to prosecute was made without giving any weight or sufficient weight to matters which ought to have been taken into account when such decision was made.

(f) That the said decision to prosecute was made in breach of the express or implied provisions of the Summary Proceedings Act 1957.

(g) That the said decision to prosecute constituted or would result in an abuse of the judicial process of the District Court.

Certain alternative claims were set forth in the statement of claim but there is no necessity to deal with them and, in fact, I will deal with but one of the grounds of claim in this judgment because in my view that is all that it is necessary to consider to enable this matter to be disposed of.

The ground which I will consider is that set forth in (f) above: namely, that the decision to prosecute was made in breach of the express or implied provisions of the Summary Proceedings Act 1957. This argument involves a consideration of the provisions of S.12 of the Summary Proceedings Act 1957:

"12. Commencement of proceedings -

(1) Except where the defendant has been arrested without warrant, all proceedings brought under this Part of this Act shall (.....) be commenced by the laying of an information or the making of a complaint.

(2) Where a defendant has been arrested on any charge and no information has been laid, particulars of the charge against him shall be set out in a charge sheet.

(3) The provisions of this Act shall apply with respect to every entry in a charge sheet as if that entry were an information."

For the purposes of this case the important subsection is s-s.(2). In this case the Applicant Anderson was arrested and released on bail and in respect of an offence which was within the summary jurisdiction of the District Court. Sub-section (2) of S.12 therefore required the Prosecution to lodge a charge sheet setting out the particulars of the charge on which Anderson had been arrested. By s-s.(3) once the charge sheet was lodged it became the equivalent of an information. The Prosecution not having lodged the charge sheet, it is submitted on behalf of the Applicant that as that requirement in the Statute is mandatory it is now not competent for the Prosecution to resort to the information procedure which is in the circumstances to be regarded as an alternative to the charge sheet procedure.

Mr Ruffin argues that at best the provisions of S.12 are directory, but if that is not so then resort can be had to the provisions of S.204 of the Summary Proceedings Act 1957 which reads as follows:

"204. Proceedings not to be questioned for want of form -

No information, complaint, summons, conviction, sentence, order, bond, warrant or other document

> "and no process or proceeding shall be quashed, set aside, or held invalid by any (District Court) or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice."

Counsel have not been able to find any decided case in which S.12 of the Summary Proceedings Act 1957 has been interpreted so it is therefore necessary to consider the principles which ought to be applied. Of considerable importance in this regard is the provision of S.316(5) of the Crimes Act 1961. That provides as follows:

> "Every person who is arrested on a charge of any offence shall be brought before the Court, as soon as possible, to be dealt with according to law."

In other words the legislature was seeking to protect the individual by ensuring that once a person has been arrested he shall be brought before the Court promptly so that the Court can ensure that he is dealt with in accordance with legal principles.

So far as the present case is concerned, Anderson was arrested in the early hours of a Saturday morning and he was required to appear on the following Monday.

To decide whether the provision under the statute under consideration is mandatory or directory I refer firstly to the decision in Howard v. Bodington (1877)2 P.D. 203 and I quote from two passages of the speech of Lord Penzance, firstly from page 210 where the following appears:

> "The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to

> "be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end."

Secondly, from page 211:

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

The second portion of the speech to which I have referred was applied in Graham v. Attorney-General (1966) N.Z.L.R. 937, while both portions were applied by Casey, J. in H v. Social Welfare Department (1980)2 N.Z.L.R. 656.

In N.Z. Institute of Agricultural Science Inc. v. Ellesmere County (1976) 1 N.Z.L.R 630, Cooke, J. had this to say:

> "Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance."

Applying the above principles to s-s.(2) of S.12 of the Statute I am of the view that the provisions therein contained are mandatory. When an offender has been arrested and released on bail, as was the Applicant in the present case, he ought to be brought before the Court as soon as possible. In circumstances similar to that which occurred to Anderson it was the duty of the Prosecution to ensure that the charge sheet was lodged so that the matter could be dealt with by the Court when Anderson appeared.

In the present case it is my view that Mr McKimmie did not carry out his duties as he ought to have and he should have ensured, notwithstanding the decision which he had come to, that the charge sheet was lodged with the Court because Anderson was, in accordance with the bail bond he had entered into, required to appear in answer to his bail on the following Monday 22nd September, 1980. In fact he did not appear, acting on the advice given to him by Mr McKimmie.

Having failed to lodge the charge sheet as required by law, in my view the Prosecution were then estopped from laying the further information against Anderson. I cannot accept at all that the provisions in S-s.(2) of S.12 are merely directory. The provision is in mandatory form which is indicated by the use of the word "shall" and it is a very necessary provision to protect the liberty of the subject and to ensure that a person in Anderson's situation was, in accordance with S.316(5) of the Crimes Act 1961, brought before the Court as soon as possible to be dealt with according to law.

If I am wrong in that conclusion then I do not consider

that S.204 of the Summary Proceedings Act 1957 is available to the Prosecution in the circumstances of this case. Had Anderson appeared before the Court as he ought to have done on 22nd September, 1980 the Court would have, I am sure, ensured that a charge sheet was lodged. With the decision which had then been made by Mr McKimmie, there are three possible results which could have occurred: firstly, the Prosecution could have offered no evidence in support of the charge; secondly, it could have asked the leave of the Court to withdraw the charge; thirdly, it could have sought to have the charge dismissed without prejudice. There is no suggestion at all that the last course would have happened and on the balance of probabilities I am of the view that the Prosecution would either have offered no evidence in support of the charge or would have asked leave to have it withdrawn. In eitherevent Anderson would have been discharged and that would have been the end of the matter so far as he was concerned; any later attempt to prosecute him could have been met with a plea that he had already been dealt with in relation to that particular offence. In other words, the lodging of the information as was done in October, 1980 has, in my view, resulted in there being a miscarriage of justice.

Accordingly the Applicant is entitled to succeed and a declaration is made that the decision to lodge the information against the Applicant in respect of the alleged offence on 20th September, 1981 was invalid. In consequence the District Court ought not to proceed to hear it at all and the information ought in the circumstances to be dismissed. If it is necessary to do so an order is made prohibiting

the District Court at Auckland from proceeding to hear further the said information.

On the question of costs, normally I would favourably consider allowing the Applicant costs, but by reason of the manner in which these proceedings have been dealt with and the way they have been permitted to meander for such a long period, I am persuaded that in the exercise of my discretion I ought to make no order as to costs. Accordingly there will be no such order.

D A Ineson J.

SOLICITORS:

Snedden Anderson & Co., Auckland for Applicant
D. S. Morris, Crown Solicitor, Auckland for Respondents

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JUDGMENT OF SINCLAIR, J.

Reserved Decision delivered by me at 12 noon on the 22nd March 1984.

Deputy Registrar,
High Court, Auckland P.H. MILWARD

Mr Illingworth B/NV

T. Riddell

Mr Ruffin sec. advised.