30/10 NZLR

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.263/84

BETWEEN THE ATTORNEY GENERAL

Applicant

308

A N D NOEL LIAM BRADFORD

First Respondent

Appeal granted [1985] 2 NZLR 274
cited in Watson v Clarke [1990] NZLR

A N D WILLIAM HUGH McMENAMIN

Second Respondent

Hearing: 23 October 1984

Counsel: N.W. Williamson for Applicant
P.G.S. Penlington Q.C. and J.G.S. Mathews for First Respondent
C.B. Atkinson Q.C. for Second Respondent and for M. Turnbull and T.M.J. Hurley
M.J. Glue for B.M. Mayo
T.J. Allen for J.D. Scott

Judgment: 25 OCT 1984

JUDGMENT OF HOLLAND, J.

This application for review concerns the administration of justice. The first Respondent is a District Court Judge sitting at Christchurch. On 18 September 1984 and 25 September 1984 he was presiding in the Christchurch District Court where cases brought by the Ministry of Transport were set down for hearing as defended fixtures.

On the first day there were eleven defended cases set down to be heard. The estimate of time given for those cases was 9 1/2 hours. The normal sitting of the Court is from 10 a.m. to 1 p.m. and 2.15 p.m. to 5 p.m. with a break of 15 minutes in the morning and the afternoon. There is accordingly 5 1/4 hours of Court time. It is not clear how the order of hearing was determined but at the end of the day at 5.16 p.m. the Court was left with three defended charges which had not been heard. The District Court Judge dismissed the charges against those three defendants. He had earlier in the day had called before him a charge against a Mrs Mayo. In that case Mrs Mayo's counsel had first indicated that there would be a plea of not guilty but had later advised the prosecution that a plea of guilty would be entered and that the prosecution should not bring witnesses to Court. He asked that the matter be stood down later in the list to enable him to appear. The first Respondent, however, when the case was called before him, ordered the prosecutor to proceed even though counsel for Mrs Mayo was not present. As the prosecution had no evidence available the first Respondent dismissed the charge. Counsel for Mrs Mayo appeared in Court shortly afterwards intending to plead guilty on her behalf in accordance with the arrangement he had made with the prosecution and to make submissions in mitigation of penalty but found that the charge had been dismissed.

On 25 September there were set down for hearing 16 cases with an estimated time of hearing of 11 hours. Again it is not clear how the order of hearing was fixed, but the first Respondent, at the commencement of the hearing, addressed the Court and advised those present of the course of conduct he had taken the

previous week. Some cases were adjourned by consent. Some were heard. The charges brought against two defendants were dismissed without a hearing at or about 5.30 p.m. when the first Respondent had completed his day.

The Attorney General has brought these proceedings on behalf of the Ministry of Transport seeking a declaration that the dismissals of the charges against the five defendants left awaiting hearing on 18 and 25 September respectively, and the one charge dismissed against Mrs Mayo, were made without jurisdiction or were invalid and that orders be made that the informations be now heard and determined in accordance with law in the District Court.

Originally only one of the six defendants dealt with by the first Respondent was named as a Respondent in these proceedings. On 10 October I held a conference at which were present counsel for the Applicant, the first Respondent and the second Respondent. I directed that the five defendants other than the second Respondent be served forthwith and that this matter be heard on 23 October. The defendants were given seven days from the date of service, or in the case of the second Respondent from 10 October, to file statements of defence. In fact, no statements of defence were filed. One of the five defendants other than the second Respondent was served on 11 October and the other four were served on 12 October. Notwithstanding that no statements of defence were filed, affidavits were filed in opposition by the second Respondent and by Mr M. Turnbull, Mr J.D. Scott and Mr T.M.J. Hurley who were three of the five defendants intended to be served. Counsel for Mrs Mayo appeared and informed the Court that he did not wish to make any submissions on behalf of Mrs Mayo. He acknowledged

that he had indicated to the Ministry of Transport on her behalf that she would plead guilty to the charge and asked that the matter could stand down for a short while to enable him to appear to make submissions in mitigation. On his indication that he wished to make no other submissions he was discharged from further attendance. Drago Vrhovnik who was served with the proceedings has taken no part.

One must start off with some sympathy for the first Respondent, the District Court Judge, who on the face of the matter before him on each day had fixtures that would be expected to take twice the time available. On 18 September, the first day in question in these proceedings, the Judge was in the situation where he had on the previous day also presided over defended traffic fixtures and because a defendant who was there was a person from out of town had taken the unusual step of sitting in Court in the evening concluding at 9.30 p.m. A Judge should not be rostered with cases requiring him to preside from 10 a.m. in the morning until 9.30 p.m. in the evening.

The Registrar of the District Court has made an affidavit in which he confirms that the cases set down for hearing before the first Respondent were as described by him. He has described the system as follows.

> "6. I confirm that the present system in the District Court at Christchurch for defended Traffic and Police prosecutions is to allocate constant days of the week throughout the year for the hearing of such fixtures. In addition when rosters for Judges are completed additional time is generally given. When a 'not guilty' plea is indicated the prosecutor, after consultation with the defence is able from his diary to offer suitable dates for the hearing of the proceeding. The prosecutors have a good idea of how long the department's case will take and if there has not

been a prior consultation when a plea is entered in Court then a quick discussion takes place before a suggested date is referred to the Court for confirmation. This establishes the length for trial and the date suggested to the Court reflects the availability and suitability for both prosecution, defence and witnesses.

7. I can also confirm that I have instructed prosecutors that the volume of work set down is to be in the vicinity of 8 to 11 hours of estimated hearing time per day. This time limit recognises and allows for changes of plea, the non attendance of accused persons and for those seeking further remands. It is correct, as stated in paragraph 9 of Mr Dando's affidavit, that a suggestion was made for an increase in the estimated time allocation per day. It was not, however, as a result of an agreement at any time by all District Court Judges in Christchurch. The suggestion was made at a meeting between representatives of the prosecuting authorities, myself and the Criminal Liaison Judge, that is, the Judge deputed by the List Judge to liase with those authorities and the administration. The meeting had been arranged to discuss the then apparent problem, namely the very high rate of change of plea to guilty on the day of the fixture. It was generally agreed at the meeting that the Lists be increased to allow for the fallout. The First Respondent was not one of those present at this meeting. The List Judge is the agent of the Chief District Court Judge and is appointed by the latter. I have recently prepared a memorandum reviewing the whole situation and the List Judge has arranged to have this discussed at a meeting of the Christchurch District Court Judges on the 19th of October 1984, with a view to improving the system and minimising the difficulties.

8. I confirm that it is not uncommon for a further Judge to be available to assist with the defended traffic list and that it is also not uncommon for the Judge allocated for defended traffic fixtures to finish early and to help in other areas."

He then relates that as a result of a survey of 14 defended traffic fixture days in the District Court in 1984 less than 50 per cent of the cases were actually heard. There was a total of 189 cases set down of which 54 changed their plea to guilty,

16 withdrew the defence so that formal proof was all that was required, 17 were adjourned, 17 were withdrawn by the prosecution, and in a further 8 warrants to arrest were issued because the defendants failed to appear. Only 77 of the 189 cases were heard as defended fixtures. He has also checked the time of finishing the lists for defended police and traffic matters in three Courts over the period from 1 January 1984 to 30 September 1984 and they show that on 393 days of sitting only 25 involved the Court finishing after 5 p.m. and 57 between 4.30 p.m. and 5 p.m. On 311 of the sitting days the Court rose having completed the work available before 4.30 p.m. Apart from the occasion on 17 September when the first Respondent sat until 9.30 p.m. the latest sitting of a Court in the 393 days was 5.45 p.m.

The issues in this application require consideration of the jurisdiction of a District Court Judge. All the offences before the Court were summary offences and the Summary Proceedings Act 1957 provides that a District Court shall have jurisdiction in respect of summary offences. That Act also provides a code as to the manner in which that jurisdiction is to be exercised. Section 61 makes provision for where the informant appears and the defendant does not. Section 62 provides for where the defendant appears and the informant does not. Sections 63 and 64 provide for the situation where neither party appears and makes a specific provision that in that case the Court may either dismiss the information for want of prosecution which is not a bar to further proceedings or adjourn the hearing. None of these sections apply to the present situations where both the informant and the defendant appear. That is covered by section 65 of the Act which provides:-

> "Where at the hearing of any charge both the informant and the defendant appear, the Court shall proceed with the hearing: ..."

Section 45 of the Act provides:-

> "(1) The hearing of any charge may from time to time be adjourned by the Court to a time and place then appointed".

(The underlining in respect of both of those sections is mine.)

Although a District Court has no jurisdiction other than that given to it by statute, there nevertheless must accompany that specific jurisdiction a power to control its procedures in a manner not in conflict with any code, in order effectively to exercise the jurisdiction. Likewise, there can be little doubt that a Court specifically given criminal jurisdiction must have with it the power (which is inherent in a Court's jurisdiction) to prevent abuses of its process and to control its own procedure including a power to safeguard an accused person from oppression or prejudice. See Connelly v Director of Public Prosecutions (1964) A.C. 1254 at 1296.

In the Court of Appeal of New Zealand in Moevao v Department of Labour (1980) 1 N.Z.L.R. 464 Richmond P. and Richardson J. expressly left for further consideration whether such jurisdiction existed in an inferior Court as distinguished from a superior Court, the matter not having been argued before them. Woodhouse J. was clearly of the view that such jurisdiction existed in an inferior Court. The reservation expressed by Richardson J. in Moevao's case did not appear to trouble him in giving the judgment

of the Court of Appeal in Bryant v Collector of Customs (unreported CA258/83, Judgment 18/5/84) where he said in relation to a District Court Judge:-

> "In turn the Judge's duty at that point was to exercise the inherent power which any court of justice must possess to prevent abuse of its processes ..."

The matter was earlier averted to by Somers J. sitting in the High Court in Bosch v Ministry of Transport (1979) 1 N.Z.L.R. 502.

Confusion may have arisen because of the use of the term 'inherent jurisdiction' and the comparison with the inherent jurisdiction of a superior Court which is not limited in its jurisdiction by statute. In Rapana v Police (High Court, Invercargill, M.87/79, 20 September 1979) I referred to what I described as the implied powers given to a Magistrate exercising criminal jurisdiction in relation to the conduct of the proceedings. I respectfully adopt the term used by Richardson J. in Bryant's case of inherent powers with the grammatical meaning of the word 'inherent' as forming an essential element of something as against in any way being inherited through history. If the term 'inherent power' is used it will remind a District Court that it must act within the jurisdiction given to it by statute and not beyond it. I mention this because the observations in Bosch's case (supra) appear to have encouraged some District Courts to dismiss informations without hearing them. Such actions have had to be declared as being without jurisdiction by this Court in Rapana v Police (supra); Kettle v Basil (High Court, Wellington, M.558/79, Jeffries J.); Williams v Patterson and Pearson (High Court,

Masterton, M.9/79, O'Regan J.) and Miratana v Bremner & Osborn (A.132/81 Wellington Registry, Davison C.J.).

In the present cases it is necessary to consider the reason why the District Court Judge dismissed the informations before him.

In the course of giving his reasons for dismissing the informations the Judge was highly critical of the Ministry of Transport in setting down more fixtures than could be heard. On each occasion he referred to the surrender of sovereignty in the Courts by the administration to the Ministry of Transport and to the Police and on one instance indicated that the administration had given the prosecutions free reign with Court time. That is clearly an exaggeration.

The adjournments to the dates for hearing are made by the Court even if the Court permits the prosecution to suggest a date and merely follows that suggestion. There may well be room for improvement in the present system but it has substantial advantages and convenience to the public over the system which it replaced many years ago when the prosecution were required to attend with their witnesses on the day first set down for hearing not knowing whether the charge would be defended or adjourned or proceed on the day. Undoubtedly the ideal would be some form of appointment system but such a system could not be introduced without a doubling of the numbers of Judges and a consequential substantial increase in Court staff. The records show that less than 50 per cent of defended fixtures proceed. In the case of civil actions set down for hearing as defended matters the experience is that a substantially higher proportion than 50 per cent do not proceed. So long as human nature

remains what it is and decisions relating to litigation are not made until the last minute some inconvenience must be caused to the public and all concerned with the administration of justice. It is undoubtedly desirable that a system be provided which causes as little inconvenience to the public as possible consistent also with the administration of justice and consideration as to costs. Fortunately the experience of the general public with the Courts either as witnesses or litigants is not a frequent occurrence and some inconvenience must be accepted.

This Court is conscious of the frustration that the District Court Judge must have felt in a busy Court when he considered that the work had not been arranged so that it was capable of speedy and convenient disposal. He was no doubt aware of some degree of public criticism to that effect. Ideally, prosecutions should be brought and heard as quickly as practicable and excessive delay is likely to prejudice the prosecution as well as the defence. Today there is a substantial amount of delay and some inefficiency in criminal proceedings both before and at trial. All concerned must do their utmost to bring criminal proceedings before the Court and to a conclusion as swiftly and efficiently as possible, but the law does not allow that in circumstances such as before the District Court Judge in this case, cases should be dismissed out of hand without hearing any evidence on the grounds of an alleged injustice. The prosecutor or the informant has a right to be heard as does the defendant and the Summary Proceedings Act 1957 so provides.

Mr Atkinson placed some considerable reliance on the Court of Appeal's decision in Bryant's case (supra). Certainly the

Court there said that the Judge's duty was to refuse the application to have a voir dire without hearing evidence. That was not, however, a case of refusing to hear an information without any investigation into the facts. In that instance the accused had been prosecuted on indictment for theft. The prosecution relied on evidence of admissions. A voir dire had been held and the Court had ruled that the evidence was inadmissible because the statements made were not voluntary. A subsequent prosecution was brought against the accused charging him with smuggling under the Customs Act. The prosecution intended again to rely on the admission evidence. With respect, the Court not surprisingly held that this was an abuse of the Court process and should not be tolerated. The Court held that in the course of hearing the information the District Court should have declined to rehear the matter already judicially determined. The Court of Appeal directed that the accused be discharged but that presumably was on the basis that there was no evidence which the prosecution could offer. The case is not an authority recognising a jurisdiction in a District Court Judge to decline to hear an information simpliciter.

It accordingly follows that I am clearly of the view that the District Court Judge acted without jurisdiction when he dismissed all the informations. The proceedings presently before the Court are by way of review seeking the exercise by this Court of the ancient prerogative writs of certiorari and mandamus. The Courts have always regarded the grant of those remedies as a discretionary matter where the justice of the situation between the individual parties will be considered. Counsel for the Attorney General referred the Court to the recent decision of the House of

Lords in R v Dorking Justices ex p. Harrington (1984) 3 W.L.R. 142 where the House of Lords held that in circumstances similar to this the decision to acquit was a nullity. I do not, however, read that case as being an indication that the High Court in exercising its reviewing jurisdiction has no discretion. The finding that the acquittal was a nullity, as indeed is the finding of this Court in this case, was considered only as an answer to the submission on behalf of the defendant concerned that he had been in jeopardy at the first hearing and acquitted and that it was accordingly wrong in principle for him to be tried again. The House of Lords certainly did not refer to any question of discretion but clearly questions of discretion were not before their Lordships and I do not read anything in the judgment to indicate that this Court is not required to consider the discretionary element of the grant of relief of this nature before making its order.

In the cases of Mayo and Vrhovnik nothing has been advanced to justify the exercise of the Court's discretion in their favour. In the case of Mr Hurley it was submitted that this case was first set down for hearing in July as a defended fixture but was adjourned at the request of the prosecution and over the opposition of counsel for Mr Hurley. Apparently Mr Hurley is a freezing worker and he anticipates that if he is convicted of the charge or charges he may be sentenced to periodic detention or imprisonment. In either event, if he has started work in the freezing season and it is interrupted he will lose seniority but he does not lose seniority if he starts work late. He accordingly says that he has not yet started work. That seems an extraordinary situation but I am willing to accept it. Although it was advanced as a ground for

opposing the adjournment in July no submission to this effect was put before the District Court Judge when he commenced his hearing on 25 September. Had such a submission been made it was likely that priority would have been given to its hearing. It was first submitted to the District Court Judge after 5 p.m. when reference was made to what had happened in the preceding week. Indeed it is clear from Mr Dando's affidavit that Mr Hurley's counsel was either not available earlier in the day or insisted that cases called earlier that day be heard before Mr Hurley's case. The charges brought against Mr Hurley are of refusing to give a blood sample when required to do so, driving while disqualified and careless use of a motor vehicle. They are serious charges. There may well have been some considerable inconvenience to Mr Hurley but it has not been shown that he will be embarrassed in the conduct of any defence which he cares to make to the prosecution. As I have stated before, litigants must inevitably suffer some inconvenience and it is clear that Mr Hurley has suffered more inconvenience than most, but it is not a sufficient ground for this Court effectively to refuse to make an order that the law should take its course.

It was submitted on behalf of Messrs McMenamin and Turnbull that they also had suffered some considerable inconvenience and in the case of Mr Turnbull his was an instance of bad luck because the medical reports indicated that the proportion of alcohol in his blood was only barely over the prescribed minimum. The charges against Mr Turnbull are of driving a motor vehicle with an excess proportion of alcohol in his blood and against Mr McMenamin of failing to stop, failing to ascertain whether anyone was injured, failing to supply information and careless use of a motor vehicle.

All charges are serious. It has not been established that either will be seriously prejudiced in defending the prosecutions and no grounds exist for the exercise of discretion in their favour.

The case of Mr Scott is different. He is charged merely with careless use of a motor vehicle in circumstances where there was no accident and no damage to any person or property. Although careless use of a motor vehicle is a relatively serious charge this particular charge is of considerably lesser gravity than the others earlier referred to. More importantly, however, Mr Scott has deposed that not only did he attend with the intention of defending the case but he had with him a witness who has now left for Australia and is unlikely to return to New Zealand within some years. His case was in the list for hearing on 25 September. I do not suggest that it was the duty of the District Court Judge to go on sitting after 5.30 p.m., but in the case of a defendent in that situation with a witness who is to leave the country on 2 October it was his duty to do all within his power to ensure that a hearing could be made for the information between 25 September and 2 October. The plain fact is that the District Court Judge was not willing to grant the adjournment to any date and dismissed the information. The restoration of the information and the quashing of the dismissal may render some difficulties in the path of Mr Scott in defending the proceedings. In these circumstances I am satisfied that justice requires this Court not to interfere even though the dismissal was wrongfully made. The application for review in respect of the dismissal of the information against Jeffrey David Scott is accordingly dismissed.

In respect of the other parties an order is made that the dismissals made by the first Respondent on 18 and 25 September 1984 of informations brought by the Ministry of Transport against William Hugh McMenamin, Barbara Michelle Mayo, Murray Turnbull, Drago Vrhovnik and Terence Mortimer Joseph Hurley were made without jurisdiction and are invalid. A further order is made that those informations be now heard and determined in accordance with law in the District Court. It should be unnecessary for me to say that a fixture should be made for the hearing of these cases as soon as reasonably practicable and in the circumstances before another District Court Judge. The statement of claim also seeks an order for costs. No argument was advanced in favour of this application for costs. It would not be an appropriate case for an award of costs against the Respondents. There will be no order as to costs.

A D. Holland J.