IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

(2)

567

M. No. 1006/83
M. No. 1007/83
M. No. 1008/83
M. No. 1009/83

IN THE MATTER of an appeal from a determination of the District Court at Auckland

BETWEEN EDGAR GERALD BOYACK of Wellington, Nautical Adviser (Ministry of Transport)

Informant

AND BRIAN DALBETH of 52 Juniper Rd, Mairangi Bay, Auckland, fisherman, DOUGLAS LOW of 56 Webster Avenue, Mt Roskill, Auckland, Fisherman and JAYBEL NICHIMO LIMITED 119 Customs Street West, Auckland

Defendants

Hearing: 15th May, 1984

Counsel: Mrs Shaw for Informant
Johnston for Defendants

Judgment: 18 May 1984

JUDGMENT OF SINCLAIR, J.

These four cases stated were all heard together and all related to alleged offences relating to fishing operations conducted in an area declared to be a protected area pursuant to S.7A(1) of the Submarine Cables and Pipelines Protection Act 1966.

The cases stated showed that the Defendants appeared on 29th November, 1982 and pleaded not guilty. On 12th

April, 1983 after hearing submissions only from the parties the District Court Judges declared each of the informations to be a nullity. Each case stated was in the following form:

"I DETERMINED:-

1. THE date and place of swearing of the information were omitted from the spaces provided for their insertion on the face of the information.

2. THERE appeared a signature in the space provided for the signature of a Justice of the Peace or a (Deputy) Registrar (not being a Constable) in the bottom right-hand corner of the information. A copy of the information is annexed hereto and marked with the letter 'A' and forms part of this Case Stated.

3. I refused an application by the Informant's counsel for an adjournment to another date for the purpose of enabling the Informant to be called to give evidence as to the date the information was sworn.

4. I rejected a submission on behalf of the Informant that S.204 of the Summary Proceedings Act 1957 applied.

5. I concluded that the information was a nullity because I could not be satisfied on the face of it that it was properly sworn.

I ACCORDINGLY DECLARED THE INFORMATION A NULLITY.

The question for the opinion of the Court is whether my decision is erroneous in point of law and in particular:-

(i) Was the information as a matter of law, properly sworn as required by S.15 of the Summary Proceedings Act 1957?

(ii) If the answer to question (i) is 'no', were the defects in the information covered by S.204 of the Summary Proceedings Act 1957?

(iii) By way of further alternative, if the answer to question (i) is 'no', could the defects in the information be cured by the calling of evidence as to the date and place of swearing?

(iv) If the answer to question (iii) is 'yes', could I have reasonably arrived at only one conclusion after the Informant's Counsel had made a request for an adjournment to another date for the purposes of calling evidence to remedy the defects, namely, that the request for such an adjournment should have been granted?"

I record at the outset that my understanding of the matter was that there was no detailed argument before the District Court and that on the morning of the defended hearing counsel for the Defendants asked to be advised of the date upon which the informations were sworn to ensure that they had been sworn within the six months period set forth in S.14 of the Summary Proceedings Act 1957. It was then discovered that while prima facie the informations appeared to have been sworn in that the Informant's signature appeared in the appropriate place, as did the signature of the Deputy Registrar who apparently administered the oath, the place at which the oath was administered and the date on which it was administered were blank. I was informed by counsel that as a result of discussions the District Court Judge was inclined to allow the matter to be covered by evidence until it was ascertained that both the Informant and the Deputy Registrar of the Court concerned were in Wellington and that it would require an adjournment for them to be called as witnesses, whereupon the Court decided to treat the informations as a nullity and they were dismissed.

It is with that background that I consider the questions posed in the cases stated.

Dealing with the first question: the starting point is, of course, the Summary Proceedings Act 1957. S.15 of that statute provides:

> "Information to be in prescribed form and upon oath - Every information to which this Part of this Act applies shall be form 1 in the Second Schedule to this Act, and shall be substantiated on oath before a (District Court Judge) or Justice or before a Registrar (not being a constable)."

The form referred to is as follows:

" SECOND SCHEDULE

Forms of Information

Form 1

Information or Complaint Where Defendant is to be Proceeded Against Summarily

1, (Full name), of (Address, occupation), say on oath that (*I have just cause to suspect and do suspect, that) (*within the space of (6) months last past, namely,) on the day of 19 , at , (Full name), of (Address, Occupation), (Here set out the substance of the offence or matter of complaint) (*being an offence punishable summarily). (Here add section and statute applicable.)

.....
(Signature of Informant or Complainant)

SWORN before me at this day of 19

.....
(District Court Judge) Justice of the Peace, Registrar (not being a constable).

*delete if inapplicable. "

As has been held on many occasions there are two essential prerequisites for a valid information, namely it must be substantiated on oath and it must be in writing.

On the face of each of the informations which were before the Court they were in writing and prima facie were on oath and all that has happened is that the date and place of swearing were not filled in as they ought to have been. When one has a look at each of the informations the reason for that becomes readily apparent; that reason was because there had to be a certificate on each of the informations from the Solicitor General authorising the

prosecution pursuant to S.8 of the Submarine Cables and Pipelines Protection Act 1966 and the certificate from the Solicitor General is so positioned that it to some extent conceals the area where one would normally find the particulars as to the place and date of swearing of the information. However, the informations reveal:

(1) the name and status of the Informant;

(2) that he had just cause to suspect, and did suspect, that each Defendant had committed an offence which was known to the Law, namely one specified under the Submarine Cables and Pipelines Protection Act 1966;

(3) that each of the offences had been committed withinthe space of six months last past;

(4) the identity and status of the person before whom the information was sworn;

(5) that there was one offence for each information.

To my mind the absence of the date and place of swearing did not vitiate the proceedings and it was a particular which, in the circumstances, could be proved by the calling of the appropriate witness to establish those particular matters just as much as it would have been necessary to call evidence to establish the identity of each Defendant and the facts in support of each of the offences alleged. The omissions were in my view merely slight deviations from the prescribed forms and ones to which S.5(i) of the Acts Interpretation Act 1924 could be applied, that subsection providing as follows:

> "Whenever forms are prescribed slight deviations therefrom but to the same effect and not calculated to mislead, shall not vitiate them."

If further authority is needed then in my view it is to be found in the decision of Cooke, J. in Police v. Thomas

(1977)1 N.Z.L.R. 109. Admittedly that involved a consideration of S.20A of the Summary Proceedings Act 1957, but it was held that although the notice to the Defendant in that particular case was not strictly in compliance with the prescribed form, it was not a nullity so long as the substance and the spirit, though not in all respects the letter, of the prescribed form is complied with.

Thus in my view the answer to the first question is in the affirmative and that would be sufficient in reality to dispose of these cases stated. But in case I am wrong I go on to consider the second question. That involves a consideration 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."

This section has been considered on many occasions and in relation to the context of this case I draw attention to the following words appearing in it:

> "No information .... shall be quashed, set aside, or held invalid by any (District 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."

This section also received consideration in Police v. Thomas (supra) and while that was in respect of a notice issued under S.20A of the statute, it is still appropriate to quote a portion of the judgment of Cooke, J. at page 121

in the context of this case:

> "If a notice considered as a whole is defective, S.204 will apply unless there has been a miscarriage of justice. No doubt S.204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity. But nullity or otherwise is apt to be a question of degree...In practice the questions of miscarriage of justice and nullity will often tend to merge."

Again in Best v. Watson (1979) 2 N.Z.L.R. 492 the Court was concerned with a somewhat similar provision appearing in S.11 of the Insolvency Act 1967. At page 494 Richardson, J. had this to say:

> "In our view the section has to be given its full meaning and is not to be read subject to any limitations not required by the statutory language. There must, of course, be proceedings before the Court before rectification may be directed under s 11. So if the document is so defective that it is a nullity there is nothing before the Court capable of rectification. The distinction between nullity and irregularity is well recognised in other areas of the law (see, for instance, New Zealand Institute of Agricultural Science Inc v. Ellesmere County (1976)1 NZLR 630, particularly at p 636; and Police v Thomas (1977) 1 NZLR 109). In that latter case Cooke, J, referring to s 204 of the Summary proceedings Act 1957 which is in essentially the same terms as s 11 of the Insolvency Act, said at p 121: 'No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity.' He went on to observe that 'nullity or otherwise is apt to be a question of degree.'
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> We think that the same considerations apply under s 11. That provision may be invoked in any case where the proceedings are defective and however the defect may be characterised. It will always be a question of degree whether or not it can be said that, notwithstanding failure to comply with an apparently mandatory requirement of the Act or of the Rules, there is before the Court what can fairly be described as proceedings under the Act; and that question should not be approached in a mechanical or technical way."

Again in Cunningham v. Ministry of Transport, C.A. 179/77, 13th June 1978, Somers, J. had this to say in relation to a consideration of S.204 of the statute:

> "That is the setting provided by the Summary Proceedings Act 1957. The matters which emerge as of importance are that the substance of the offence with such particulars as will fairly inform the defendant of it are to be provided, but that defect, irregularity, omission or want of form, unless there is a miscarriage of justice, and error or omission in the description of the offence if sufficiently described to enable its identification by reasonable intendment, will not invalidate. The Legislature has, I think, endeavoured to free procedure under the Summary Proceedings Act 1957 from technicality and concentrated its attention on matters of prejudice to a defendant."

Thus it becomes apparent, and has been reiterated on more than one occasion, that in relation to an information laid under the Summary Proceedings Act 1957 the intention of the Legislature has been to provide a simple and easy method of bringing alleged offences before the Court for consideration untrammelled by technicalities, but ensuring at all times that the defendant should not be placed in a position where he is in any way prejudiced. I repeat in this case, as I did in Brooks v. Tolich, M.1547/81, Auckland Registry, 18th December 1981, that the final words of S.204 must also be construed by having a look at the words which are actually used. I repeat again that the Court ought not to treat any omission or want of form as vitiating an information unless the Court is satisfied that there has been a miscarriage of justice. In Tolich's case I drew attention to the fact that the test is not whether there "may be", "could be" or "possibly be" a miscarriage of justice so that regard must be had to what has actually occurred to ascertain whether there has in fact been a miscarriage of justice. In respect of each of the cases before the District Court with which I am now concerned that certainly could not be said to be the case. Each of the Defendants had pleaded not guilty; each

was represented by counsel and the facts were not even embarked upon before the informations were dismissed. None of the Defendants at any time was in jeopardy in the legal sense of that word in that no evidence was called at all.

Accordingly I am of the view that at worst there was a mere omission from each of the informations in question or there was a want of form in each of them which did not render the informations a nullity, and that in respect of each there certainly had not been any miscarriage of justice. The answer to the second question in each of the cases stated is obviously in the affirmative.

By reason of the answers I have already given the third question really requires no answer, but the plain solution obviously was if that particular aspect of the matter was to be contested by the Defendants, to allow evidence to be called to establish the date and place of the swearing of each of the informations and that would then have established whether they were laid within the six months period or not. If, of course, the evidence failed to establish the date and place of swearing, or if the Court was left in any real doubt in relation to that particular aspect, then there would have been room for the Court to have held that the informations could not proceed in that it had not been established that they had been sworn within the six months period.

This is a similar situation with which I was confronted in Palmano v. Mitchell, Auckland Registry, M.1537/80, 20th March 1981, and somewhat similar to the situation with which Somers, J. was faced in Timaru Transport Company Ltd v.

Ministry of Transport, Timaru Registry, 22nd December 1980. The answer to the third question, if required, is therefore also in the affirmative.

If any further authority is wanted on this particular aspect it can be found in the decision of R v. O'Connell (1981) N.Z.L.R. 192 which relates to the qualification of the informant to lay informations for alleged breaches of the Indecent Publications Act 1963.

As to question 4: to my mind that, for the reasons I have tried to set out above, ought to be answered in the affirmative. To my mind the way the defect came to the notice of the Court, a situation had arisen where the only proper course for the Court to adopt was to allow an adjournment to enable evidence to be given to cure the defect. The place and date of the swearing of the information was not an integral part of the proof required to establish the offences which were alleged against the Defendants and that particular matter had not been raised at any time before the date set for the hearing. Had it been so raised before the hearing then the prosecution ought to have been in a position to provide the necessary proof, but where, as here, it was raised in a purely incidental way it is obvious that all were taken by surprise and that in those circumstances the ordinary rules ought to apply, namely that where a party is taken by surprise an adjournment ought to be granted to enable the situation to be dealt with. If it required an award of costs to compensate the innocent party then the Court had plenty of power to deal with that particular aspect of the matter. For my part I could not conceive, in the circumstances outlined to me, any Court refusing the grant of an

adjournment to enable the supposed defect to be covered by evidence.

In the circumstances each of the cases stated is remitted back to the District Court for it to act in accordance with this opinion.

P.D. Wild J.

SOLICITORS:

Crown Solicitor, Auckland for Informant
R. J. Johnston, Auckland for Defendants