31/10

2 7

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

Ap.69/86

HIGH PRIORITY

1539

BETWEEN EVANS

Appellant

AND POLICE

Respondent

Hearing: 11 September 1986

Counsel: M J Quirke for the Appellant
P J Savage for the Respondent

Judgment: 23 OCT 1986

JUDGMENT OF BISSON J

The appellant was charged in an information sworn on 14 March 1985 by Constable Neil Norman Peterson that on 13 March 1985 at Turangi he did commit an offence against the Crimes Act 1961 s.227(b)(ii) in that he being a servant employed by the New Zealand Electricity Department did steal tools and electrical fittings valued at $663.70 the property of his employer the said New Zealand Electricity Department. The appellant pleaded not guilty. The information was amended by consent by substituting Ministry of Energy Electricity Division

for the words New Zealand Electricity Department. After hearing the evidence for the prosecution the learned District Court Judge held that the information was bad for duplicity and declined jursidiction. In a lengthy oral decision at the close of the prosecution case the learned District Court Judge said that he accepted the "submission that in respect of a considerable number of items of property allegedly stolen...there are a number of items in respect to which there is no prima facie evidence of those particular items having been stolen." It is to be noted that the information did not specify the particular tools and electrical fittings alleged to have been stolen nor the individual values of such items but a list of the items of property was produced to the Court. This list was apparently accepted as supplying further particulars of the charge as laid in the information as exception was not taken under s.17 of the Summary Proceedings Act 1957 to the information not fairly informing the defendant of the substance of the alleged offence.

Although the evidence according to the learned District Court Judge tended to establish that thefts may have commenced on diverse dates from the middle of January to about the middle of March he did not consider that the naming of the date of 13 March 1985 was fatal to the prosecution. What did concern the learned District Court Judge was that there seemed to have been a series of separate thefts all alleged in one information. He said:

"Here the only conclusion that I can draw from the evidence that has been given is that essentially the prosecution alleges in terms of this information, that over a period of time the defendant committed a number of thefts, and they have been lumped together into one and a date has been assigned at the 13th March....it does seem to me to result in this situation, that under one information the defendant has been charged with a number of different offences. Consequently, to take counsel's submissions a good deal further than he expected that I might, it seems to me that the whole information is bad for duplicity. In fact, it alleges far more than one theft as the evidence establishes. On the face of it the information is in order, because of course on the face of it, the evidence could very well have established that on the 13th March 1985 the defendant descended upon a store and filled his boxes and cartons with what he wanted and proceeded to remove himself with them, but that is not what the evidence establishes. It seems to me that what the evidence tends to establish is that on diverse dates between one date and another the defendant committed a series of individual thefts... but it does seem to me that whatever the difficulties may have been in the prosecution formulating their information, in fact what they have done is to proceed against the defendant on an information which as the evidence now reveals to the Court comprised not a theft of things, but a whole series of thefts. In that respect it seems to me that the information is bad for duplicity, consequently under the Summary Offences Act it is a nullity and if it is a nullity the Court has no jurisdiction to do anything about it. Sometimes a Court purports to dismiss them, or to dismiss them without prejudice, or to do various other things, to allow them to be withdrawn and so on, but it seems to me that if a Court is faced with a nullity then a Court simply has no jurisdiction to do anything with it, and all the Court can do is to note that because the information is a nullity, it being bad for duplicity, the Court has no jurisdiction to deal with it....The record accordingly is noted that the information is bad for duplicity in that it alleges more than one offence and that accordingly the Court has no jurisdiction to deal with it."

The appellant in his Notice of General Appeal has stated as his grounds of appeal:

> "That the learned District Court Judge erred in declining to dismiss the information against me after having found the information to be a nullity for being bad for duplicity."

The obvious reason of the appellant for seeking to have the information dismissed is that the Police have laid a number of fresh informations alleging the theft of various items on various dates and the appellant would wish to raise a previous acquittal as a bar to these further informations.

Mr Quirke for the appellant has submitted that the decision of the learned District Court Judge that the information was bad for duplicity and a nullity and that he had no jurisdiction was a "determination" of the information and amounted to an order "against the appellant" so that the appellant has a right of appeal to the High Court under s.115(1) of the Summary Proceedings Act 1957. This section is as follows:

> "115.Defendant's general right of appeal to High Court - (1) Except as expressly provided by this Act or by any other enactment, where on the determination by a District Court of any information or complaint any defendant is convicted or any order is made other than for the payment of costs on the dismissal of the information or complaint, or where any order of the estreat of a bond is made by any such Court, the person convicted or against whom any such order is made may appeal to the High Court."

Mr Savage for the respondent has submitted that there was neither a determination of the information nor an order made against the appellant. He says:

> "All that has happened is that proceedings have halted part way through."

The appellant's second submission is that the information was not bad for duplicity. Section 16 of the Summary Proceedings Act 1957 is as follows:

> "16. Information to be for one offence only - (1) Except where it is otherwise provided by any Act, every information shall be for one offence only:
> Provided that an information may charge in the alternative several different matters, acts, or omissions if these are stated in the alternative in the enactment under which the charge is brought.
> (2) The defendant may, at any time during the hearing of any information which is framed in the alternative, apply to the Court to amend the information on the grounds that it is so framed as to embarrass him in his defence.
> (3) The Court may, if satisfied that the defendant will be so embarrassed in his defence, direct the informant to elect between the alternatives charged in the information, and the information shall be amended accordingly, and the hearing shall proceed as if the information had been originally framed in the amended form.
> (4) Where on any such alternative information the defendant is convicted, the Court may, and shall if so requested by the defendant, limit the conviction to one of the alternatives charged."

The appellant submits that the information complied with s.16 as it alleged only one offence. He says, the information being valid, it should have been determined by either a dismissal or a conviction and that the appellant had a right to such a determination. He further says that the evidence did not support the charge as alleged in the information and as the informant did not seek to have the information amended so as to allege theft of those items in respect to which a prima facie case had been made out, the only possible course open to the learned District Court Judge was to dismiss the information. Accordingly, the appellant submits that the appeal should be

allowed and the "order" declining jurisdiction be replaced by a dismissal of the information.

Mr Savage for the respondent submits that the information was perfectly valid and gave jurisdiction. It was not a nullity as in the case of an information which did not disclose an offence or was not sworn or was sworn out of time or was sworn by a person without authority to do so. Mr Savage agrees with Mr Quirke for the appellant that the information was not bad for duplicity as it alleged one offence only. Mr Savage submits that the problem which arose on the hearing of the information was that the evidence did not support the charge laid but would have supported various charges of theft in respect of certain items on certain dates. Mr Savage says this is the classic situation where the informant must be put to an election. Mr Savage contends that the information is neither a nullity nor defective in itself and as there has been neither a conviction nor a dismissal the information remains "afoot". He submits that as the appellant has no right of appeal under s.115(1) the appeal should be dismissed leaving either party to have the matter set down and if the learned District Court Judge declined to hear it further, proceedings for review would be appropriate.

The first question must be whether the appellant has a right of appeal under s.115(1). Under this section where on

the determination by the Court of an information the defendant is convicted he may appeal. There is no conviction in this case. Where on the determination by the Court of any information any order is made (other than for the payment of costs on the dismissal of the information) the person against whom any such order is made may appeal. In my view there was a determination by the Court of the information in this case by the learned District Court Judge holding that the information was bad for duplicity and that the Court had no jurisdiction to deal with it. The question is whether that determination amounts to an order and if so is it an order made against the defendant so as to confer on him a right of appeal?

What is meant by an "order" was considered by the Court of Appeal in Police v S (1977) 1 NZLR 1. In that case the question was whether a refusal of an application under s.46(1) of the Criminal Justice Act 1954 to suppress the name of a person convicted of an offence was an order of a kind which fell within the language of s.115(1). The judgment of the Court was delivered by Richmond P who said at p.3:

> "...our general approach to the case has been that s.115(1) should, so far as is reasonably possible, be given a liberal interpretation because it confers rights on individual citizens in the field of criminal and quasi-criminal proceedings.
>
> We would first point out that the word 'order' is one which is capable, according to the context, of having a narrower or a wider meaning. This was clearly explained by Bridge J in R v Recorder of Oxford, Ex p Brasenose College (1970) 1 QB 109; (1969) 3 All ER 428:

> 'The word 'order' in relation to legal proceedings in itself is ambiguous; clearly it may mean - perhaps a linguistic purist would say that its most accurate connotation was to indicate - an order requiring an affirmative course of action to be taken in pursuant of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decisions of the courts...' (ibid 114; 431).
>
> In the present case the magistrate had to make a judicial decision as to whether or not he would grant the application for suppression of name. His decision to refuse the application was, in our view, an 'order' in the wider sense of that word."

In Burton v Police (1961) NZLR 698 Barrowclough CJ held that an order granting leave to withdraw an information was not an order made against the defendant. He said at p.701:

> "It was not directed to him. It neither enjoined him to do anything nor to refrain from doing anything. He could not in any circumstances be guilty of a breach of it. All that can be said of it is that it was an order made against his wishes; but that is not the same thing as an order made against him. In a broad sense, it could perhaps be said that it was an order against him because he did not wish it to be made; but that is not, in my opinion, the sense in which the words 'against him' are used in s.115."

At p.5 Richmond P said that the "rather strict view" in Burton was in fact not exhaustive and added with regard to the words "any defendant...against whom any such order is made":

> "For our part, we think the words which we have just quoted are wide enough to encompass a situation such as occurred in the present case. We think that there was a judicial determination which resulted in a state of affairs sufficiently adverse to the interests of the appellant to bring it within the description of a decision, or 'order' in the wider sense, which was made against him."

The decision in Police v S turned more on the question of whether the refusal of an application for suppression of name

was an order made "on the determination" of the information than on the question whether if it were such an order it was made "against" the defendant. Having reached the conclusion that the decision on the application was an order on the determination of the information, the order was clearly one against the appellant as it refused him suppression of the publication of his name. In the case before this Court there was not a decision on an application to the District Court. It was the information itself on which the District Court reached a certain conclusion and in so doing made a determination of the information. In my view the word "determination" in the context of s.115 involves a decision making which may or may not terminate the proceedings. In this case the learned District Court Judge had reached a final view in his mind that he did not have jurisdiction which so far as he was concerned disposed of the matter and therefore amounted to a determination of the information.

The next question is whether in reaching that determination the learned District Court Judge had made an order. I must accept the wide meaning of order as expressed by Bridge J and approved and applied by the Court of Appeal in Police v S (supra) covering in effect all decisions of Courts. Accordingly I hold that the learned District Court Judge had in this case made an order that the record be noted that the information was bad for duplicity and that the Court had no jurisdiction to deal with it.

There remains the question whether such an order can be said to be one made "against" the appellant. The appellant contends that the evidence did not support the information laid and as the informant did not seek any amendment of the information so as to bring the charge within the evidence, the appellant was entitled to have the information dismissed. Accordingly, the appellant claims that the order made by the Court amounted to a refusal to dismiss the information and that as the appellant was entitled to such an order the order as made was "against" the appellant. I do not agree that the appellant was necessarily entitled to have the information dismissed. Had the learned District Court Judge not held the information to be a nullity then the Court would have been required to make a decision under s.68(1) which reads:

> "(1) The Court, having heard what each party has to say and the evidence adduced by each, shall consider the matter and may convict the defendant or dismiss the information, either on the merits or without prejudice to its again being laid, or deal with the defendant in any other manner authorised by law."

There is also the possibility that the information might have been amended which the Court may do under s.43(1) in any way at any time during the hearing, the defendant having appeared to answer the charge. If there had been an amendment to bring the information into line with the evidence in those instances in which a prima facie case of theft had been made out, the appellant may have elected to give and call evidence. For these reasons this Court cannot conclude how the trial might have proceeded nor the outcome if the Court had not held the

information a nullity on the grounds of duplicity. I turn to that question.

In an information duplicity may arise in various ways. In Hayes v Butcher (1894) 12 NZLR 569 an information alleging a breach under the Printers and Newspapers Registration Act 1968 at diverse times and between certain specified dates was assumed to disclose more than one offence but Richmond J did query, without deciding, whether there was in fact one continuing offence. A clear case of duplicity was Edwards v Jones (1947) 1 All ER 830 in which the information charged the defendant with dangerous driving and also with driving without due care and attention under separate sections creating separate offences under the Road Traffic Act 1930. In Ministry of Transport v Burnetts Motors Limited (1980) 1 NZLR 51 the Court of Appeal considered whether certain informations were bad for duplicity because they failed to specify which of the various meanings of "to operate" as defined in reg.2 was relied on by the prosecution in charges brought under reg.27(1) of the Traffic Regulations 1976. In the case before this Court the information was regarded as duplicitous because it appeared to the learned District Court Judge that the prosecution had "lumped together" into one information a number of alleged thefts over a period and assigned one specific date to them all. Unless the prosecution case was that the defendant having acquired possession of certain articles honestly on various

dates had dishonestly decided on 13 March 1985 to deprive the owner of those articles permanently, the information although on its face, as in Burnetts Motors, not duplicitous it could nevertheless as the learned District Court Judge held be bad for duplicity if in fact it was meant to cover a series of separate thefts. But in his oral decision at Taupo without the benefit of authorities at hand he held that an information which is bad for duplicity by not complying with s.16(1) is a nullity. In none of the cases to which I have referred was that held to be the case. In Ministry of Transport v Burnetts Motors Ltd (supra), in the joint judgment of Richmond P and Richardson J delivered by Richmond P he said at p.55:

> "Section 16(1) must also be read in conjunction with s.204 of the Act. The latter provision further emphasises the concern of the legislature that merely technical objections in matters of procedure should not necessarily result in the invalidating of convictions...Whether relating to form or substance and however characterised, a defect or irregularity will not automatically invalidate proceedings and s.204 may be invoked unless it is so serious as to result in what should be stigmatised as a nullity (Police v Thomas (1977) 1 NZLR 109; see also Best v Watson (1979) 2 NZLR 492). As Cooke J observed in Police v Thomas at p.121, nullity or otherwise is apt to be a question of degree and, in practice, the questions of miscarriage of justice and nullity will often tend to merge."

The reference in that passage to miscarriage of justice relates to the final words of s.204 which reads:

> "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 proeeding 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."

In Police v Thomas (1977) 1 NZLR 109 Cooke J 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."

After considering whether the Regulation created one offence with alternative methods of committing it or two or more separate offences Richmond P concluded in Burnetts Motors at p.57:

> "In any event we are of the opinion that, even if technically these informations could be considered duplicitous, the informations and convictions could not be regarded as nullities....On the facts discussed earlier in this judgment there is not and could not be any suggestion of a miscarriage of justice and s.204 is fully applicable."

As Richardson J said in Best v Watson (1979) 2 NZLR 492 in delivering the judgment of the Court of Appeal which concerned a bankruptcy petition which failed in two respects to comply with the Insolvency Rules 1970:

> "...if the document is so defective that it is a nullity there is nothing before the Court capable of rectification." (p.494)

There has been no suggestion in this case that there was any miscarriage of justice so far as the appellant was concerned which would exclude the application of s.204. There was nothing so serious as to stigmatise the information as a nullity nor was the information so defective that there was nothing before the Court capable of amendment.

I return to the question whether the "order" in this case could in terms of s.115(1) be held to be "against" the appellant.

In Port Line Limited v Browning (1962) NZLR 739 the Court of Appeal held that the dismissal of an information without prejudice under s.68 of the Summary Proceedings Act 1957 did not give the defendant a right of appeal under s.115. In the judgment of Gresson P he said at p.740:

> "Nothing has happened sufficiently adversely to him to constitute it, in my opinion, an order against him and to give him the right of appeal that s.115 provides."

While it may be said in those words of Gresson P that nothing has happened sufficiently adverse to the appellant to give him a right of appeal in this case I feel bound by the more recent judgment of the Court of Appeal to follow the more liberal approach in Police v S. It may be that an application for review would have been more appropriate but again to insist on a different procedural approach to this Court would not be to give s.115(1) a liberal interpretation. In my view it was an error in law to hold the information to be a nullity which error denied the appellant the right to have the case against him heard according to law and in that respect the "order" of the Court was against him.

The appeal is allowed. The determination that the information is a nullity is set aside and under s.131 the

determination appealed against is remitted to the District Court with the direction that the information be reheard.

Solicitor for the Appellant: M J Quirke
Solicitor
Rotorua

Solicitor for the Respondent: Crown Solicitor
Rotorua