Eschbank v Police 7/6/89

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.P. No.3/89

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BETWEEN EDWARD JOHN ESCHBANK
Intending Appellant

A N D POLICE
Respondent

Hearing: 7 June 1989

Counsel: S.L. O'Neill for Appellant
M.N. Zarifeh for Respondent

Judgment: 7 June 1989

ORAL JUDGMENT OF TIPPING, J.

This is in form an application by Edward John Eschbank to file a second notice of appeal against conviction out of time. The matter has a somewhat unusual history. The Intending Appellant was convicted after a defended hearing in the District Court last November on a charge brought under s.44 of the Hire Purchase Act 1971. The essence of that charge was that with intent to defraud the vendor the Intending Appellant had parted with possession of a freezer refrigerator.

Following conviction the Appellant was sentenced to two months periodic detention. Acting on the advice of his counsel an appeal against conviction was lodged. On Friday 7 April the Appellant filed a notice of abandonment. That document was signed by the Appellant in

his own handwriting. The step which he took was without the advice of counsel and indeed counsel was unaware until he appeared in support of the appeal that an abandonment had indeed been filed. Following the filing of the abandonment in terms of s.129 of the Summary Proceedings Act 1957 the appeal was deemed to be dismissed by this Court for non prosecution.

The Intending Appellant and counsel happened to meet a little later at which point counsel expressed the view that the Appellant had been unwise to abandon and suggested that steps should be taken to try and resurrect the matter. Mr Eschbank has filed an affidavit in which he has explained in brief the reasons why he abandoned the appeal. He became concerned about the appeal hearing. He was having various problems in his life at the time and as he puts it in his affidavit:-

> "I wanted to have the appeal out of the way as it would give me one less problem to worry about".

He then goes on in his affidavit to say that his counsel disagreed with the abandonment and after discussing the matter with counsel he accepted that he was unwise to have filed that document and that he wished if at all possible to have his appeal heard by this Court on its merits.

The first problem is that after an appeal has been deemed to be dismissed following an abandonment there is no power in this Court to grant leave to bring a second appeal. The position was discussed in the Court of Appeal in The Queen v. Pellikan [1959] N.Z.L.R. 1319. That was an appeal from the High Court to

the Court of Appeal but in my view the same position obtains in respect of an appeal from the District Court to this Court. In Pellikan's case the Court of Appeal treated an application such as that before me as an application for leave to withdraw the notice of abandonment. The Court reviewed some of the English cases on such an application and discussed the criteria which should be applied.

There is also quite a detailed discussion of the up-to-date English position in R v. Medway [1976] 1 All E.R. 527. There are various ways in which the test for withdrawing an abandonment have been put over the years. At page 543 of Medway, and this was a decision of a five Judge Court of Criminal Appeal in England, Lawson, J. giving the judgment of the Court said this:-

> "In our judgment the kernel of what has been described as the 'nullity test' is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision, in other words that the mind of the applicant did not go with his act of abandonment."

His Lordship then goes on to discuss various pointers towards such a conclusion such as mistake, fraud and so on.

However one postulates the test I am quite clear in my mind that unfortunately for him this Intending Appellant does not qualify. He clearly made a deliberate decision not to go on with his appeal for reasons which to him seemed good at the time. It is hard to resist the conclusion that if this Appellant was given leave to withdraw his abandonment almost every Appellant in similar circumstances would have to be given leave and the

intended finality of an abandonment and the consequent dismissal would be very much put in jeopardy.

While I have some underlying sympathy for the Appellant's wish to challenge the decision by which he was convicted, in that there may well have been a bona fide arguable point there, I am quite satisfied that both on principle and on authority I ought not to grant leave to withdraw the abandonment. Treating the present application as an application to that effect it is dismissed.

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