NZLR

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

27/12

AP 48/91

2484

BETWEEN D DAVIES
SPCA Inspector on behalf of the Society for the Protection of Cruelty to Animals

Appellant

AND D MINGINS

Respondent

MEDIUM PRIORITY

Hearing: 30 October 1991

Counsel: P Savage for Appellant
D Douthwaite for Respondent

Judgment: 30 October 1991

ORAL JUDGMENT OF FISHER J

This is an informant's appeal by way of case stated against a decision given in the District Court at Rotorua on 1 November 1990 by which the prosecution brought by the appellant against the respondent was dismissed. The case stated presently before the Court is as follows:

> "The information against the Defendant alleged that:-
>
> 1. On or about the 6th day of February 1990 at Rotorua did commit:-
>
> (a) An offence against Section 3(bb) of the Animal Protection Act 1960 in that the Defendant being the owner or person in charge of any animal, namely three goats, did without reasonable excuse neglect the animals so that they did suffer unreasonable or unnecessary pain and suffering or distress.

(b) An offence against Section 3(k) of the Animal Protection Act 1960 in that the Defendant did keep alive three goats which were in such a state that it was cruel to keep them alive.

(c) An offence against Section 4 of the Animal Protection Act 1960 in that the Defendant did wilfully commit an act of aggravated cruelty in respect of three goats in that it became necessary to destroy the said goats in order to terminate their suffering.

The Defendant pleaded not guilty and after hearing the case for the prosecution I dismissed the charges 1(b) and (c) above and on further hearing the defence's case I dismissed the Information 1(a) against the Defendant.

The Informant, within fourteen days after determination, filed in the Office of the District Court at Rotorua a Notice of its intention to appeal by way of case stated for the opinion of this Honourable Court on a question of law only; and I therefore state the following case:-

2. At the close of the prosecution case and upon the submission of Counsel for the Defendant, charges 1(c) and (c) above were dismissed as I ruled that the vidence of admissions and confessions made by the Defendant to an SPCA Officer which were necessary for maintaining these charges, were inadmissible upon the grounds:-

   (a) That a proper caution in terms of the Judges Rules was not administeered by the SPCA Officer, and

   (b) That it would be unfair to admit this evidence obtained in breach of the Judge's Rules as an injustice would have occurred because the Defendant had not been warned that he was not obliged to respond to questions.

3. The third charge noted at 1(a) above was not dismissed at this point as that charge did not depend upon the admissions and confessions which I had ruled inadmissible.

4. At the close of the Defendant's case I determined that the Defendant had reasonable excuse for the condition of the animals in question and dismissed this remaining charge.

The questions of law for this Honourable Court are:-

(a) Was I correct in law in applying the Judge's Rules to an SPCA Officer.

(b) If the Judge's Rules do apply, was I correct in holding that this evidence should not be admitted upon the grounds that an injustice could clearly have occurred because the Defendant ahd not been warned that he was not obliged to respond to questions.

(c) Were my findings of fact capable in terms of Section 3(bb) of the Animal Protection Act 1960 of establishing a reasonable excuse defence.

PJ Bate
District Court Judge"

Form of Case Stated

For the appellant Mr Savage acknowledges that there are certain difficulties with the case stated as it presently stands. For example, question (c) asks a question as to the Judge's finding of fact, whereas the case stated does not contain any findings of fact nor incorporate reference to any other document where they may be found. It turns out that the appellant did not seek to pursue any questions in that regard in any event.

As to the first two questions, the appellant seeks to have the case stated sent back to the District Court so that the following questions can be substituted:

"1. Was I correct in law in requiring compliance with the Judge's Rules by an SPCA officer acting pursuant to the Animals Protection Act 1960?

2. Was my decision to exclude the evidence of the defendant's admissions on the basis of unfairness without foundation in the evidence, or contrary to the evidence or contradictory of the evidence?"

That draft had come before me today for counsel for both parties to make comments thereon pursuant to an adjournment allowed for that purpose on two previous occasions by Penlington J The appellant's proposal is that under the agreed draft case stated the relevant passages in the evidence given in the Court below are to be recited verbatim in

order that one can establish whether there is any evidence upon which an allegation of unfairness could be founded for the purpose of excluding the evidence contrary to the prosecution's case.

It seems to me that the redrafted case stated as proposed by Mr Savage would be a legitimate and appropriate one subject only to the question of s 108 to which I will return shortly. The first of the two new questions would pose a conventional question of law based upon clear findings of fact. The second legitimately qualifies as a question of law namely whether there is any evidence to support an affirmative factual finding. It may also amount to a question of law on the basis that the question is whether the inference contended for by the appellant is the only one which could properly be drawn on the available evidence.

Summary Proceedings Act s 108

The respondent takes the point today that on the case stated as proposed in its redrafted form, there would still be before the Court nothing more than an appeal based upon the improper rejection of evidence and that since such an appeal is precluded under s 108, I should bring the proceedings to an end at this point. I agree that if s 108 would ultimately prove a jurisdictional barrier to the appellant there is no point allowing the matter to proceed further. Section 108 of the Summary Proceedings Act provides:

> "No determination shall be appealed against by reason only of the improper admission or rejection of evidence."

In this case the Judge rejected the evidence as to admissions allegedly made by the respondent. Since that evidence was critical to the prosecution case, the prosecutions were dismissed. It is plain that the appellant appealed on the ground that the Judge's rejection of that evidence was improper. In the finish that is the sole basis of the appeal.

Accordingly, at first blush the determination is appealed against by reason only of the improper rejection of evidence by the learned Judge, namely the improper refusal to take cognisance of admissions made or allegedly made by him to the SPCA inspector.

When one compares that sole basis of appeal with the plain wording of s 108 one might have thought that that would be an end to the matter. However, counsel have helpfully reviewed for me the authorities which have dealt with s 108 or its historical equivalent over a period of about 125 years. These include Ireland v Connolly (1902) 21 NZLR 314; R v Gibson (1887) 18 QBD 537. Ah Lym & Ors v Holmes [1923] NZLR 102; Quirke v Davidson [1923] NZLR 546; Wayman v Regional Controller of Inland Revenue [1989] 2 NZLR 547, 553; and Police v Gray (Whangarei AP.49/89, Henry J, 7 February 1991). In various ways the decisions have cut down the apparent scope of s 108 with the result that the appeals in question were able to proceed. No case was cited to me in which s 108 proved an obstacle in practice.

Some of the decisions can be explained upon the basis that there is said to be a special principle of common law that a person cannot be convicted except upon admissible evidence. For example in Wayman at 553, Hillyer J approved the principle referred to by Williams J in Ireland v Connolly at 315, that:

> "An accused person can only be convicted of a crime on legal evidence, and if there is no legal evidence at all against him he is entitled to be acquitted."

Hillyer J went on to say at 553:

> "If evidence has been improperly admitted so that there is insufficient admissible evidence against an accused, there can be an appeal. That appeal is not on the basis of the incorrect admission of the evidence, but on the basis that there is no proper evidence on which an accused can be convicted."

As I understand it, that concept involves the notion that even though one may not appeal on the ground that evidence has been improperly admitted, one can appeal on the basis that having been admitted it has been improperly relied upon. Of course any such principle in favour of the defence could not avail the prosecution in a case such as the present one.

A second rationale for allowing an appeal involving the improper admission of evidence has been to allow such an appeal if the improper admission or rejection of evidence is no more than incidental to some other question of law of greater significance which exists independently of any question as to admissibility. That seems to have been the approach of Reed J in Quirke v Davidson [1923] NZLR 546 at 550, when he said:

> "... I am of opinion that an appeal would lie not upon the ground of the improper rejection of the evidence, but upon the ground that, by reason of the Magistrate having misdirected himself as to an essential ingredient of the alleged offence, he had, in his final determination of the case, given his judgment on an erroneous conception of its constituent elements."

As I understand it the concept there is that the appeal goes directly to a matter of substantive law and the improper acceptance or rejection of evidence is no more than consequential upon that error.

That I think is what Henry J had in mind in Police v Gray when after reviewing some of the authorities he said a p.12:

> "The principle to be drawn from the decisons seems to be that if there is a question of law at issue in addition to the question of admissibility s 108 does not apply even if the question of admissibility is directly related or even fundamental to that issue." (emphasis added)

Again, however, that notion would not appear to assist the prosecution in this case. Here the appellant has not suggested

that there is any question of law involved other than the admissibility of the alleged admissions made by the respondent to the SPCA inspector. Whether a caution should be given by an enforcement authority before it obtains admissions or confessions, and whether evidence should be treated as unfairly obtained by an enforcement authority, has always been regarded as the province of the law of evidence and to be concerned with the admissibility of that evidence.

That leaves the question whether, if it is solely a question as to the improper rejection of evidence upon which the prosecution case necessarily rested, an appeal can be brought by way of case stated. The answer given by Henry J in Police v Gray at p 13 was in the affirmative. On this point he said:

> "The principle is reinforced by the use in the present section 108 of the word 'only'. The section appears to be designed to prohibit an appeal under the case stated procedure from being brought merely to test a question of admissibility of evidence which in itself is not determinative of of the primary issue before the lower court thereby confining appeals to those which are concerned with the incorrectness of that determination. Being a restrictive provision in respect of the general right of appeal given by s.107, I think a strict approach to its interpretation is warranted. The substance of this appeal is that there was no evidence to establish the offence charged.
>
> I hold therefore that s 108 is not a bar to this appeal."

Police v Gray is directly authoritative in the case before me because in that case too the Judge at first instance had rejected critical prosecution evidence on the ground that it had been unfairly obtained. As in this case the appeal was brought on the basis that that evidence had been improperly rejected.

I confess that as a matter of semantics I have some difficulty with Police v Gray. It seems to me that the word "only" is intended to limit the operation of s 108 to cases in

which the sole ground of appeal is a rejection of evidence. I would have thought that if the appeal had been brought on some other ground then s 108 would not preclude the additional ground that evidence had been improperly admitted or rejected. The barrier would apply only where improper admission or rejection was the sole basis of the appeal. Essentially the approach taken in **Police** v **Gray**, with considerable support from the earlier decisions to which I have referred, would be to add to the existing words of s 108 the additional words "unless the admission or rejection was determinative of guilt".

However, I cannot ignore the long line of authority which in every instance has acted to cut down the effect of s 108. I also respectfully agree with Henry J on the policy aspects of this question when he said:

> "In conclusion I note that the section appears long to have outlived its purpose. The present status and jurisdiction of the District Court cannot be compared with the limited jurisdiction exercised by the Justices in the early days. Furthermore the right of general appeal to this Court now available through s 115 untrammellled by the restrictions of s 108 which applies only to the case stated procedure would appear to leave the section as something of an anomaly."

I too can see no reason why appeals on admissibility questions should be denied to the prosecution. The law of evidence is just as important as the substantive law. It is of immense practical importance in the day to day workings of trial Courts. Blood alcohol cases under the Transport Act are simply one example cited to me by Mr Savage of cases where it is highly desirable that the enforcement authorities have the opportunity to test decisions of the District Court.

I have difficulty with the plain words of s 108 but with some hesitation I am persuaded by the combination of authorities and policy considerations to read down those words in the way favoured by Henry J in **Police** v **Gray**. Having

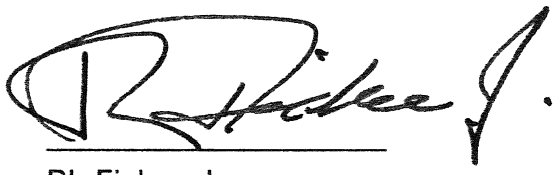
regard to the judicial history any change in direction, if there is to be a change at all, should come from the Court of Appeal or the legislature. Accordingly, I am prepared to hold that the draft case stated proposed by Mr Savage would not founder for want of jurisdiction under s 108 of the Summary Proceedings Act 1957.

Discretion

All that remains is the general discretion. I have had some concern over the effect of the delay upon the respondent who has been waiting to have this appeal disposed of for a year. However, Mr Savage has given me an adequate explanation for the delays which, apart from a possible criticism over drafting of the original case stated, have not been the responsibility of the appellant. Nor is there evidence of prejudice to the plaintiff. I conclude that the right to continue with the appeal should be upheld.

Result

I direct under s 111 of the Summary Proceedings Act that the case stated be sent back to the District Court for amendment in the form annexed to the memorandum of Mr Savage.



RL Fisher J