

State Reporting Bureau

DISTRICT COURT

APPELLATE JURISDICTION

Transcript of Proceedings

JUDGE C F WALL QC

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No D113 of 2001



GLENN ROBERT KETCHELL

and

GARY EDWARD DONALD WYNCH

First Respondent

and

OFFICIAL TRUSTEE

Second Respondent

TOWNSVILLE

..DATE 29/05/2001

JUDGMENT

HIS HONOUR: This is an application by the first respondent to strike out the appeal of the appellant as incompetent for being beyond the jurisdiction of the District Court to hear.

On 8 March 2001 at Townsville the first respondent, pursuant to section 9 of the Crimes Act (Commonwealth), seized a prime mover truck belonging to the appellant and an attached refrigerated trailer thought to belong to the appellant but in fact belonging to Esanda Finance Corporation Limited. Esanda was given leave to appear on the appeal, but took no part in argument on the application.

The first respondent seized the vehicles either because they were, or he had reasonable ground to believe they were, forfeited under section 116(1)(e) of the Excise Act (Commonwealth) because they were involved in unlawfully conveying tobacco leaf. The vehicles are, according to the appellant, valued at about \$265,000.

As required by section 9 the first respondent "took" the vehicles before the Magistrates Court at Townsville, a court of summary jurisdiction. He did this by filing an application in the Magistrates Court on 13 March 2001, asking for an order that they be condemned. The application was opposed by the appellant. It was heard by a Magistrate and on 15 March 2001 the Magistrate ordered that the vehicles be condemned, being satisfied that they were forfeited. This order was made notwithstanding that there was no evidence that the owners of

the vehicles knew they were being used for the unlawful conveyance of tobacco leaf. In addition, Esanda Finance Corporation Limited, the owner of the refrigerated trailer, was not given notice of the proceedings in the Magistrates Court. Presumably, this was because the appellant thought, incorrectly, that he was the owner of the trailer. See section 9(2A) of the Crimes Act.

The Crimes Act contains no provisions dealing with how such property is to be taken to a court of summary jurisdiction, hence the application which was made. The Commonwealth must accept the organisation and procedures of the relevant State Court as it finds them. See McMahon v. State of Queensland, unreported, Court of Appeal 24 November 2000, [2000] QCA 483. The application was an originating application under Rule 11 of the Uniform Civil Procedure Rules and that was, it was agreed, the correct way to proceed. The matter was accordingly a civil proceeding, see Uniform Civil Procedure Rules, Rule 3.

The first respondent submits that there is no right to appeal to the District Court from the order made by the Magistrate. No right of appeal is given by the Crimes Act. The first respondent submits that the only appellate option open to the owners is to appeal, by leave, to the High Court of Australia under section 73(ii) of the Commonwealth Constitution. See also section 39(2)(a) of the Judiciary Act. The appellant may

also have rights under Part 5 of the Judicial Review Act (Queensland).

The appellant submits that a right of appeal to the District Court is conferred by section 45(1)(a) of the Magistrates Courts Act 1921 which is in the following terms:

"45(1) Subject to this Act, any party who is dissatisfied with the judgment or order of a Magistrates Court

(a) in an action in which the amount involved is more than \$5,000...

may appeal to the District Court as prescribed by the rules."

The relevant Rules are the Uniform Civil Procedure Rules.

The appellant contends that the Magistrates Court here made an order in an "action". I cannot agree that this is so. In my view, it is only those actions referred to section 4 of the Magistrates Courts Act which are encompassed by section 45(1)(a).

Clearly other legislation confers jurisdiction on the Magistrates Court, but unless that legislation confers a right of appeal section 45 governs appeals in civil proceedings heard in the Magistrates Court and that, so far as the present case is concerned, limits an appeal to a judgment or order made in an action.

The Uniform Civil Procedure Rules speak not of an "action" but of a "proceeding" and to this extent I do think that the Magistrates Courts Act has not kept pace with the Uniform Civil Procedure Rules. With limited exceptions, no judgment or order made by the Magistrates Court on an originating application is appealable. I doubt that the legislature intended this result. The District Court Act for example in section 118(2) confers a right of appeal on a party who is dissatisfied with a final judgment of the District Court; it is not limited to a judgment in an action.

The appellant submits that the word "action" in section 45 is used or should be interpreted in its widest sense as meaning a proceeding. I accept that the word is not exhaustively defined in section 2 of the Magistrates Courts Act. Reliance was placed on Crimes Compensation Tribunal v. Stratton [1984] VR 1015 at 1017 ("action" encompasses proceedings initiated in the particular court), Johnson v. Refuge Assurance Co Limited [1913] 1KB 259 at 264 ("action" in its natural meaning refers to any proceeding in the nature of litigation between a plaintiff and a defendant, to litigation between a plaintiff and defendants in the nature of an action) and Re W Carter Smith ex parte The Commissioner of Taxation (1908) 8SR (NSW) 246 at 249 (in its proper legal sense "action" is a generic term and includes every sort of legal proceeding).

These decisions are however, in my view, distinguishable on their facts and legislation from the present case. In

Johnson, Kennedy LJ at page 264 said that other provisions of the relevant legislation "may give much assistance in deciding the question" and in Carter Smith, the interpretation referred to was to be adopted "unless it is apparent upon the face of the Act, in which it is used, that it is intended to bear a more restricted meaning" (at page 249). This I consider is the position here.

In the present case the meaning of "action" in section 45(1)(a) is in my view governed or restricted by section 4. I am reinforced in this conclusion by the decisions in Martin v. Commissioner for Employees' Compensation [1953] St. R. Qd 483 and Goward v. The Commonwealth (1957) 97 CLR 355 at 359-360 and two unreported decisions of Judge McGill in Crowley v. McKay, 5 November 1999 and Horne v. Frank and Others [2001] QDC 29, 2 March 2001. In this sense the decision of the Magistrates Court was not a judgment or order made in an action.

It follows therefore that there is no right of appeal to the District Court in the present case. The appeal is therefore incompetent and will be struck out.

The first respondent submitted that if this were the result the appellant should be ordered to pay the first respondent's costs of the appeal. Such an order was opposed by the appellant. Section 9(4) of the Crimes Act requires that articles that are condemned as forfeited must be transferred to the Official Trustee to be dealt with under section 9A of

the Crimes Act. The Magistrates Court here in fact made such a transfer order. Where articles are so transferred, the Official Trustee, under section 9A, must, subject to any direction by the Attorney-General given in a particular case, sell or otherwise dispose of the articles and apply the proceeds as stated in section 9A(b) and (c). On this basis the Commonwealth will benefit from the proceeds of sale at the expense of the innocent owners. In these circumstances I am not inclined to make any order for costs in favour of the first respondent.

The formal orders will be:

1. The appeal is struck out;
2. Each party is to bear their own costs of the appeal and the application to strike out the appeal.

In conclusion, I would urge the Official Trustee not to take any steps to sell or dispose of the vehicles until the appellant and Esanda Finance Corporation Limited have exhausted any further appeal or review rights which they may have.

The folders containing outlines of argument and authorities in relation to the merits of the appeal can be returned to the parties.
