SC593

IN THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

CORAM: KELLY, J.
Thursday,
8th October, 1970.

THE QUEEN

v.

THE RESIDENT MAGISTRATE RABAUL, KEITH WALTERS, ESQUIRE

Ex parte DAMIEN KEREKU AND OTHERS

1970
Sep 28, 29 and Oct 8
PT MORESBY
Kelly, J.

On the application of Damien Kereku and others an order nisi was granted calling upon Keith Walters, Esquire, the Resident Magistrate at Rabaul and Rima Nau who is the clerk of the Gazelle Peninsula Local Government Council to show cause before the Supreme Court why a writ of prohibition should not issue to the Magistrate to prohibit him from hearing further certain informations laid by Rima Nau against the applicants on the ground that the District Court is acting in excess of its jurisdiction in hearing the informations.

The informations were laid and the summonses thereon issued on 28th July, 1970 in the case of two of the applicants and on 29th July, 1970 in the case of the remaining applicants. The proceedings thus brought were prosecutions for non-payment of tax to the Council. After an adjournment the informations came on for hearing before the Magistrate on 9th September, 1970. Prior to that, on 2nd September, 1970, a writ had been issued in the Supreme Court by the applicant Damien Kereku and one Melchior Tomot against the Council seeking a declaration that the Council is invalidly constituted and an injunction restraining it from acting in any way. All the summonses had been served before the issue of the writ and the writ was served on the Council on 8th September, 1970. On the hearing of the informations on 9th September, counsel for the applicants applied for an adjournment on the grounds, inter alia, firstly, that the District Court had no jurisdiction to hear the issue of the validity of the constitution of the Council because of the pendency of the proceedings in this Court for the determinations of the identical issue, and secondly, that the applicants had applied to the Public Solicitor's Office for legal aid but that they had not yet been advised whether such aid would be granted or refused. The application for adjournment was refused, although it would appear that the Magistrate did not in fact proceed with the hearing.

The case for the applicants proceeded on three grounds, the first of which was that the Magistrate had no

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jurisdiction to hear the informations before him while there were pending in this Court proceedings for the determination of the identical issue, particularly when some of the parties to both proceedings were the same. The second ground was that, even if the Magistrate had jurisdiction, he had a discretion whether or not to hear the matters and he had exercised such discretion wrongly. The third ground was that, even if the Magistrate normally had jurisdiction notwithstanding that the proceedings had been commenced in this Court, his jurisdiction was ousted by a bona fide claim of the nature made by the applicants.

The first of these grounds involves the determination of the question of whether, when a superior court is seized of an issue between parties, an inferior court is thereby deprived of jurisdiction to determine that same issue between those parties. It will be apparent that if this were so, the only applicant to which this would apply is Damien Kereku and the position as to the remaining applicants on whose behalf the issue was raised before the Magistrate, but who are not parties to the Supreme Court proceedings, would require consideration.

There is certainly authority for the proposition for which the applicants contend and, if this were to prevail, prohibition would lie. There is, however, another line of authority to the effect that the pendency of proceedings in a superior court does not go to the jurisdiction of the inferior court and that it is a matter of discretion as to whether that court proceeds further, and, if this is so, prohibition would not lie.

The authority that is most directly in point to support the proposition that the matter is one of jurisdiction and not of discretion is Ex parte Gray (1) in which a husband had applied to the Children's Court for variation of a maintenance order on the ground of his wife's adultery and before the hearing of the application had filed and served a petition for dissolution of marriage on the same ground. Davidson, J. made absolute a rule nisi for prohibition, holding that as the same issue of adultery was then before both courts, the Magistrate had no jurisdiction to deal with the application so far as it related to a hearing and determination of the issue of adultery which was the basis of the petition. Prior to the decision in Ex parte Gray (1) (supra) the Full Court of the Supreme Court of New South Wales in Ex parte Hollingworth (2)

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(1) (1928) 45 W.N. (N.S.W.) 27
(2) (1920) 20 S.R. (N.S.W.) 619

had granted prohibition, apparently on the basis that the Magistrate had no jurisdiction to make an order for maintenance after the institution of a suit for divorce by the husband against the wife, but it does appear that this decision is based on a misapprehension as to the ratio decidendi of Craxton v. Craxton (3) and it is therefore of doubtful value.

Some support for the proposition is also to be gained from Durdin v. Durdin (4) a decision of the Full Court of the Supreme Court of South Australia and although it is not entirely clear that the Court was treating the matter as one of jurisdiction, reading the judgment as a whole, it would appear that it was doing so. In Goldsmith v. Pinnock (5) where the relief sought was an injunction or, in the alternative, mandamus, Lilley, C.J. went no further than to say "... it is a safe rule for justices not to entertain complaints when civil proceedings are pending in other courts, in respect of the same subject matter" and it would thus not seem that the learned Chief Justice was going so far as to say that the matter was one of jurisdiction. In Thames Launches Ltd. v. Trinity House Corporation (Deptford Strond) (6) where the substantial point in the two proceedings was the same, Buckley, J. concluded that "the right course" for him to take was to grant an injunction to restrain the defendant from proceeding on the summons before the Magistrate, but, as I read his judgment, he did not do so on the basis that the Magistrate had no jurisdiction to proceed further. In R. v. Police Magistrate at Brisbane and O'Sullivan, Ex parte Tully (7) the Full Court of the Supreme Court of Queensland granted certiorari where the subject matter of a claim in the Magistrates Court had also become the subject matter of proceedings in the Supreme Court and although the short extempore judgment does not expressly treat the matter as one of jurisdiction, it would seem that this was the basis on which the Court proceeded and the report indicates that the applicant's case was put on that basis.

I do not propose to deal in this judgment with all the authorities cited to me for and against this proposition as, while a number of them tended inferentially to support one view or the other, for various reasons they do not prove of assistance in deciding the point at issue. Support for the view that the matter is one of discretion is derived from the

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(3) 23 T.L.R. 527
(4) (1956) S.A.S.R. 128
(5) (1890) 4 Q.L.J. 17
(6) (1961) 1 Ch. 197 at p. 209
(7) (1935) 29 Q.J.P.R. 145

decision of the Queensland Full Court in R. v. Acting Police Magistrate at Brisbane and Grace Wallace Arndt, Ex parte Ernest August Arndt (8) in which Blair, C.J. says "In our opinion in this case the institution of a petition for divorce between husband and wife does not oust the jurisdiction of the Magistrate to entertain an application for maintenance under The Deserted Wives and Children Act, 1840-1858 of a child whose parentage is not in question. All that can be said is that where the Supreme Court in its matrimonial jurisdiction has before it an application for maintenance of the child of the marriage, a Magistrate, if an application for maintenance be made to him on behalf of such child under the Deserted Wives and Children Act, should stay his hand and allow the superior Court to deal with the matter." A most useful analysis of the English authorities is to be found in the recent judgment of Ormrod, J. in the Divisional Court in Lanitis v. Lanitis (9) in which His Lordship reaches the conclusion that "It is clear that by 1948 the matter was not now any longer regarded as a matter of law, but as a matter of discretion, although a matter on which the magistrates would normally follow the advice given by the High Court." This certainly is the trend of the English decisions and it does mean that Walker v. Walker and Another (10) in which, following the pre 1948 English decisions, a contrary conclusion was reached is for that reason of no real assistance.

On an examination of these authorities I would consider that the better view is that the fact that the superior court is seized of an issue between parties does not mean that the inferior court is thereby deprived of jurisdiction to determine that same issue between those parties and that it is a matter for the discretion of the inferior court as to whether it proceeds or adjourns. It is true that as was said in Kaye v. Kaye (11) in a passage referred to by Ormrod, J. in Lanitis v. Lanitis (9) (supra) "In all other than exceptional cases the justices should, as a matter of obvious convenience and public policy, exercise their discretion to adjourn the proceedings until the High Court proceedings are disposed of. But there may be exceptional cases where they would be justified in exercising their discretion to proceed to adjudication notwithstanding that proceedings are on the file of the High Court covering the same ground." However, as the matter is not properly one of jurisdiction, prohibition would not lie where the

(8) (1930) St. R. Qd. 154 at p. 159
(9) 1970, 1 W.L.R. 503 at p. 507
(10) (1949) N.Z.L.R. 273
(11) (1965) P. 100 at p. 105

Magistrate chose to proceed. It follows of course that prohibition would not lie on this ground at the suit of any of the applicants. On the view which I have taken matters such as which proceedings were commenced first and at whose instance the proceedings in the Supreme Court were brought do not become of significance for the present purpose.

The second ground, namely that if the matter were one of discretion the Magistrate has wrongly exercised his discretion, may be shortly disposed of. It is no objection to this ground that it was not the ground on which the order nisi was granted as, since it is not necessary that grounds appear in the rule nisi (Eversfield v. John Newman and Edward Newman (12); Regina v. Taylor, Ex parte Blain (13)), in the case where the grounds are set out, an applicant is not precluded from seeking to support the rule on other grounds and there is nothing in the Rules of Court applicable to a writ of prohibition which would have the effect of so limiting an applicant. However, on my understanding of the authorities dealing with the circumstances in which prohibition lies, a wrongful exercise of discretion, if this were to be established, is not such a circumstance and I am not aware of any authority which would lead to any different conclusion. As the writ could not be granted on this ground no good purpose is to be served by examining the manner in which the Magistrate exercised his discretion.

The third ground involves consideration of the questions of whether the applicants have set up a bona fide claim of right and, if so, whether the jurisdiction of the Magistrate was thereby ousted. The common law rule is that a defendant is entitled to set up a claim of right or title to do the act which is the subject of the information and provided that the claim is bona fide and it is not clear that the right claimed is impossible in law, the jurisdiction of the Magistrates Court will thereby be ousted (Halsbury, 3rd Ed., Vol. 25, p. 182, para. 332).

The rule certainly applies to cases where a claim of title to property is set up and it would seem that this includes both real and personal property (see Clarkson v. Aspinall, Ex parte Aspinall (14) especially per Philp, J. at p. 109). Whether the claim of right is necessarily limited to a right in property is more doubtful. The matter is the subject of dicta by the Divisional Court in Andrews v. Carlton (15)

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(12) (1858) 4 C.B. (N.S.) 418, 140 E.R. 1147
(13) (1879) 5 V.L.R., L. 271
(14) (1950) 44 Q.J.P.R. 103
(15) (1928) 93 J.P. 65

in which the right which was being claimed was regarded by the Court as being a right to property. However, Lord Hewart, C.J. said at p. 66 "It was said on behalf of the respondent that the right which alone will avail is the right to property. In my opinion there is no sufficient authority for that proposition." Avory, J. after observing in the course of argument "It need not be a right in property; a man may claim the right to do something which may oust the jurisdiction of the justices without his making a claim to the property. It may be ousted by a bona fide claim to do the thing" contented himself in his judgment with saying "It is not necessary in this case to determine whether the claim of right to oust the jurisdiction of the justices must, as contended by Mr. Macaskie, be a claim of title to property." There are a number of cases such as Reg. v. Pedler (16) and Reg. v. Nunneley (17) in which, on a summons for non-payment of church-rates, on the defendant disputing the validity of the rate the jurisdiction of the justices has been held to be ousted and similarly in the case of a rate other than a church-rate (In re Batkin and the Justices of Staffordshire (18)). Although full reports of all these decisions are not available here, it would seem that they turn on statutory provisions ousting the jurisdiction of the justices when the question of validity was raised, so they are not of direct assistance. Whilst the position cannot be regarded as by any means clear, I shall proceed on the basis that the claim of right which ousts jurisdiction is not limited to a right in property.

The fundamental question here appears to me to be whether it could be said that by asserting that the Council is invalidly constituted the applicants are raising a claim of right. Sec. 89(1) of the Local Government Ordinance 1963-1967 under which the prosecutions are brought provides -

> "A person liable to pay rates or taxes under this Ordinance shall not, without reasonable cause, refuse or fail, after demand whether oral or in writing, to pay the rates or taxes at or within the time prescribed in the rule imposing the tax.
> Penalty: One hundred pounds or imprisonment for six months.
> Default penalty: One pound."

Subsec. (3) contains certain evidentiary provisions and pro-

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(16) (1864) 12 L.T. 17
(17) 27 L.J. (M.C.) 260
(18) (1856) 25 L.J. (M.C.) 126

visions as to the burden of proof. Authority for the imposition of the tax is given by Sec. 55 of the Ordinance which authorises a council, with the approval of the Commissioner for Local Government, to make rules imposing rates and taxes. When it is alleged that a person is in breach of Sec. 89(1) the complainant must establish both liability to pay the rate or tax and failure to do so without reasonable cause, although the burden of proof of reasonable cause lies on the defendant (Subsec. (3)). Where by way of defence a defendant sets up that the Council is invalidly constituted he is presumably doing so with a view to asserting that there is no valid rule imposing the tax and consequently no liability on his part to pay it. Viewed in this way it does not seem to be correct to say that the defendants are making a claim of right not to pay the tax; what they are claiming is that the Council cannot establish their liability to pay it and there is thus no obligation on them to pay it and perhaps also that there is reasonable cause for their refusal to pay the tax which, to my mind, is a rather different matter from setting up a positive claim of right. The position is not altered by the fact that one of them has commenced an action for a declaratory judgment on the matter on which the defence is based.

There is one authority not cited in argument which might be thought to lead to a contrary conclusion to that which I have just indicated. In Backhouse v. The Churchwardens of Bishopwearmouth (19) church-rates had been made upon the appellant and he, being a quaker, had been summoned to appear before justices for non-payment and had offered bona fide several serious objections to the validity of the rates, including a contention that the rates were invalid by reason of the alleged illegal constitution of the vestry. The Court held that the order made by the justices for the payment of the rates was improperly made as when the validity of the rates was bona fide brought into question they should not have proceeded. In that case, the decision was founded upon the application of the general rule that the summary jurisdiction of justices ceases when a matter of title comes into question bona fide before them, the Court treating the matter as one of title.

The Court there did not, however, advert to the principle enunciated shortly afterwards in Ex parte Vaughan (20) where it was held that the jurisdiction of justices was not ousted by a claim of title where the question of title was

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(19) (1860) 9 C.B. (N.S.) 315, 142 E.R. 123
(20) (1866) 2 L.R. Q.B. 114

necessarily involved in the matter which the justices had to determine. This decision and others to a similar effect are discussed in the judgments in Clarkson v. Aspinall (21) (supra) and, whilst the operation of this qualification to the general rule is admittedly the subject of some differences of view, I am of the opinion that there is such a qualification and that it operates in this instance. So that even if it could be said that a matter of title had been raised the jurisdiction of the Magistrate would not be ousted as the questions of liability to pay the tax and the existence of reasonable cause for refusal to pay were necessarily involved in the matter which he had to determine.

On the view which I take, it becomes unnecessary to consider the question of whether, if there is a claim of right raised, it is a bona fide claim. I am not suggesting it is not bona fide - the matter is simply one which does not arise for consideration.

It may be that this question of a bona fide claim of right should have been expressly raised before and dealt with by the Magistrate in order to found an application for prohibition. The material before me shows that it was not expressly raised and even if it could be said to have been raised by implication it would appear unlikely that the Magistrate would have directed his mind to it. However, it is not necessary to consider the availability of this ground at this stage since, in any event, I do not consider that the jurisdiction of the Magistrate was ousted.

As the applicants have thus failed to make out any of the grounds on which they sought to have the rule nisi made absolute, the rule must be discharged.

Solicitor for the Applicants : John Goldring

Solicitor for the Respondent Rima Nau : J.G. Smith, Acting Crown Solicitor

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(21) (1950) 44 Q.J.P.R. 103