REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

POOLE AND ANOTHER;

Ex parte HENRY.

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *Dec.* 6, 7.

Latham C.J., Rich, Dixon, and McTiernan JJ.

High Court—Practice—Appeal from State Court of Petty Sessions exercising Federal jurisdiction—Pendency of appeal to State Court of Quarter Sessions—Judiciary Act 1903-1937 (*No.* 6 *of* 1903—*No.* 5 *of* 1937), *sec.* 39 (2) (*b*)—*Rules of the High Court, Part II., sec. IV., r.* 1—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *sec.* 112.

A person who had been convicted in a Court of Petty Sessions of New South Wales by a magistrate exercising Federal jurisdiction appealed under the *Justices Act* 1902 (N.S.W.) to the Court of Quarter Sessions and, before that appeal was determined, appealed, under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1937, to the High Court by way of an application for a writ of prohibition in respect of the same conviction.

Held that the High Court would not proceed with the hearing of the application until the proceedings before the Court of Quarter Sessions had been terminated.

Ex parte Giles, (1912) 29 W.N. (N.S.W.) 83, referred to.

H. C. OF A. 1938.

THE KING v. POOLE; EX PARTE HENRY.

APPEAL, by way of order nisi for prohibition, from a Court of Petty Sessions of New South Wales.

Henry Goya Henry of North Sydney, New South Wales, was charged before Mr. Scobie, a stipendiary magistrate, upon an information laid by Alfred Alderson Poole, senior control officer at Mascot aerodrome, that " on or about the thirteenth day of April, 1938, at Mascot, near Sydney, in the said State, within Australian territory, an aerodyne bearing registration mark VOG of which you were the pilot, did fly in contravention of the *Air Navigation Regulations* made under the *Air Navigation Act* 1920-1936, in that at about 12.10 p.m. on the thirteenth day of April, 1938, the said aerodyne did other than when departing or loading fly over the aerodrome known as the Mascot aerodrome at a lower height than 2,300 feet " in contravention of the said *Air Navigation Regulations*.

After a hearing which extended over several days, the defendant, on 6th July 1938, was convicted and fined the sum of £5, and was ordered to pay costs in the sum of £16 3s. He was sentenced to imprisonment with hard labour for forty-three days in default of payment, which was required to be made within seven days.

After he had been so convicted the defendant served upon the informant a notice of his, the defendant's, intention to appeal under the *Justices Act* 1902 (N.S.W.) to the next Court of Quarter Sessions holden at Sydney against his conviction, on the following grounds: (*a*) Not guilty; (*b*) that the evidence disclosed no offence; (*c*) that the conviction was bad and contrary to law; (*d*) that the conviction was against evidence and the weight of evidence; and (*e*) that he, the defendant, had fresh evidence to call.

The notice bore date 6th July 1938.

On 20th July 1938, upon an application by the defendant, *Rich* J. ordered that the informant and the magistrate show cause why a writ of prohibition should not be issued directed to each of them to restrain them and each of them from further proceeding on or in respect of the said conviction of the defendant. The grounds stated in the order nisi were as follows: (*a*) That the *Air Navigation Act* 1920-1936 is *ultra vires* the *Commonwealth of Australia Constitution Act*; (*b*) that the regulations purporting to issue under the *Air Navigation Act* 1920-1936 are invalid; (*c*) that reg. 51 (1) under

which the applicant was convicted was *ultra vires* and did not apply to the applicant; (*d*) that the regulations are ineffective within the State of New South Wales; and (*e*) that on the evidence given before the magistrate the applicant was wrongly convicted.

The order nisi was made returnable before the Full Court of the High Court.

The respondent magistrate, Mr. Scobie, did not appear on the hearing of the application although served with notice thereof.

In an affidavit filed on behalf of the respondent informant the deponent stated that he was present at the Court of Quarter Sessions held at Sydney before Judge *Sheridan*, Chairman of Quarter Sessions, on 16th August 1938, during the hearing of an appeal by Henry, the defendant, against his said conviction, and that upon the appeal being called on the judge was informed by counsel for the informant that an appeal to the High Court by way of order nisi for a writ of prohibition to restrain the informant and the magistrate from further proceeding upon the said conviction was pending in the High Court, whereupon the judge intimated to counsel and to Henry, who appeared in person, that he would not deal with any questions of law arising in the appeal before him, but would hear the facts. The deponent further stated (*a*) that witnesses were called and gave evidence on behalf of Henry, and Henry also gave evidence on his own behalf, and (*b*) that after hearing evidence the judge said:— "I find the offence proved. Further hearing stood over to determination of High Court appeal or until 31st October 1938," and that an indorsement to that effect appeared upon the relevant court records of such appeal proceedings. Judge *Sheridan* died on 6th September 1938.

E. M. Mitchell K.C. (with him *McIntosh*), for the respondent informant on a preliminary objection. It is not competent for the applicant to bring the matter before this court during the pendency of an appeal by him under the *Justices Act* 1902 (N.S.W.) to the Quarter Sessions. This particularly applies to the ground taken in this court, that on the evidence the applicant was wrongly convicted, as on an appeal to the Court of Quarter Sessions the matter is heard

H. C. OF A. 1938.

THE KING v. POOLE; EX PARTE HENRY.

de novo (*R.* v. *Pilgrim* (1)). Upon its being heard *de novo* and a new determination by the Court of Quarter Sessions the order in respect of which this application is made became inoperative. It follows that if the order became inoperative there is nothing against which to apply to this court.

[DIXON J. referred to *O'Sullivan* v. *Morton* (2).]

A difficult situation might arise if the Court of Quarter Sessions and this court were to deal concurrently with the same order. A somewhat similar question arose in *Ex parte Giles* (3). The grounds on which the application is based are grounds for common law prohibition which, under the decision in *The King* v. *Murray and Cormie*; *Ex parte The Commonwealth* (4), cannot be granted.

Louat (with him *Storey*), for the applicant. The effect of an appeal to Quarter Sessions is to stay the operation of the magistrate's order, which, however, remains a perfectly good order. *Qua* the Quarter Sessions appeal the applicant is in the position that he has filed his appeal and given his recognizances but the appeal has not been heard. All questions of law proposed to be raised before this court were reserved by the chairman of that court. No final order has been made by the Court of Quarter Sessions. In any event, the two remedies may be pursued concurrently up to the time of the commencement of the hearing before the Court of Quarter Sessions (*Ex parte Giles* (3)). It is submitted that that position continues up to the time of the making of an order by that court, and, further, that even such an order would not necessarily determine the proceedings. If this court proceeded to determine the question of law the Court of Quarter Sessions would be bound by that decision *qua* the law. A final decision by this court would mean that the appeal to Quarter Sessions would be no longer available to the applicant.

[DIXON J. referred to *Coleshill* v. *Manchester Corporation* (5).]

Nothing has been done in the Court of Quarter Sessions that can affect this court or its willingness to exercise its jurisdiction. The practice in the New South Wales courts of allowing cumulative remedies to the Full Court of the Supreme Court by way of prohibition

(1) (1870) L.R. 6 Q.B. 89, at p. 95.
(2) (1911) V.L.R. 235.
(3) (1912) 29 W.N. (N.S.W.) 83.
(4) (1916) 22 C.L.R. 437.
(5) (1928) 1 K.B. 776, at p. 786.

and to the Court of Quarter Sessions by way of appeal is a very old one, which has been consistently followed (*Ex parte Marx* (1); *Ex parte Wedlock* (2); *Ex parte Giles* (3); *Ex parte King* (4); *Ex parte Lovell*; *Re Buckley* (5)). The applicant is prepared to abandon the appeal to the Court of Quarter Sessions, and also any rights he may have in that court.

E. M. Mitchell K.C., in reply. The effect of the decision in *Ex parte Giles* (3) is that an appeal can be dealt with in the Court of Quarter Sessions when the application to the Supreme Court for prohibition has not begun, and vice versa. The matter can be pending, but not litigated, in the two courts at the same time. The only right the applicant has at Quarter Sessions is to defend himself against a charge brought against him, and there is not provision, once the appeal has been lodged, enabling him to withdraw the appeal; a reason being that the Court of Quarter Sessions has power to inflict a larger penalty.

THE COURT delivered the following judgment:—

This is an appeal from a conviction of the appellant by a stipendiary magistrate exercising Federal jurisdiction as a Court of Petty Sessions in New South Wales.

The appellant was convicted of an offence against regulations made under the *Air Navigation Act* 1920-1936. The appeal came to this court by virtue of the provisions of the *Judiciary Act* 1903-1937, sec. 39 (2) (*b*). It appears that the appellant after his conviction immediately lodged an appeal to the Court of Quarter Sessions. It is to be presumed that he complied with the provisions of the *Justices Act* in giving a recognizance conditioned to appear at the court and prosecute his appeal and abide the judgment of the court thereon (*Justices Act* 1902, sec. 123). After giving notice of appeal to the Court of Quarter Sessions an appeal was brought to this court, the procedure adopted being that of statutory prohibition as provided in the *Justices Act* (N.S.W.), secs. 112 et seq.

Pursuant to rule 1 of sec. IV of the Appeal Rules of this court, appeals to the High Court from the decisions of inferior courts of a

(1) (1868) 7 S.C.R. (N.S.W.) 344.
(2) (1899) 20 L.R. (N.S.W.) 353; 16 W.N. (N.S.W.) 117.
(3) (1912) 29 W.N. (N.S.W.) 83.
(4) (1913) 30 W.N. (N.S.W.) 70.
(5) (1938) 38 S.R. (N.S.W.) 153, at pp. 175, 176.

H. C. OF A. 1938.

THE KING v. POOLE; EX PARTE HENRY.

Latham C.J. Rich J. Dixon J. McTiernan J.

State in the exercise of Federal jurisdiction are to be brought in the same manner and within the same times and subject to the same conditions as are prescribed by the law of the State for bringing appeals from the same court to the Supreme Court in like matters.

The Supreme Court of New South Wales has considered and dealt with the position which arises when a person against whom an order has been made in a Court of Petty Sessions exercises at one and the same time his right of appeal to a Court of Quarter Sessions and his right to take proceedings by way of statutory prohibition. The practice appears from the decision in *Ex parte Giles* (1), where it was held that the institution of an appeal in the Court of Quarter Sessions against a conviction by a magistrate was not a bar to proceedings under a rule nisi for prohibition to restrain further proceedings under the same conviction. To this case may be added the authorities cited by Dr. *Louat* this morning. Appeals to Courts of Quarter Sessions and General Sessions, in this country as in England, are by way of rehearing upon fresh evidence. Thus it was held in *Ex parte Morrissey* (2) that where a respondent did not appear upon an appeal and no evidence was given it was the duty of the Court of Quarter Sessions to quash the conviction of the appellant. It is evident that the Court of Quarter Sessions is seised of the whole question of the guilt or innocence of the accused, and is bound to pronounce upon all the issues of fact or questions of law which are necessary for the determination of the question whether the accused ought or ought not to be convicted upon the information.

The decisions mentioned show that, according to the practice established by the Supreme Court under the *Justices Act* of New South Wales, the institution of proceedings by way of appeal to the Supreme Court cannot be regarded as prejudicing an appeal by a defendant to a Court of Quarter Sessions.

In appeals to this court by virtue of sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1937 the State practice is the basis of the procedure whereby an appeal is brought to this court. We are, accordingly, not prepared to say that the pendency of an appeal to a Court of Quarter Sessions excludes an appeal to this court or vice versa.

(1) (1912) 29 W.N. (N.S.W.) 83.
(2) (1911) 11 S.R. (N.S.W.) 550; 28 W.N. (N.S.W.) 130.

This court, however, is, in Australia, the court of final appeal. It is not consistent with the character of such a court that it should entertain an appeal while proceedings are pending in an inferior court which has jurisdiction, not yet fully exercised, to determine the subject matter of that appeal. *Fletcher Moulton* L.J. said in *Doleman & Sons* v. *Ossett Corporation* (1) :—" There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the courts will not allow their jurisdiction to be ousted."

Where the course adopted in the present case is followed, if the court were to proceed to hear the appeal, it would be possible for the Court of Quarter Sessions, on new and different evidence, or even on the same evidence, to acquit the accused person when this court had affirmed his conviction, or to inflict a punishment different from that imposed by the order which we had affirmed. A court of final appeal should adopt measures to prevent the possibility of such a result. This it can do by declining to hear an appeal while proceedings of the character mentioned are still pending.

We do not think it sufficient for counsel to express in this court his willingness on behalf of his client to abandon proceedings in the inferior court. It is necessary that the inferior court should have finally dealt with the matter so that it is *functus officio*. The court is therefore not prepared to proceed with the hearing of this appeal until the proceedings before the Court of Quarter Sessions have been terminated.

The hearing of the appeal is therefore adjourned *sine die*. Either party is to be at liberty to apply to a justice of the court to put the appeal in the list. All questions of costs are reserved.

Application adjourned sine die. Either party to be at liberty to apply to a justice of the court to put the appeal in the list. All questions of costs reserved.

Solicitors for the applicant, *A. S. Henry & Slade.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.

(1) (1912) 3 K.B. 257, at p. 269.