[HIGH COURT OF AUSTRALIA.]

KEETLEY . . . . . APPELLANT;
DEFENDANT,

AND

BOWIE . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1951.

ADELAIDE, *Sept.* 21, 24;

MELBOURNE, *Oct.* 11.

Dixon, Williams and Fullagar JJ.

Justices—Northern Territory—Whether appeal lies to Supreme Court from order dismissing charge for minor indictable offence—Justices Ordinance 1928-1939 (*N.T.*) (*No.* 26 *of* 1928—*No.* 6 *of* 1939), *s.* 163 (1).

Section 163 (1) of the *Justices Ordinance* 1928-1939 (N.T.) provides as follows: "There shall be an appeal to the Supreme Court from any conviction, order, or adjudication of a Court of Summary Jurisdiction (including a conviction of a minor indictable offence or an order dismissing a complaint of a simple offence), as hereinafter provided, in every case, unless some special Act or Ordinance expressly declares that such a conviction, order, or adjudication shall be final or otherwise expressly prohibits any appeal against it."

Held that s. 163 (1) does not confer a right of appeal from an order dismissing an information for a charge dealt with as a minor indictable offence.

Order of the Supreme Court of the Northern Territory (Judge *Wells*) discharged.

APPEAL from the Supreme Court of the Northern Territory.

An information was laid under s. 93 of the *Criminal Law Consolidation Act* 1876 (S.A.), which forms part of the law of the Northern Territory. That section created an indictable offence, but the magistrate, in pursuance of Div. 2 of Part V. of the *Justices Ordinance* 1928-1939 (N.T.), dealt with the charge as one of a minor indictable offence and dismissed the information. The appeal was instituted under s. 163 (1) of the *Justices Ordinance*, the text of which is set out in the headnote.

Wells J. allowed the appeal and quashed the order of the magistrate dismissing the information.

From this order the defendant appealed to the High Court.

J. E. Kelly (with him *K. T. O'Loughlin*), for the appellant.

C. C. Brebner, for the respondent. The words, " any conviction, order, or adjudication ", in s. 163 (1) of the *Justices Ordinance* are sufficient to cover a dismissal of a minor indictable offence.

[DIXON J. referred to *Nilsson* v. *Nilsson* (1) ; *Platz* v. *Osborne* (2).]

J. E. Kelly in reply.

Cur. adv. vult.

Oct. 11.

The Court delivered the following written judgment :—

This is an appeal from an order of the Supreme Court of the Northern Territory made by his Honour Judge *Wells*. The order was made in an appeal brought as under the *Justices Ordinance* 1928-1939 (N.T.) from the dismissal of an information. By the order his Honour allowed the appeal and quashed the order of the magistrate dismissing the information. The information was laid under s. 93 of the *Criminal Law Consolidation Act* 1876 (S.A.), which forms part of the law of the Northern Territory. That section creates an indictable offence, but the offence in the present case was dealt with summarily under Div. 2 of Part V. of the *Justices Ordinance* 1928-1939. Part V. deals with indictable offences. Section 120 (1) (v), the section with which Div. 2 of Part V. of the Ordinance commences, gives jurisdiction to a special magistrate to hear and determine in a summary way a charge of the description in question. A charge so dealt with is described by s. 4 of the Ordinance as a minor indictable offence. The definition of " minor indictable offence " is as follows :—" ' Minor indictable offence ' means indictable offence which is capable of being, and is, in the opinion of the Justice before whom the case comes, fit to be heard and determined in a summary way under the provisions of Division 2 of Part V. of this Ordinance." The appeal to the Supreme Court is given by Div. 2 of Part VI. of the Ordinance. That division begins with s. 163, sub-s. (1) of which now stands as follows :—

" (1) There shall be an appeal to the Supreme Court from any conviction, order, or adjudication of a Court of Summary Jurisdiction (including a conviction of a minor indictable offence or an order dismissing a complaint of a simple offence), as hereinafter provided, in every case, unless some Special

(1) (1922) S.A.S.R. 405. (2) (1943) 68 C.L.R. 133.

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Act or Ordinance expressly declares that such a conviction, order, or adjudication shall be final or otherwise expressly prohibits any appeal against it."

If the bracketed words were disregarded it is possible that the appeal given by the section would include an appeal by an informant against the dismissal of any charge. There is, however, a presumption in favour of the finality of acquittal, which it would be necessary to take into account: see *Secretary of State for Home Affairs* v. *O'Brien* (1) and cf. *Platz* v. *Osborne* (2). But the bracketed words point strongly to the conclusion that no appeal lies from the dismissal of a charge dealt with as a minor indictable offence.

In the present case the magistrate dealt with the charge as a minor indictable offence in pursuance of Div. 2 of Part V. Construing s. 163 (1) as it stands, the implication of the bracketed words appears plainly to be that while an appeal from a conviction of a minor indictable offence was included in s. 163 an appeal from a dismissal of a charge of a minor indictable offence was not included. The reference to a dismissal of a complaint of a simple offence strongly supports this implication. If the general words sufficed to cover appeals from convictions or orders made in respect of a minor indictable offence and dismissals of a complaint of a simple offence, the bracketed words would be entirely unnecessary. The express mention of an appeal from a conviction of a minor indictable offence amounts to a plain implication that an appeal from an acquittal of such an offence is not included. The reference to the dismissal of a complaint of a simple offence strongly reinforces this implication. On this view of the provision no appeal lay to the Supreme Court from the dismissal of the charge by the magistrate.

This conclusion is reinforced by the history of the legislation and of that upon which it is founded, the legislation of South Australia. As s. 163 (1) stood in the *Justices Ordinance* 1928 before amendment it provided that any person aggrieved by any conviction, order or adjudication of a Court of Summary Jurisdiction (including a conviction of a minor indictable offence, or an order dismissing a complaint of a simple offence) might appeal to the Supreme Court from the conviction, order or adjudication. This provision was based upon s. 163 (1) of the *Justices Act* 1921 (S.A.).

Under s. 113 of the *Police Act* 1916 (S.A.), which gave an appeal to a person feeling aggrieved by the imposition of any fine or order or adjudication under that Act, it was held by *Gordon* J. in *Nilsson* v. *Nilsson* (3) that a prosecutor was not a person aggrieved and

(1) (1923) A.C. 603.
(2) (1943) 68 C.L.R. 133.
(3) (1922) S.A.S.R. 405.

could not appeal from a dismissal of a complaint. This decision was given shortly after the *Justices Act* 1921 (S.A.) came into operation (26th July 1922) but in proceedings which apparently originated before it did so. Section 46 of the *Acts Interpretation Act* 1915-1936 (S.A.) provides that when an Act contains a provision that proceedings in respect of offences shall be disposed of summarily and contains a further provision that there shall be an appeal in respect of such proceedings, such further provision shall be taken to mean, amongst other things, that there shall be an appeal from any order in such proceedings dismissing any information or complaint. *Gordon* J. held that this provision was inapplicable because the appeal was not given in respect of proceedings but only to the person aggrieved by the order. An amendment was made to s. 163 (1) of the *Justices Act* 1921 after this decision by *The Justices Act Amendment Act* 1923 (No. 1573) (S.A.), which put s. 163 (1) of the *Justices Act* (S.A.) in the same form, so far as material, as s. 163 of the *Justices Ordinance* now is. In taking this course the legislature evidently intended to overcome the possible effect of the decision of *Gordon* J. But it is equally evident that the legislature was not prepared to go further in giving the right of appeal to a complainant or informant against the dismissal of the complaint or information than in the case of a simple offence and deliberately withheld a right of appeal in the case of an acquittal of a minor indictable offence. This is made clear by the retention of the bracketed words " (including a conviction of a minor indictable offence and an order dismissing a complaint of a simple offence) ". There is no reported decision of the Supreme Court of South Australia entertaining an appeal from the dismissal of a complaint of a minor indictable offence so far as we have been able to ascertain, and we are informed that it is not the practice of the Supreme Court of South Australia to entertain such appeals, the view being taken that s. 163 (1) does not give an appeal when a charge for a minor indictable offence is dismissed. The fact is that the legislature recognized that no appeal lay from an acquittal of an indictable offence when it was tried upon indictment and was not willing, when the indictable offence was dealt with summarily as a minor indictable offence, to give a right of appeal to the prosecutor because it was so dealt with.

There is no provision analogous to s. 46 of the *Acts Interpretation Act* (S.A.) either in the *Interpretation Ordinance* 1931-1949 (N.T.) or in the *Acts Interpretation Act* 1901-1950 (Cth.), which is adopted by the *Interpretation Ordinance* (N.T.). Whatever argument might have been based on that provision in South Australia is, therefore, not available in the case of the Northern Territory.

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In making this observation we do not intend to indicate any opinion that s. 46 of the *Acts Interpretation Act* (S.A.) ought to affect the conclusion derived from the bracketed words in s. 163 (1). We merely note the circumstance. The *Justices Ordinance* 1933 (N.T.), s. 32, amended s. 163 of the *Justices Ordinance* 1928 (N.T.) by replacing the old sub-s. (1) with the present sub-s. (1) based upon the South Australian Amendment made by the *Justices Amendment Act* 1923 (S.A.).

We think that the correct construction of s. 163 (1) of the Ordinance is that no appeal lies from an order of a magistrate or justices dismissing a charge for a minor indictable offence.

Section 125 (2) of the *Justices Ordinance* has, in our opinion, no bearing upon the matter. When that sub-section says that the provisions of the Ordinance shall apply as if the charge were a complaint for a simple offence it is dealing with procedure before the magistrate. Such a provision is quite insufficient to give a right of appeal. In any case the sub-section is governed by the words " subject to this Ordinance ", so that it is subject to s. 163.

For these reasons we think that no appeal lay in this case from the dismissal by the magistrate of the charge under s. 93 of the *Criminal Law Consolidation Act* 1876 (S.A.), the magistrate having dealt with the charge as a minor indictable offence. It was suggested that, if no appeal lay to the Supreme Court of the Northern Territory, the order made by the Supreme Court must be a nullity and from it no appeal could lie to this Court pursuant to s. 21 of the *Supreme Court Ordinance* 1911-1936 (N.T.). But it is an order made by the Supreme Court, even although unlawfully, and that is enough : cf. *Troy* v. *Wrigglesworth* (1).

We are therefore of opinion that the appeal from the Supreme Court should be allowed, the order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the appeal to the Supreme Court should be dismissed as incompetent.

Appeal allowed with costs. Order of the Supreme Court of the Northern Territory discharged. In lieu thereof, order that the appeal from the Court of Summary Jurisdiction at Darwin be dismissed with costs as incompetent.

Solicitors for the appellant, *Kelly, Travers, Melville and Hague.*

Solicitor for the respondent, *D. D. Bell,* Commonwealth Crown Solicitor.

B. H.

(1) (1919) 26 C.L.R. 305.