IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION)

No. 14029 of 1989

CORAM: CAMPBELL J.

FRIDAY 8TH DECEMBER, 1989

MACKIE -V- HUNT & ANOR.

JUDGMENT

The Summons herein seeks a declaration that the determination by the Second Defendant that it is a prerequisite to an application under Section 428W of the Crimes Act 1900 as amended that the Plaintiff herein be regarded as unfit to plead is wrong in law and an order remitting the matter to the Second Defendant to be heard according to law.

An order is also sought as to costs.

Mr. Basten of Counsel appeared for the Plaintiff, Ms Ainslie-Wallace of Counsel for the First Defendant and the Second Defendant filed a submitting appearance.

It was common ground that on the 6th November, 1989 the Plaintiff came before the Second Defendant to answer a charge of malicious damage to property under s.195 of the Crimes Act, 1900.

The short facts as they were subsequently put to the Second Defendant by the Prosecutor are as follows:

> " Your Worship it was 12.20 a.m. Saturday morning the defendant was in the Woonona Circle, Park Road, Woonona and apparently took the metal lining out of a council garbage bin and threw it into the window of the Scoop Food Store, smashing it. The damaged window was a large one Sir and there is an amendment to the value there. I am tendering a quote with the owner's statement for $996.12 to repair it. The Defendant went to a nearby telephone apparently Sir and called police himself. The police arrived, he admitted throwing the bin into the window said he was responsible

> for smashing it, said he was drunk although he appeared to police to be slightly to mildly affected by liquor. They are the facts Sir the defendant has no previous convictions. I think I am bound to bring to the court's notice he was committed for sentence to a District Court sir in relation to larceny matters and malicious injury, I have got no result. Apparently a bond for three years Sir under 558 of the Crimes Act. The defendant volunteered that to the Constable."

The initial question of the Second Defendant to Mr. Masters the Solicitor for the Plaintiff "A plea of Not Guilty Mr. Masters ?" sufficiently demonstrates that the learned Magistrate proposed to deal with the matter under s.496 of the Crimes Act, that is as a summary matter. The amount in the initial charge does not appear from the material before me and it is clear from the short facts that some amendment was contemplated, nonetheless the figure referred to in the short facts is well within the financial limit provided for in s. 496.

On being asked that question Mr. Masters put to the learned Magistrate that it would be a suitable matter to be dealt with under s.428W of the Crimes Act.

When Mr. Masters made it clear, in response to a question from the Bench, that he did not submit that the Plaintiff was "unfit to enter a plea", the learned Magistrate ruled that s.428W had no application in respect of a Defendant who was "fit to plead" (that is, to use the more modern language, "fit to be tried"). Whether this view is correct is the short point involved in this Summons.

Part XlA with the heading "Unfitness to be tried for an offence" was introduced into the Crimes Act by the Crimes (Mental Disorder) Amendment Act, 1983 and subsequently amended by the

Crimes (Mental Disorder) Amendment Act, 1989. That Part provided, inter alia, as follows:

"

PART XlA

UNFITNESS TO BE TRIED FOR AN OFFENCE

CHAPTER I - Proceedings in the Supreme Court or District Court

.....

428F.(1) Where, in respect of an offence -

(a) the Attorney General determines under section 428E(2) that an inquiry should be conducted; or

(b) the question of a person's unfitness to be tried for the offence is raised after the person is arraigned upon a charge in respect of the offence,

the Court shall except as provided by subsections (2), (4) and (5), as soon as practicable after the Attorney General's determination is made or the question is raised, as the case may be, conduct an inquiry in order to determine whether the person is unfit to be tried for the offence.

.....

(5) Where, in respect of a person charged with an offence, the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other matter which the Court thinks proper to consider to inflict any punishment, the Court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released.

.....

CHAPTER 2 - Summary proceedings before a magistrate.

Application.

428U(1) This Chapter applies to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a magistrate, but does not apply to committal proceedings.

(2) Sections 428W and 428X apply to the condition of a defendant as at the time when the magistrate considers whether to apply the relevant section to the defendant.

Persons suffering from mental illness or condition.

428W(1) Where, at the commencement or at any time during the course of the hearing of proceedings before a magistrate, it appears to the magistrate -

(a) that the defendant is developmentally disabled, is suffering from a mental illness or is suffering from a mental condition for which treatment is available in a hospital, but is not a mentally ill person within the meaning of the Mental Health Act, 1958; and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the magistrate

may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Chapter than otherwise in accordance with law,

the magistrate -

(c) may dismiss the charge and discharge the defendant -
  (i) into the care of a responsible person, unconditionally or subject to conditions;
  (ii) upon the condition that the defendant attend upon a person or at a place specified by the magistrate for assessment of the defendant's mental condition or treatment, or both; or
  (iii) unconditionally; or
(d) may do any one or more of the following:
  (i) adjourn the proceedings;
  (ii) grant the defendant bail in accordance with the Bail Act 1978;
  (iii) make any other order that the magistrate considers appropriate.

(2) A decision under subsection (1)(c) to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

Mentally ill persons.
428X.....

Disqualification of magistrate.
428XA(1) If:
(a) a magistrate has inquired into whether a defendant should be dealt with under section 428W or 428X; and
(b) the magistrate has decided not to so deal with the defendant,
the magistrate shall, on the application of the defendant, disqualify herself or himself from further hearing the proceedings concerned.
(2) An application may only be made by a defendant under this section if:
(a) except as provided by paragraph (b), the question whether the defendant should be dealt with under section 428W or 428X has not been previously inquired into by another magistrate in the same proceedings; or
(b) in the case of proceedings in which another magistrate has previously inquired into whether the defendant should be dealt with under section 428W or 428X, the magistrate before whom the proceedings are being heard considers that it should, because of the circumstances of the case, be permitted to be made.

Means by which magistrate may be informed.
428Y. For the purposes of this Chapter, a magistrate may

inform himself or herself as the magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself.

CHAPTER 3 - Other powers of magistrates.
.....
Transfer of prisoners.
428Y13. (1) This section applies to a person who is awaiting committal for trial or trial for an offence or summary disposal of the person's case.
(2) Where it appears to a magistrate that it may be appropriate to transfer a person to whom this section applies from prison to a hospital under section 123 or 124 of the Mental Health Act, 1983, the magistrate may make an order directing:
....."

The learned Magistrate considered that the heading "Unfitness to be tried for an offence", which formed part of the Act (Interpretation Act, 1897, s.35) governed the operation of the Part and in particular s.428W so that its operation was limited to persons who were unfit to be tried. He took the view that the purpose of the Part was to deal with the disposition of "the person" and not the disposition of "the case".

The learned Magistrate also considered that the amendments made in 1989 confirmed his approach to the interpretation of the Part. In the discussion which took place between the Bench and Mr. Masters, no specific part of the amendment was referred to, however I assume the learned Magistrate had in mind the amendments which provided, inter alia, that the Defendant's condition is to be considered as at the time the Magistrate considers the matter, that the matter can be considered at the commencement or at any time during the hearing of the proceedings, that a decision to dismiss the charge under subs.428W(1)(c) does not constitute a finding that the charge

against the Defendant is proven or otherwise and the additional power provided for Magistrates in Chapter 3.

With respect to the learned Magistrate, I find myself unable to agree with his interpretation of the Section. It is my view that a Magistrate may properly apply s.428W to a Defendant who satisfies the criteria referred to in subs.(1)(a) whether or not that person is unfit to be tried and without first determining that that is the situation.

Whilst it is true that the heading is part of the Act, nonetheless it still has to be read with the Section itself and there is nothing in s.428W(1)(a) that prescribes unfitness to be tried as one of the criteria for the application of the Section and none of the conditions referred to therein necessarily imply such a state.

There is nothing unusual in the heading of a Part or Section of an Act describing the general subject matter of that Part where the Part contains within it Sections expressly designed to exclude or divert particular matters from being dealt with under the principal provisions of the Part.

In any event the absence of intention that the Part should apply only to persons unfit to be tried appears from s.428F(5).In that subsection the Supreme and District Courts are given power to dismiss a charge and order that a person be released without conducting an enquiry and therefore without determining whether that person is, or is not, unfit to be tried.

As to the contention that the Part deals with the disposal of persons rather than cases, the answer to this is that in s.428F

and in s.428W(1)(c) there is provision for the charge to be dismissed. That the dismissal does not constitute a finding that the charge against the Defendant is proven or otherwise does not alter the fact that the charge has in fact been disposed of by dismissal.

Whilst I agree that the amendments are, with the exception to which I shall in a moment refer, consistent with the view that the Section is only applicable to persons unfit to be tried, they are in my opinion equally consistent with the contrary view.

The exception to which I referred is s.428XA which deals with the disqualification of a Magistrate at the request of the Defendant where he has decided not to deal with the Defendant under s.428W or 428X after having enquired into whether the Defendant should be so dealt with. If it is a pre-requisite for the application of those sections that the Defendant be unfit to plead, then at least in some cases there will have been a determination of that question before the Magistrate decides not to deal with the Defendant on that basis. In that situation there would be no point in the Magistrate disqualifying himself in relation to further proceeding with the case because in non-indictable matters there would be in effect no case to proceed with (see Pioch -v- Lauder (27 F.L.R. 79); yet s.428XA makes no provision for such a situation. This indication that the Legislature considered at the time of the amendment, that s.428W could have application to a person who was not unfit to be tried may be looked at to assist in the construction of the Section (See the discussion at p.68 of Pearce Statutory Interpretation in

Australia, 2nd Edn.).

In my view it would be consistent with the purpose of the Part, as appears from its terms, that s.428W be used as a diversionary measure, just as s.428F(5) is clearly designed to be. I note that Ierace, in his manual Intellectual Disability at p.45, prefers the interpretation of s.428W pursuant to which:

> " the Magistrate may exercise the section's powers whether the intellectually disabled defendant is fit to be tried as a diversionary measure as well as where the defendant is unfit."

Ms Ainslie-Wallace submitted that to interpret the Section in this way would be to give to a Magistrate a power which was not available to the Supreme Court or District Court. It is to be noted however that the Supreme or District Court has the power to dismiss the charge and order that the person be released and has a power, which the Magistrate does not, of determining that an enquiry should be conducted into fitness to be tried with the consequences that follow from the results of that enquiry, including where the Attorney General considers it appropriate, a special hearing. In those circumstances it is not surprising that the Magistrate be given certain different powers of disposition which may be characterised substantially as discharge of the Defendant into the care of a responsible person or with the imposition of conditions. It is to be borne in mind in this connection that the power to "make any other order that the Magistrate considers appropriate" in subs.428W(1)(d)(iii) does not include the making of an order so as to impose duties or burdens upon persons other than the accused person (See Minister

for Corrective Services -v- Harris, Brownie J., Unreported, 10th July, 1987).

Ms Ainslie-Wallace submitted that because the learned Magistrate when standing the matter over indicated that the result of enquiries as to the Defendant's antecedents and the possible need for a special hearing might lead him to commit the Defendant to the District Court under s.51A, the proceedings were committal proceedings and that therefore the Chapter did not apply. The order made by the learned Magistrate was that the matter be adjourned to a named day for "sentence or 51A". It is clear that the learned Magistrate embarked upon the hearing of this matter as being the hearing of an indictable matter triable summarily and the circumstance that he indicated that he may subsequently decline to deal with the offence pursuant to s.497 of the Crimes Act does not, until such time as he in fact declines to deal with the matter summarily, take it outside the proceedings referred to in s.428U. I do not consider that anything appears from the judgments of the Court of Criminal Appeal in Reg -v- Stramandinoli (4 P.S.R. 1888) contrary to this view.

Ms Ainslie-Wallace did not argue that the Court did not have the power to make the declaration sought by the Plaintiff, but submitted that in its discretion it should not do so. She referred me to a number of well known cases upon this topic which I do not think it necessary to mention in any detail. The view that she advanced is conveniently summarised by Helsham C.J. in Eq. in Czidei -v- Anderson (1977) 1 N.S.W.L.R. 747 when he said

at p.752:

> " Where, in the exercise of summary jurisdiction conferred upon him, a magistrate has embarked upon the hearing of proceedings, and where questions of law arise, or may arise, for determination by him, or have been determined by him, and those questions are within his jurisdiction to determine, it must be only in rare cases that this Court will, by declaratory order, interfere with the ordinary processes which the law has provided for the determination of such questions, namely, by the magistrate, and thereafter by one of the courts to which an appeal from any determination of his lies as of right. This Court will always be astute to use in proper fashion its discretionary powers, if it can do so, where it can be seen that a denial of justice is likely to result otherwise. Where the correction of a wrong decision is provided for by a right of appeal, a denial of justice by reason of that decision will not often be seen."

Ms Ainslie-Wallace also referred to the observation by Gibbs A.C.J., as he then was, in Sankey -v- Whitlam (142 C.L.R. 1) at p.26 when he said:

> " For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in Shapowloff -v- Dunn (1973) 2 N.S.W.L.R. 468 at p.470 that a Court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears for some special reason that it is necessary in the interests of justice to make a declaratory order."

However, Gibbs A.C.J., speaking of the case of Bacon -v- Rose (1972) 2 N.S.W.L.R. 793 and Willesee -v- Willesee (1974) 2 N.S.W.L.R. at 275, said at p.24:

> " There was in these cases clear power to grant a declaration. In both cases the question involved was principally one of law and the decision of that question was determinative, in the first case of whether the proceedings should continue, and, in the second case, of whether they should be conducted in public or in private. In these circumstances there were good reasons for exercising the discretionary power of the Court by granting a declaration."

In Willesee -v- Willesee, a case where a Magistrate declined to extend the privilege of a closed Court to a woman entitled to one, Holland J. considered that there were special circumstances. Although this is a different case, it seems to me there is a helpful analogy to be drawn for here the learned Magistrate has declined to consider as applying to the Defendant a method of disposal of his case other than according to law.

Whilst it is true that if the learned Magistrate does deal with the Defendant by way of conviction and sentence following upon his plea of guilty, on appeal to the District Court the same application could be made. The District Court Judge could pursuant to s.125(1) of the Justices Act exercise the power of the Magistrate. However, if it be that the Defendant is a person in respect of whom it is appropriate that the application of s.428W should at least be considered, it would seem undesirable that such a person should be subjected to the imposition of a sentence and a further hearing in order to have this question determined.

If, on the other hand, the learned Magistrate decided that the appropriate course was to commit the Defendant under s.51A, it would seem that the proceedings would have become a committal and therefore the Defendant would not be in a position to have the application of s.428W to him considered.

It is my view that, with due regard to the warnings as to the caution with which the Court should approach the making of a declaration where a matter is before a Magistrate, that nonetheless the special circumstances of the present matter and

the question at issue are such that it is appropriate for me to make the declaration sought.

I do not consider it appropriate to make the order sought, that is an order remitting the matter to the Second Defendant to be dealt with according to law, as the matter presently remains before the learned Magistrate and has not been brought up to this Court. There is no reason to suppose that the learned Magistrate would not take due note of this declaration in determining the course that he will now follow in relation to the matter.

I should emphasise that the matter has been argued before me on the basis that there is material available upon which the application of s.428W could be considered, if it be accepted that it is appropriate to consider the application of the Section in the case of a person who is in fact fit to be tried. Whether that material attracts orders in accordance with the powers conferred by the Section is entirely a matter for the learned Magistrate.

The Plaintiff has succeeded in the application which was opposed by the First Defendant and it would be appropriate that the Plaintiff have an order for his costs.

I accordingly make the declaration sought in the Summons and order that the First Defendant pay the Plaintiff's costs of the Summons.

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I certify that this and the 11 preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Campbell.

Associate

8/12/89

Dated