



## *Criminal Law - Appeals - Section 63 Justices Act*

*Zanco -v- McGeorge.* SC No JA48 of 1995

Judgment of Martin CJ, delivered 12 July 1996 (unreported)

The appellant had been dealt with by a magistrate in respect of a charge of behaving in a disorderly manner in a public place. The Magistrate did not make a formal finding of guilt but "cautioned and discharged" the appellant without proceeding to conviction. The appellant sought to have the Magistrate's finding that the offence was proved set aside by the Supreme Court.

Martin CJ found that the Magistrate had purported to dismiss the complaint pursuant to section 74 (2)(a) of the *Justices Act* in view of the fact that his only options pursuant to section 69 of the *Justices Act* were to convict, dismiss the complaint or make an order against the defendant.

Held that section 163 of the *Justices Act* prohibits an appeal to the Supreme Court from a dismissal order. This was despite the fact that there had been a finding of guilt. Martin CJ described the appeal as "incompetent".

Held the prohibition on a right of appeal applies equally between complainants and defendants.

His Honour suggested that the appellant "may perhaps take some comfort" from the comments of the New South Wales Supreme Court in *Collector of Customs -v- Tallerman Co Pty Ltd* (25FLR 213) where the Court considered an appeal against a dismissal pursuant to section 19B of the *Crimes Act*, 1914 (Cth):

"The dismissal is no mere technicality – it is a substantive dismissal. It contains no element of conviction and hence no element of sentence."

Martin CJ observed that it would be preferable if magistrates used the language of the statute when dealing with cases pursuant to section 75(2) of the *Justices Act*.

## COMMENTARY

Section 75(2) was abolished on 1 July 1996 when the *Sentencing Act* and the *Sentencing (Consequential Amendments) Act* came into operation. Section 7 of the *Sentencing Act* outlines various sentencing options upon a finding of guilt, including the imposition of a fine or community service order without conviction.

A further option is to order the dismissal of the complaint without conviction (this reproduces the old section 75 (2)). Section 8(3)(b)(i) allows for sentence appeals from non-conviction orders. An appeal against a finding of guilt is not especially provided for in the *Sentencing Act*.

Section 163 of the *Justices Act* allows for an appeal from a "conviction, order or adjudication" but not from an order dismissing a complaint of an offence. It appears that Martin CJ was of the view that a finding of guilt does not constitute an "adjudication".

The *Sentencing (Consequential Amendments) Act* amends provisions in more than forty statutes. Where previously various regulatory bodies were only entitled to act upon a conviction, they now can make the same decisions on the basis of a finding of guilt by a court. Persons who may be affected include auctioneers, architects, dentists, real estate agents and lawyers.

In the absence of a right of appeal against a finding of guilt (at least where the complaint is subsequently "dismissed") query:–

1. Whether circumstances may arise where serving a client's interests will require a lawyer to urge the judicial officer to record a conviction (e.g. in submissions on sentence following a finding of guilt in a defended case).

2. Whether section 8(3)(b)(i) is intended to limit appeals from non conviction orders to severity appeals. Can this provision be reconciled with section 163 of the *Justices Act*?

## *Criminal law - Costs - Section 77 Justices Act*

*Harlan -v- Hayward.*  
SC No. JA37 of 1995

Ruling of Kearney J delivered 7 May 1996 (unreported)

On 30 January 1996 Kearney J had quashed a conviction imposed in the Court of Summary Jurisdiction at Darwin and set aside the penalty imposed.

The appellant was awarded the costs of his successful appeal. His Honour reserved the question of the award of costs in the lower court in order to receive and consider written submissions from both parties.

Held that the Supreme Court is not limited to awarding costs in respect of appellate proceedings.

His Honour referred to Section 77(2) of the *Justices Act* which sets out when an order for costs must not be made (e.g. where the defendant unnecessarily prolongs proceedings) and ruled that none of the grounds were manifest in this case.

Kearney J rejected the respondent's submission that in the absence of an appeal lodged against the Magistrate's refusal to award costs, the Supreme Court has no power to award costs in respect of the lower court proceedings. His Honour considered section 163 of the *Justices Act* which allows a right of appeal from a "conviction, order or adjudication".

Held that an order in relation to costs is a matter consequential to the result and the proper course is for an appeal to be lodged against the conviction and then, if successful, an application made for costs in the lower court proceeding.

The appellant was awarded costs in respect of the Court of Summary Jurisdiction.

### Appellant

Counsel: Norman

Solicitors: Norman & Associates

### Respondent

Counsel: Noble

Solicitors: DPP