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I have had the advantage of reading the judgment of my brother Dixon and as I agree with his reasons and conclusion have nothing to add. The appeal should be allowed.

MUNDAY V GILL AND OTHERS.

This is an appeal by special leave from an order of the Supreme Court of New South Wales making absolute an order nisi for statutory prohibition in respect of eighteen summary .... convictions.

The convictions were made upon separate informations laid by the appellant against each of eighteen respondents severally. In the case of each of sixteen respondents the charge was that he knowingly continued in an unlawful assembly.

In the case of each of two respondents the charge was that being armed with something which used as a weapon of offence was likely to cause death or serious bodily harm, he was a member of an unlawful assembly.

The offences with which the respondents were thus charged are created by the Crimes (intimidation and Molestation) Act 1929 (N.S.W.) which defines an unlawful assembly to be an assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do, or to abstain from doing what he is legally entitled to do.

The prosecutions were all in respect of the same assembly, a gathering of between six and ten thousand coal miners which, on 16th December 1929 moved upon Rothbury Coal Mine.

The informant's case was that the common object of the assembly was by means of injury or intimidation to compel men who were working or about to work at the Rothbury Coal Mine to abstain from so doing. Before these charges were heard, the question whether the assembly was unlawful was fought out before the Magistrate in another prosecution against some other Defendant and the Magistrate found that it was unlawful.

Counsel for the informant and Counsel for all eighteen Defendants in the present cases, who appeared also in that prosecution ,thereupon agreed that the eighteen informations should .....

all be heard together and that the depositions of some of the witnesses in the earlier case should be read in evidence. Accordingly, the defendants pleaded to the informations, witnesses were examined for the prosecution and cross examined for the defence, and two depositions were read without calling the deponents.

At the close of the case for the prosecution the Magistrate at the request of the defendants' Counsel "stated that the "whole of the evidence given in these cases is taken into "consideration in respect of each defendant for the purposes "of determining whether there was an unlawful assembly." Counsel for the defence then called nine of his clients and stated that "he did not wish to tender any more witnesses" and that " there was no conflict with the evidence of the " Police in respect of the other defendants who state that they "withdrew the moment they realised it was an unlawful assembl

The defendants were all severally convicted, but they applied for and obtained a single order nisi for Statutory prohibition to restrain further proceedings on or in reppect of "the conviction..... wherein the (defendants) were each convicted".

It may well be doubted whether sec 112 of the Justices Act 1902 to 1918 authorises the grant of a single order nisi in respect of several defendants convicted severally upon separate informations. But apparently, when the order nisi was made, the defendants had no intention of departing from the agreement by which their cases had been heard together a they continued to deal with them collectively.

On the return of the order nisi, however, the point was taken that the convictions could not be supported because the informations had been heard together. In Russell v Bates 27 S.R. 257 the Supreme Court had held that a magistrate had no jurisdiction to hear together several informations agains different defendants even by consent. The judgement of the

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Supreme Court in that case was reversed in this Court but for a reason which did not affect this ground (see 40 C.L.R.209) and the Supreme Court followed its former judgement and made absolute the order nisi for statutory prohibition in respect of all eighteen convictions.

In deciding Russell v Bates, the Supreme Court applied to proceedings before justices the authorities which establish that two indictments cannot be tried at once, and it appears from the cases which the learned Chief Justice of this Court has found that in some of the provinces of Canada a like use has been made of these authorities.

There is, however, a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or ex officio information are pleas of the Crown. A Prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of Society. In the one the prisoner is brought to the bar of the Court" in his own proper person and being demanded concerning the "premises in the indictment specified and sharged upon him how "he will acquit himself thereof he saith he is not guilty there- "of and thereof for good and evil he puts himself upon the "Country and he who prosecutes for our Lord the King doth the "like". In the other the defendant is given sufficent opportunity to appear which (unless he be in custody because it is considered that he will abscond) he may exercise or not at his choice and, whether he avails himself or not of his right to be present, he is dealt with by those assigned to keep the peace

who judge both law and fact. "There is says Blackstone, no intervention of a jury, but the party accused is acquitted or "condemned by the suffrage of such person as the statue has "appointed for his Judge. An institution designed professedly "for the greater ease of the subject by doing him speedy justice" 4 Comm 280.

The tribunal is fixed and remains the same whether the cases are dealt with successively or simultaneously. But upon a crimminal inquest the jurors are summoned particularly, to pass betwe their Sovereign Lord the King and the prisoner at the bar. The prisoner standing upon his deliverance may shallange them or any of them. At common law in treason and in felony he is entitled to a number of peremptory challanges, a right which in Australia has been extended to misdemeanours.

When prisoners are jointly indicted that may sever or they may join in their challanges and the consequence which ensue are prescribed by law. But there is no way allowed by law of

PUTTING IN CHARGE OF ONE JURY AT ONE TIME two OR MORE PRISONERS arraigned upon separate indictments.

The jurors are specially chosen for the single purpose of trying one indictment or such of the prisoners arraigned on one indictment as they may have in charge. It is thereofre not surprising that the Court of Crimminal Appeal decided that it was not competent for a Court holding crimminal inquests to depart from this method of trial and try by one jury simultaneously prisoners separately indicted. Rex v Crane 1920 3 K.B. 236 (Comp.1921 2 A.C.299). Rex V Dennis 1924 1 k.B 867 and Rex v McDonnell 20 C.A.R. 163.

Moreover upon trials for treason and felony the prisoner has not been allowed to consent to variations of the procedure prescribed for his protection although in the past there has been a difference in this respect in the case of misdemeanours. Reg V Foster

7 C & P 495 and Reg V Thornhill 8 C & P 575. This no doubt is the basis of the observation made by Lod Phillimore in relation to the administration of criminal justice in India, in delivering the judgment of the Judicial Committee in Abdul Rahman v The King- Emperor (1926) 54 I.A. 96 at p 114 that "their "Lordships wish it to be understood that no serious defect in the "mode of conducting a crimminal trial can be justified by the "consent of the advocate of the accused".

If therefore the requirement that prisoners arraigned on separate indictments should be tried separately did not depend on the character of the tribunal, but depended merely upon a right conferred upon the prisoners for their benefit, it might well be that, apart from the traditional rule in the case of treason and felony, an attempt by a Court to try simultaneously more than one case before one jury would involve too serious an irregularity to admit of waiver.

But an entirely different view has long been taken of the right to a separate hearing in summary proceedings for statutory offences.

In Reg v The Justices of Staffordshire 1859 32 L.T. o.s. 105 23 J.P. 487 two persons were charged on separate informations and separately convicted but the charges were heard simultaneously. By Statute the proceedings were not removable by certiorari unless for excess of jurisdiction. The Court of Queens Bench held that if the offences were joint nevertheless in convicting severallly the Justices did not exceed their jurisdiction to hear two informations as one. Lord Campbell said " They had jurisdiction to hear each information. Is this more than an "irregularity?" Counsel answered that it was a nullity. But " Lord Campbell said " We must assume the justices applied to " each case the evidence which was given in support of it. The " proceedings were irregular but not null". Erle J concurred.

In Ex.p.Biggins Reg v Lipscombe (1862) 5 L.T. n.s.

605 26 J.P. 245 several charges were heard together against several defendants who were severally convicted. The Court of Queens Bench in granting a rule nisi upon another point refused to include the ground that the charges should have been heard separately. Cockburn C.J. said "That proceeding was not intended to deprive "each of the testimony of the others but was thought to be a "convenient method od disposing of the whole matter and it does "not appear that it was objected to ". Crompton J said "As "regards the trying of all these people together that does not show "a want of jurisdiction. It was thought to be more convenient to "do so and there was no application that each should be taken "separately." Blackburn J. concurred.

In Wells V Cheyney (1871) 36 J.P? 4 198 several persons were charged in one information with committing an offence severally. They took no objection and their cases were heard together, but they were convicted severally. Upon a case stated the convictions were upheld. The question in the special case was whether the objection was good" that the offences, if any, were "several and could not be the subject of one information". Upon rhis question the propriety of hearing the Defendants' cases together depended.

Cockburn C.J. said that "it might have been a good objection but "the only consequence would have been that a separate information "would have been issued against each of the persons. It was at most "an irregularity that could be waived and was so waived."

In Reg v Sturt (1876) 2 V.L.R. (1) 103 the Supreme Court of Victoria (Stawell C.J. Fellows and Stephen JJ) refused to quash convictions upon separate informations because the charges were heard together. The offence charged appears to have been joint (see per Hood J in Turner V Mangan 10.A.L.R. 102) but in Davidson v Darlington 24 V.L.R. 667 5 A.L.R. C.n.54 Holroyd J. upheld convictions upon separate informations which were heard together although the offences were several when the guilt or innocence of the accused turned upon the same facts. In these cases the

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accused do not appear in any way to have waived the objection that they should not be tried together.

In Reg v Muir 2 A.L.R. c.n. 322, however, Hood J. set aside convictions for separate and apparently quite distinct offences vharged against separate defendants because the justices had heard them together. The defendants do not appear to have waived the objection.

In Larkin v Penfold 1906 V.L.R 535, 12 A.L.R. 337 Cussen J. observed that it followed from Davidson V Darlington and other cases that if the Defendants who were charged with separate offences consented to be tried together they would be bound by the result. See also Johnson V Kennedy 1922 V.L.R. 28 A.L.R.194.

In New Zealand Stout C.J. upheld separate convictions upon several charges although heard together. Ah Kan V Cox 1902 21 N.Z. L.R. 645. In Brown V Bowden 1900 19 N.Z. L.R. 98 the argument and the judgment are based upon the assumption that such a proceeding is binding.

It may be considered that defendants charged upon different informations for summary offences are entitled to separate hearings, but these cases show that in England, Victoria and New Zealand it has long been considered that failure to give effect to this right does not go to the jurisdiction of the justices, nor to the validity of the conviction, but is an irregularity only which the defendants may waive. This view is in accordance with principle as well as with justice and convenience. The Statutory requirement that an information shall be confined to one offence does not appear to affect the question whether a defendant may waive his right to a separate hearing of every information.

Of course when parties consent to several charges being heard together they do not lose or impair their right to the exclusion of all evidence not lawfully admissable against them in the consideration of the charge against them.

If, however acting upon the consent of the parties, the justices do hear separate charges together, there seems to be no reason for presuming until the contrary is shown that the justices have infringed upon this right and confused the evidence and applied that admissable only upon one information to the others. Such a case differs widely from that in which the justices, having heard an information, reserve their decision for the very purpose of sophisticating their judgment by hearing another. In so doing they intimate an intention of informing their minds improperly. This is the ground upon which Pollock B seems to have proceeded in Hamilton v Walker which is best reported in 56 J.P. 583. Compare R. v Fry 78 L.T. 716, 19 Cox CC 135 and Parker v Sutherland 116 L.T. 820 Ah Khan V Cox 21 N.Z.L.R. 645 at p 652; Loasby V Main 1914 33 N.Z.L.R. 974.

The statement made in the present cases at the close of the prosecution, shile it shows that the magistrate did consider all the evidence for the purpose of deciding whether there was an unlawful assembly, implies that he did not do so for the purpose of deciding whether thr defendants knowingly continued therein or were armed and were member thereof.

In point of fact the evidence given for the prosecution was all relevant to the issue of unlawful assembly. It is true that some of the defendants appear to have retired shortly after the first rush, and that the evidence describes the doings of the assembly for sometime afterwards. But upon the issue what the purpose and object of the assembly was the evidence of the whole incident, which was entire and inseperable, was strictly admissable. Doubtless proof of what took place after the first rush was superfluous in the case of these defendants, because the intention of the assembly, by injury and intimidation, to compel the men working or about to work at Rothbury to abstain from so doing had then been vociferously declared in unmistakable if sanguinary terms. But evidence is not irrevelant because it is unnecessary.

Upon the Issue whether the defendants knowingly participated in the unlawful assembly the evidence was pointedly directed to each individual and there was no likelihood of confusion.

Whether the remedy of statutory prohibition would be available to correct such an error if it appeared that the Magistrate did take into consideration inadmissable evidence, if there was admissable evidence which justified his decision, it is unnecessary to decide; for there is no reason to think that he did so. But this point should not be passed by without referring to the terms of Sec 115 and EX p.Ward (1855) 2 Legge 872; Ex p.Elliott (1881) 2 N.S.W.L.R. 97; Ex p Mc Callum (1885) I W.N. 136 ; Ex p Damsiell (1901) 18 W.N. N.S.W. 245 Ex P.Moy Shing (1904) 21 W.N. N.S.W. 189 and compare Smith v Hennessy (1902) 19.w.n. N.S.W.23 see also Peck v Adelaide S.S Co. (1914) 18.C.L.R.167.

Another objection relied upon is that depositions taken in the earlier case, were by consent, read in evidence. In Reg V Bertrand L.R. I.P.C. 520 the Privy Council expressed their Lordships' "anxious wish to discourage generally the mode of laying evidence before the jury which was adopted" in that case on a second trial for murder and consisted of swearing witnesses who had already given evidence on the former trial and reading to them the Judge's notes of the evidence they had then given. But their Lordships were careful to say even in that case that they "did not pronounce that anything amounting in law to "a mistrial can fairly be charged on the course pursued" (at p.535) and it appears that a similar course has been adopted both before and since in England at trials upon indictment. See R.V.Foster 7 C.& P 495 R.v Beere 2 Moo & Rob 472; R v Lawrance 25 T.L.R. 374 and the discussion of R v Monson in 67 J.P. 267 and per Phillimore J. in Ex p Bottomley 1909 2 K.B. 14 at p.20. Moreover the considerations which prompted their Lordships observations are not present in the case of a magistrate who has seen and heard the witnesses give the evidence which the ....

depositions record. But in any case, as the judgments in Ex p Bottonley (supra) show, to read depositions before a magistrate by consent is not contrary to law. So also Gleeson v Mow Sang and others. 18.V.L.R. 698.

It is said, however, that the evidence did not establish an unlawful assembly because it did not prove that the men working or about to work at Rothbury were legally entitled to do so. This contention rests upon the fact that during his cross examination a witness said these men were employed at less than rates fixed by the "Award governing the industry". The Award was not put in evidence and no reliance was placed upon the point before the justices where it might have been met by evidence that these men were not entitled to the benefit of any award, nor employed by a person bound by it.

Of course the burden rested upon the informant of proving every ingredient in the offence charged including the lawfulness of the facts from which those intimidated were compelled to abstain. The informant did prove that, by intimidation, men were compelled to abstain from ordinary work at a coal mine. It might be thought that, prima facie, ordinary work should be considered lawful. The work is of a description which neither statute nor common law directly makes illegal, but however improbable, it may be perhaps possible that its legality is affected by some award which the Court cannot notice without proof. In these circumstances, the evidence might seem enough to warrant the conclusion that the work was lawful unless and until some instrument is produced which makes that conclusion less probable.

The only suggestion made is that an awrd exists prescribing a minimum wage. No proof is adduced that it affected the men in question or their employer. If we were to speculate as to the contents of the award to which the witness referred we might remember that an award prescribing a minimum wage does not usually make it unlawful for the employee to work. It makes it unlawful

unlawful

for the employer to pay less for the work than the prescribed rate. Moreover when the object of penal provisions is to sagegaurd and protect persons of some particular descritpion, it generally follows that those who are to be advantaged do not themselves commit an illegality if they connive at the benefits being withheld. It may well be that this is so in the case of the Commonwealth Conciliation and Arbitration Act 1904- 28, which secures to persons entitled to the benefit of an Award its observance by those bound by it. But it is enough to say that prima facie evidence was given of the lawfulness of what the persons intimidated were compelled to refrain from doing.
A further contention was raised to the effect that the evidence in the case of some of the defendants was insufficient to support the conclusion that they knowingly continued in the unlawful assembly or being armed were members thereof. The evidence upon examination appears quite sufficient in each case
The Appeal should be allowed and the order of the Full Court discharged, and in lieu thereof the order nisi should be discharged.

MUNDAY V GILL AND OTHERS

ORDER.

Appeal allowed without costs.
Order of the Supreme Court discharged. In lieu thereof order nisi discharged with costs.

Convictions restored.