1962
*May 1
June 25

WALTER DRESSLER (*Complainant*) ....APPELLANT;

AND

TALLMAN GRAVEL & SAND SUPPLY LTD. (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Appeal by way of stated case—Whether questions of law raised—Whether necessary facts before the Court—Whether proper procedure.

The appellant, who had been an employee of the respondent, laid an information under *The Employment Standards Act,* 1957 (Man.), c. 20, charging that the respondent had unlawfully failed to pay him overtime rates. When the matter came before the magistrate, he, without hearing any evidence, ordered the charges dismissed on the grounds that the information was for an offence which took place more than six months before the time when the proceedings were commenced and that the information was void for duplicity and could not be amended. On appeal by way of a stated case, the respondent moved in the Court of Appeal, before any hearing on the merits, to dismiss the appeal upon grounds that the stated case did not raise a question of law; that the

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

stated case was defective in form in that it did not contain a statement of facts sufficient to enable the Court to come to a decision of the question of law; and that the appellant's proper procedure was not to appeal by way of stated case but to move for a *mandamus* to compel the magistrate to exercise his jurisdiction. By a majority decision the motion was allowed and the stated case quashed. Pursuant to special leave, the appellant appealed to this Court.

Held: The appeal should be allowed and the order of the Court of Appeal set aside.

The rules of the Court of Appeal for Manitoba which prescribed what was to be contained in a case stated under the Code were made by the Judges of the Court of Appeal under the powers vested in them by the Code on May 13, 1930. The case in the present matter complied with these requirements.

The points referred to in the stated case were matters of law which had in fact been dealt with by way of written submissions to the magistrate. Every fact necessary to decide the questions of law was before the Court and the points of law were arguable upon the face of the information itself. As to the objection that the proper procedure was not by way of stated case but by *mandamus* to compel the magistrate to exercise his jurisdiction, this was not the case of a magistrate declining to enter upon a hearing because he was of the opinion that he had no jurisdiction, but one in which, exercising his jurisdiction, he had dismissed the information on grounds of law which appeared to him sufficient.

The motion to dismiss or quash the stated case, as it was expressed, should have been dismissed and the questions of law, which were clearly raised, determined.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], which dismissed an appeal from a decision of Police Magistrate Kyle dismissing an information laid under *The Employment Standards Act,* 1957 (Man.), c. 20. Appeal allowed.

D. Gibson, for the complainant, appellant.

G. A. Higenbottam, and *R. B. Goodwin,* for the defendant, respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal brought by special leave of this Court from a judgment of the Court of Appeal for Manitoba[1] which dismissed the appeal of the present appellant from a decision of Police Magistrate Kyle of the Provincial Police Court, dismissing an information laid against the respondent under the provisions of *The Employment Standards Act,* 1957 (Man.), c. 20.

[1] (1961), 35 W.W.R. 452, 131 C.C.C. 48, 36 C.R. 227, 29 D.L.R. (2d) 130.

At the request of the present appellant, the magistrate stated a case under the provisions of s. 734 of the *Criminal Code*. The respondent moved before the Court of Appeal to "quash or dismiss the appeal" and it was upon this motion that the appeal to that Court was dismissed and, accordingly, the questions of law propounded were not considered.

Section 27 of *The Employment Standards Act* provides that no employer shall require or permit an employee to work or be on duty for more than 8 hours in a day and, if a male employee, for more than 48 hours in any week unless in place of the rate of wages ordinarily paid the employer pays him overtime rates for each hour in excess of these limits the employee is required or permitted to work.

Section 14 declares, *inter alia,* that every person who contravenes any provision of the Act is guilty of an offence and, if no other penalty is by the Act provided, is liable on summary conviction to a fine, in the case of an employer, of $500, and to imprisonment or to both. By subs. (2), where the contravention continues for more than one day, the person is guilty of a separate offence for each day that it continues.

Section 16(2) provides that in default of payment by an employer of wages found to be due by him, the magistrate may issue his warrant to levy the amount of the wages and costs by seizure and sale of the goods and chattels of the employer.

Prosecutions for offences under this statute are subject to the provisions of *The Summary Convictions Act,* R.S.M. 1954, c. 254. By s. 7 of that Act, Part XV of the *Criminal Code* applies and, *inter alia,* the present s. 693(2). This provides that no proceedings may be instituted more than six months after the time when the subject-matter of the proceedings arose.

The information charges the respondent with having permitted Dressler

to be on duty for more than eight hours on various days between the 9th day of February, A.D. 1959 and the 28th day of November, A.D. 1959; and between the 6th day of April, A.D. 1960 and the 18th day of May, A.D. 1960, did (sic), on the 18th day of May A.D. 1960, unlawfully fail to pay to the said Walter Dressler, overtime rates for each hour or part of an hour in excess of the said eight hours worked on the said days in place of the rate of wages ordinarily paid to the said Walter Dressler, contrary to the provisions of the Employment Standards Act R.S.M. 1957, Chap. 20.

The matter came before the magistrate on November 21, 1960, and, without hearing any evidence, he ordered that the charges be dismissed on the following grounds, namely that:

(1) The Information was defective in that it disclosed the occurrence of an offence the subject matter of which took place in part more than six months before the time that the proceedings were instituted

(2) The Information was void for duplicity and not capable of being amended.

The respondent moved in the Court of Appeal, before any hearing on the merits, to dismiss the appeal upon grounds only three of which require consideration, namely, that the stated case did not raise a question of law: that the stated case was defective in form in that it did not contain a statement of facts sufficient to enable the Court to come to a decision of the question of law: and that the appellant's proper procedure was not to appeal by way of stated case but to move for a *mandamus* to compel the magistrate to exercise his jurisdiction.

The learned Chief Justice of Manitoba, with whom Schultz and Guy JJ.A. agreed, considered that the stated case was defective in not disclosing that the dismissal was made on preliminary objections without hearing evidence: that the facts upon which the magistrate based his ruling that the information was void for duplicity and not capable of being amended were not set out in the case as stated: that while reference was made to the information the case did not state what evidence was offered by way of admission of facts or otherwise to contradict or support the charges made and that there was not a sufficient disclosure of the grounds upon which the magistrate based his decision. Accordingly, he considered that the stated case should be quashed. The learned Chief Justice, while mentioning an objection raised that the stated case should not have been entitled "In the Court of Appeal", considered that it was unnecessary to deal with it.

In the dissenting judgment of Tritschler J.A. (now C.J.Q.B.), with whom Freedman J.A. agreed, there is a résumé of the contents of certain affidavits filed before the Court of Appeal by the parties which described what had taken place before the magistrate and the manner in which the stated case had been approved before being signed by him and its terms are stated *in extenso*.

1962

DRESSLER
v.
TALLMAN
GRAVEL
& SAND
SUPPLY LTD.

Locke J.

The rules of the Court of Appeal for Manitoba which prescribe what is to be contained in a case stated under the Code were made by the Judges of the Court of Appeal under the powers vested in them by the Code on May 13, 1930 (see the Canada Gazette, June 7, 1930, vol. 63, p. 4464). The case in the present matter, in my opinion, complies with these requirements.

Dealing with the objections advanced in the respondent's motion to the Court, Tritschler J.A. said in part:

> As to ground 1, that the stated case does not raise a question of law: Defendant's counsel submits that what the magistrate decided were questions of fact; it was a matter of knowing the calendar and applying simple mathematics; he had only to count back from August 15, 1960, the date of the information, to certain dates mentioned in the information, or to count forward from those dates to August 15 and see if the period exceeded 6 months; if there was an error it was an error of calculation; as to the alleged duplicity of the information, it was simply a question of counting the charges and if there was an error it was a mistake of counting. I found it difficult to believe, and still do, that these submissions could be seriously put forward. The points involved were matters of law which had in fact been dealt with by way of written submissions to the magistrate by solicitors for both sides. The complainant's position as outlined in his factum to us is: that the six months' limitation period is not applicable because the Legislature has "otherwise specially provided" (The Summary Convictions Act, R.S.M. 1954, Cap. 254, Sec. 7); that employment at overtime is not an offence but the offence is failure to pay for overtime; the offence takes place at termination of employment if overtime wages are left outstanding; sec. 14(2) of The Employment Standards Act makes the non-payment for overtime a continuing offence; if the six months' limitation was applicable and part of the offence took place six months prior to the date of the information, the magistrate should not have dismissed the information but should have allowed recovery in respect of that part of the wages claimed which were earned and not paid within a period of six months before the date of the information; there was one offence and not two and it occurred on May 18, 1960; in any event the magistrate had the right under sec. 704 of the Code to permit amendment.

And again:

> Every fact necessary to decide the questions of law is before the Court. As appears from what has been said under the head of ground 1, the points of law are arguable upon the face of the information itself. The learned Magistrate's question (i) raises the issue whether "the Information was defective in that it disclosed", etc. The only fact necessary here is the Information itself, which is fully set out in the case. Question (ii) raises the issue whether the Information was void for duplicity. Here again the Information is the only fact required. Obviously what the learned Magistrate said is that, looking at the Information alone, he could see duplicity in it; that it showed duplicity on its face. No amount of facts other that the Information could be relevant here. Whether the Information was capable of amendment is pure law.

As to the objection that the proper procedure was not by way of stated case but by *mandamus* to compel the magistrate to exercise his jurisdiction, he pointed out that this was not the case of a magistrate declining to enter upon a hearing because he was of the opinion that he had no jurisdiction, but one in which, exercising his jurisdiction, he had dismissed the information on grounds of law which appeared to him sufficient.

With these conclusions I agree and, with the greatest respect for the contrary opinion of the learned Chief Justice of Manitoba, I consider that the motion of the respondent to dismiss or quash the stated case, as it was expressed, should have been dismissed and the questions of law, which appear to me to be clearly raised, determined.

If it were the opinion of the Court that any clearer statement of the questions of law to be determined was required, the proper course, in my opinion, was to send the case back to the magistrate for amendment and to deliver judgment after it had been amended under the powers contained in s. 740 of the *Criminal Code.*

I would allow this appeal and set aside the order of the Court of Appeal with costs in this Court and in the Court of Appeal, to be paid by the respondent to the appellant in any event of the appeal forthwith after taxation.

Appeal allowed, the order of the Court of Appeal set aside and the matter returned to that Court to be dealt with on the merits. Respondent to pay in any event costs in this Court and costs in the Court of Appeal.

Solicitors for the complainant, appellant: Mitchell & Green, Winnipeg.

Solicitors for the defendant, respondent: Monk, Goodwin, Higenbottam & Goodwin, Winnipeg.