32/87

SUPREME COURT OF VICTORIA

BRAUN v BROUGH

Southwell J

27 August 1986 — (1986) 4 MVR 145

PRACTICE AND PROCEDURE – REHEARING APPLICATION – CIVIL CLAIM – EXPLANATION FOR NON-ATTENDANCE NOT ACCEPTED BY COURT – DELAY IN MAKING APPLICATION TO SET ASIDE AND REHEAR – WHETHER OPEN TO COURT TO REFUSE APPLICATION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, PART XVII.

On 5 December, an order was made against Braun, a solicitor, for damage arising out of a motor vehicle collision. Braun did not appear. On 20 December, an application to set aside and rehear (dated 17 December) was sent to the Court and on 18 January a copy (together with a notice of counterclaim) was sent to the complainant's solicitor. Upon the return of the rehearing application, the court refused to accept Braun's explanation for his failure to attend the original hearing and dismissed the application. Further, there was no evidence to support Braun's contention that he had a defence to the action. Upon order nisi to review—

HELD: Order nisi discharged.
(1) The significance of a failure to give a satisfactory explanation ought not be over-estimated; nor should delay in itself be given much significance where there is no evidence that the delay may cause prejudice to the other party.
***Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596; and**
***Rosing v Ben Shemesh* [1960] VicRp 28; (1960) VR 173, applied.**

(2) However, having regard to the evidence given by the applicant and the inexplicable delay in making the application (having regard to the applicant's profession) it was open to the magistrate to reject the applicant's explanation for his non-attendance and refuse the application for a rehearing.

SOUTHWELL J: [145] This is a return of an order nisi to review a decision of the Magistrates' Court at Prahran given on 20 February 1985 whereby the learned stipendiary magistrate refused to grant a rehearing of a complaint heard on 5 December 1984 whereby on a claim for damages to a motor vehicle arising out of a collision, the applicant/defendant was ordered to pay to the respondent/complainant the sum of $890.67.

The accident, the subject of that claim, occurred on 5 March 1984 in Jackson St, Toorak where the applicant was reversing his car when it collided with the respondent's car. The only evidence before this court as to the circumstances of the collision, came from the affidavit of the applicant in support of this application. In that affidavit he says that at the time of the collision the respondent was performing a U turn. That allegation, so it appears, is the only evidence that there is, or might have been, a triable issue between the parties.

The history of events, so far as they are presently relevant, is that on 6 July, the complaint by way of special summons was issued. It would appear that it was not until 5 September that notice of defence was given, there being then no indication of a counterclaim although negligence was, I am given to understand, denied and an allegation was made of contributory negligence. As I have said, the hearing occurred on 5 December, the applicant and his solicitor not then being present. I should interpolate that the applicant is himself a solicitor and a partner in the firm which he had instructed to act for him on that day, the same firm which now acts for him in this application.

[146] On 20 December 1984 a notice of application to apply for a rehearing was sent to the court and on 18 January, notice of that application was posted to the respondent's solicitors together with a notice of counterclaim. It is to be observed that at no time has application been made to extend the time in which a counterclaim could be made, and accordingly, there was not before the Magistrates' Court, nor is there alive any counterclaim. The hearing of the application to set aside the original order to grant a rehearing took place on 20 February 1985 and on 19

March 1985 Master Evans granted the order nisi now before the court.

The only evidence as to the time at which the original hearing took place at the Magistrates' Court comes from the affidavit of the applicant and he says, in his affidavit, para 6:

> "At the hearing of the application to set aside judgment, I gave evidence on oath before Mr Graham Golden with respect to my reasons for failing to appear at the original hearing of the matter described in para 1 hereof on 5 December 1984. This part of my evidence consisted of a reiteration of the reasons I gave on (sic) the said notice to set aside an order and rehear a complaint."

The notice, which, incidentally, is dated 17 December 1984, but a copy of which was not, as I have indicated, sent to the complainant until 18 January 1985, gives these reasons:

> "The reason why I did not appear at the hearing of the complaint is the late arrival at the court of myself and the solicitor who was to appear for me brought about by numerous factors including time spent waiting in Toorak on the morning of the hearing on an important witness in my case, namely the repairer of my vehicle.
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> "A conference was arranged with him in Toorak at 8.45 am. The witness did not arrive as promised. The endeavours of myself and the solicitor who was to appear for me to try and locate our witness, including contacting his wife, proved fruitless. This time wasted accounted for our late departure from the office.
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> "Shortly before 10.00 am, we proceeded to the Prahran Magistrates' Court but with the traffic being relatively heavy for that time of day and the difficulties in finding a parking spot outside the court we did not arrive at the court until approximately 10.15 am. By that time the matter had already been heard."

The applicant goes on, in his affidavit, to depose, in para 7:

> "That in the course of giving evidence during the said application the Magistrate, Mr Graham Golden, questioned me as to why there was a delay in applying for judgment to be set aside. I stated that but for the exigencies of the Christmas period the application would have been made sooner. I further stated that I did not consider that there had in fact been undue delay in forwarding the application to the Magistrates' Court at Prahran in the said State.
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> "8. That the Magistrate, Mr Graham Golden, dismissed my application to have judgment set aside on the grounds that there was undue delay in the filing of my application to have judgment set aside...
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> "11. That the said Magistrate Mr Golden further stated whilst giving his reasons to dismiss the application that there was on the basis of evidence given by me a *prima facie* defence to the action brought against me,"
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> "12. That the said magistrate Mr Golden also stated during the course of giving his reasons for dismissing my application that he accepted as being **[147]** adequate the grounds given by me in the said Notice of Application to set aside judgment and rehear a complaint for not appearing at the original hearing."

If the matter rested there, one might say that the applicant makes out a strong case for a rehearing on the basis that, by reason of a combination of circumstances, including the failure of a witness to keep an appointment and some delay caused by unexpectedly heavy traffic, the applicant arrived in court only 15 minutes after the time fixed for hearing. However, the matter does not rest there at all.

The learned Stipendiary Magistrate has filed an affidavit which, of course, in proceedings such as this, must be accepted as correct. His Worship states, in para 6:

> "In respect to para 11 of the affidavit, I state that I did not make a finding that the applicant has a *prima facie* defence to the action. All I know of the applicant's defence is that he alleges he has a defence. I have not heard evidence in support of that allegation.
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> "7. In respect of para 12, of that affidavit, I did not accept the applicant's explanation for not attending the original hearing. The applicant gave sworn evidence and in my view was effectively cross examined by Mr Herbert. At the conclusion of his evidence I was substantially unimpressed by

> the evidence of the applicant as a whole, and in particular, by his explanation for not being present at the original hearing."

The application for rehearing was made pursuant to s152 of the *Magistrates (Summary Proceedings) Act* 1975 which, so far as is relevant, provides that, after an order made by a Magistrates' Court, when one party does not appear, the latter may:

> "...subject to and in accordance with the provisions of this part, apply to the Court... for an order that the order be set aside and that the complaint be reheard".

Section 154 (1) provides that:

> "A notice of intention to make an application under s153 shall state:
> (a) why the applicant did not appear on the hearing of the information or complaint ..."

Mr Murphy, who appeared for the applicant, submitted upon the application of well-established principles enunciated in *Rosing v Ben Shemesh* [1960] VicRp 28; (1960) VR 173 and *Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596 the applicant was entitled to a rehearing because he had given an explanation for his non-attendance, that there had been no undue delay in the making of the application and that he had shown that there was a *prima facie* defence or, at least, some triable issue which, in justice, he should be permitted to litigate.

I might say that the material before me does not make it at all clear that the applicant gave evidence of facts which, if true, might have constituted a defence or might have led to a finding of contributory negligence. It may be that he merely claimed that he had a good defence, without giving evidence of facts to support that claim. Be that as it may I think, for the purposes of these proceedings, it is reasonable to assume that the magistrate knew that the applicant was claiming the existence of facts, which, if true, might constitute some defence, by which I mean either a defence to the claim or a basis for a finding of contributory negligence.

In the course of discussion, during Mr Murphy's treatment of ground I of the order nisi to review, which was the only ground argued, I raised the question whether the applicant should have applied for a ground that there had been a denial of natural justice in that the learned Stipendiary Magistrate **[148]** had rejected uncontradicted and apparently credible evidence without giving any, or any satisfactory, reasons for doing so. Mr Murphy submitted in substance that ground 1 was drawn widely enough to permit of such an argument.

Grounds 1 reads:

> "(i) No reasonable magistrate on the evidence before the learned magistrate and on the facts as found by him, would have refused the application."

I doubt that that ground is wide enough to encompass the matters that I raised with Mr Murphy but, having regard to the views I have formed as to the proper disposal of this application, it is unnecessary to decide the matter. Argument was, in fact, heard from both counsel on it and, if it were necessary to do so, I would give leave to amend *nunc pro tunc*.

For the respondent, Mr Blumsztein submitted that the application foundered at its inception. That was so, it was said, because the applicant had not complied with s154(1)(a), that is to say, if the applicant has given an explanation for his non-appearance which was rejected by the learned stipendiary magistrate, then there had been non-compliance with s154, in that the applicant had not given a reason why he did not appear at the hearing. It was said that s154 must mean that compliance can only be made by the giving of a true reason, and it followed, it was said, that the application must fail because compliance with s154 was a condition precedent to the success of the application.

Mr Murphy responded by submitting that s154(1)(a) was procedural only and compliance with it could not be said to constitute a condition precedent. I note that provisions of s157 of the *Magistrates (Summary Proceedings) Act* 1975, which state that, on the hearing of an information or other proceeding before a Magistrates' Court:

> "no objection shall be taken or allowed to an information, warrant or summons for any defect therein in substance or in form ...

That does not specifically include a notice such as is here under consideration but it would, in my view, be strange if a failure to comply with s154(1)(a) was held to be fatal to an application whereas a similar defect in an information or warrant or summons would not be fatal. In any event, I am not satisfied that strict compliance with s154 is a condition precedent to the granting of an application for a rehearing. The fact that the reasons given for the non-appearance are not accepted does not lead to the conclusion that there has been non-compliance with s154.

Mr Blumsztein, however, went on to submit that, even were it to be held that s154 does not create a condition precedent, nevertheless it forms a statutory basis for giving more significance to the reasons for non-appearance than might be given upon the application of well-established principles to other rules not expressed in similar terms to the requirements of the *Magistrates (Summary Proceedings) Act*.

There is, I think, some force in that submission. However, the significance of a failure to give a satisfactory explanation ought not to be over-estimated, as *Kostokanellis* reminds us, nor should delay in itself be given much significance where there is absent any evidence that that delay has caused or might well cause prejudice to the other side, see *Grimshaw v Dunbar* (1953) 1 QB 408, per Jenkins LJ at 415; *Rosing v Ben Shemesh*, *supra*, at 176.

[149] To say that undue emphasis ought not to be given to those relevant factors is not, of course, to say that they must be put aside as irrelevant. I thus have before me a case where the magistrate heard evidence from an applicant for a rehearing. That applicant had, in substance, said that there were a number of reasons for his non-attendance and two of them were particularised. The applicant was cross-examined and, one might assume, was cross-examined as to what those other reasons were. The applicant was disbelieved; not to put too fine a point upon it, the magistrate was not satisfied that he had heard the truth of the reasons for the non-appearance.

Mr Blumsztein pointed to a number of what he described as "curious factors" in the applicant's explanation for non-attendance and to a number of matters which the magistrate was entitled to Regard as of significance and which could have influenced him to reject that explanation. It was, in my opinion, open to the magistrate to adopt views along the lines of Mr Blumsztein's submission and, accordingly, to reject the applicant's explanation.

That might not, in all circumstances, be fatal to an application but it surely must be of significance. The magistrate, therefore, had before him an application, one of the bases of which he thought was not truthful, an application in respect of which there was unexplained and, I would have thought in the circumstances, almost inexplicable delay, particularly having regard to the applicant's profession, and for what it is worth, he had heard some evidence which might tend to suggest that there may be some finding of contributory negligence, unlikely though it was that that evidence would constitute a defence.

There was imposed, in the learned stipendiary magistrate, a discretion as to whether a rehearing should be granted. It is well-established that this Court will interfere with the exercise of such judicial discretion if and only if, it appears that the learned stipendiary magistrate erred in law, that in some way he misdirected himself as to the law and acted upon some wrong principle of law or that he took into account irrelevant matters or that he failed to take into account relevant matters.

There is nothing in the material before me which demonstrates affirmatively that the learned stipendiary magistrate so erred. Accordingly the application could succeed only if it was demonstrated that, notwithstanding the absence of any discernible error, then on the proven and indisputable facts the court below could have properly exercised its discretion in only one way and that is to grant the application.

It is sufficient for me to say that I am not satisfied that there was either discernible error or that the circumstances show that there must have been error.

Accordingly, the order nisi will be discharged with costs.
