7/96

SUPREME COURT OF VICTORIA

RANDALL v GOLDEN and CITY OF PORT PHILLIP

Coldrey J

6 November, 19 December 1995 — (1995) 23 MVR 417

PROCEDURE – PERIN SYSTEM – APPLICATION FOR REVOCATION – APPLICANT PREVENTED FROM PRESENTING CASE – MAGISTRATE DECLINED TO READ WRITTEN SUBMISSIONS – NATURAL JUSTICE – PRINCIPLES OF – WHETHER DENIAL OF NATURAL JUSTICE – NATURE OF APPLICATIONS – WHETHER SIMILAR TO REHEARING APPLICATIONS.

R. applied to the Magistrates' Court for revocation of enforcement orders made under the PERIN system. At the hearing, R., who was not legally represented, sought to hand to the magistrate written submissions. However, the magistrate declined to read the submissions and, following questioning of R., concluded that R. had forfeited his right to a hearing and refused the application on the basis that R. had failed to notify Vic Roads of his change of address. Upon originating motion—

HELD: Magistrate's decision and dismissal quashed. Remitted for hearing by another magistrate.
1. Whatever the precise content of the requirement of courts to accord litigants natural justice or procedural fairness, the right to a fair hearing in which each party to proceedings is given the opportunity to properly present their case is an irreducible minimum.

2. In the present case, there had been a denial of natural justice, whether it may be said to flow from a failure to accord the plaintiff a fair hearing by preventing him from fully presenting his case or by the creation in fair-minded people of a reasonable apprehension that the case was pre-judged.

3. The types of matters a magistrate should take into account in applications of this nature will parallel those which arise for consideration in a normal application for rehearing.

COLDREY J: *[After setting out the facts, referring to the cases* St. Kilda City Council v Kenyon *(1993) 18 MVR 349 and* Cameron v the Secretary to the Department of Justice*, unrep. Vic. Sup. Ct., Byrne J, 28 October 1994, and giving an outline of the* PERIN *procedure, His Honour continued]*...**[6]** Application having been made by the plaintiff under clause 10(6) of Schedule 7 of the *Magistrates' Court Act* 1989 for the application for revocation to be referred to the Court, that step was taken by the registrar pursuant to clause 11. Ultimately the matter came on for hearing before the first defendant on November 16 1994. Counsel for the plaintiff being otherwise engaged on that day the Magistrate adjourned the further hearing of the matter to 14 December 1994 ordering the plaintiff to pay the second defendant's costs. On the adjourned date the plaintiff appeared before the Court unrepresented. The course of events thereafter is set out in the affidavit of Michael Dennis Somerville dated 20 September 1995. The account of proceedings of Mr Somerville, **[7]** who appeared on the occasion for the second defendant, is as follows:

> Magistrate "Now Mr Randall you are applying for revocation of these matters. Is that correct?"
> Randall "Yes sir".
> Magistrate "Mr Somerville what's Council's position on these matters?"
> I said "We oppose each application Your Worship".
> Magistrate "I see these matters were adjourned from 16 November".
> I said "Your Worship all 12 matters were before yourself on 16 November and they were adjourned to today because the Applicant's Counsel, Mr Kenyon, had double booked himself and was tied up at the Heidelberg Magistrates' Court. After standing the matters down twice for some considerable time you adjourned them as Mr Kenyon still had not arrived and wasn't expected to arrive until some time in the afternoon. You also awarded costs of $60.00 against the Applicant."
> Magistrate "Ah yes, I recall the situation now. Is Mr Kenyon here today?"
> I said "I understand that he won't be here as he has commitments at another Court today."
> Magistrate "Is that the position Mr Randall?"
> Randall "Yes sir, but I've got something here to hand up to you for me and another person also here today, Julie Drysdale."
> I said "Your Worship, Julie Drysdale is another Applicant in respect of separate matters. I understand

from Ms Drysdale that Mr Kenyon had been acting for her but she advises me that she is no longer using his services as she has made certain arrangements with Council which will be explained when her case is called."
Magistrate "Mr Randall you have so many fines, why don't you pay them when you receive notification?"
Randall "I don't understand the question."
Magistrate Repeated the question.
Randall "What do you mean. I don't understand."
Magistrate "Mr Randall you seem to have great difficulty understanding the most simple questions. Why haven't you paid your fines?"
Randall "I never received the courtesy letters or infringement notices because I changed my addresses a number of times. I was playing in a band at the time and different people were using my car."
Magistrate "Did you notify Vic Roads about any of the address changes?"
Randall "No."
Magistrate "Why didn't you notify Vic Roads?"
Randall "I don't know. I just never got around to it."
Magistrate "Mr Randall the law requires you to notify Vic Roads within a certain period of time, 5 or 7 days I think after changing your address. Do you have anything further to say in relation to those matters."
Randall "I've got it in writing here to hand up to you."
Magistrate "Why don't you tell me about it."
Randall "I can't because I don't really know how to say it. Mr Kenyon prepared this (referring to the written submission) because he knows all about these things."
Magistrate "Does he now. Mr Randall, do you have anything further to put to me?"
Randall "I want to hand this up for you to read."
Magistrate "I am not prepared to look at that (referring to written submission) but I am prepared to listen to anything you wish to tell me."
Randall "I want a hearing. I want to hand this up. (Referring to the written submission)."
Magistrate "Mr Randall you have forfeited your right to a hearing by failing to notify Vic Roads of your changes of address. Accordingly each application is refused and will be referred back to the ***".

Whilst there are some discrepancies between this account of events and that contained in the plaintiff's affidavit, I do not think that they are ultimately of significance. I note for example that in the plaintiff's account he does not record having told the first defendant that he had not notified Vic Roads of his change of address. In fact records produced as exhibits to the affidavit of Mr Somerville indicate that the plaintiff had notified the Roads Corporation of a change of address twice during the relevant period. Whatever may have been the plaintiff's precise response it is clear on either version that the first defendant acted upon a belief that the plaintiff had failed to notify the authorities of changes of his address and on that basis asserted that he had forfeited his right to a hearing.

It is as a result of what occurred in the Magistrates' Court that this matter is before the Court by way of originating motion. According to such motion, the plaintiff seeks the following relief or remedy:

"1. A declaration that:
(a) The first defendant erred in law by refusing to revoke the PERIN Enforcement Orders ...('the Enforcement Orders').

2 Relief in the nature of *certiorari* to quash:
(a) the decision of the first defendant dismissing an application for revocation ('the referral application') of the Enforcement Orders pursuant to sub-clause **[10]** 10(6) of Schedule 7 ('The Schedule') of the *Magistrates Court Act* 1989 ('The Act').

3. Relief in the nature of mandamus to compel:
(a) the first defendant to consider the referral application pursuant to law;
(b) the first defendant to grant the referral application and proceed to hear and determine the matters of the alleged offences, the subject of the Enforcement Orders.

4. Such further or other relief as this Honourable Court may deem fit.
Upon the grounds that:
1. the first defendant failed to take into account the rules of natural justice
(i) by failing to grant the referral application and allow the plaintiff a hearing and determination of the matters of the alleged offences, the subject of the Enforcement Orders;
(ii) by refusing the Plaintiff leave to submit written legal submissions prepared by Counsel in support of the referral application;

(iii) by failing to consider written legal submissions prepared by Counsel in support of the referral application.

2. Further, or alternatively, the first defendant failed to take into account the principle of law that a person is entitled to a fair hearing."

There are another 12 grounds set out by the plaintiff which range from the alleged failure of the first **[11]** defendant to consider the duties imposed upon Australia as a signatory to the International Covenant on Civil and Political Rights as impacting upon municipal law, to grounds which, on one view may be seen to relate back to the alleged failure of the first defendant to accord the plaintiff natural justice, or as it is frequently called procedural fairness.

The Law Reports abound with references to the concept of natural justice in its various manifestations. One general statement is to be found in the case of *Kioa & Ors v West & Anor* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28. At CLR p582 Mason J (as he then was) stated:

> "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: [cases cited] ... The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."

Later in the same judgment Mason J observed that it had been said on many occasions that "natural justice and fairness are to be equated." In the earlier decision of *R v Watson, Ex Parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 262; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11 Barwick CJ, Gibbs, Stephen and Mason JJ, in approving comments made by Lord Hewart CJ in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256; [1923] All ER 233; 93 LJKB 129, at KB 259 went on to remark:

> "It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has pre-judged the case they cannot have confidence in the decision. To repeat the words of Lord Denning MR which have already been cited, 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased" ...'"

Whatever be the precise content of the requirement of courts to accord litigants natural justice or procedural **[12]** fairness, the right to a fair hearing in which each party to proceedings is given the opportunity to properly present their case is an irreducible minimum. In the instant case the plaintiff, who was unrepresented, far from being accorded assistance in presenting his case was initially interrogated by the first defendant and, when he sought to provide written submissions prepared by his absent counsel, the first defendant refused to accept or read them. On the latter aspect of the matter, Mr Mueller, who appeared on behalf of the second defendant, conceded:

> "... that it is somewhat unfortunate the Magistrate did not read the submissions since ... there would be no doubt that that creates a perception on the face of it of a degree of unfairness."

In my view that observation is clearly correct. The first defendant pursued the reason for the non-payment of the original fines and having received the explanation from the plaintiff that he had not received courtesy letters or infringement notices because he had changed addresses a number of times, the first defendant, (according to Mr Somerville's affidavit), elicited an admission which on the materials before me now, may have been erroneously made by the plaintiff, that he had not notified Vic Roads of the change of addresses.

Had this concession been correct it would, no doubt, depending on the reasons for the failure to notify, have been one factor to be taken into account in determining the revocation application. The first defendant however appears to have regarded it as conclusive and on one view determined on the basis of it that the plaintiff had "forfeited" his right to any further hearing of the revocation application. On another view **[13]** the right "forfeited" was to an ultimate hearing of the parking infringement matters on their merits. Whether it may be said to flow from a failure

to accord the plaintiff a fair hearing by preventing him from fully presenting his case or by the creation in fair-minded people of a reasonable apprehension that the case was pre-judged, there has in this instance, been a denial of natural justice.

Mr Mueller submitted that it was not every case in which there had been a denial of natural justice that required the reviewing court to intervene by making the orders sought by the plaintiff. In this regard he cited the case of *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141; (1986) 67 ALR 21; (1986) 60 ALJR 662; [1986] Aust Torts Reports 80-054; (1986) 4 MVR 542; (1986) 11 ALN N80. In particular he relied on a passage contained at CLR p145 in the joint judgments of Mason J (as he then was), Wilson, Brennan, Deane and Dawson JJ that:

> "... not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial."

That judgment goes on, however, to state that where a denial of natural justice affected the entitlement of the party to make submissions on an issue of fact it was more difficult for an appellate court to conclude that compliance with the requirements of natural justice would have made no difference. Whilst it may be accurate to observe that a number of the legal issues set out in the plaintiff's submissions (Ex. 8 to the plaintiff's affidavit sworn 13 November 1995), refer to matters of law previously considered by other Courts, for **[14]** example in *Cameron's Case,* there are matters of fact raised in the legal context which are said to give rise to possible defences on the merits.

Moreover the remarks of the High Court must necessarily be placed in the context of the nature and extent of the breach of natural justice which has occurred. Accordingly I do not think this aspect of the matter assists the second defendant.

Before departing from this aspect of the case I should indicate that the types of matters a Magistrate should take into account in applications of this nature will parallel those which arise for consideration in a normal re-hearing situation. They will, for example, include such matters as the reasons for a failure to adopt the procedure set out in the courtesy letter, and whether any and what prejudice may be occasioned to the enforcement agency by reason of delay. No doubt a Magistrate would also bear in mind the criminal nature (in a broad sense) of any subsequent Court proceedings as well as the ultimate sanction potentially faced by an unsuccessful applicant.

Certainly, if the applicant were to convince a Court that, for reasons not attributable to any fault of the applicant, pertinent documentation, such as a courtesy letter, had not been received, enforcement orders should normally be revoked and hearing on the merits ordered. This would accord with the provisions for re-hearing contained in s95 of the Act. There is, I think, nothing in the PERIN procedures which require any different approach, particularly bearing in mind that the procedure envisages a trial on the merits if the recipient of a courtesy letter requires it.

[15] It was argued by Mr Kenyon that the refusal of a Magistrate to revoke an enforcement order necessarily meant the denial to the applicant of a right to a fair trial. Consequently it was said to be contrary to the provisions of the International Covenant on Civil and Political Rights and such cases as *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176. If this be so, the discretion apparently residing in the Magistrate pursuant to clause 13 is illusory. The short answer to such a submission is that a right of fair trial is not denied by the PERIN procedure which specifically provides for it at the election of the recipient of a courtesy letter.

Similarly insofar as it is argued that the PERIN procedure removes from a person subject to its operation rights of appeal accorded by s83 of the Act and that s69 of the *Sentencing Act* 1991 removes from the operation of the PERIN system sentencing discretions available in normal summary criminal proceedings, the simple answer again is that these rights are only excluded if a person subject to the PERIN system elects not to utilise the right to a summary hearing in a Magistrates' Court.

Some argument was directed by Mr Mueller as to whether, in any event, such rights adhere in the case of a Court hearing generated as a result of the application of the provisions of Schedule 7. It was submitted that such a hearing could not be said to be a criminal proceeding conducted in accordance with Schedule 2. Although it is not necessary to decide this issue the better view is, I think, that such a hearing would be a criminal proceeding attracting both the **[16]** operation of s83 of the Act and Division 4 of the *Sentencing Act.*

The conclusion at which I have arrived based upon the reasons previously set out in this judgment, is that the plaintiff has made out ground 1(ii) and (iii) and ground 2 of the originating motion. Insofar as the appropriate relief is concerned I do not regard the declaration sought as being warranted given that the application was not the subject of a proper hearing. For the same reason this Court should not grant relief in the nature of mandamus to compel the first defendant to grant the revocation application and proceed to hear and determine the matters of the alleged offences the subject of the enforcement orders.

I am, however, prepared to grant relief in the nature of certiorari to quash the decision of the first defendant dismissing the application for revocation of the enforcement orders pursuant to sub-clause 10(6) of Schedule 7 of the *Magistrates' Court Act* 1989. The application for revocation ought to be the subject of a fresh hearing by a Magistrate which hearing may involve, for example, the adducing of evidence. Consequently the appropriate course is for this application to be re-heard in the Magistrates' Court at Prahran and, given the history of this matter, it is desirable that such application be heard by a Magistrate other than the first defendant. I would assume this could be done by arrangement between the parties and the clerk of the Magistrates' Court without the necessity of any specific orders from this Court.

APPEARANCES: For the Plaintiff: Mr N Kenyon, counsel. Solicitors: St. Kilda Legal Service Co-op Ltd. For the City of St. Kilda: Mr K Mueller, counsel. Wisewoulds, solicitors.
