47/90

SUPREME COURT OF VICTORIA

MOONEY v EDWARDS

McDonald J

5, 6, 8 June 1990 — (1990) 11 MVR 333

MOTOR TRAFFIC – DRINK/DRINKING – BLOOD SAMPLE – WHETHER COPY CERTIFICATES SERVED ON ACCUSED – *VOIR DIRE* HELD – ONUS OF PROOF UPON HEARING OF – HEARING ADJOURNED – CERTIFICATES SERVED ON ACCUSED – WHETHER EFFECTIVE SERVICE – WHETHER NECESSARY ON RESUMED HEARING TO RULE ON *VOIR DIRE* – APPLICATION BY ACCUSED FOR ADJOURNMENT – WITNESS AS TO ELEMENT OF OFFENCE ON HOLIDAYS – ADJOURNMENT REFUSED – WHETHER ACCUSED UNABLE PROPERLY TO PRESENT DEFENCE – WHETHER A DENIAL OF NATURAL JUSTICE: *ROAD SAFETY ACT* 1986, SS49(1)(g), 57.

Whilst driving his motor car, M. was involved in a single-car accident. He was later taken to hospital where a blood sample was taken which when analysed showed an excessive concentration of alcohol. M. was charged under s49(1)(g) of the *Road Safety Act* 1986 ('Act') and at the hearing, evidence of a circumstantial nature was given as to the time when M. had been driving. When the police prosecutor sought to tender the relevant certificates in relation to the blood sample, M.'s counsel objected on the ground that copies that had not been served on M. The magistrate decided to conduct a *voir dire* as to the question of service, proceeding on the basis that M. carried the burden of proving that service had not been effected. After evidence had been called on both sides, M.'s counsel sought and was granted an adjournment of one month (approx.) in order to lead further evidence on the question of service. After M. had left the Court but whilst in the precincts, the prosecutor handed M. a copy of the relevant certificates, whereupon M.'s counsel went to the Magistrate's Chambers and, in the presence of the prosecutor, apprised the Magistrate of what had occurred. When the adjourned hearing resumed, M.'s counsel sought a further adjournment on the ground that a witness (who had been present on the first day of hearing) was unavailable on holidays. The magistrate refused to grant the adjournment stating that there had been ample time to subpoena the witness and that a further adjournment would lead to difficulty in recalling the evidence already given. As to the *voir dire*, M.'s counsel called no further evidence, the prosecutor gave evidence as to service of the documents on the first day of hearing and the Magistrate refused to rule on the *voir dire* stating that it was not necessary because, in his view, service had been properly effected. The charge was found proved and M. convicted. Upon order nisi to review—

HELD: Order absolute. Conviction quashed. Remitted for re-hearing *de novo*.
(1) Whilst the magistrate was in error in stating that the onus of proof of service of the certificates was on M., in view of the prosecutor's evidence as to personal service, the magistrate was not in error in concluding that it was not necessary to rule on the *voir dire* as to whether or not service had been effected in the first place. Further, the magistrate was not in error in ruling that service of the certificates had been properly effected for the purpose of enabling their tender in evidence pursuant to s57(5) of the Act.

(2) In deciding whether to grant an application for an adjournment, a magistrate must carefully weigh the interests of the accused, the Crown, witnesses and generally the administration of justice. In view of the fact that:
(i) the absent witness could give evidence as to an ingredient of the offence;
(ii) the application was made for *bona fide* reasons;
(iii) the evidence already given was of a straightforward nature and could be recalled without difficulty;
(iv) there was no inconvenience to the prosecution witnesses; and
(v) the prosecution took advantage of the first adjournment period to effect service, the magistrate, in refusing the application for an adjournment failed to allow M. to present his case fully thereby resulting in a denial of natural justice.
***McInnis v R* [1979] HCA 65; (1979) 143 CLR 575; 27 ALR 449; 54 ALJR 122, applied;**
***Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701;**
***McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234;**
***R v McGill* [1967] VicRp 79; (1967) VR 683;**
***R v Cox* [1960] VicRp 102; (1960) VR 665; and**
***Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, referred to.**

McDONALD J: [*After setting out the facts, His Honour continued*] ... **[11]** On 22 November 1989 a Master of the Court granted the Order Nisi to Review the Orders of the Magistrate on the following

grounds –

> "(a) The Magistrate was wrong in law in concluding that service of copy certificates being Exhibits B and C of the affidavit of Alan Mooney sworn on 17 November 1989 and filed therein, were effectively served on the Applicant for the purpose of the *Road Safety Act* or at all.
>
> (b) The Magistrate erred in law in refusing to give a decision on a *voir dire* which had been conducted in this matter.
>
> **[12]** (c) The Magistrate in refusing an application for an adjournment made to him on 27 October 1989 denied natural justice to the Applicant".

Although before me counsel for the Applicant initially addressed argument with respect to each of the above three grounds, after counsel for the Respondent had concluded his submissions, counsel for the Applicant informed the Court that he no longer relied on ground (a) and abandoned that ground. Accordingly, it is not necessary for me to consider that ground.

I turn to the second ground. On the facts, it appears that at the conclusion of the first day when the Court adjourned the *voir dire* hearing was part heard. That hearing concerned the issue as to whether there had been personal service of the certificates on the Applicant before that date to enable them to be tendered in evidence pursuant to s57(5) of the Act. It was during the period of the adjournment that the prosecution took the advantage of the interval to serve the certificates on the Applicant. What happened thereafter on that particular day, as I have previously referred to, included counsel appearing before the Magistrate in his Chambers and informing the Magistrate as to what had happened on the path outside relating to service. That can have only put the Magistrate in a most embarrassing position with respect to the continued hearing of the proceedings and the *voir dire* in particular. It should not have happened.

If there was any reason for complaint it should have been dealt with by counsel in an appropriate manner so as to avoid embarrassing the Magistrate with this knowledge during the course of the **[13]** proceedings and in particular during the conduct of the *voir dire*. It led regretfully to the comments being made by the Magistrate on the resumption of the hearing when counsel for the applicant indicated that he was calling no further evidence on the *voir dire* and the Magistrate found that it was unnecessary to make any finding on the *voir dire*. It appears that what occurred thereafter was no longer part of the *voir dire* but rather evidence was then called as to personal service of the certificates on the Applicant on 13 September 1989 which evidence was cross-examined on and was the subject of submissions to the Magistrate as to whether personal service had been effected on the Applicant for the purpose of enabling certificates to be tendered in evidence under s57(5) of the Act.

In the light of the receipt of that evidence which was ruled on by the Magistrate, I consider that in the events that happened there was no longer any necessity for the Magistrate to rule as to whether there had been personal service of the certificates effected on the Applicant on 28 January 1989. It appears that after the resumed hearing the personal service sought to be relied on by the prosecution as a foundation to tendering the certificates in evidence under s57(5) of the Act was not the service alleged to have occurred on 28 January but that service which occurred on 13 September.

Not only was it not necessary, in my view, for the Magistrate to rule on the subject matter of the *voir dire*, but insofar as the Applicant, through his counsel in these proceedings, no longer challenges the ruling made by the Magistrate with respect to personal service on the Applicant **[14]** on 13 September 1989, there can remain no substance in that ground. I, accordingly, do not uphold the same.

I turn next to the third ground. Section 79(1)(b) of the *Magistrates (Summary Proceedings) Act* 1975 vests power in the Magistrates' Court to adjourn the hearing of an Information either before or during the course of the hearing. That discretion must be exercised judicially. Here the question that arises is whether in refusing to grant the adjournment sought on behalf of the Applicant on the second day of the hearing the Magistrate's exercise of his discretion miscarried as to result in the Applicant being denied natural justice.

In *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR

701, Wilson J (with whose judgment Gibbs CJ, Murphy and Aickin JJ agreed) said at pp548-9 –

> "The decision whether to grant or refuse an adjournment lies in the discretion of the trial judge, and it is indeed seldom that an appellate court will feel justified in reviewing such a decision. In *Maxwell v Keun* [1928] 1 KB 645 at 653; [1927] All ER 335 Atkin LJ stated the terms which have won general acceptance 'I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so'. See also *Hayes v Hayes (No.1)* [1934] 1 St R Qd 219; *Myers v Myers* [1969] WAR 19; *Walker v Walker* [1967] 1 All ER 412; [1967] 1 WLR 327".

In *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234 Kaye J, on the return of an Order Nisi to review a Magistrate's decision examined the authorities concerned with the circumstances in which an appellate Court will interfere with a lower Court's refusal of an application for an adjournment by a party to **[15]** litigation. At p506 His Honour said –

> "The decision whether to accede to or refuse the application for adjournment of the hearing was within the Magistrate's discretion. An appellate Court will rarely interfere with a trial judge's exercise of discretion upon such an application: *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55 at 58-8; (1981) 55 ALJR 701, per Wilson J. However, the result of refusal to grant an adjournment might be to prevent the party seeking it from presenting his case or defence; in some circumstances such result could constitute an injustice. This is so because it is essential to the fair trial of an action – whether civil or criminal – that all parties are able to present their case as fully as necessary and within the limits of the law. To overcome an injustice so brought about or threatened, an appellate court will interfere with the trial judge's discretion".

His Honour then referred to what was said by Atkin LJ in *Maxwell v Keun* as previously referred to. In *R v McGill* [1967] VicRp 79; (1967) VR 683, Lush J delivered the judgment of the Court comprising himself, Winneke CJ and Little J on an appeal to the Court of Criminal Appeal against a conviction in the Court of General Sessions. In dealing with the ground that the trial judge had wrongly refused to grant an adjournment of the trial thereby depriving the appellant of an opportunity of adequately instructing counsel, at p685-6 he said –

> It is essential to the administration of justice that the standards required to secure a fair trial according to law should be insisted upon. One of these standards is that an accused person must be given full opportunity to present his defence. In the present case that standard was not, in our opinion, observed. As the only effective sanction to safeguard the observance of the basic standards essential for the proper administration of justice is the failure of proceedings in which they are not attained, that result must ensue in this case. ... Each case of this kind must depend upon its own facts".

In *R v Hynsi Pergjegjaj* (unreported, 3 September 1987, Court of Criminal Appeal) Hampel J, with whom Murray and Fullagar JJ agreed, applied the principles enunciated in *McColl v Lehmann* and in *R v Jones* [1971] VicRp 7; [1971] VR 72 at p76 **[16]** (in which the Court of Criminal Appeal made reference to the judgment of *R v McGill*.) The Court upheld the appeal against conviction suffered by an accused following the refusal of the trial judge to grant him an adjournment in order to call as a witness a person whose name appeared on the presentment. The trial judge considered that it would not have been of particular advantage to the defence to call the witness. Hampel J, in delivering his judgment, also indicated that it was unlikely that the absent witness would be of advantage to the defence and also expressed the view that he had grave doubt whether if the witness were available he would have in fact been called. His Honour continued:-

> "However, in exercising the discretion whether to grant the adjournment, it could not, in my view, be said that (the witness) could not possibly have assisted the defence case at all. He could have, though it is hard to see how, had a plausible explanation for what on the face of them were prior inconsistent statements and the defence may have chosen to call him despite them".

Again in *Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, Kaye J reviewed the relevant decisions on the return of an Order Nisi to review the decision of a Magistrate, one ground of which review, related to his refusal to grant an adjournment. In that case the Magistrate on application for adjournment being made in order to call defence evidence had asked the defence counsel whether he intended to call the applicant as a witness. When counsel replied that he did not, the Magistrate then stated that there was no basis for the adjournment. Kaye J at p445 stated –

> "In the present case, the exercise of the magistrate's **[17]** discretion refusing the application for an adjournment was founded upon an irrelevant consideration, namely that the applicant did not intend to give evidence. As a result the applicant was denied a fair trial according to law. The right of an accused person to call evidence in his defence is not conditional upon the magistrate, before hearing a proposed witness, forming his own view of the merits or otherwise of the evidence. Before a person charged with an offence can be properly convicted he must be afforded the opportunity to call in his defence such witness or witnesses as he or his counsel deem to be appropriate. Precluding him from doing so constitutes a denial of natural justice of the defendant".

However, in exercising his discretion whether to grant an adjournment or not, the interests of the accused are not the only interests that a Magistrate may have regard to. In *R v Cox* [1960] VicRp 102; (1960) VR 665 on the application for leave to appeal against conviction on the ground of the refusal of the trial judge to grant an adjournment of the trial, the Court at p667 said -

> "How the power [to adjourn or refuse to adjourn a trial] is to be exercised is a matter in the judicial discretion of the trial judge, a discretion which will only be disturbed on serious grounds. The judge in exercising his discretion is not confined to regarding the interests of the accused. He is entitled to regard the interests of justice which may well be a very different matter. In this case, these include such matters as the opportunities which the applicant had since committal of engaging counsel, the fact that he had not engaged counsel, the state of the court list, the inconvenience and expense which would or might be caused to others by granting the adjournment, whether it was desirable or convenient that the applicant's case should be adjourned and that of his co-accused proceed alone and whether he was of the opinion that the application was made for the reason advanced. A judge is not so naive as not to know of the manoeuvring that sometimes goes on to avoid a trial before one judge in order to get a trial before another who is supposed to be more favourable for the accused, and he may well be critical of applications for adjournments".

In *McInnis v R* [1979] HCA 65; (1979) 143 CLR 575; 27 ALR 449; 54 ALJR 122 the High Court considered an application for special leave to appeal against a conviction for rape. The Applicant had appeared unrepresented at his trial and an application for an **[18]** adjournment of the trial had been refused. It appears that the Applicant had no means to provide legal representation for himself and that on making the application for an adjournment he informed the trial judge that he wished to apply to have the Legal Aid Commission reconsider its refusal of his application for legal aid. It was held by Barwick CJ, Mason, Aickin and Wilson JJ, Murphy J dissenting, that special leave to appeal should be refused. At p453 Barwick C.J said -

> "... In my opinion the trial judge ought very seriously to consider whether an accused should be forced on without counsel in any case in which there is a reasonable possibility that he may obtain the services of counsel in his defence without unbearable delay: but of course a trial judge must also have in mind the interests of the Crown and of the witnesses including a prosecutrix in such a trial as the present and of the jurors. In the present case the case had been specially fixed for trial on the day in question, the jurors had been summonsed and the witnesses were present. It is indeed a close balance and a matter of judgment whether in those circumstances the chance that the refusal of legal aid might on appeal or review be reversed outweighed other considerations. I would not be prepared myself to say that the trial judge erred in the exercise of his judgment and in the refusal of an adjournment. But in so saying I would emphasise the need for most careful weighing of the interests of the accused, the Crown, witnesses, jurors and generally of the administration of justice, when an adjournment is sought in order to obtain or endeavour to obtain the service of counsel for the conduct of the defence".

In this judgment at p455 Mason J cited, with approval, that part of the judgment in *R v Cox* referred to concerning the matters to be taken into account by a trial judge on an application for adjournment. In this case a central issue was the issue whether the sample of blood taken from the Applicant, and which was the subject of the certificates tendered in evidence in accordance with the Magistrate's ruling, was taken from the Applicant within three hours after driving a motor vehicle. **[19]** From the reasons given by counsel to the Magistrate when he enquired as to the relevance of the proposed witness, it is clear that the evidence that was proposed to be adduced from this witness was directed to that issue.

At the time when the application was made for the adjournment the evidence of the prosecution relating to this issue was circumstantial. The consequence of the Magistrate's refusal to grant the adjournment was that the Applicant was refused the opportunity of calling this evidence on his trial. From the statement of counsel to the Magistrate, the witness was available

to give evidence on the first day of the hearing. The hearing on that day was adjourned during the course of the hearing of the *voir dire* on the request of counsel for the Applicant in order to obtain further evidence relevant to whether the Applicant had been previously served with the relevant certificates. At that time the Magistrate had stated, incorrectly, that the onus was on the applicant to prove that he had not been served. It would appear that it was in accordance with that ruling that the *voir dire* was conducted as the Applicant and his wife gave evidence first and before the evidence was called as to service of the certificates on them. It was during the adjournment that the prosecution took advantage of the period of time that was available to it to serve the Applicant with copy certificates, and it was this service on which the prosecution later relied on the resumption of the hearing rather than the alleged earlier service.

In those circumstances, and having regard to the course that followed on the resumption of the hearing, it could not **[20]** be fairly said that the Applicant, in seeking an adjournment on the first day, had delayed the progress of the trial.

It appears from the reasons given by the Magistrate for refusing the application for adjournment that the matters had regard to by him were that the proposed witnesses had not been served with a subpoena by the legal advisers of the Applicant and it was necessary to proceed with the trial for if there was a further adjournment difficulty may be encountered in recalling what had been said in evidence. As appears from the affidavit material before the Court, the evidence given to that point of the trial was the evidence of the witness Cole and most of the evidence-in-chief of the Informant. The evidence was straightforward, of short compass, and one would have expected, not difficult to be remembered.

The application for adjournment was made as soon as the hearing was resumed on the second day and it was not delayed until after the Magistrate had concluded hearing the evidence on and giving his ruling with respect to the question of the service of the certificates. The Magistrate was informed that the application had been preceded by a request to the prosecution two days earlier for it to consent to the application but that that consent was not forthcoming. It was not suggested to the Magistrate by the prosecution, nor did he hold, nor would it have been reasonable to hold on the facts placed before the Magistrate, that the application was made other than for *bona fide* reasons. There was no suggestion to the Magistrate that the adjournment would cause inconvenience to witnesses to be called by the prosecution.

Having regard **[21]** to the fact that on the adjourned hearing the prosecution intended to rely on service of the certificates during the period of the adjournment, and that the only witness that would be called would be the prosecuting police officer as to that service, and the Informant himself, one can well understand why no such suggestion was made. In the reasons given by the Magistrate for refusing the application, it appears that he did not have regard to the considerations emphasised by Kaye J, as previously referred to in *McColl v Lehmann*, and which were repeated by him in *Humphrey v Wills*, which latter judgment was delivered on 30 June 1988.

In determining whether or not to accede to the application, the Magistrate was obliged to make a judgment weighing in the balance considerations of the type referred to by Barwick CJ in *McInnis v R*. In the circumstances of this case, as they existed on the second day of the hearing, it is my view that having regard to the nature of the evidence sought to be adduced from the intended witness and having regard to the nature of the prosecution case to that point, the considerations of permitting the Applicant time to be able to call the intended witness were such that if that was prevented an injustice could result.

I am of the view that in the result that the Magistrate refused the application he either gave no or insufficient consideration to the importance of permitting a party to present his case fully as an essential element of ensuring a fair trial. In the circumstances of this case that consideration far outweighed any inconvenience that may flow from the granting of an adjournment. In the result, I conclude that the exercise **[22]** by the Magistrate of his discretion miscarried. Counsel for the respondent submitted that if it was found that the discretion had miscarried, then he did not contend that in the circumstances of this case it did not result in a denial of natural justice to the Applicant.

I am of the view that by refusing the application for adjournment and precluding the

Applicant from being able to call the proposed witness it did constitute a denial of natural justice to the Applicant. It follows, therefore, that this ground of the Order Nisi is made out with the result that the order must be made absolute, the conviction quashed and the information remitted to the Magistrates' Court for re-hearing. For these reasons I order that the Order Nisi be made absolute with costs, including costs reserved by the Master, that the conviction be quashed, the penalties imposed be set aside and the Information remitted to the Magistrates' Court for re-hearing *de novo*.

APPEARANCES: For the applicant Mooney: Mr P McLaughlin, counsel. GR Campbell & Co, solicitors. For the respondent Edwards: Mr BM Dennis, counsel. Victorian Government Solicitor.
