36/87

SUPREME COURT OF VICTORIA

HAWRYLUK v GILLMAN

Nathan J

20 August 1987

BIAS – MAGISTRATE STOPPING INAPPROPRIATE CROSS-EXAMINATION – PRESSURING COUNSEL TO MOVE EXPEDITIOUSLY – WHETHER BIAS SHOWN – WHETHER FAIR CONDUCT OF TRIAL PREJUDICED.

A magistrate is entitled and should discipline the legal processes before the Court, including the conduct of counsel. Accordingly, where a magistrate stopped cross-examination deemed to be inappropriate or moved into chambers and exhorted counsel to move expeditiously, bias was not necessarily shown nor was the fair conduct of the trial prejudiced.

NATHAN J: [1] By way of notice of motion the plaintiff seeks to prohibit the Stipendiary Magistrate at Dandenong from continuing to hear charges laid against him by Roy James Speechley relating to alleged contraventions of the *Wildlife Act*. The plaintiff has been charged in that he failed to keep proper records relating to Red-rumped Parrots and Major Mitchell Cockatoos.

The matters came on before the defendant on 25th June 1987, and on 11th August 1987 I made an *ex parte* order requiring service of this notice of motion and its supporting affidavit material upon the Magistrate. The plaintiff alleges that the submissions made by the barrister appearing on his behalf were treated by the Magistrate in such a way as to reveal prejudice on his part and, in any event, the manner in which the submissions were treated would raise **[2]** in the minds of a reasonable observer the fear that the Magistrate was not treating both sides in the same way and had approached his task of adjudication with bias.

Prejudice, in the legal context, is not novel and the word itself does not pose any problems. Prejudice simply means that a matter has been prejudged or that a person has approached the tasks of judgment with pre-conceived opinions which, if put into effect, result in a detriment to one side or the other. The classic Victorian case is *R v The Magistrates' Court at Lilydale; ex parte Ciccone* [1973] VicRp 10; (1973) VR 122, in which McInerney J refers to the necessity that Magistrates must approach their task in an even-handed manner so that in fact and in style the charge before them is conducted fairly.

Elaborations of this principle are to be found in *R v Watson; ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *Livesey and the New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420, and *Re JRL ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; (1986) 66 ALR at p239; [1986] FLC 91-738; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184. In the latter case a Family Court Judge had interviewed a counsellor in her chambers during a luncheon adjournment. The counsellor had, in reports, expressed a strong preference for one of the parties. She declined to disqualify herself from continuing with the hearing and the High Court, by a majority, ordered the order nisi for prohibition be made absolute. Mason J there ruled that:

> "There was a firm basis for a reasonable apprehension that the judge would not bring to bear an impartial and unprejudiced mind on the resolution of the custody issue. The case was plainly one in which the principle that justice must manifestly be seen to be done" -

[3] and if that were not so, it would be appropriate to make the order absolute.

It becomes necessary to examine the facts in this case which have two categories. Firstly, that the Magistrate showed prejudice in pre-determining the issue of a witness's expert qualifications and, secondly, that by ordering all parties, other than the barristers, from the court room, he continued the legal process in the absence of the defendant, in effect, in a closed court contrary to the provisions of s4 of the *Magistrates' Courts Act*.

As to the first contention, I am satisfied that the Magistrate, albeit expressing his views robustly, did nothing more than reject submissions by the defendant's counsel as to the qualifications and expertise of the witness as being properly capable of giving opinion evidence. The person involved, Mr Griffin, gave his occupation as a Wildlife Officer and he was sought to be qualified as to the way certain wildlife would behave in captivity and in the wild. In evidence-in-chief he set out his qualifications which, if I might characterise them, are impressive in respect of the task he was called upon to give evidence about. Defence counsel submitted that he was not qualified to give such material evidence and that submission was overruled.

Although the Magistrate apparently used expressions such as "You are not assisting your client"; "Your submissions are ridiculous and puerile"; "I am here to determine the matter and I am not going to tolerate you interrupting the prosecutor as you are putting up a spurious attempt to lengthen these proceedings and if you are not quiet, I will deal with **[3A]** you", those expressions are hardly benign examples of judicial placidity. They are, in reality, nothing more than a rejection of a submission and a request to move expeditiously.

The Magistrate then permitted cross-examination as to the expertise. The Magistrate expressed a view that he was firmly of the view that the expert was qualified, thus permitting the cross-examination. A line of cross-examination dealing with academic training and ornithological study was interrupted by the Magistrate on the basis that it was largely irrelevant. **[4]** The Magistrate was entitled to so find and entitle to so comment.

The Magistrate interrupted to say that the case had been set for two hours and that if it was not completed within that time, he would adjourn it. He was entitled to do so. The Magistrate again interrupted counsel for the defendant, allegedly saying, "You are keeping a lot of people waiting; you are endeavouring to punish me for taking you to task earlier in the piece; you are wasting your time; the questions you have asked this witness are absolute rubbish" and "if the case is not finished by 1 o'clock, I will adjourn it." He said after being taxed by defence counsel with the term "with the greatest respect" that "I am not interested in your nonsense." He then ruled that the witness Griffin was capable of giving opinion evidence.

I am satisfied that this was an intemperate exchange; it is nothing more than a Magistrate taking hold of the proceedings before his Court and in the face of cross-examination he deemed to be inappropriate, he indicated to counsel very forcibly that he should move to other matters. The witness Griffin then produced a sketch plan, and that was objected to by counsel for the defendants. The lines of the objections as revealed in counsel's affidavit are close to vacuous, and the Magistrate registered great irritation in dealing with the submission that the sketch plan should not be admitted. The objections were taken on the line that there were no actual measurements taken and that Griffin was unable to prove conclusively and mathematically that the document was an accurate reflection and was as such **[5]** not admissible.

It is objections of that kind which rightly attract the ire of Magistrates, and one can readily comprehend the Magistrate then doing what he did, namely clearing the Court room and proceeding to discuss the behaviour of the parties in chambers. He did not purport, on the affidavit material, to continue with the adjudicative process, but would appear on the affidavit material to have set about exhorting counsel for the defendant to move relevantly and expeditiously, and to reiterate that this matter would be adjourned at 1 o'clock at the set time.

Although there was some discussion in the Magistrates' chambers as to the admissibility of evidence, the affidavit material fails to tell me what that was, and I am not satisfied that it constituted the continued hearing of the case in the absence of the defendant, and it is not appropriate, as the deponent swears, to refer to those matters as 'closed Court'. It follows, then, that I am not satisfied that either of the two categories of bias have been made out. The warnings given by the Magistrate to the defendant's barrister were not warnings given in open court in relation to the defendant's case, but would appear to have been warnings and exhortations given by the Magistrate as to counsel's own conduct of the proceedings. He said, "I want you to understand that I can have you dealt with and that I am going to adjourn this case at 1 o'clock and award costs against you if you continue with this nonsense, do you understand?" That would appear to be intemperate language used to direct defendant's counsel's mind to the time constraints established by the Court listing authorities.

[6] Now, it is quite plain – and let me make this observation very strongly – that Court processes are not dictated by listing times. A case is to take as long or as brief a period as its merits demand. But, on the other hand, justice is neither priceless nor timeless, and a presiding judicial officer is entitled by virtue of his function to indicate to counsel when cross-examination is unhelpful, when it appears to be repetitive, and in certain circumstances of that kind, to stop it. The presiding judicial officer is entitled and should discipline the legal processes before him, and that includes the conduct of counsel.

I am satisfied on this affidavit material that that is what the Magistrate was doing. He moved into chambers in order to apply pressure upon defence counsel to move quickly. There will undoubtedly be circumstances when such pressure passes beyond propriety and would prejudice the fair conduct of the trial. This is not one.

Accordingly, I discharge the order nisi. (Discussion ensued.) In this matter it is not appropriate to order costs and I will make no order.
