

38/75

SUPREME COURT OF VICTORIA

FRENCH v BARNETT

Starke J

18 February 1975

PROCEDURE – MAGISTRATE AND DEFENDANT'S COUNSEL HAD DIFFICULTY IN UNDERSTANDING WHAT WITNESS WAS SAYING IN THE WITNESS BOX – INTERPRETER CALLED – OBJECTION TO INTERPRETER BY DEFENDANT'S COUNSEL – MAGISTRATE REFUSED PERSON TO ACT AS INTERPRETER – WHETHER MAGISTRATE IN ERROR – INTERPOSING OF WITNESSES BY PROSECUTION – MAGISTRATE REFUSED APPLICATION FOR MAIN WITNESS TO BE STOOD DOWN AND OTHER WITNESSES TO BE CALLED – MATTER NOT ADJOURNED – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute. Remitted for a complete re-hearing and determination.

1. A discretion undoubtedly resides in a Magistrate or any judicial officer to refuse to allow any particular individual to act as an interpreter for any reason which would seem to affect the course of justice or the appearance of justice. That being so, the Supreme Court would be very slow to interfere with the discretion of a Magistrate who had not only seen the interpreters but had heard them examined and cross-examined and had gleaned facts in relation to them. If the Magistrate's discretion in the present case had been based only on the fact that the interpreters had not interpreted before, then that discretion miscarried. But here probably the best reason for rejecting a man as an interpreter existed — that he had knowledge or association with the witness whose evidence he proposed to interpret. That was a basis and probably the main basis of the Magistrate's decision in relation to both the interpreters, and accordingly, the Magistrate's discretion did not miscarry in refusing to permit them to interpret the witness's evidence.

2. The obvious course the Magistrate should have taken – and it is here that his discretion miscarried – was to allow the interposition of the witnesses that the police prosecutor desired to call and then listen to such applications that might have been made at the end of the evidence of these witnesses or take such action of his own volition as he thought proper. It may have been that at the end of the evidence of the other witnesses, an interpreter would have been present. It may have been that the Police Prosecutor would then have applied for an adjournment, but the Magistrate deprived himself of all the information on which it would have been proper to exercise his discretion in dismissing the information.

3. In the result the order nisi was made absolute with a direction that the proceedings be remitted to the Magistrates' Court for a complete re-hearing at that Court.

STARKE J: ... The order to Review attacks four rulings or Orders of the Magistrate. The first is refusing in the course of the hearing of the information three applications by the Prosecutor for leave to interpose or call other witnesses prior to the completion of the examination and cross-examination of the witness Popescu. Secondly, refusing in the course of the said hearing to permit one Vasile Bagu to act as interpreter for the witness Popescu. Thirdly, determining not to adjourn the said hearing to another day. And fourthly, dismissing the Information.

The facts are a little complex and in fact the hearing, occurred over parts of two days. The initial hearing was on 19th February 1974, and during the course of that day it was adjourned until 10th April 1974. Before the hearing of evidence, on the application of Mr Bourke, witnesses were ordered to leave the court. The first witness called by the Crown was Mr Alexandru Popescu who gave certain evidence. After some time had elapsed, Mr Bourke objected that he had difficulty in understanding the witness, and the Magistrate agreed that he was difficult to understand. The witness was giving his evidence at this point without the assistance of an interpreter.

After some discussion it was determined that he should try again in English and again he gave some evidence. After a period of time Mr Bourke again objected that he was having difficulty in understanding the witness and the Magistrate observed that he was having great difficulty in understanding the witness and that he had missed most of the last answer before the objection.

The court then adjourned for a short time so as an interpreter could be found. On resumption Mr Simimeonidis was present as an interpreter. It turned out that he had had a business transaction with the witness Popescu and on this basis Mr Bourke objected to his acting as an interpreter. The Magistrate said that he was impressed by Mr Simimeonidis and said that he appeared to have a good command of English, but to avoid any possibility of a miscarriage he upheld the objection and dismissed him as an interpreter. At this stage the Inspector who was prosecuting applied for an adjournment so that he could get a suitable interpreter. Mr Bourke objected to the adjournment and said that he could see no reason why the other witnesses, of whom there were apparently about ten could not be called and the hearing proceed.

On the 10th April 1974, the hearing resumed and a Mr Bagu was called as an interpreter and was sworn and asked some questions by the Magistrate and cross-examined by Mr Bourke at some length. It appears that, as with the case of Simimeonidis, Bagu had never appeared as an interpreter in court before. However, he had an association, a business association with Popescu, and it transpired from the affidavit of Mr Bourke, that the Magistrate found that the police had left it to Popescu to get the interpreter Bagu to court. In those circumstances the Magistrate said he would not permit Mr Bagu to act as interpreter because of his association with Popescu, furthermore because he had not previously interpreted in court proceedings and by inference one would assume because he had been brought to court by Popescu. It appears then that the Prosecutor informed the court there was a good deal of difficulty in getting a Rumanian interpreter.

However, after some discussion Mr Popescu had a third try in the witness box. After a fairly short period Mr Bourke again complained that he could not understand what the witness was saying, and the Magistrate ruled that the hearing could not proceed without the assistance of an interpreter. After some discussion the Magistrate suggested that an adjournment might be the best course of action in order to enable the Prosecution to obtain an interpreter. Mr Bourke objected to the adjournment. The prosecutor said that he was concerned about whether an order for costs would be made against the Police Department if an adjournment was sought. He did not seek an adjournment but he again pointed out that he had witnesses and believed that he should be allowed to call those witnesses and to proceed with the hearing of the matter. The Magistrate concerned adjourned to consider the situation and on resumption he returned to deliver this ruling. I should say that before he considered his decision, Mr Bourke for the first time asked that the information be dismissed. The Magistrate said this:-

"In the absence of any application for adjournment I feel it would be improper for this court to adjourn the matter. The normal reasons why the court could adjourn the matter of its own volition would be, I think, the reaching of the time of day for a normal adjournment or perhaps for consideration by the court of facts or legal argument or the illness of a witness or participants in the case. None of these reasons prevail and there has been no application for an adjournment. Furthermore, the defendant is prepared and is ready to proceed today. Admittedly the prosecutor has been frustrated by the court's ruling, whether it be correct or incorrect, that a witness or witnesses should not be interposed before the completion of the examination and the cross-examination and, in fact, the re-examination of a witness under oath, more especially as that witness appears to be the main witness. The court therefore dismisses the information. I will certify costs for the Magistrates' Court for any witnesses of the prosecution."

These being broadly the facts I turn to the rulings of the Magistrate which are attacked in the order nisi to review. As to the second ruling, that is refusal in the course of the said hearing to permit one, Vasile Bagu, to act as an interpreter for the witness Popescu. I am of opinion that this ground has not been made out. One, I think, should look at the rulings the Magistrate made in relation to both interpreters. He rested at least in part his decision to refuse in his discretion to allow them to interpret on the basis of their knowledge of the witness whose evidence they were going to interpret, namely, Popescu. In each case I think he further stated that one of the matters which he took into consideration was that neither of the interpreters put forward had ever acted as interpreters before. This, I think, on the face of it, is not a basis for refusing an interpreter, because just as one has to have a first conviction so one has to have a first time as an interpreter in Court. The question is always not whether he has done it before or not but whether he is a competent interpreter.

In the case of Bagu, of course, it not only appeared that he knew Popescu, but Popescu had been given the task of seeking him out and bringing him to court. In my judgment a discretion

undoubtedly resides in a Magistrate or any judicial officer to refuse to allow any particular individual to act as an interpreter for any reason which would seem to affect the course of justice or the appearance of justice. That being so, this court would be very slow to interfere with the discretion of a Magistrate who has not only seen the interpreters but has heard them examined and cross-examined and has gleaned facts in relation to them. I think, if the Magistrate's discretion had been based only on the fact that the interpreters had not interpreted before, that the discretion miscarried. But here probably the best reason for rejecting a man as an interpreter existed, that he had knowledge or association with the witness whose evidence he proposed to interpret. That was a basis – and I would imagine the main basis – of the Magistrate's decision in relation to both the interpreters, and that being so I am not prepared to find that the Magistrate's discretion miscarried in refusing to permit them to interpret the witness Popescu's evidence.

As far as the third determination of the Magistrate is concerned – that is determining not to adjourn the said hearing to another day – I think, although at one stage I momentarily took another view, I agree with Mr Batt for the applicant that he cannot rely on this ground because the prosecutor did not and expressly did not seek an adjournment. Of course he did not seek an adjournment because at that time, as I have recited, he wanted to call other witnesses and to continue Crown evidence. Therefore, in the result the outcome of this order depends on the first matter, that is refusing in the course of the hearing on the information hereinafter mentioned three applications by the prosecutor for leave to interpose or call other witnesses prior to the completion of the examination and cross-examination of the witness Popescu.

I think it may be conceded for present purposes that once a witness is sworn and has commenced his evidence-in-chief another witness cannot be interposed as a matter of invariable practice in this State without the leave of the court and this is for obvious reasons of regularity and justice. It may well be that there are cases where it would be quite unjust to allow the interposition of witnesses, for instance, during the course of a successful cross-examination, but in this case the Magistrate really did not give any grounds at all for refusing the application, or none that I find acceptable. In this case witnesses were ordered out of court. The evidence given by the witness up to the time that he finally stood down does not allow me to have much idea of what the case is all about, although the Magistrate apparently knew or was told that he was the main witness.

There could be, in my view, no prejudice whatever to the defence if the witness had been stood down when the prosecutor applied. If, in fact, he had not been called, of course the prosecutor could have chosen any order he liked of witnesses to give evidence. In reality no evidence had been given of any worthwhile nature by Popescu at all because I have a very strong impression from the transcript that neither the Magistrate nor Mr Bourke really understood what he was saying anyway, and I have no doubt at all that the excerpts of his evidence appearing in the affidavit of French are no more than excerpts from the police brief. It also appears that he was being consistently led in examination-in-chief during the time he was in the witness box. Indeed, that being the fact, if you look at the reality of it he did not give any evidence at all of any worthwhile description.

This being so then the greater the reason to allow the prosecutor to do what initially he could have done anyway and that is to choose the order of his witnesses. In my judgment, in refusing to allow the prosecutor to introduce his other witnesses, the Magistrate's discretion miscarried. It is said by Mr Aherne that this argument cannot prevail because the Crown have put itself out of the court by declining to ask for an adjournment just prior to the time that the Magistrate dismissed the informations. This is an attractive argument, but I think it is wrong. I think the boot is really on the other foot. Whether he should dismiss the informations or whether he should grant an adjournment or whether he should take some other action depended on all the circumstances. There were some ten witnesses present waiting to be called. Nobody knows what they were going to say, or at least it is not disclosed in the material here, nor did the Magistrate know.

In my judgment the obvious course he should have taken – and it is here that his discretion miscarried – was to allow the interposition of the witnesses that the police prosecutor desired to call and then listen to such applications that might be made at the end of the evidence of these witnesses or take such action of his own volition as he thought proper. It may, of course, have been

that at the end of the evidence of the other witnesses, an interpreter would have been present. It may have been that the sergeant would then have applied for an adjournment, but the Magistrate deprived himself of the information, of all the information on which it would be proper to exercise his discretion in dismissing the information.

I might say that it does appear on the material Rumanian interpreters are hard to come by but I decline to believe that with proper investigation that interpreters in Rumania are found in this community. Perhaps I should add that in my opinion it is only in exceptional cases, such as where there would be an injustice to the Defendant to do otherwise, that a criminal information should be dismissed without a hearing on the merits.

In the result the order nisi will become absolute and I direct that these proceedings be remitted to the Magistrates' Court and direct that there be a complete re-hearing at that Court.
