14/95

SUPREME COURT OF VICTORIA

PRIMERANO v THAYER

Harper J

30 May 1995

APPEAL COSTS FUND – APPLICATION TO DISQUALIFY OPPOSED BY POLICE – APPLICATION GRANTED – APPLICATION FOR CERTIFICATE MADE – REFUSED – WHETHER PROCEEDING HAD COMMENCED – WHETHER DISCONTINUANCE DUE TO APPLICANT – WHETHER CERTIFICATE SHOULD HAVE BEEN GRANTED: *APPEAL COSTS ACT* 1964, S18(1)(c).

Section 18(1)(c) of the *Appeal Costs Act* 1964 ('Act') provides so far as relevant:

> "Where after the commencement of this Act:
> (c) the hearing of any criminal proceeding is discontinued and a new trial ordered by the presiding Magistrate for a reason not attributable in any way to the act, neglect, default of the accused or his legal practitioners..."

P. and a person named Royle were involved in a fracas over allegations that P. had indecently assaulted Royle's daughter. Charges of assault and criminal damage were laid against Royle and a number of charges including indecent assault were laid against P. The charges against Royle were dealt with and the charges against P. were listed for hearing before the same Magistrate a few days later. A police officer told P.'s legal practitioner that he would speak to the clerk of courts to see whether another magistrate could be allocated to the case but if not, the police would oppose any application for disqualification. When the matter came on for hearing, the magistrate disqualified himself, adjourned the charges and refused P.'s application for a certificate under the Act on the ground that the discontinuance of the proceeding was attributable to P. Upon appeal against the refusal of the certificate—

HELD: Appeal allowed. Certificate granted.
1. The proper course was for the police and the legal practitioner to have made a joint approach to the clerk requesting that another magistrate be allocated to hear the matter.

2. Once the court assembled for the purposes of hearing the charges and the application to disqualify was made, the proceeding had commenced for the purposes of s18(1)(c) of the Act. The primary reason why the proceeding came before the magistrate was the refusal by the police to accept that the magistrate should have disqualified himself. In those circumstances, the magistrate erred in attributing to P. an act, neglect or fault which resulted in the discontinuance of the proceedings.

HARPER J: [1] The appellant and a man named Gavin Royle were involved in a fracas in Myrtleford on 2 November 1994. Royle was upset over allegations that the appellant had indecently assaulted Royle's daughter. As a result of the fracas, Royle was dealt with by the Myrtleford Magistrates' Court on 27 January 1995. He pleaded guilty. The Magistrate, Mr Ian McGrane, released him, without conviction, on his entering into a bond to be of good behaviour for twelve months. Royle was ordered to pay $1,371 costs. The appellant had meanwhile been charged with one count of indecent assault, one count of committing an act of indecency with a child under the age of 16, and one unrelated count involving drugs. He was not charged with any offence arising out of the affray. He was required to appear in answer to these charges at the Wangaratta Magistrates' Court on 3 February 1995. A barrister, Mr George Trazcyk, was briefed on his behalf.

On the 1st or 2nd of February Mr Trazcyk was informed by a member of the police that the charges against Mr Royle had been heard by Mr McGrane and that that Magistrate was likely to be rostered to preside at the hearings involving the appellant. This was the first that the appellant or his advisers knew of the hearing before that Magistrate in Myrtleford on 27 January. On receipt of this information, Mr Trazcyk told the policeman that he, Mr Trazcyk, would have to ask Mr McGrane to disqualify himself should that Magistrate **[2]** indeed be rostered to hear the matter. The policeman replied that he would speak to the Clerk of Courts and ask whether another Magistrate could be allocated to the case, but if not, the police would oppose any application for Mr McGrane's disqualification.

In my opinion, it was wrong for Mr Trazcyk to leave to the police the making of an approach

to the Clerk of Courts. It is axiomatic that no litigant should be able to dictate who should sit on a matter involving that litigant; and although in this case there was no question of the police dictating the composition of the court, nevertheless it was inappropriate that one party only should approach the clerk on a matter of this kind. The police also made a mistake. It should have been at once appreciated by them that Mr. McGrane could not preside over the hearing of the charges against the appellant. This is not to suggest for a moment that the Magistrate would have been or was biased, but appearance of bias or possible bias would have been unavoidable. Mr McGrane had, after all, dealt with Mr Royle in a matter arising out of the charging of the appellant only six days before.

In those circumstances, the Magistrate, in my opinion, had no option but to disqualify himself. The police were wrong not to appreciate that this decision was inevitable. They ought to have agreed to a joint approach to the clerk with a request that a Magistrate other than Mr McGrane be allocated to the case. The matter was called on in accordance with the rostered timetable on 3 February. Mr McGrane presided. **[3]** The foreshadowed application was made, and succeeded. The appellant was remanded to the Wangaratta Magistrates' Court on 20 April 1995. His bail was extended. He was ordered to pay costs in the sum of $90. An application pursuant to s18(1)(c) of the *Appeal Costs Act* 1964 was dismissed. The appellant now appeals against both the order for costs and the refusal of the application for a certificate. That appeal is now before me.

For reasons which I have already given, it is, in my opinion, not within my jurisdiction to hear the appeal in relation to the order for costs. That is a matter which arises out of committal proceedings before the Magistrate, and accordingly does not fall within s92 of the Magistrates' Court Act. Again, for reasons already given, I am of the opinion however that it is competent for the appellant to appeal to the Supreme Court against a Magistrate's refusal to grant a certificate pursuant to s18 of the *Appeal Costs Act* 1964. That section provides insofar as relevant as follows. 18(1):

> "Where after the commencement of this Act:
> (c) the hearing of any criminal proceeding is discontinued and a new trial ordered by the presiding Magistrate for a reason not attributable in any way to the act, neglect, default of the accused or his legal practitioners, and the presiding Magistrate grants a certificate (which certificate the presiding Magistrate is hereby authorised to grant) to the accused stating the reason why the proceedings were discontinued and a new trial ordered, and that the reason was not attributable in any way to the act, neglect or default of the accused or his legal practitioners, the appellant who pays or is ordered to pay additional costs, or on whose behalf additional costs are paid or ordered to be paid by reason of a new trial that is **[4]** had as a consequence or the proceedings being rendered so abortive, shall be entitled to be paid from the moneys appropriated by Parliament for the purposes, such costs as the Board considers have been reasonably incurred by him or on his behalf in the proceedings."

The first question for determination under this provision is whether in the circumstances of this case the hearing of a criminal proceeding was discontinued and a new trial ordered. It was submitted on behalf of the respondent that no proceeding had commenced before Mr McGrane at the time that he disqualified himself, and accordingly that there was nothing to discontinue. In my opinion, however, the proceeding before Mr McGrane was a criminal proceeding which had commenced before His Worship's disqualification. It is true that the substantive merits of the charges had not been considered. Nevertheless, the court had assembled for the purpose of hearing those charges and the initial application, that is, the application that the Magistrate disqualify himself, was in my opinion properly to be described as a part of that proceeding.

Accordingly, on the Magistrate disqualifying himself, that proceeding discontinued. By remanding the appellant to the Wangaratta Magistrates' Court on 20 April, the Magistrate ordered a new trial. Accordingly, in my opinion, so much of the necessary elements of the section are made out, and it was open to the Magistrate to consider an application under that provision. The Magistrate refused the application because in his opinion the reason for discontinuance was attributable to the act, neglect or default of the appellant. I do not agree. It is true that the appellant's **[5]** advisers ought to have joined with the police in an approach to the clerk. It seems to me, however, that the primary reason why the proceeding was brought on on 3 February was the refusal by the police to accept that Mr McGrane was not in the circumstances qualified to hear the charges against the appellant. Had the police conceded, as they should have done, that the rostering of another Magistrate was necessary, then the parties could have made a joint

approach to the clerk, and that approach being by consent, doubtless the necessary administrative arrangements would have been made.

The alternative course, the course which Mr McGrane apparently thought the appellant should take, was to seek a hearing before a Magistrate seeking directions, the effect of which would have been that Mr McGrane would not have been rostered to preside over the hearing of the charges against the appellant. In my opinion, it is not surprising that such a course did not commend itself to the appellant. Indeed, there is no evidence that such a course was even contemplated by the appellant. It seems to me to be a misallocation of court resources to require an application of this kind to be made in open court before a Magistrate.

An application before one Magistrate for an order disqualifying another Magistrate is obviously one that could not properly be made. An application before a Magistrate that that Magistrate order that proceedings be heard before a different Magistrate, or a Magistrate other than a named Magistrate would be unusual to say **[6]** the least. An application in open court for a purely administrative direction seems to me to be a misallocation of resources. Commonsense ought to have found a solution to the problem which confronted the parties on the 2nd or 3rd of February, but commonsense dictated, in my opinion, the acceptance by the police that a common approach be made to the clerk for relevant administrative directions.

If this be correct, then the Magistrate was wrong to attribute to the appellant an act, neglect or fault which resulted in the discontinuance of the proceedings on 3 February. The Magistrate, in my opinion, had regard to irrelevant matters in deciding that the hearing before him would discontinue for a reason attributable to the act, neglect or default of the appellant. Accordingly, in my opinion, the discretion of the Magistrate miscarried with the result that his refusal of a certificate was wrong. *[After referring to a question of costs, His Honour concluded]*...**[7]** The Magistrate was in my opinion clearly wrong to deny him that certificate, and accordingly I think that I should not exercise my discretion against the application. I will accordingly grant the applicant a certificate pursuant to s18(1)(c) of the *Appeal Costs Act* 1964 but I will hear the parties on the question of costs.

APPEARANCES: For the appellant Primerano: Mr S Stuckey, counsel. For the respondent Thayer: Mr S Dewberry, counsel. Office of Public Prosecutions.
