10/99; [1999] VSC 139

SUPREME COURT OF VICTORIA

BAO DUC CHU v HENHAM

McDonald J

16, 19 April, 4 May 1999 — (1999) 105 A Crim R 528

NATURAL JUSTICE – INTENTION OF COUNSEL TO MAKE A SUBMISSION OF LAW AT CLOSE OF CASE – COUNSEL NOT GIVEN OPPORTUNITY TO MAKE SUBMISSION DUE TO RAPID PASSAGE OF EVENTS AT CLOSE OF CASE – WHETHER DEFENDANT DENIED PROCEDURAL FAIRNESS.

At the end of the cross-examination of the defendant, the magistrate asked the defendant's counsel if he intended to call other witnesses. When counsel indicated that he did not intend to do so, the magistrate told the defendant to leave the witness box and return to his seat. The magistrate then announced his decision and found the charge proved. The defendant's counsel then objected that he had not been given an opportunity to make a submission in law. The magistrate replied that the case was not a question of law but of fact. Counsel was then given an opportunity to make a plea as to sentence. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for hearing by another magistrate.
1. On the facts of the case, a question of law arose as to what were the duties and the extent of the duties of the attending police officers when the defendant was first grabbed. Depending on the findings of fact to be determined by the magistrate, the principles of law stated in the decision of Hedigan J in *Nguyen v Elliott* (VSC, 6 February 1995) may well have been relevant to the ultimate issue to be decided by the court namely, whether the defendant was guilty of the offence charged.

2. It should not be part of the duty or function of a magistrate in the conduct of a trial before the court on each case to enquire, before announcing the decision of the court, whether a party appearing before the court or his or her legal representative wishes to address the court on a matter of law relevant to the evidence. If a party or legal representative wishes to make such a submission that fact should at an appropriate point in the trial be brought to the attention of the magistrate in order that the submission may be heard before the court gives its decision.

3. However, in the present case, events occurred too rapidly between the defendant being told to resume his seat and the magistrate announcing his decision for counsel to inform the court that he wished to address the court on a matter of law. In those circumstances, given that it was the intention of counsel to make a submission of law relevant to the evidence, there was a failure to accord the defendant procedural fairness on his trial. Accordingly, the decision and order must be set aside.

McDONALD J:

1. The proceeding before the Court is an appeal brought pursuant to s92 (1) of the *Magistrates' Court Act* 1989. That section provides that a party to a criminal proceeding in the Magistrates' Court (other than a committal proceeding) may appeal to this court, "on a question of law, from a final order of the court in that proceeding."

2. On 2 July 1998 the appellant was charged before the Magistrates' Court at Prahran that on 18 February 1998 he assaulted the respondent, a member of the police force in the execution of her duty, contrary to s52(1) of the *Summary Offences Act* 1966.

3. That section provides, as is relevant – "Any person who assaults ... any member of the police force in the execution of his duty under this Act or otherwise ... shall be guilty of an offence."

4. The appellant pleaded not guilty to the charge.

5. At the hearing before the Magistrates' Court the respondent gave evidence as did three other police constables and two other persons, in support of the prosecution case. The appellant also gave evidence.

6. After the appellant had been cross-examined by the prosecutor the Magistrate enquired of Counsel appearing for the appellant whether he intended to call further evidence. On being told that he did not, the Magistrate directed the appellant to return to his seat. The Magistrate then, after stating he was satisfied as to a number of matters (to which I shall later return) stated that he found the charge proved. After a further exchange between Counsel for the appellant and the Magistrate, Counsel addressed the court on the matter of penalty. The Magistrate then, by order, found the appellant guilty of the charge but without recording a conviction, adjourned the further hearing of the case to the Melbourne Magistrates' Court on 1 July 1999 on the appellant undertaking to be of good behaviour during the period of the adjournment and to appear before the court if given notice by the court requiring him to appear. It was further ordered that the appellant pay $300 compensation although on this appeal it was contended that the Magistrate ordered that the appellant pay $300 to the court fund. Nothing turns on this latter matter on this appeal however.

7. In making the finding that the appellant was guilty of the offence charged and making the further orders referred to, the Magistrate clearly exercised the sentencing discretion vested in him pursuant to s75 of the *Sentencing Act* 1991. *[His Honour set out the relevant provision and continued]*

8. On 31 July 1998 a Master of the Court stated by order a number of questions of law raised by this appeal. Although the questions of law raised by this appeal, as stated, were numerous, on the conduct of the appeal before the court, three questions of law were raised and pursued on behalf of the appellant. The first was whether on the whole of the evidence before the court it was reasonably open to the Magistrate to find the appellant guilty of the offences charged. It being contended on behalf of the appellant that it was not. Secondly, whether in the conduct of the trial the appellant was denied procedural fairness by the Magistrate refusing or omitting to permit his Counsel to re-examine him after being cross-examined by the prosecutor. Thirdly, whether the appellant was denied procedural fairness on his trial by the Magistrate refusing or omitting to give his Counsel an opportunity to make submissions of law following the close of evidence. [*His Honour then considered whether the magistrate's order was a "final order" for the purposes of s92 of the* Magistrates' Court Act *1989 and continued*] ...

21. The conclusion that I have reached is that on the court being satisfied that the appellant was guilty of the offence charged and that forming part of the order of the court on which the sentence was imposed in exercise of the court's sentencing discretion under s75 of the *Sentencing Act* 1991, the order of the court, the subject of this appeal, is a "final order" for the purpose of s92 of the *Magistrates' Court Act* and the appeal to this court on a question of law is competent.

22. I propose to deal first with the third question of law raised by this appeal, that is, whether the appellant was denied procedural fairness on his trial by the Magistrate refusing or omitting to give his Counsel the opportunity to make submissions of law before announcing his findings, including that he found the charge proved. In order to address this question it is necessary to have regard to the evidence given before the Magistrate and matters which occurred during the hearing of the trial. [*His Honour then referred to affidavits setting out the evidence given before the magistrate and continued*] ...

36. In the affidavit of the appellant filed in these proceedings he has deposed that during his cross-examination the Magistrate asked him a number of questions. He has sworn that at the end of his cross-examination the Magistrate then asked his Counsel if he intended to call other witnesses and when his Counsel said that he did not intend to do so, the Magistrate told him to leave the witness box and to return to his seat. He has sworn, “Counsel was not given any opportunity to re-examine me following the cross-examination by the prosecutor or the questions by the learned Magistrate and I had no opportunity to say anything in reply to the cross-examination.”

37. [Senior Constable] Janine Gleeson [who was the prosecuting officer before the Magistrates' Court] has sworn that it was after she had completed her cross-examination that the Magistrate asked a question of the appellant. She has sworn that the Magistrate gave both parties an opportunity to respond to those questions. She has not deposed how that opportunity was given, whether it was by reason of something which was said or by reason of the fact that no further question was asked. There is no evidence before this court that at this time the Magistrate said anything relating to either party wishing to ask the appellant any questions arising from the questions asked by him. In all events the appellant was not re-examined.

38. I return to the events that occurred and that which was said by the Magistrate and Counsel for the appellant after the Magistrate had informed the appellant that he was to return to his seat. The appellant has sworn that what was then said and that which occurred was that the Magistrate said –

> "I am satisfied the defendant bit the policewoman. I am satisfied he was not justified in doing it. I am satisfied the best way of dealing with the situation was that he should have given the police his house keys. If he had given the police his house keys this situation would not have arisen. I found the charge proved."

The appellant has sworn that his Counsel then objected that he had not been given an opportunity to make a submission in law and that the Magistrate then said,

> "This is not a question of law. This is a question of fact. Whether the police were acting reasonably or not is a question of fact. I am satisfied that the police were acting reasonably in taking the keys from the defendant. The defendant by his own admission stated that he intended to return to the flat after his sister had gone to sleep. It was reasonable to take his keys to stop him."

The appellant has further sworn that the Magistrate then asked the prosecutor whether there was "anything known" to which the prosecutor said that there was nothing known against the appellant following which the Magistrate said, "Well, he is a student, I suppose he is going to ask for a non-conviction". It appears that following this, the appellant's counsel made a plea on behalf of the appellant as to sentence following which the Magistrate sentenced the appellant as previously referred to.

39. In her affidavit, Janine Gleeson has also sworn that in addition to the findings of the Magistrate as referred to he further said,

> "I am satisfied that his own evidence was that he intended to return to the flat that night after the police left, therefore he may continue to breach the peace."

40. From that which occurred immediately after the Magistrate had announced his findings, concluding that he found the charged proved, it is apparent that Counsel for the appellant objected that he had not been given an opportunity to make a submission in law. It would therefore appear from that fact alone that it was the intention of Counsel to make a submission to the Magistrate on a matter of law at the conclusion of the evidence although it would appear that at no time before the Magistrate announced his finding had Counsel informed the Magistrate of that matter. It does appear, however, from the affidavit of Janine Gleeson that during the course of the luncheon adjournment Counsel for the appellant advised her that he would be arguing that the appellant had a right to assault the police as his arrest was illegal, stating that he would be relying on the decision of *Nguyen v Elliott* (unreported, 6 February 1995, Hedigan J). She has deposed that she stated to Counsel that she believed that the case related to the police officers' duties and obligations to prevent a common law breach of the peace, informing him of the cases that she was going to rely on. One case referred to by Janine Gleeson was *Minto v Police* [1987] 1 NZLR 375. The facts of that case were that Minto was one of a group of protesters involved in an anti apartheid demonstration at a tennis tournament. One of the tools used by the protesters, including *Minto*, was a loud hailer. After its initial use a police officer warned *Minto* and others that action would be taken for a breach of the peace if they persisted. The loud hailer was used to amplify chanting and comments, the police officer considered that there was a real likelihood of a breach of the peace, he grabbed the loud hailer from Minto who grabbed it back from the police officer, and then Minto was arrested and charged with intentionally obstructing a police constable in the course of executing his duty. In the course of his judgment at p377 Cooke P referred to the judgment of Lord Diplock in *Albert v Lavin* [1982] AC 546 at p565; [1981] 3 All ER 878; [1981] 3 WLR where His Lordship stated –

> "[E]very citizen in whose presence a breach of the peace is being, or reasonably appears about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation."

41. In his judgment, Cooke P referred to a submission that had been made to the court in which

it had been stressed that the powers of police to take steps to prevent threatened breaches of the peace should be confined to situations where an immediate or imminent breach was apprehended. The President continued –

> "That is inherent or implicit in what Lord Diplock said. Obviously immediacy is in part a question of degree. It would be going too far to say as a matter of law that the powers of the police at common law can be exercised only when an instantaneous breach of the peace is apprehended, but the degree of immediacy is plainly highly relevant to the reasonableness or otherwise of the action taken by the police. What Lord Diplock spoke of was reasonable steps to prevent a breach being committed or about to be committed. So his proposition has its own in-built limitations.
>
> It is true that nothing was said in *Albert v Lavin* about impounding personal property, but it seems to me a matter of common sense that in certain circumstances reasonable steps to prevent a breach of the peace may extend to the temporary taking and detention of chattels such as the loud hailer in the present case. After all, the common law power extends to detaining a person against his or her will. It is evidence that, on some occasions at least, to detain the personal property of an individual against his or her will must be a less drastic step than detaining the individual and a less serious interference with the liberties of a citizen. I can see no reason for withholding as a matter of law power to take temporary control of a chattel."

42. From the evidence before the Magistrates' Court and without having any reference to the exchange that occurred during the luncheon adjournment between Counsel for the appellant and the prosecuting police officer it is apparent that on the facts of this case a question of law arose as to what were the duties and the extent of the duties of the attending police officers, particularly Constable Cole and the respondent relevant to the time that the appellant was first grabbed. There were clearly questions of fact to be determined by the Magistrate, including:

> • was the appellant grabbed as an act in order to restrain him and to prevent him from committing a breach of the peace;
>
> • did it reasonably appear by any acts of the appellant that he was about to or threatened to breach the peace;
>
> • was the appellant grabbed as an act to detain him so as to search him to see if he had keys to the flat on his person and to take those keys from him?

These questions, in my opinion, needed to be addressed particularly having regard to evidence of the respondent that she said to the appellant that he had done nothing wrong and that he was not under arrest and that although it was the intention to take keys from the appellant he was not under arrest. These questions of fact were relevant for by the Magistrate as the appellant was charged that he assaulted the respondent in the execution of her duty. It was the prosecution case that the keys were to be taken as a reasonable step to prevent a breach of the peace by the appellant. It was in those circumstances that it would appear that counsel intended to make a submission of law to the Magistrate. It is not suggested that he intended to seek to address the court on the evidence before the court, alone. In Clause 2(3) of Schedule 2 to the *Magistrates' Court Act* it is provided that on the hearing of a summary charge before the Magistrates' Court -

> "Leave of the Court is necessary before the Court may be addressed on evidence by or on behalf of the informant or defendant, whether the address is for the purpose of opening, or summing up, the evidence."

43. The authority on which Counsel for the appellant had intended to address the court was a decision of this court in *Nguyen v Elliott*. In that case Nguyen had been charged before the court on a number of charges including assaulting a police officer in the course of the execution of his duties. The charges were not related to a breach or apprehended breach of the peace as in this case. It had been found by the Magistrate that in respect of a police officer Nguyen took physical action against the officer in opposition to a threatened unlawful search of him for a drug of dependence.

44. In the course of his judgment Hedigan J stated –

> "The right of citizens to resist unlawful search and arrest is as old as their inclination to do so. The role of the courts in balancing the exercise of police powers conferred by the State and the rights of citizens to be free from unlawful search and seizure may be traced through centuries of cases."

45. His Honour referred to previous decisions of this court including to *McLiney v Minster* [1911] VicLawRp 67; [1911] VLR 347; 17 ALR 336; 33 ALT 33, in which case Madden CJ at VLR p350-351 said –

> "The whole question was — did Minster assault McLiney? ... If the question of the assault on McLiney had been deliberately and properly investigated it would have become important to ascertain whether or not the assault was justified, and that would depend on whether or not the constable had lawfully arrested and was lawfully holding Minster, because it is an important principle of law that no man has the right to deprive another of his liberty except according to law, and if he does so the person so unlawfully deprived has a perfect right to use reasonable efforts to beat him off and to get out of his custody."

46. It is not appropriate for me to discuss the principles enunciated by Hedigan J in *Nguyen* and the authorities referred to in his judgment with reference to the facts in this case. It is sufficient in my view to conclude, as I have, that there were issues of fact in this case to be determined by the Magistrate and depending on such findings of fact, principles of law stated in *Nguyen* and authorities referred to by Hedigan J in his judgment may well have been relevant to the ultimate issue to be decided by the court, namely, whether the appellant was guilty of the offence charged.

47. The question of law that then arises in the circumstances of this case is whether having regard to the events that occurred in the conduct of the trial was the appellant's trial not fair as his Counsel did not have the opportunity to address the court on a matter of law which may well have been relevant to the decision of the court as to whether it had been proved that the appellant was guilty of the offence charged.

48. In my view it is important to be reminded of and to repeat that which was said by Barry J in *Mooney v James* [1949] VLR 22 at p29 where his Honour said –

> "Courts of Petty Sessions are Courts of summary jurisdiction, but a summary hearing does not mean that the inferior Court is to dispense with the aids that superior courts find substantial protections against injustice. Courts of Petty Sessions occupy a place of great importance in the hierarchy of Courts; the matters committed to them are of vital significance to the community; they are the Courts best known to a large section and such knowledge as a great many members of the public have of the administration of the law is drawn from the experience of those Courts. It is necessary that the business should be done with dispatch, dispensing with needless details, but magistrates should bear in mind when seeking to do 'ideal justice, fair and fast' the next and concluding line of the late Sir Frank Gavan Duffy's poem, '*A Dream of Fair Judges*' (19 ALJ at pp43-4), 'But less fast were more fair'. In a great many of cases, addresses by counsel will be unnecessary, but where the case is complicated (and the enlarged jurisdiction of Courts of Petty Sessions means that difficult cases not within the jurisdiction of Petty Sessions when they were originally set up now come frequently for decision) the Bench should avail itself of the assistance that can be had from the Bar."

49. Those words of his Honour are equally applicable to Magistrates' Courts today as they were applicable to the Courts of Petty Sessions at the time they were written.

50. In *Simon Parsons and Co v Batt and Falls* (unreported, 13 August 1996, Batt J) the court had before it proceedings in which the plaintiff sought relief by way of judicial review under Order 56 of the *Rules of the Supreme Court*. The plaintiff sought to have set aside an order made by a Magistrates' Court on the grounds that the plaintiff had been denied procedural fairness during the course of proceedings before the lower court. In that case the Magistrate, when a solicitor sought to address him with respect to a question of costs, pre-emptorily stopped hearing the submission being made and then made an order as to costs in the case before him. Batt J in his judgment set aside the order and remitted the matter for re-hearing before the Magistrates' Court. In the course of his judgment his Honour said –

> "I am not unmindful of the need from time to time, and perhaps more so than in the past, for a judicial officer to stop unnecessary or repetitive cross-examination or argument, but, in my view, it was necessary for the Magistrate at least to allow the solicitor to indicate the argument, that is to state the cases by name or at the very least by topic or genus. Otherwise there is, in my view, a want of procedural fairness in that part of the case has not been heard."

51. His Honour further said –

> "It seems to me to decline to hear part of an argument is to deny a proper hearing. I make it clear that I am not talking about repetition of an argument already advanced or exemplification of a point already made or some minor branch or twiglet of an argument. Nor am I suggesting that if the cases had been identified individually or by genus it would not have been open to the Magistrate to say, if this was his view, that he did not want to hear them for some reason which he then advanced ... . I am, then, sensible to the difficulties facing all judicial officers, but I do think here that the solicitor should have been allowed to refer to the authorities at least until, if at all, the Magistrate formed the conclusion, when he actually knew what they were, that they were inapplicable for some stated reason or other."

52. It is to be appreciated that *Simon Parsons and Co* differs significantly from the case presently before me. In that case the solicitor had commenced to endeavour to address the court whereas in the circumstances of this case at no time before the Magistrate announced his decision including that he found the charge proved did Counsel indicate that he wished, on behalf of his client, to make submissions of law to the court. On behalf of the respondent it was submitted that as Counsel for the plaintiff had at no time before the Magistrate commenced to give his decision informed the court that he wished to make a submission as to law there was no denial of procedural fairness to the plaintiff in the circumstances of this case. It was further submitted, on behalf of the respondent, that if in circumstances where a Magistrate at trial does not actively prevent a submission of law, relevant to the trial, being made or actively decline to hear such a submission, it could be later contended in proceedings such as the present, that the party against whom the decision of the court went had been deprived of procedural fairness on his or her trial, as it was intended to make such a submission had the opportunity been given before the decision was announced, then proceedings such as these could be open to abuse. That is certainly not the case here.

I am satisfied that it always was part of the strategy of Counsel in the conduct of the appellant's defence to make a submission of law to the court relevant to the facts in this case. The opportunity to address a Magistrates' Court on the evidence in a trial is the subject of the Rules of Procedure to which I have previously referred. However, if a party appearing before a Magistrates' Court or his or her legal representative wishes to make a submission of law relevant to the case the court should entertain the same. For a Magistrate to decline to hear such a submission it would result in the party appearing before the court being deprived of procedural fairness in the conduct of the trial. As referred to by Batt J in *Simon Parsons and Co* it is well within the capacity of the Magistrate hearing such a submission to manage and control the same while ensuring that procedural fairness is given to the party making the submission. It is to be noted that in *Mooney v James* [1949] VicLawRp 6; [1949] VLR 22; [1948] 2 ALR 369, Barry J at VLR p31 held that on a submission of "no case" being made to a Magistrates' Court, which the defendant was entitled to have heard, Counsel was entitled to advance the submission by examination of the evidence. Such would be the case on other submissions of law made to the court.

53. If a party or his or her legal representative wishes to make a submission on the law relevant to the evidence at the conclusion of the evidence and before the Magistrate gives his or her decision, that fact should at an appropriate point in the trial be brought to the attention of the Magistrate in order that the submission may be heard before the court gives its decision. In this case, unlike the circumstances which occurred at trial in *Simon Parsons and Co* the Magistrate did not actively decline to hear a submission of law being addressed to the court or sought to be addressed to the court for at no time was he informed, before he commenced giving his decision that Counsel sought to make a submission of law. But in my view that does not end the matter in this case. It is extremely difficult on the hearing of an appeal such as this to obtain an appreciation of the timing of events that occurred in the course of the trial before a Magistrates' Court when the material before this court is affidavit material only. It should not be part of the duty or function of a Magistrate in the conduct of a trial before the court in each case to enquire, before announcing the decision of the court, whether a party appearing before the court or his or her legal representative wishes to address the court on a matter of law relevant to the evidence.

54. However, in this case being satisfied that it was always the intention of Counsel to address the court on a matter of law and having acquainted the prosecuting officer of that fact and informed her of the authority on which he intended to rely, I have reached the conclusion that whereas the Magistrate sought in the conduct of this trial to give, "ideal justice fair and fast" Counsel was not given the opportunity before the decision of the court was announced to inform the court that he

wished to address it on a question of law and to advance argument to the court on a question of law relevant to the evidence before the court. Events occurred too rapidly between the appellant being told to resume his seat and the Magistrate announcing his decision for Counsel to inform the court of that matter. As said by Deane J in *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 56; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and agreed with in its terms by Mason and McHugh JJ in *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 at 299; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176, an accused person has a right not to be tried unfairly and has "an immunity against conviction otherwise than after a fair trial" which "right is manifested in rules of law and of practice designed to regulate the course of the trial". Having reached the conclusion that in the circumstances of this case that at the close of evidence events took place too quickly to give to the appellant's Counsel the opportunity to inform the court that he wished to address it on a question of law relevant to the evidence before the court announced its decision and being satisfied that it was the intention of Counsel to make such submission, I have further concluded that in the circumstances of this case there was a failure to accord the appellant procedural fairness on his trial. Such failure strikes at the decision and order of the Court. The decision and order must be set aside.

55. I am comforted in reaching such conclusion by authorities drawn to my attention by Senior Counsel for the respondent after the hearing of this appeal had concluded, where in each case events occurred not dissimilar to the present. In *R v Middlesex Crown Court, ex parte Riddle* [1975] Crim LR 731, the Divisional Court (constituted by Lord Widgery CJ, O'Connor and Lawson JJ) had before it on application for an order of *certiorari* to quash a conviction on the ground of the judge's refusal to allow the applicant to address the Crown Court, which was hearing an appeal by the applicant from a conviction before Magistrates, before it announced its decision, was a breach of natural justice. Not unlike the events that occurred in the present case, at the close of the applicant's evidence before the Crown Court he was asked whether he wished to call more evidence. The applicant answered no and was about to make a speech when the judge announced that the applicant's appeals were dismissed. The applicant complained that he had been deprived of the opportunity of making a final speech. When asked what the speech would include and on informing the court, the judge dismissed the appeal without hearing the speech. The Divisional Court on allowing the application held that there had been a breach of the rules of natural justice.

56. In *Ex parte Kent, Re Callaghan and Anor* (1969) 90 WN (pt 1) (NSW) 40, Herron CJ with whom Sugerman and Mason JJA agreed, held, that in circumstances where after the close of evidence in a children's court, Counsel for the defendant and the prosecutor had addressed the court as to guilt or innocence but not as to penalty, at the conclusion of which the Magistrate said that he was satisfied that the case was established and then proceeded to sentence the applicant, that there had been no opportunity given to Counsel for the applicant to address on the question of penalty and that this amounted to a denial of natural justice. It was ordered that the rule nisi for prohibition be made absolute. See also *Ex parte Kelly; Re Teece* (1966) 85 WN (pt 1) (NSW) 151.

57. Having reached the conclusion that the order of the Magistrates' Court in this case should be set aside it is unnecessary for me to consider the other grounds of appeal.

58. In the result the appeal must be allowed and the order of the Magistrates' Court made on 2 July 1998, as identified in this proceeding by the order of the Master made 31 July 1998 must be set aside and the charge before the Magistrates' Court at Prahran the on 2 July 1998 against the appellant be re-heard. In circumstances where the Magistrate who initially heard the charge announced his decision it is appropriate that the re-hearing of the charge against the appellant be heard by a Magistrate other than the Magistrate who conducted the trial on 2 July 1998.

59. For these reasons it is ordered:

1. That the appeal be allowed.
2. That the order of the Magistrates' Court at Prahran made on 2 July 1998, as identified by order of the Master made 31 July 1998 be set aside and that the charge against the appellant as heard by the Magistrates' Court at Prahran on 2 July 1998 be re-heard by the Magistrates' Court by a Magistrate other than the Magistrate who heard the charge on that day.

APPEARANCES: For the appellant Bao Duc Chu: Mr SP Hardy, counsel. Stonnington & Zervas, solicitors. For the respondent Henham: Mr J McArdle QC, counsel. Solicitor for the DPP.