22/95

SUPREME COURT OF VICTORIA

HOI v LARKMAN

Byrne J

15, 29 August 1995

PROCEDURE – CRIMINAL PROCEEDINGS – PARTICULARS OF CHARGE – DUTY OF PROSECUTION – PARTICULARS PROVIDED TOGETHER WITH DISCLOSURES IN INTERLOCUTORY PROCEEDINGS AND COPY OF POLICE BRIEF – WHETHER SUFFICIENT PARTICULARS.

1. The prosecution must provide a defendant with reasonable particulars of the charge(s), i.e. what law has been broken and how it is alleged to have been broken.

2. Where particulars are sought, it is undesirable that the prosecution should be permitted to give particulars orally when it would be easy for them to be reduced to writing. In this way, it is possible to avoid any misunderstanding.

3. Where the prosecution erected its case upon inference which depended upon matters disclosed by it to the defence in interlocutory proceedings and the fact that the defendant had a copy of the prosecution brief, it was open to conclude that the particulars supplied were sufficient.

BYRNE J: **[1]** On 8 December 1992 the appellant, Cecil Philip Quai Hoi, was charged with the offence of theft. The charge is in the following terms:

> "The defendant at Reservoir between the 2nd of October, 1992 and the 15th of October, 1992, did steal documents including four passport photos, Australian Passport Application form, Vietnamese birth certificate, a certificate of Australian Citizenship, a document for travel in Australia, a letter from the Department of Immigration, Local Government and Ethnic Affairs and a letter from the City of Essendon all relating to Ngoc Tuyen Vu of the value of $30.00 being property belonging to Ngoc Tuyen Vu."

On 10 December 1992 Mr Hoi's solicitors sought further particulars of the charge. The response of the informant to this request was considered inadequate by the solicitors and there followed over the next two years a long history of requests and responses including on 25 October 1993, 29 June 1994 and 20 July 1994 lengthy hearings before the Magistrates' Court. The upshot of all this was that, in response to the specific requests of 10 December 1992, the solicitor for Mr Hoi had the following particulars in writing:

> (a) State the precise location at which the alleged offence is said to have taken place.
> Response: The offence occurred between Spring Street and Edwardes Street in Reservoir.
>
> (b) State the time at which the alleged offence is said to have taken place.
> Response: The offence occurred between the 2nd of October 1992 and the 15th of October 1993 [sic] (this was accepted as being an error for 1992).
>
> (c) State the manner of each of the defendant's alleged acts and/or omissions constituting the alleged offence.
> **[2]** Response: The defendant has dishonestly appropriated by finding the mentioned property and further failing to take reasonable steps to locate the owner thereof, therefore assuming the rights of the owner.
>
> (d) State the particulars of the material facts that will be relied on by the informant as constituting the alleged offences.
> Response: The informant amongst other things, relies upon circumstances, witness testimony and admissions by the defendant.

Before the Magistrates' Court on 20 July 1994 the Magistrate asked the prosecuting officer to state the facts the prosecution would rely upon to establish the appropriation. The appellant's

solicitor's account of the response was undisputed. The prosecuting officer said "that he relied on the complainant's assertion that he had lost the documents and that he had received telephone calls concerning the return of the documents in return for payment of some money. He said he relied on the admissions of [Mr Hoi] made in his record of interview. He said other things but I am unable to recall what he said as he spoke too fast for me to write them down". Ultimately, the particulars of the charge as understood by the defence were said by counsel for Mr Hoi at the hearing to be:

> "The charge as particularised in this matter is a theft where the defendant has dishonestly appropriated by finding the mentioned property and further, failing to take reasonable steps to locate the owner thereof, therefore assuming the rights of the owner."

Despite protest made on behalf of the appellant, the trial of the charge was heard before the Magistrates' Court on 18, 19, 31 October 1994. The first days were largely occupied **[3]** by a *voir dire* to determine the voluntariness of the admissions of Mr Hoi in his record of interview. The Magistrate ruled that they should not be given in evidence. Evidence was then given by the complainant who said that he left the documents for his passport application on the roof of his car on 2 October 1992 and then drove off, forgetting that they were there. He spoke of five telephone calls from a man in which the man requested payment for the return of the documents. In the last of these, on 14 October 1992 (214) he made an appointment to meet the man at the Caltex Service Station at 7.00 a.m. on the following day (216). The police arrested Mr Hoi at the appointed time and place, finding the missing documents in his possession. At the conclusion of the prosecution case, counsel for the appellant, having announced that he was calling no evidence, made submissions that the charge had not been proved. The Magistrate rejected this submission. He convicted Mr Hoi and fined him $750.

Mr Hoi appeals against the Magistrate's order pursuant to the *Magistrates' Court Act* 1989 s92. The following questions of law were settled by the Master on 8 May 1995:

> "(a) Should the Magistrate have held that in the circumstances of the case, and in the absence of any amendment, the particulars operated so as to bind the prosecution to the case contained?
>
> (b) Was the Plaintiff prejudiced in his defence by the Magistrate's failure to confine the case by the provision and appropriate use of particulars?
>
> (c) On the evidence, and in the absence of any application by the prosecution to amend **[4]** the information, was the Magistrate entitled -
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> (i) to consider a case against the Plaintiff that was outside the particulars provided;
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> (ii) to make findings about matters which were not properly part of the case put by the prosecution at the hearing; or
>
> (iii) to proceed on a basis which was not properly placed before the Court for determination?
>
> (d) On the evidence was it open to a reasonable Magistrate to conclude -
>
> (i) the Plaintiff was the original finder of the property;
>
> (ii) the Plaintiff was the maker of a series of telephone calls to the complainant.
>
> (e) Was the Magistrate wrong in using the form of questions put during cross examination by Counsel for the Plaintiff as a basis for concluding that the phone calls were made by the Plaintiff?"

The Particulars

The essential complaint contained in questions (a) (b) and (c) is that the Magistrate permitted the prosecution to lead evidence and that he made findings that were outside the charge as particularised. Much of the argument before me appeared to be directed to a very different question, that as to the sufficiency of the particulars which were provided. It was, for example, submitted that the charge does not state with sufficient certainty what the appellant is alleged to have done which is said to amount to stealing. In support, I was referred to such well known cases as *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at 489-91; [1938] ALR 104*; R v Magistrates' Court at* **[5]** *Heidelberg, ex parte Karasiewicz* [1976] VicRp 73; [1976] VR 680. It was submitted that the prosecutor did not specify whether the theft allegedly occurred on any particular date between 2 October and 15 October, nor whether it was alleged that the defendant was the finder or subsequently obtained possession from the finder, nor whether the intention to steal was said to arise at the time of finding or later and with respect to any or all of the documents. In short, counsel submitted, the prosecution did not identify the whole transaction which constitutes the stealing.

In deference to this argument I will state shortly my views with respect to this point. The prosecution must provide a defendant with particulars which are reasonable particulars: *Magistrates' Court Act* 1989 s32(2). For present purposes, particulars satisfy this requirement, and the requirements of natural justice, when they tell the defendant what law has been broken and how it is alleged that it has been broken: *R v Magistrates' Court, ex parte Karasiewicz* [1976] VicRp 73; [1976] VR 680 at 683. Whether this requirement has been satisfied in a given case will depend upon what the justice of the particular case requires, not omitting what is unarguably known or available already to the defendant: *Freeman v Brear* (unreported, SC (Vic), JD Phillips J, 5 November 1992) at p18. In the present case, the prosecution erected its case upon inference which depended upon the matters which had been disclosed by it to the defence in the course of the long interlocutory history of this matter. It appears, too, that the solicitor for Mr Hoi had copies of the prosecution statements and, indeed, the whole prosecution **[6]** brief. In mentioning this, I do not intend to confuse the very different functions of particulars and evidence. It is just that in a case such as this, where the facts were of fairly narrow compass, the provision of this material is able to overcome any deficiencies in the particulars provided.

I leave this topic with two general observations. I would not wish to be taken as endorsing the giving of particulars in the form of particular (d) in the present case. The Magistrate, in my view, was quite correct in ordering that further particulars be given. Second, it is in my view undesirable, in a case where particulars are sought, to permit them to be given orally when it would be easy for the prosecutor to have reduced them to writing. In this way, it is possible to avoid the difficulty of some misapprehension or misunderstanding of what particulars were given. It is clear from the transcript that this was not the cause of difficulty here.

I return now to paras. (a), (b) and (c) of the Master's Order. No submission was addressed to the questions here raised that the Magistrate fell into error in failing to confine the prosecution to the particulars as given. I have, nevertheless, examined the transcript and the Magistrate's reasons and find no failure as alleged. I conclude that there is no error of law as alleged in paras (a), (b) or (c).

Insufficiency of Evidence

The questions of law in paras (d) and (e) require a consideration of the question whether the Magistrate fell into error of law in concluding that the appellant was the original **[7]** finder of the documents and that he was the person who made the telephone calls. In order to make out these errors, the plaintiff must show that there was no evidence upon which a Magistrate could have made these findings: *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197 at 199; (1988) 7 MVR 193, per Young CJ, McGarvie J. The two findings are intertwined. The first telephone call occurred at about 7.00 p.m. on the day the documents were lost. The transcript of the evidence in chief of Mr Vu as to this telephone call is incomplete, but it is clear that the caller then had the documents. The Magistrate's finding, then, that he was the finder or was in possession of the documents within a very short time after their loss, is to my mind open. Mr Vu said that in the last telephone call the caller said he would see Mr Vu the next morning at the Caltex Service Station. It was Mr Hoi who appeared at the rendezvous. To my mind it was open to the Magistrate to find that Mr Hoi made the last and, therefore, all of the telephone calls.

Counsel for Mr Hoi submitted that the Magistrate fell into error in inferring from the form of the questions of counsel in cross-examination that he had instructions from his client as to what was actually said in the course of the telephone calls, and that these instructions emanated from the client, and that, therefore, the client was the caller. I agree that such an inference is impermissible. It appears from the transcript that the Magistrate entertained this inference although it was not clear whether he was serious or merely teasing counsel, a course which was, of course, **[8]** inappropriate. Nevertheless, it is clear that he was persuaded not to act on such an inference and his failure to mention it in the course of his reasons lends further support to that conclusion. In any event, as I have mentioned, the inference that the appellant was the caller was open on legitimate inference. I conclude, therefore, that the plaintiff fails on points of law raised in paras (d) and (e) of the Master's order. The appeal will be dismissed with costs.

APPEARANCES: For the Appellant: Mr D Perkins with Mr R Clark, counsel. Solicitors for the Appellant: G Kuek & Associates. For the Respondent: Mr D Just, counsel. Solicitors for the Respondent: Mr P Wood, Solicitor for DPP.