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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

R v DOBSON; ex parte ANM

Fox J

19 June 1975 — (1975) 15 ACTR 33

NATURAL JUSTICE – EVIDENCE – QUESTION DISALLOWED BY MAGISTRATE – WHETHER DENIAL OF NATURAL JUSTICE.

During cross-examination of a witness, defendant's counsel asked 'And do you understand that difference to be that in the one it is an offer to pay for the goods and the other is a statement of intention to pay for the goods?' The magistrate upheld an objection by the prosecutor and counsel was told that the question would not be allowed. Counsel then said that he could not continue with the matter unless he was permitted to ask the question. He was again told that it had been disallowed. He then reiterated that it was a perfectly proper question and very soon thereafter he asked the magistrate for an adjournment so that he may seek prohibition in the Supreme Court.

HELD: Order nisi discharged. The matter to proceed before the magistrate.
1. The question which was disallowed related to the understanding of the defendant and might, in the circumstances, fairly be taken as a question concerning what at the time of the relevant events was the witness' belief as to the import of certain forms of words. Thus regarded, it seems that the question was permissible.

2. It is the duty of counsel, with courtesy but with firmness, to ask to be given an opportunity to state his position. In any ordinary situation it would be the duty of the court to listen to him, although, as one knows, it is the practice that reasons for admitting or disallowing questions need not be given. Quite often the conduct of the business of any Court would be greatly impeded if much time was occupied with argument about questions of admissibility. However, cases differ and the matter in the long run must be left to the good sense and good judgment of the Bench.

3. All that did in fact happen was that the magistrate disallowed a question. He did not say that he was limiting cross-examination or suggest that he would not allow the fullest testing of the evidence of the witness by cross-examination. It was simply a question of the admissibility of a particular question.

4. It has more than once been held that a wrongful allowance or disallowance of a question does not amount to a denial of natural justice. 'Natural justice' is a rather elusive rubric and it could not be said that in no circumstances could disallowance of a question amount to a denial of natural justice when taken in the situation of a particular case. On the other hand, it is plain that cross-examination can be so excluded or abridged or interfered with that there will be a denial of natural justice. In the present case there was no denial of natural justice.

5. The conduct of proceedings before magistrates would become quite impossible if the admission or disallowance of questions, even of important questions, were to be subject to be tested in this way and the degree of interference by the superior court would soon become intolerable.

FOX J: This is the return of an order nisi for a writ of prohibition. The application for the writ relates to proceedings which took place in the Court of Petty Sessions when the prosecutor here was the defendant on a charge of stealing. Evidence was given on behalf of the informant relating to the facts of the matter and one of the witnesses called was a Mrs Jones. At the material time she had been working at the store from which it was alleged goods had been stolen by the defendant and she had been working there in the capacity of a security officer. Having given her evidence-in-chief she was cross-examined by counsel on behalf of the defendant who is counsel appearing for him in this application.

The point came in the cross-examination when counsel was asking the witness precisely what it was that she said the defendant had said to her shortly after the goods had been taken. She said in cross-examination as she had said in chief, that the defendant had said, 'Can I pay for the goods?' or 'Can I pay for the goods now?'.

From the evidence she gave in cross-examination it appeared that she might not be relying upon her memory of the particular incident, but might on the other hand be attributing to the defendant in this case a form of words which she commonly heard in a similar situation.

Counsel for the defendant put to her whether the defendant had not used a different form of words, namely, 'I am going to pay for the goods.' The witness adhered to the form of words to which she had already deposed, and counsel then asked this question: 'I suppose you appreciate there is a difference then, do you, between saying, "I am going to pay for the goods" and, "Can I pay for the goods?'? The witness answered this question before it had been completed, but her answer was simply that there plainly was a difference.

Counsel then started to ask a question which appears on the transcript in this way: 'And would you agree that that difference would mean that he intended to pay for the goods as deposed to?. He was then interrupted by an objection by counsel for the informant, and the magistrate immediately said to the witness that she need not answer it. Counsel said that he pressed the question, and the magistrate said that he disallowed it. Counsel then persisted in trying to put the question and in his right to put it, and was eventually told that he was not to ask the same question.

Pausing there, it would, seem to me that there could be no quarrel with the ruling of the magistrate. It appears that the witness was being asked either an abstract question as to the meaning of words, or a question as to the actual intention of the defendant. The question was not completed, but I think it may be accepted that its effect would have been as I have stated.

Having been told by the magistrate that he was not to ask the same question, counsel then asked this question: 'Is it your understanding, Mrs Jones, that there is a difference between saying, "I'm going to pay for the goods" and offering to pay for the goods? This question she answered, 'Of course there is a difference,' Counsel then asked this question: 'And do you understand that difference to be that in the one it is an offer to pay for the goods and the other is a statement of intention to pay for the goods?' Counsel for the informant objected, and the magistrate disallowed the question. Counsel for the defendant then said that he submitted that he was entitled to have the question answered, whereupon he was told that the question would not be allowed. Counsel then said that he could not continue with the matter unless he was permitted to ask the question. He was again told that it had been disallowed. He then reiterated that it was a perfectly proper question and very soon thereafter he asked the magistrate for an adjournment so that he may seek prohibition in this court.

It is to be noted that the later question which was disallowed related to the understanding of the defendant and might, in the circumstances, fairly be taken as a question concerning what at the time of the relevant events was her belief as to the import of certain forms of words. Thus regarded, it seems to me that the question was permissible.

Counsel did not formally ask the magistrate whether he might argue the admissibility of the matter in question, nor did he indicate to the magistrate the importance which he placed upon the question. He now tells this court that it was in a sense a threshold question which, depending upon the answers he got, could have developed into a line of cross-examination which might have operated to the benefit of his client.

It seems to me that, apart from all other considerations, if counsel has some such object in view and the particular question is disallowed, he should endeavour to put before the magistrate, with some clarity, the grounds upon which he supports the allowance of the question.

I appreciate that in some situations what has been said to him from the bench may be strongly discouraging but I think, nevertheless, that it is the duty of counsel, with courtesy but with firmness, to ask to be given an opportunity to state his position. In any ordinary situation it would be the duty of the court to listen to him, although, as one knows, it is the practice that reasons for admitting or disallowing questions need not be given. Quite often the conduct of the business of any Court would be greatly impeded if much time was occupied with argument about questions of admissibility. However, cases differ and the matter in the long run must be left to the good sense and good judgment of the Bench.

What is sought here is a writ of prohibition and the ground stated in the rule nisi is as follows:

> 'The conduct of the hearing of the said information by the said respondent (that being the magistrate) has been such as to deny to the prosecutor proper opportunity of presenting his case and testing by cross-examination the case for the informant therein and the credit of a witness for the informant and of eliciting material in support of his own case and that there was a denial of natural justice to the said prosecutor.'

The first matter is that the facts really do not establish the ground relied upon. Whatever may be said as to the intentions of counsel at the time, and, of course, I entirely accept what counsel has said to me in this court about that matter, all that did in fact happen was that the magistrate disallowed a question. He did not say that he was limiting cross-examination or suggest that he would not allow the fullest testing of the evidence of the witness by cross-examination. It was simply a question of the admissibility of a particular question.

It has more than once been held that a wrongful allowance or disallowance of a question does not amount to a denial of natural justice. 'Natural justice' is a rather elusive rubric and I would not for myself like to say that in no circumstances could disallowance of a question amount to a denial of natural justice when taken in the situation of a particular case. On the other hand, it is plain that cross-examination can be so excluded or abridged or interfered with that there will be a denial of natural justice. In the present case, in my view, there was no denial of natural justice.

[His Honour then considered the question of whether or not further proceedings on the informations would be prohibited if the writ should issue and continued]: The conduct of proceedings before magistrates would become quite impossible if the admission or disallowance of questions, even of important questions, were to be subject to be tested in this way and the degree of interference by the superior court would soon become intolerable. Counsel has cited no precedent for any such course and I am not aware of any.

It is therefore my opinion that the rule nisi should be discharged. The effect will be that the matter can proceed before the magistrate. If he finds what I have said about the evidence of assistance to him he may act accordingly, but the conduct of those proceedings is a matter for him. Once he has made a finding and an order the prosecutor has available to him a number of alternative remedies with which his counsel is familiar and in these circumstances there seems to me no possibility of any miscarriage of justice.
