

38/07; [2007] VSC 337

SUPREME COURT OF VICTORIA

TOMASEVIC v TRAVAGLINI & ANOR

Bell J

20, 21 June, 3, 13 September 2007 — (2007) 17 VR 100

PRACTICE AND PROCEDURE – SELF-REPRESENTED LITIGANT – APPLICATION FOR LEAVE TO APPEAL OUT OF TIME – DELAY OF THREE YEARS IN BRINGING APPEAL – APPLICANT REQUIRED TO SHOW EXCEPTIONAL CIRCUMSTANCES – APPLICATION REJECTED ON GROUND THAT DELAY HAD BEEN TOO GREAT – HUMAN RIGHTS OF EQUALITY BEFORE THE LAW AND ACCESS TO JUSTICE – RELEVANCE TO EXERCISE OF JUDICIAL POWERS AND DISCRETIONS – DUTY OF COURTS TO ASSIST SELF-REPRESENTED LITIGANT – WHETHER JUDGE APPLIED INCORRECT TEST – WHETHER RULES OF NATURAL JUSTICE BREACHED: CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006.

1. A judicial officer has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, whilst at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the *International Covenant on Civil and Political Rights* are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.

2. Where a judicial officer conducted a short hearing in which the informant's counsel was called on to say very little, the judge did not explain to the self-represented applicant the procedures that would be followed or the legal requirements that he had to satisfy, nor assist him to present his case nor mention exceptional circumstances or prejudice to the informant's case and the judicial officer rejected the application on the basis that the delay had been too great, the judge failed to properly perform his duty to ensure a fair hearing of the application and was in breach of the rules of natural justice.

BELL J: *[After setting out the facts and relevant legal decisions, His Honour continued]* ...

The law as it currently stands

126. On the basis of this analysis, I think I can summarise the law as it currently stands.

127. Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the *International Covenant on Civil and Political Rights*. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

128. Most self-represented persons lack two qualities that competent lawyers possess – legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

129. The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

130. The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the

reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances – it must ensure a fair trial, not afford an advantage to the self-represented litigant.

131. It remains to apply these principles to the present case.

The Judge did not properly perform his duty to assist Mr Tomasevic as a self-represented litigant

132. In the circumstances more fully set out earlier in these reasons, Mr Tomasevic presented to the judge as a self-represented litigant. Being a teacher, Mr Tomasevic had some relevant skills. But his position was not to be compared to that of a lawyer, for he had little or no knowledge of the legal issues raised by his application or the procedures that would be followed, and he was emotionally involved in his own case. As he put it in the present application, it was “my life”. The informant was represented by experienced counsel instructed by a solicitor.

133. Mr Tomasevic’s application was for leave to proceed with an appeal against findings of guilt and sentence of a magistrate that was three years out of time. The judge had to apply cl1(3) of Schedule 6 of the *Magistrates’ Court Act* 1989, which required Mr Tomasevic to establish that, in the judge’s opinion, the delay in bringing the appeal was due to exceptional circumstances and that, to the judge’s satisfaction, the informant’s case would not be materially prejudiced. In support of his application, Mr Tomasevic filed an affidavit with a folder of material, much of which was not relevant.

134. In these circumstances, I think the judge had a duty to –

- recognise Mr Tomasevic as someone who, as a self-represented litigant, was gravely disadvantaged
- explain to him the procedures that would be followed in the hearing and determination of the application
- explain to him the legal requirements that he had to satisfy, namely that the delay was due to exceptional circumstances and the informant’s case was not materially prejudiced
- encourage him to make submissions on relevant issues, but explain to him what was relevant
- discourage him from making submissions on irrelevant issues, but explain to him what was irrelevant
- ask appropriate questions to confirm he was fully putting forward the matters he wished to rely on, and ask for elaboration of any areas apparently not fully covered
- before deciding the application, ask him if there was anything else that he wanted to add.

135. The judge did not assist Mr Tomasevic in these ways. His Honour conducted a short hearing. He did not tell Mr Tomasevic about the procedure that would be followed. He did not assist him to present his case. I think Mr Tomasevic was implicitly aware that the reason for the delay of three years was an important issue. But he did not know, and he was not told, that the real issues were exceptional circumstances and material prejudice to the informant’s case.

136. Not all of these measures of assistance were equally important. But failing to assist in all of these ways was collectively significant and, with respect, amounted to a failure on the part of the judge to ensure a fair trial. The informant’s legal representatives did not contribute to this failure, for the judge strongly dictated the course that the hearing followed. The failure constituted a breach of the rules of natural justice,^[152] which is a form of jurisdictional error. The breach was not a mere technical breach which made no difference to the outcome of the case, but represented a substantial departure from what was required.

137. This ground of judicial review will also be upheld.

Conclusion

138. A magistrate found Milan Tomasevic guilty of criminal charges and sentenced him to a conditional 12 months good behaviour bond. Mr Tomasevic’s counsel failed to attend the hearing, so he was represented by a solicitor who was not as familiar with his case. In Mr Tomasevic’s

view, important evidence was not properly used by that solicitor, and the magistrate would not admit it.

139. Mr Tomasevic appealed the magistrate's decision within the 30 day time period specified by the *Magistrates' Court Act*. He withdrew that appeal, he says because the same solicitor advised him his career as a teacher would not be affected, which proved to be incorrect.

140. Three years later, Mr Tomasevic applied to the County Court of Victoria for leave to proceed with an appeal out of time. The application was heard by a judge of that Court. Under the *Magistrates' Court Act*, the judge could only grant leave if Mr Tomasevic established that, in the judge's opinion, the delay in appealing was due to exceptional circumstances and that, to the judge's satisfaction, the delay would not materially prejudice the informant's case.

141. Mr Tomasevic is qualified as a teacher, not as a lawyer. He represented himself in the hearing before the judge. The informant was represented by an experienced barrister, instructed by a solicitor. Mr Tomasevic was gravely disadvantaged, for he lacked the necessary legal skill and ability, and objectivity, to present his case.

142. The judge conducted a short hearing in which Mr Tomasevic did his best. The informant's counsel was called on to say very little. The judge did not explain to Mr Tomasevic the procedures that would be followed or the legal requirements that he had to satisfy. Nor did the judge assist Mr Tomasevic to present his case. Without mentioning exceptional circumstances or prejudice to the informant's case, his Honour rejected the application on the basis that the delay had been too great.

143. A judge has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, whilst at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the *International Covenant on Civil and Political Rights* are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.

144. With respect, I think the judge applied the wrong test in coming to his decision. His Honour applied a long delay test, not a test based on exceptional circumstances and material prejudice to the informant's case. This amounted to a failure on the part of the judge properly to exercise his jurisdiction under the *Magistrates' Court Act*.

145. With respect, I also think the judge, in respects that were collectively significant, failed properly to perform his duty to ensure a fair hearing of Mr Tomasevic's application, given he was self-represented. That failure constituted a breach of the rules of natural justice, which also represented a failure on the part of the judge properly to exercise his jurisdiction.

146. For these reasons, Mr Tomasevic's application for judicial review in respect of the order of the judge dated 13 July 2006 refusing to grant his application to have the appeal heard out of time will be granted. That order will be quashed and Mr Tomasevic's application in that respect will be remitted to a judge of the County Court for reconsideration according to law.

^[152] Compare *Luck v Renton* [2005] VSCA 210, [65]-[66]; 24 VAR 1 where Maxwell P and Harper AJA held a judge of this Court had failed to afford procedural fairness to a self-represented litigant by dismissing her applications for an extension of time and for leave to appeal when she was too distressed to present arguments in support of them.

APPEARANCES: The plaintiff appeared on his own behalf. For the first defendant Travaglini: Mr T Lynch, counsel. Angela Cannon, solicitor for Public Prosecutions.
