73/76

SUPREME COURT OF VICTORIA

R v MAGISTRATES' COURT at HEIDELBERG; ex parte KARASIEWICZ

Menhennitt J

17, 18, 21 June 1976 — [1976] VicRp 73; [1976] VR 680

PRACTICE AND PROCEDURE – REQUEST FOR PARTICULARS OF ALLEGED OFFENCES – WHETHER PARTICULARS ADEQUATE – MAGISTRATE DECLINED TO ORDER FURTHER PARTICULARS ON GROUND THAT IT WOULD AMOUNT TO ORDERING DISCLOSURE OF THE POLICE BRIEF – WHETHER MAGISTRATE IN ERROR – WHETHER A DENIAL OF NATURAL JUSTICE.

The defendant was charged with nine informations relating to driving a motor car, assaulting police, resisting arrest, assault and assault by kicking. On the day prior to the hearing, counsel for the defendant sought an order from the Magistrate directing the informants to supply acertain particulars previously requested by a solicitor's letter. The Magistrate directed that the prosecution supply in relation to all charges particulars of the time, date and particular place of the offence saying that to direct any further particulars would amount to ordering disclosure of the police brief. Upon Order Nisi to review—

HELD: Order absolute for prohibition against the Magistrates' Court.

1. It is well established by authority that even although an information is adequate in law in so far as it may do no more than charge an offence which is described by the words of the statute, none the less a defendant is entitled to certain particulars of the offence. The particulars to which he is entitled does not dispense with the necessity of specifying the time, place and manner of the defendant's acts or omissions.

Dixon J in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, applied.

2. Accordingly, in an appropriate case it is permissible to order prohibition where particulars ought to have been supplied and a court ought to have ordered them to be supplied and has not done so. In the present informations there were certain particulars sought in the letter of 21 April 1976 which the Magistrate ought to have ordered to be supplied. The requirement as stated by Dixon J in *Johnson v Miller*, *supra*, that the particulars should specify the manner of the defendant's acts or omissions, and the alternative statement of the principle that the defendant should know the case being made against him, required the Magistrate to accede to the requests contained in the letter of 21 April 1976 that the informants should be required to specify by particulars the facts that would be relied upon as constituting the assaults. Assuming that the time involved was no more than two hours and ten minutes, and proceeding on the basis that the precise time and place of the assaults were supplied, nonetheless the defendant was entitled to have an order for particulars specifying the facts that would be relied upon as constituting the assaults.

3. Not only did the Magistrate not order supply of such particulars, but he decided this matter on an erroneous basis. He said that to direct any further particulars than he ordered would amount to ordering disclosure of the police brief. That is an entirely irrelevant test. The supply of any particulars to some extent involves disclosure of the police brief, and the test is not whether the supply of particulars would involve disclosing the police brief, but what a defendant is reasonably entitled to. The combination of the fact that the Magistrate failed to order particulars to be supplied which should have been supplied and the fact that he proceeded on an erroneous basis did in this case amount to a denial of natural justice, because the defendant did not know and would not know when the cases commenced the precise facts alleged to constitute the assaults and the precise false name relied upon and would thereby not know the precise case against him, would not be able to prepare adequately to meet it, and would not be able to know whether evidence sought to be adduced was or was not relevant and whether or not it could be or could not be properly objected to.

MENHENNITT J: I have before me two orders nisi granted by me on 4 June 1976. In one case the order nisi is directed to the Magistrates' Court at Heidelberg and Denis Roy McNamara, Michael Anthony Noonan and Stuart Nevill which last-mentioned persons I shall call "the informants". That order nisi calls upon the Court and the informants to show cause why a writ of prohibition should not issue directed to the Magistrates' Court of Heidelberg prohibiting that Court and the informants from proceeding further to hear and determine or otherwise deal with informations against one Michael Andrew Karasiewicz to whom I shall refer as "the defendant".

There had been before the Magistrates' Court at Heidelberg and adjourned to 17 June 1976 and now adjourned to 1 July 1976 nine informations in each of which one of the informants was the informant. The other order nisi is addressed to the informants and calls upon them to show cause why a writ of mandamus should not issue directed to the informants directing them to supply the particulars sought in a letter from the defendant's solicitors dated 21 April 1976 addressed to the Officer-in-Charge, Heidelberg Police Station which letter was exhibited to an affidavit in support by David Anthony Perkins who appeared as counsel for the defendant when the informations came before the Court.

Three of the nine informations charged the defendant with offences associated with driving a motor vehicle. Of the remaining six informations two charged the defendant with assaulting one or other of the informants as a member of the Victorian Police Force in the execution of his duty. One charged the defendant with unlawfully assaulting one of the informants, a member of the Police Force in the execution of his duty. One charged the defendant with assaulting one of the informants by kicking. Two charged the defendant with resisting an informant as a member of the Police Force in the execution of his duty.

The informations were listed for hearing on 27 April 1976. On the previous day 26 April 1976 Mr Perkins as counsel for the defendant sought an order from the Magistrate requiring or directing the informants to supply the particulars which had been requested in the letter of 21 April 1976 from the defendant's solicitors. That letter referred to seven of the nine informations. One of those informations related to driving in that it charged the defendant "being the driver of a motor car upon a highway to wit Southern Road and being requested by a member of the Police Force to produce his licence and state his name and address did state a false name". The letter otherwise related to the informations concerning the charges of assault and resisting arrest. In each case the letter requested particulars of the date, the time and the place of the alleged assault or the alleged resistance, and in the case of the charge concerning the false name, again the date, time and place of the alleged driving and request were sought.

After hearing submissions by counsel for the defendant and the prosecuting sergeant, who was not one of the informants, during the course of which counsel for the defendant said that the defendant had been in custody for about twenty hours in a police van and at the police station, the Magistrate directed that the prosecution supply in relation to all charges particulars of the time, date and particular place. He said it was not enough simply to allege that the offences occurred at Heidelberg. He said that to direct any further particulars would amount to ordering disclosure of the police brief.

The object of the proceedings before me is to achieve compliance with the request for other particulars, and so far as the Court is concerned the order that is sought is that the Court be prohibited from further hearing, determining or otherwise dealing with the informations unless all the particulars sought in the letter are provided, and as I have said, in the mandamus proceedings a direct order is sought against the informants directing them to supply all those particulars.

I have been informed from the Bar table by counsel for the informants that the defendant was intercepted and arrested at 9:50 p.m. on 14 February 1976. No objection has been taken to me being given that information, and the point that is made is that all the informations name 14 February 1976 as the date of the alleged offences and that accordingly the assaults and resisting arrest which are charged must have taken place within a period of two hours and ten minutes to have occurred on 14 February 1976.

It is convenient to deal first with the order nisi for prohibition, and the terms of that order nisi make it clear that all it seeks is to prohibit the Court and the informants from proceeding further to hear and determine or otherwise deal with the informations, and in reality that amounts to an order nisi for prohibition directed against the Court alone, because the informants play no part in hearing or determining or otherwise dealing with the informations.

It is well established by authority that even although an information is adequate in law in so far as it may do no more than charge an offence which is described by the words of the statute, none the less a defendant is entitled to certain particulars of the offence. The particulars to which he is entitled were stated by Dixon J in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR

467, at p486; [1938] ALR 104 – this is referring to compliance with a statutory provision that a complaint may be described in the words of the statute which shall be sufficient in these words:

> "But this relates only to the nature of the offence and does not dispense with the necessity of specifying the time, place and manner of the defendant's acts or omissions (*Smith v Moody* [1903] 1 KB 56 at pp61, 63; [1900-3] All ER Rep Ext 1274)."

In *Smith v Moody* [1903] 1 KB 56: [1900-3] All ER Rep Ext 1274 Channell J said at p63:

> "There must be facts relating to the particular matter, such as the time when and the manner in which the offence was committed, which would have to be inserted in the charge, and the omission of which cannot be cured by stating the offence in the words of the statute."

In *Johnson v Miller* Evatt J defined the right to particulars in this way at p497:

> "It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him."

What the defendant is entitled to has been stated by Gowans J in *Marchesi v Barnes and Keogh*, [1970] VicRp 56; [1970] VR 434, at p439 in these terms:

> "What is contended for is that there is a common law power in a court of petty sessions to order that a defendant be furnished with such particulars of an information as it is necessary for him to have in the interests of justice in order to apprehend the case being made against him. It has been recognised that there is such a common law power."

His Honour then cites a number of authorities in support of that proposition. That is the way in which the test is stated in *Halsbury's Laws of England* 4th ed. vol. 1 under the subject "Administrative Law" chapter C, headed "Right to Notice and Opportunity to be Heard" and which commences with para. 74 "Audi alteram partem" and proceeds in para. 75 headed "Prior notice" as follows:

> "Compliance with the rule requires that parties liable to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet.... The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."

Authorities are cited in *Halsbury* in support of those propositions and the propositions I have stated whether expressed in the terms used by Dixon and Evatt JJ in *Johnson v Miller*, *supra*, or in the terms used by Gowans J and *Halsbury* are supported by the following decisions, viz. *Ex parte Ryan; Re Johnson* (1944) 44 SR (NSW) 12, at p16; 61 WN (NSW) 17 per Jordan CJ; *Cochran v Price* [1943] St RQd 122; 37 QJPR 55 and a series of South Australian reports, viz. *Romeyko v Samuels* [1972] 2 SASR 529; (1972) 19 FLR 322; *Lafitte v Samuels* [1972] 3 SASR 1; *Giles v Samuels* [1972] 3 SASR 307 and *Dalton v Bartlett* [1972] 3 SASR 549. In the last-mentioned of those cases which was a decision of the Full Court of the Supreme Court of South Australia Bray CJ said at p551:

> "I do not desire to traverse the ground covered by the Full Court in *Romeyko v Samuels* and in *Lafitte v Samuels*, and by me in *Giles v Samuels*, but I may perhaps refer again to the words of Napier CJ in *O'Sullivan v De Young* [1949] SASR 159, at p164; [1949] ALR 722: 'The accused must be told what law he is alleged to have broken, and, with reasonable particularity, how he is alleged to have broken it.'"

The authorities establish that a decision by a magistrate refusing to order particulars is an order of a Magistrates' Court within the meaning of s88 of the *Magistrates' Courts Act* 1971 which can be reviewed upon an order to review. And in two cases orders nisi to review have been made absolute requiring in effect magistrates to order the supply of further particulars than they did order. One of those was the decision to which I have already referred of Gowans J in *Marchesi v Barnes and Keogh* [1970] VicRp 56; [1970] VR 434 and the other is the decision of Murphy J in *Whitehead v Koulouklidis* (19 June 1974, unreported) where his Honour reviewed the authorities,and his decision is a further decision applying the tests and the authorities to which I have referred.

However in the present case the procedure by way of order to review was not availed of, and I am told that was because the supporting affidavit by the defendant was sworn at too late a stage. In those circumstances, the remedy that is sought is prohibition against the Magistrates' Court at Heidelberg proceeding unless the particulars are ordered to be supplied.

It is submitted on behalf of the defendant, and as I understand it not disputed on behalf of the informants, that prohibition may lie if it is established that there has been or will be a denial of natural justice. The law is so stated in de Smith, *Judicial Review of Administrative Action* 3rd ed. at p209 in this sentence:

> "Depending on the circumstances of the case, a decision reached or proceedings conducted in breach of the *audi alteram partem* rule will be reviewable by means of *certiorari*, prohibition, mandamus, an injunction or a declaration."

And it had earlier been stated that among other things the rule *audi alteram partem* includes as stated at p172 "Prior Notice" and the passage is in these terms:—

> "Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position: —
>
> (a) to make representations on their own behalf; or
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> (b) to appear at a hearing or inquiry (if one is to be held); and
>
> (c) effectively to prepare their own case and to answer the case (if any) they have to meet."

In *Halsbury*, 4th ed. vol. 1 para. 77 under the heading "Effect of Breach of the Rule", the rule being right to notice and opportunity to be heard, it is stated:

> "An act or decision consequential upon contravention of the rule may be restrained by prohibition or an injunction, or set aside by certiorari or a statutory application to quash."

The authority referable to prohibition is *R v North; Ex parte Oakey* [1927] 1 KB 491 a decision of the Court of Appeal, and that is one of the authorities cited in support of the passage in de Smith with reference to prohibition, the other authority there cited being *R v Kent Police Authority; Ex parte Godden* [1971] 2 QB 662; [1971] 3 All ER 20.

However, for the informants it was submitted, contrary to what was submitted for the defendant, that the failure to order the supply of the particulars did not constitute a denial of natural justice.

In *B. Surinder Singh Kanda v Government of the Federation of Malaya* [1962] UKPC 2; [1962] AC 322; [1962] 2 WLR 1153, Lord Denning, giving the judgment of the Privy Council, said at p337:

> "In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua* and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard."

That statement appears to me to be authority in support of the view that in certain circumstances the non-observance of the rule *audi alteram partem* can constitute a denial of natural justice, and as I have said, the failure to order particulars to be supplied is an aspect of the rule *audi alteram partem*.

It has been submitted on behalf of the informants that there is authority to the effect that a failure to order the supply of particulars cannot amount to a denial of natural justice. One case

so relied upon is what was said by the Full Court of the Supreme Court of New South Wales in *Ex parte Graham; Re Dowling* [1969] 1 NSWR 231. It appears to me that in that case no member of the Full Court of New South Wales decided that the failure to order the supply of particulars can never amount to a denial of natural justice. Wallace P decided no more than that the applicant had not shown a denial of natural justice in that case. Jacobs JA at p236 said:

> "I express no conclusion upon the question whether an error by a magistrate in refusing to order particulars in a particular case can be the subject of a statutory prohibition or of a common law prohibition."

Asprey JA made it clear that his decision related to the facts of that case because he said at p244:

> "This error" (that is on the part of the magistrate) "is to be more properly described in the instant case, in my opinion, as an error of law rather than a denial of natural justice."

In my view it is implicit in the judgment of Gowans J in *Marchesi v Barnes*, *supra*, that in certain circumstances the failure to order the supply of particulars could amount to a denial of natural justice but that it did not do so on the facts of that case. His Honour said, [1970] VR at pp440-1:

> "It was made clear, however, to the magistrate that any order he made for particulars would be complied with by the informant. The magistrate adjourned the proceedings to enable his ruling to be tested. There is no question of proceeding in the absence of the particulars if such should properly be finished. There can, therefore, be no question of a denial of natural justice, justifying the issue of a writ of prohibition: cf. *Ex parte Graham; Re Dowling*."

His Honour placed significance on the fact that the Magistrate had deliberately adjourned the proceedings to enable his ruling to be tested. There is no evidence before me that the Magistrate did that in the present case. The adjournment was made necessary by other matters. It is also in my view significant that Gowans J made that statement after he had already decided to make absolute an order nisi to review the Magistrate's decision and that significant fact distinguishes that case from the present case. And I repeat that in my view what his Honour said impliedly recognised that in certain circumstances prohibition could lie for a denial of natural justice through the failure to order the supply of particulars.

Counsel for the informants also relied upon the decision of Slattery J in *Macklin v Miller* [1973] 2 NSWLR 262. At p264 his Honour said:

> "The proceedings before the magistrate in which the plaintiff is a defendant are now part heard. It has not been suggested that the learned magistrate committed an error as to jurisdiction in these proceedings. The magistrate has merely refused to order the informant to furnish particulars as requested by the present plaintiff. As in my view the plaintiff could not, prior to 1st July 1972, have obtained one of the prerogative writs on the events which occurred in the preliminary proceedings before the magistrate, the provisions of s69 of the said Act do not provide any relief now by way of judgment or order."

His Honour did not advert expressly to the issue as to a denial of natural justice and for that reason the decision is distinguishable. But if his Honour was intending to go as far as saying that in no circumstances would prohibition lie on the grounds of the denial of natural justice where there had been a failure to order particulars with respect to his Honour I feel unable to follow the decision.

Accordingly I proceed on the basis that in an appropriate case it is permissible to order prohibition where particulars ought to have been supplied and a court ought to have ordered them to be supplied and has not done so. In the present informations there are certain particulars sought in the letter of 21 April 1976 which in my view the Magistrate ought to have ordered to be supplied and if the matter had come before me on order nisi to review under the *Magistrates' Court Act* in my view I should have made the order absolute in certain respects. The requirement as stated by Dixon J in *Johnson v Miller*, *supra*, that the particulars should specify the manner of the defendant's acts or omissions, and the alternative statement of the principle that the defendant should know the case being made against him, in my view required the Magistrate to accede to the requests contained in the letter of 21 April 1976 that the informants should be required to

specify by particulars the facts that would be relied upon as constituting the assaults. Assuming that the time involved was no more than two hours and ten minutes, and proceeding on the basis that the precise time and place of the assaults were supplied, it seems to me that nonetheless the defendant was entitled to have an order for particulars specifying the facts that would be relied upon as constituting the assaults.

It is not without significance that in one of the cases such particulars were supplied in the information, namely the information that the defendant assaulted one of the informants by kicking, and it seems to me that the principles which have been laid down in the authorities to which I have referred require that in the cases of the other assaults similar particulars should be supplied of the facts which would be relied upon as constituting the assault, such as by kicking, or hitting, or, maybe, by threatening conduct constituting an assault without a battery. Those particulars should have been ordered to be supplied, in my view, in the two cases which charged assault of a member of the Victorian Police Force in the execution of his duty and in the case that charged unlawful assault of a member of the Police Force in the execution of his duty.

Although the request was too wide, in relation to the information stating the false name I think that the informant should have been ordered to state particulars of the false name given, which is narrower than what the particulars asked, namely the answers given.

Not only did the Magistrate not order supply of such particulars, but in my view he decided this matter on an erroneous basis. He said that to direct any further particulars than he ordered would amount to ordering disclosure of the police brief. That, in my view, is an entirely irrelevant test. The supply of any particulars to some extent involves disclosure of the police brief, and the test, in my view, is not whether the supply of particulars would involve disclosing the police brief, but what a defendant is reasonably entitled to. The combination of the fact that the Magistrate failed to order particulars to be supplied which should have been supplied and the fact that he proceeded on an erroneous basis in my view does in this case amount to a denial of natural justice, because the defendant does not know and will not know when the cases commence the precise facts alleged to constitute the assaults and the precise false name relied upon and will thereby not know the precise case against him, will not be able to prepare adequately to meet it, and will not be able to know whether evidence sought to be adduced is or is not relevant and whether or not it can be or cannot be properly objected to.

For those reasons I propose to make the order nisi for prohibition absolute in the same conditional way as was done by Joske J in *R v Hermes; Ex parte Ball* [1967] ALR 158; (1966) 10 FLR 375. I mention in passing that although his Honour there granted prohibition, no submission was made that prohibition would not lie, but his Honour expressly refrained from deciding the point and proceeded on the assumption that prohibition did lie.

As to the other particulars sought, in my opinion the defendant was not entitled to them and the Magistrate was under no obligation to order them. In six of the cases particulars were sought of the duty it would be alleged the informant was performing and the facts relied upon as constituting an execution by the informant of his duty. Apart from the obligation of the Crown to establish relevant knowledge, as to which particulars are not sought, it appears to me that it is obvious from the informations that what is being charged is that the offences charged were offences committed against members of the Police Force in the execution of their duty. That clearly in my view involves an allegation that the informant was a member of the Police Force and that the alleged offence occurred whilst he was executing his duty. As his duty is a combination of common law and statutory provisions it is in my view unnecessary if not impossible to specify the duty which it was alleged he was performing or the facts relied upon as constituting an execution of his duty. In substance if he established that he was a member of the Police Force and on duty and the assault or resisting of arrest took place, that would be sufficient for that portion of the offence.

As to the particulars which were sought of the facts constituting resisting in my view it was not obligatory on the Magistrate to order those. An assault consists of a specific act or acts whereas resistance consists rather of a much less specific thing and may be a conclusion drawn from both action and inaction. In my view so long as the date and time and place of the alleged resistance are specified the defendant will know sufficient to enable him to know the manner of

the performance of the conduct relied upon and the case being made against him.

In the result I propose to make the order absolute in respect of the three informations alleging assault and the request that there be supplied particulars of the facts which will be relied upon as constituting the assault. By that I intend to exclude the information alleging assault by kicking because in my view the necessary particulars have there been supplied. I shall also make the order absolute in respect of the non-supply of the false name.

As I have decided that the only particulars as to which the defendant is entitled to an order for particulars relate to those three charges of assault without specifying the manner and the false name, it follows that whether or not the defendant would have been entitled to an order for mandamus against the police, as to which I decide nothing one way or the other, because that remedy is a discretionary remedy and the defendant has achieved all he is entitled to by the alternative relief sought I will discharge the order nisi for mandamus.

I accordingly make the following orders: I make absolute the order nisi for prohibition against the Magistrates' Court at Heidelberg and I prohibit the Magistrates' Court at Heidelberg from proceeding further to hear and determine or otherwise deal with the following informations, viz. the information of Denis Roy McNamara that the defendant did "on the 14th day of February 1976 at Heidelberg" in the State of Victoria "unlawfully assault one Denis Roy McNamara a member of the Police Force in the execution of his duty"; and the information that the defendant did "on the 14th day of February 1976 at West Heidelberg" in the State of Victoria "assault one Michael Anthony Noonan a member of the Victorian Police Force in the execution of his duty"; and the information that the defendant did "on the 14th day of February 1976 at West Heidelberg" in the State of Victoria "assault one Stuart Nevill a member of the Victorian Police Force in the execution of his duty" unless the informants in those cases provide to the defendant a reasonable time before the hearing particulars of the facts that will in each case be relied upon as constituting the assault.

I further prohibit the said Magistrates' Court at Heidelberg from proceeding to further hear and determine or otherwise deal with the information that the defendant "on the 14th day of February 1976 at West Heidelberg" in the State of Victoria "being the driver of a motor car upon a highway to wit Southern Road and being requested by a member of the Police Force to produce his licence and state his name and address did state a false name", unless the informant therein, Stuart Nevill, a reasonable time before the hearing provides particulars of the false name stated by the defendant.

The order nisi for mandamus will be discharged. *[His Honour then heard argument as to costs and continued]:* I have refrained from making any decision on the order nisi for mandamus because the defendant has obtained the relief in another way. In the circumstances, as the defendant has succeeded on significant aspects, I think that he is entitled to an order for certain costs. However, the success he has obtained is limited and in terms of proportion he has obtained less than half of the particulars he sought, and appreciably so. Nonetheless he did succeed, and in all the circumstances in my view a just order would be that the informants who resisted the making absolute of the orders should pay 50 per cent of the defendant's costs. It is ordered that the informants pay to the defendant 50 per cent of the costs of both proceedings.
I certify for counsel. Orders accordingly.

Solicitors for the defendant: Katz, Rosen and Silverlight.
Solicitor for the informants: John Downey, Crown Solicitor.
