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SUPREME COURT OF VICTORIA

YOUNG v VERSCHUUR

Fullagar J

6 September 1988

CRIMINAL LAW – APPLICATION FOR ADJOURNMENT OF TRIAL – DOCUMENTARY MATERIAL TAKEN FROM DEFENDANT BEFORE TRIAL – APPLICATION REFUSED – WHETHER DEFENDANT HAD OPPORTUNITY TO PREPARE AND PRESENT CASE - WHETHER PROPER EXERCISE OF DISCRETION.

Approximately six weeks after a charge against Y. had been listed in the Mention Court (but 16 days before the date of the trial) certain documents, which Y. claimed were relevant to the preparation of his case, were taken from his possession. When the charge came on for hearing Y. sought an adjournment pending the return of the documents. The Magistrate granted an adjournment of one hour and then proceeded to determine the charge in Y.'s presence. Upon order nisi to review the refusal to grant the adjournment for more than one hour—

HELD: Order nisi discharged.
1. Natural justice requires that a person shall have a reasonable opportunity to obtain names of relevant witnesses, to prepare his case generally and to present it fully.
***McColl v Lehmann* [1987] VicRp 46; (1987) VR 503; (1986) 24 A Crim R 234, distinguished.**
***R v Jones* [1971] VicRp 7; (1971) VR 72, applied.**

2. In view of the time which had elapsed, it was open to the Magistrate to conclude in the circumstances that Y. had had a reasonable opportunity to prepare and present his case.

FULLAGAR J: **[1]** This is the return of an order to review a decision of a Magistrate in the Magistrates' Court at Broadmeadows, made on 29 October 1987. On that day the applicant appeared in person in that Court to defend an information charging an offence on 19 April 1986 against s9(1)(d) of the *Summary Offences Act*. The matter had previously been mentioned on 31 August 1987 in the presence of the applicant or his lawyers and there had been an adjournment to a date to be fixed. On that day, the applicant was served with a notice that the trial would proceed on 29 November 1987. Later he was served with a notice that the trial would proceed earlier, that is to say, on 29 October 1987. It does not appear on what date this notice was served. However, **[2]** there was no contention here or below that the period of notice to the applicant, Mr Young, was too late for the hearing date of 29 October.

When the case was called on on 29 October 1987 the applicant appeared, as I say, in person and he at once sought an adjournment. He stated to the Magistrate that his grounds were that, in a police raid on the Union office of his Union, known as the B.L.F., on 13 October 1987, all the documents in that office were "stolen" and he added that "all my brief and all my papers concerning my case" were in the possession of Dr Ian Sharp, who was – and as I understand it still is – the Government-appointed Curator of all the property of the B.L.F. He added in substance that he could not defend himself because the police and Dr Sharp had his documentation, although an unsuccessful attempt had been made to have it returned.

The Magistrate in substance asked, 'what was in the so-called brief?' The applicant says that he replied in substance, "I've spoken to a solicitor and had advice regarding questions to ask and points of law, and there were names and addresses of witnesses and general matters concerning my case that were in the documents stolen." The applicant deposes that the Magistrate said that the applicant should be able to remember what took place and the names and addresses of witnesses. At all events, I accept that the Magistrate must have said in substance that he would adjourn the case for an hour and that the applicant should be able to remember **[3]** the incident and who were the witnesses, and that the time from 13 October to 29 October was enough time for the applicant to prepare a brief to defend the case.

The applicant then refused to plead to the case and said that he would take no part as

there had been a denial of natural justice. He attended the hearing, which began an hour or so later, but he took no part despite being repeatedly invited by the Magistrate to do so. At the end of the hearing, he was convicted and fined.

I accept the evidence of the applicant as to the evidence which was given at the hearing except insofar as it is inconsistent with or enlarged by the evidence of the respondent thereon, which I accept. I observe however, that there is little material difference between the two versions for the present purposes. It is simply that the respondent's evidence is, not unnaturally, slightly more complete. I reject as inadmissible the evidence of the applicant as to what he did not think to say to the Magistrate and I also reject as inadmissible the hearsay evidence of the respondent and in particular, the respondent's evidence of what he has ascertained as to what documents Dr Sharp has or does not have. I observe that it was with the benefit of legal advice that the applicant, through his legal advisers, sought the order to review in the Supreme Court, based on the refusal to grant an adjournment of more than one hour.

This Court is, I think, entitled to take judicial notice of the widely-publicised fact that the office of **[4]** the Union was raided by police on 13 October 1987 and that a large number of documents were taken away and retained by them or by the Curator. It is a fact that has been repeatedly deposed to in this Court. It is, I think, to be inferred that the Magistrate knew of these basal facts as at 29 October 1987.

> The grounds of the order nisi are as follows -
> (a) that the learned Magistrate misdirected himself and thereby failed to exercise his discretion properly or at all in refusing to grant the adjournment of the proceeding sought by the applicant;
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> (b) the learned Magistrate erred in law in finding -
> (i) that the defendant should be able to remember the circumstances of the incidents to which the information related and the names and addresses of witnesses to the incident;
> (ii) that the defendant should have been able to proceed without the documents to which he had referred.

In respect of ground (a), which refers to "the adjournment of the proceeding sought by the applicant", it should be observed that the applicant did not ask for an adjournment of any stated duration. Before me the applicant argued his case, if I may say so, with assurance and clarity. He relied upon the decision particularly of Kaye J in this Court, in the case of *McColl v Lehmann* [1987] VicRp 46; (1987) VR 503; (1986) 24 A Crim R 234, and also upon the following statement, attributed to the same learned judge by the *Age* newspaper of 1 July 1988, as having **[5]** been made in a case in this Court on the day before -

> "Before a person charged with an offence can properly be convicted, he must be afforded an opportunity to call in his defence such witnesses as he or his counsel deem appropriate."

The applicant contended that he had been denied such an opportunity by the failure to grant a larger adjournment. He did not say how long he needed but it was, I think, implicit in his submission that he needed as long as it might take to obtain the return of the allegedly confiscated documents from the Curator.

The decided cases show that a trial court of law has a very wide discretion to grant or refuse an adjournment and that an appellate court will only rarely interfere with the exercise where it is clear to the appellate court that there has been a denial of natural justice, and it is asserted by the applicant that that is the case here.

In the present case, there was no reason to think at the hearing before the Magistrate that any material documents or, indeed, any documents held by the Curator would be released at any early date and, as I think, some considerable reason to think that they would be held by the Curator for a more or less lengthy period of time to allow all documents seized to be indexed and sifted and filed and later to be the subject of a report to the Cabinet or a Minister. Indeed, the applicant before me has frankly said that he still has been unable to obtain the document or documents which **[6]** he maintains were confiscated nearly a year ago in the raid, and he has not held out to me any prospect of seeing them again.

Upon the application for adjournment, as I have indicated, the applicant did not state or suggest any suitable period or, indeed, any period of adjournment of the case, so that it was open to the Magistrate not unreasonably to conclude that he was faced with an application for a completely indefinite period of adjournment until such time, if ever, as the alleged "documentation" was delivered by the Curator to the Union and thence to the applicant.

It is said by the applicant that the documents contained the names and addresses of witnesses. The applicant had obviously had a considerable time to work upon his defence. It is to be noted that there had been several adjournments, that is to say, there had been two earlier occasions when a trial had been imminent. I am not overlooking the applicant's statement to me that the Union's affairs and his own affairs as an official of it had been greatly disorganised by the sudden and unexpected confiscation of the documents and other property. The Magistrate apparently considered that, as there had been 16 days between the discovery of the apparent confiscation of the documents and the date of trial on 29 October, the applicant had had sufficient opportunity to prepare his defence-in-person of the prosecution.

The applicant placed principal reliance on the decision in *McColl v Lehmann*. The circumstances of that case, however, were clearly distinguishable from **[7]** those before the Magistrate in the present case. In *McColl v Lehmann*, the illness of the applicant had resulted in the fact that his counsel, who was appearing for him, had had no opportunity of a conference with him until the morning of the trial and that in the precincts of the court.

Secondly, information from the employers was being sought under the *Freedom of Information Act* and it was considered that this would be available to counsel within 45 days. Moreover, there was reason to know what the main defence would be. It was not kept a secret. There was reason to know that the defence – or a defence – would be that the defendant acted under a fair and reasonable supposition that he had a right to remain on the site, and there was reason to think that the 45-day information, to use the words of Kaye J, "might have gone to the heart of his defence". As a consequence, "there was a real risk that justice was denied to the applicant".

In the present case, it was open to the Magistrate not unreasonably to consider that here was a case where neither 45 days, nor any finite period, was likely to see the recovery of the allegedly seized documents. It was at least open to the Magistrate not unreasonably to consider that the nature of the case was such – that is to say, that the elements of the offence were such – that 16 days was a period calculated to enable a defendant-in-person to prepare his case, to decide what questions to ask and either remember who the witnesses were or at least complete all available and appropriate enquiries to find out.

[8] It is, I think, important to observe that natural justice requires only that a person shall have a reasonable opportunity to obtain the names of relevant witnesses and to prepare his case generally and it was, in my opinion, open to the Magistrate upon all the admissible evidence in the present case to conclude that the applicant had had that opportunity. That is, indeed, what the Magistrate did conclude.

> The applicant cited to me the *dictum* of Kaye J in *McColl v Lehmann* at p506 that -
> "It is essential to the fair trial of an action ... that all parties are able to present their case as fully as necessary and within the limits of the law".

Doubtless, the applicant was inferring that, in order to present his case as fully as necessary, he needed the missing documents. What the law says and what, with respect, I have no doubt that His Honour intended by these words to convey, is that each party shall have the opportunity to present his case fully; if he is given that opportunity, the rest is up to him. Indeed, the second proposition put to me by the applicant in his argument was the quotation from *R v Jones* [1971] VicRp 7; (1971) VR 72, at p76 that -

> "It is a basal consideration of justice that an accused person must be given a reasonable opportunity to prepare and to present his defence."

In *Sullivan v Department of Transport* (1978) 20 ALR 323; (1978) 1 ALD 383, Deane J, in the Full Court of the Federal Court, said -

> "It is important to remember that the relevant duty of the tribunal is to ensure that a party is given a reasonable opportunity to prepare his **[9]** case. Neither the Act nor the common law imposes upon the tribunal the duty of ensuring that a party takes the best advantage of the opportunity to which he is entitled."

See also *Ostreicher v The Environment Secretary* [1978] 3 All ER 82; (1978) 1 WLR 810 at p815. The applicant in his helpful argument before me tended at times to depart from the facts that had been placed before the Magistrate as reasons for granting the indefinite adjournment. This was not unnatural but it must be remembered that the Magistrate had to exercise his discretion on the facts which were before him.

For the reasons which I have endeavoured to make clear, I think that the proper conclusion in the present case is that it was fairly open to the Magistrate, on the facts before him, to conclude that the applicant had had a reasonable opportunity to prepare his case and, in particular, a reasonable opportunity to prepare it since the date of the seizure of the documents. Despite the applicant's careful argument, he has failed to satisfy me that the Magistrate failed to consider anything that he should have considered, or that the applicant was deprived of a fair opportunity to prepare and present his case, or that the applicant has otherwise suffered any denial of natural justice. In all the circumstances, the submissions of the applicant come close to the propositions that –

(1) the case for the defendant cannot be presented properly without the documentary material;

(2) the documentary material cannot be found or is not available; **[10]**

(3) Therefore the information can never be tried, for to try it at all would be a denial of natural justice.

I do not consider that the Magistrate made any error of law in concluding that the defendant had had a fair opportunity, in all the unfortunate circumstances of the unavailability of the documents, to recall or else to make all necessary enquiry into the circumstances of the relevant incidents in which he had been, along with Mr Christopher, a central figure at a stipulated time and place. Further, I consider it is not shown that the Magistrate made any error of law in concluding that the loss of the documents had not deprived the applicant of a reasonable opportunity of presenting his case. That it placed the applicant in a less advantageous position than he would have been if the documents had been available, may very likely be true. That, however, is not the question for decision. For these reasons, the order nisi should be discharged. The orders of the Court are that the order nisi is discharged and that the applicant pay the respondent's costs, including any reserved costs.

APPEARANCES: The applicant Young appeared on his own behalf. For the respondent Verschuur: Mr T Ginnane, counsel. Victorian Government Solicitor.
