05/04; [2004] VSC 95

SUPREME COURT OF VICTORIA

RUMBIAK v HOUGH

Balmford J

27 February, 30 March 2004

PROCEDURE – DIVERSION PROGRAM – BOTH PARTIES CONSENTED TO ACCUSED PARTICIPATING IN A DIVERSION PROGRAM – PROSECUTION CONSENT LATER WITHDRAWN – MATTERS ADJOURNED BY MAGISTRATE FOR THREE WEEKS "FOR DIVERSION" – NO REFERENCE TO DIVERSION IN COURT REGISTER – NO FORMAL ACKNOWLEDGEMENT OF RESPONSIBILITY FOR THE OFFENCES BY ACCUSED – NO CONSIDERATION BY MAGISTRATE THAT ACCUSED SHOULD PARTICIPATE IN A DIVERSION PROGRAM – FINDING BY MAGISTRATE THAT HE HAD NOT REFERRED THE MATTER FOR DIVERSION – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S128A.

1. Where a matter is adjourned for the accused to undertake a diversion program, the acknowledgement to the court of an accused's responsibility for an offence is a formal step of a serious nature, analogous to a plea of guilty, which should be carried out formally by the accused in open court. The agreement of the parties cannot determine whether a matter should be referred to diversion. The making of such an order is at the discretion of the magistrate who is required to consider the several prerequisites for the making of the order as set out in s128A(2) of the *Magistrates' Court Act* 1989.

2. Where a magistrate granted an adjournment of charges for three weeks "for diversion" without any formal admissions being made and the prerequisites for the order not considered by the magistrate, it was open to the magistrate to find subsequently that the matter had not been adjourned for the accused to undertake the diversion program.

BALMFORD J:

Introduction

1. This proceeding was commenced by originating motion on 21 July 2003. By letter to the Prothonotary dated 26 August 2003 Ms Popovic, Deputy Chief Magistrate, asked that a formal appearance be entered on behalf of the second defendant ("the Magistrates' Court") and indicated that Mr Stone, the Magistrate who made the orders sought to be reviewed, was content to abide by the decision of this Court.

2. In the amended originating motion filed on 27 February 2004 the plaintiff seeks the following orders:

> 1. Relief in the nature of *certiorari* to correct the order recorded in the register of the second defendant for 7 May 2003 to record an order that the proceeding be adjourned to 28 May 2003 to enable the plaintiff to participate in and complete a diversion program under section 128A of the *Magistrates' Court Act* 1989 ("the Act"); and
>
> 2. Relief in the nature of *certiorari* to quash the rulings made by the second defendant on 8 July that:- (a) the jurisdiction of the Magistrates' Court to order diversion had never been lawfully invoked; and (b) no order for diversion had been made in the proceeding; and
>
> 3. Alternatively to the orders sought in paragraphs 1 and 2(b) relief in the nature of mandamus directing the Magistrates' Court to proceed to consider whether an order under section 128A(2) of the Act should be made, on the basis that the jurisdiction of the Court to make such an order has been invoked and the parties have given consent to diversion; and
>
> 4. Such further or other order as the Court deems fit.

3. The evidence before the Court was contained in the affidavit sworn on 25 August 2003 of Mr Lurie, and the exhibits thereto. However, I accept the submission of Mr Dennis, for the first defendant, that exhibit JL5, being a bundle of advice notices relating to adjournments, is not admissible to prove the content of the order of the Magistrates' Court made on 7 May 2003,

having not been certified as provided for in rule 25.04 of the *Magistrates' Court (Civil Procedure) Rules* 1999.

4. Mr Lurie deposes that between 6 May 2003 and 8 July 2003 he had the care and conduct of the plaintiff's defence of charges brought against him in the Magistrates' Court, subject to the supervision of the legal practitioners permanently employed by the North Melbourne Legal Service.

5. In summary, the plaintiff was charged with wilful and obscene exposure under section 7(1)(c) of the *Vagrancy Act* 1966 and behaving in an offensive manner under section 17(1)(d) of the *Summary Offences Act* 1966. The first defendant was the informant in respect of those charges. The matter came on for a contest mention on 7 May 2003 before Mr Stone, Magistrate. The plaintiff sought referral to diversion, and the police prosecutor indicated that she consented to that course. The transcript of the proceeding on that date records that the Magistrate concluded with the words:

> The matter is adjourned to this court on the 28th day of May next for diversion.

6. A certified extract of the decision of the Magistrate reads, under the heading "Court Order":

> Adjourned to 10:00am 28/05/2003 at Frankston Magistrates' Court.

That order contains no reference to diversion.

7. The matter was further adjourned several times. At a mention on 17 June 2003, at which the plaintiff's *de facto* partner was present, the plaintiff being overseas, the police prosecutor informed the Magistrate hearing the mention that Victoria Police did not consent to referral of the matter to diversion. On 24 June 2003 Mr Lurie was informed by an officer of Victoria Police that Victoria Police had decided to revoke their consent to diversion. On 8 July the matter came on for a mention before Mr Stone.

Application to extend time in respect of the first order sought

8. The jurisdiction of the Court to grant any relief or remedy in the nature of *certiorari* or mandamus is to be exercised in accordance with the *Supreme Court (General Civil Procedure) Rules* 1996 ("the Rules") and in particular under Order 56 of the Rules. Rule 56.02 reads:

> 56.02 Time for commencement of proceeding
> (1) A proceeding under this Order shall be commenced within 60 days after the date when grounds for the grant of the relief or remedy claimed first arose.
>
> (2) Where the relief or remedy claimed is in respect of any judgment, order, conviction, determination or proceeding, the date when the grounds for the grant of the relief or remedy first arose shall be taken to be the date of the judgment, order, conviction, determination or proceeding.
>
> (3) The Court shall not extend the time fixed by paragraph (1) except in special circumstances.

9. Mr Batten, for the plaintiff, sought an extension of time to commence the proceeding insofar as relief was sought to correct what was said to be an error in the register of the Magistrates' Court for 7 May 2003. The sixty days for commencement of a proceeding ran from the date of the order on 7 May, and expired on 6 July. The originating motion was filed on 21 July and thus was out of time. He indicated, although this did not appear in Mr Lurie's affidavit, that the reason for the delay was that the plaintiff's advisers were unaware of the form of the entry in the register until a certified copy of that order was obtained in the course of preparing the affidavit, by which time the sixty days had expired.

10. However, it is apparent from [7] above that the plaintiff's legal advisers were aware at least by 24 June that an issue had arisen with regard to the question of diversion. They might have been expected, in preparing for the mention hearing on 8 July, to check the order in the register to ascertain what was recorded as having occurred on 7 May. Mr Batten conceded that no steps were taken by the plaintiff's advisers at that stage to ascertain the text of the formal order.

11. As to the meaning of "special circumstances" in Rule 56.02(3), I would adopt what I said in *Carra v Hamilton*[1]:

> The expression "special circumstances" is frequently used in legislation, and must in each case be considered in the context, both substantive and verbal, in which it appears. To begin with, it seems clear to me that Rule 56.02(3) does not require that there be special circumstances related to the reason for the late commencement, but requires merely that special circumstances be present. The Rule is, however, expressed negatively rather than positively; it would appear that the extension of time to commence proceedings is to be discouraged rather than encouraged. ...

McDonald J in *Schwerin v Equal Opportunity Board* [1994] VicRp 60; [1994] 2 VR 279; [1994] EOC 92-561 was concerned with section 109(5)(a) of the *Magistrates' Court Act* 1989, giving the Court power to extend time if it is of the opinion that the failure to institute an appeal from the Magistrates' Court within the prescribed time "was due to exceptional circumstances". That provision differs from Rule 56.02(3), not only in the use of "exceptional" rather than "special", but also in the required causal connection between the circumstances and the delay, and accordingly is not of assistance to me. "Exceptional circumstances" in my view must be more extreme, further from the ordinary, if I may put it that way, than "special circumstances".

Holding that view, as I do, I must, with reluctance, disagree with the inclusion of the words "exceptional" and "extraordinary" (which is further again from the ordinary) in the statement by Beach J in *Denysenko v Dessau* [1996] VicRp 65; [1996] 2 VR 221 at 224 that:

> 'Special' when used in this connection [i.e. in Rule 56.02(3)] must mean something unusual, uncommon, exceptional or extraordinary.

Having said that, I would say that I regard the use of those words as *obiter dicta*, given the decision which His Honour came to in that case.

In *In re Norman* (1886) 16 QBD 673 at 677, the English Court of Appeal was concerned with a provision to the effect that a bill of costs was not to be taxed when twelve months had elapsed since its delivery, "except under special circumstances". That expression is effectively the same as the phrase "in special circumstances" which is in question here. Lopes LJ said at 677:

> The statute uses the words "special circumstances". Those are wide, comprehensive, and flexible words, and I think that the legislature intended them to be so, and that no Court can or ought to lay down any exhaustive definition of them. Charges which in one case would be special circumstances, in another would not be such. It is for the discretion of the judge to say what are special circumstances in a particular case. I cannot express my meaning better than by adopting the words of Bowen LJ in *In re Boycott* (1885) 29 Ch D 571 at 579 when he said:
>
> > Special circumstances, I think, are those which appear to the judge so special and exceptional as to justify taxation. I think no Court has a right to limit the discretion of another Court, though it may lay down principles which are useful as a guide in the exercise of its own discretion. It seems to me to be the true view of the statute, that there must be special circumstances making the payment differ from an ordinary payment, and that the judge thereupon has a discretion as to whether they are sufficient to authorise taxation.

That is entirely in accordance with my view, and expresses what I desire to convey.

That passage was relied on by FB Adams J in the Supreme Court of New Zealand in *Re Hunter, Ex parte Exclusive English Imports Ltd (in liquidation)* [1954] NZLR 746 at 752, considering whether there were "special circumstances" within the meaning of section 100(9) of the *Bankruptcy Act* 1908 (NZ) – to justify delay in lodging a proof of debt. The Court went on to say:

> There is also the view expressed by Lord Goddard LCJ in *Lines v Hersom* [1951] 2 KB 682, 688; [1951] 2 All ER 650, 653 to the effect that 'special' circumstances are those which are not of general application. I respectfully adopt the test suggested by these passages and do not think it is possible to go further by way of definition. I think it is impossible to regard circumstances as 'special' if they are characteristic of the common run of cases. For this reason it will, in general, be impossible to admit proofs under section 100(9) in cases where the failure to prove has arisen from those circumstances, or combinations of circumstances, which commonly lead to and explain a failure to prove in time. There is thus a wide field in which the Court has no discretion.

I would, with respect, and with reservations as to the use in the above passages of the word "exceptional", adopt that view of the correct approach to the expression "in special circumstances"

in Rule 56.02(3). It is consistent with the view of the Commonwealth Administrative Appeals Tribunal, presided over by Toohey J, then a Judge of the Federal Court, in *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, in the context of section 102(1) of the then *Social Security Act* 1947, which provided that a claim for family allowance must be lodged within 6 months of eligibility arising, or "in special circumstances within such longer period as the Director-General allows". The Tribunal said at 3:

> An expression such as 'special circumstances' is by its very nature incapable of precise or exhaustive definition. The qualifying adjective looks to circumstances that are unusual, uncommon or exceptional. Whether circumstances answer any of these descriptions must depend upon the context in which they occur. For it is the context which allows one to say that the circumstances in one case are markedly different from the usual run of cases. This is not to say that the circumstances must be unique but they must have a particular quality of unusualness that permits them to be described as special.

An appeal from that decision (*Beadle v Director-General of Social Security* [1984] AATA 176; 60 ALR 225; (1984) 1 AAR 362; (1985) 7 ALD 670; (1985) 7 ALN N193) was dismissed by the Full Court of the Federal Court (Bowen CJ, Fisher and Lockhart JJ) who said at ALR 228:

> The phrase "special circumstances", although lacking precision, is sufficiently understood in our view not to require judicial gloss.

12. Having considered the matter in the light of the authorities there cited, I find that, even if I were to take the step of admitting into evidence the statement made by Mr Batten from the Bar table, the failure of the plaintiff's advisers to ascertain the terms of the order in the register does not amount to "special circumstances" in terms of Rule 56.02. The application to extend time is accordingly dismissed.

13. That being so, the claim of the plaintiff must be dismissed insofar as it relates to the first order sought in the originating motion.

The second order sought

14. Section 128A of the Act reads as follows, so far as relevant:

> 128A Adjournment to undertake diversion program
> (1) This section does not apply to ...
>
> (2) If, at any time before taking a formal plea from a defendant in a criminal proceeding for a summary offence or an indictable offence triable summarily -
> (a) the defendant acknowledges to the Court responsibility for the offence; and
> (b) it appears appropriate to the Court, which may inform itself in any way it thinks fit, that the defendant should participate in a diversion program; and
> (c) both the prosecution and the defendant consent to the Court adjourning the proceeding for this purpose—
> the Court may adjourn the proceeding for a period not exceeding 12 months to enable the defendant to participate in and complete the diversion program.
>
> (3) A defendant's acknowledgment to the Court of responsibility for an offence is inadmissible as evidence in a proceeding for that offence and does not constitute a plea.
>
> (4) If a defendant completes a diversion program to the satisfaction of the Court—
> (a) no plea to the charge is to be taken; and
> (b) the court must discharge the defendant without any finding of guilt; and
> (c) the fact of participation in the diversion program is not to be treated as a finding of guilt except for the purposes of— ...

15. I turn now to pick up the facts from where they were left at the conclusion of [7] above. The matter came on again for mention on 8 July 2003 before Mr Stone, Magistrate, who had last been seized of it on 7 May. Mr Lurie, for the plaintiff, submitted that as Mr Stone had on 7 May ordered that the matter be referred to diversion, it was not open to the police to withdraw consent to that procedure. The Magistrate, who understandably had no recollection of the contest mention on 7 May, said that all that had happened, presumably, was that the matter had been adjourned out of a contest mention list for it to be placed before a magistrate to see whether it was appropriate for diversion to be followed. He proposed that it be placed before himself or another magistrate that day to decide that question. However Mr Lurie objected to that course, on the ground that the matter had already been ordered to diversion.

16. The Magistrate said that if he had ordered diversion "there will be a plan, he will have signed documents, he will be coming back to court, he will be either on bail or it will be adjourned off down the track" and "we don't enter the diversion process until he's been judged to be suitable" and "what is clear to me is that … given off to the diversion co-ordinator so that she could place the matter before a magistrate. She might need to make further enquiries … it would be placed before a magistrate to see whether your client was appropriate for diversion.". Those statements are consistent with the procedure envisaged by section 128A(2).

17. When it was put to him that he had ordered on 7 May that the matter be referred to diversion, the Magistrate responded "perhaps it's badly worded, perhaps it should have said be referred to the diversion co-ordinator" and later "I am making the decision that it is not in the diversion stream … as it hasn't been considered by the Court, it cannot possibly be in the diversion stream and I'm making that decision". The plaintiff seeks an order in the nature of *certiorari* to quash that decision.

18. The matter was adjourned to 22 July 2003, and Mr Lurie deposes that on that date it was further adjourned to 22 October 2003 pending the decision of this Court. It is to be presumed that that time has been extended.

19. In *Craig v South Australia*[2] the High Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) said:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

20. Section 10 of the *Administrative Law Act* 1978 provides that:

> Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

21. The extracts from the transcript cited in [15] to [17] above, to the extent that they may be regarded as reasons for a decision, thus form part of the record for the purpose of the claim for relief in the nature of *certiorari*. It is arguable that all the Magistrate did on 8 July 2003 (other than adjourning the matter to 22 July 2003) was to make certain statements of fact in the course of rejecting the contention that on 7 May he had made an order that the proceeding be adjourned to enable a defendant to participate in and complete a diversion program; and that there cannot be said to be any error of law in those statements of fact. However, His Worship described himself on 8 July as making a decision rejecting that contention, and I propose to deal with the matter on the basis that that is what he did, although I note that no formal record of any decision made on that day was in the material before me.

22. Mr Batten submitted that those extracts from the transcript of 8 July, and other similar statements of the Magistrate not included here, involved a refusal to exercise jurisdiction, fettered the jurisdiction of the Magistrates' Court under section 128A by reference to the practice of that court, and were contrary to the facts of what was decided on 7 May.

23. The submission of refusal to exercise jurisdiction is dealt with in a different context in [33] below. It is clear that the references to the practice of the Magistrates' Court were relied upon not to fetter the jurisdiction of that court, but to indicate why the Magistrate, although he had no recollection of the contest mention of 7 May, was satisfied that he had not made an order under section 128A(2).

24. Mr Batten's submission that the transcript is inconsistent with the facts as decided would appear to turn on the meaning of the words "adjourned for diversion" employed by the Magistrate in his oral disposition of the contest mention on 7 May. As has been said, His Worship recorded in the register that the matter had been adjourned, with no mention of diversion.

25. The submission assumes that the only prerequisite for an order that the proceeding be adjourned to enable a defendant to participate in and complete a diversion program is the agreement of the prosecution and the defendant. However, the making of such an order is at the discretion of the Magistrate, as indicated by the words "the Court may adjourn the proceeding" in section 128A(2), and the several prerequisites for the making of the order are set out in that provision. The agreement of the parties cannot determine the matter.

26. Mr Lurie deposes to his instructions that the plaintiff was willing to acknowledge responsibility for offending for the purpose of enabling participation in a diversion program, and that he had discussions with the informant and the police prosecutor as a result of which it was agreed that the plaintiff and the prosecution would consent to the plaintiff participating in a diversion program. He notified the Magistrate that the plaintiff sought referral to diversion and that the informant and the prosecutor agreed. The prosecutor informed the Magistrate that she consented to that course.

27. However, there is no evidence before me that the plaintiff's readiness to acknowledge responsibility for the offence was notified to the Magistrate as required by section 128A(2)(a). Mr Batten submitted that that acknowledgment to the Court was implied by his counsel's request for diversion. I do not accept that submission. The acknowledgment to the court of responsibility for the offence is a formal step of a serious nature, analogous to a plea of guilty, which should be carried out formally by the accused in open court. That acknowledgment is not a matter for implication.

28. Nor is there any evidence of a finding by the Magistrate that it seemed appropriate to him that the plaintiff should participate in a diversion program, as required by section 128A(2)(b). Mr Dennis submitted, and I accept, that before making that finding it would be necessary for the Magistrate to consider such matters as whether the plaintiff had prior convictions and the gravity and circumstances of the offence. There was no evidence to suggest that His Worship had any evidence of such matters before him.

29. The only requirement of section 128A(2) which I can be satisfied, on the evidence before me, was met at the hearing on 7 May is the requirement in section 128A(2)(c) that both the prosecution and the defendant consent to an adjournment to enable the defendant to participate in and complete a diversion program.

30. Further, the adjournment was for a period of three weeks. Section 128A(2) provides for an adjournment for a period not exceeding twelve months to enable the defendant to participate in and complete a diversion program. It is unlikely that a period of three weeks would have been envisaged as sufficient for that purpose.

31. Mr Batten submitted that the real issues were:

1. Did the prosecution at contest mention give its consent to diversion?
2. If yes to 1, did the Court at contest mention rule that the matter was to proceed by diversion?
3. Should the prosecution be permitted to withdraw its consent to diversion?

On the evidence before me, the answer to the first question is Yes. As to the second question, the only evidence before me to suggest that the Magistrate ruled that the matter was to proceed by diversion was His Worship's words "adjourned for diversion". In the light of the other matters to which I have referred, I cannot find, on the basis of those words alone, that His Worship intended to rule or did rule that the matter was to "proceed by diversion"; that is, to be adjourned for a period not exceeding twelve months to enable the defendant to participate in and complete the diversion program. Accordingly, I find no error of law in what I have assumed to be the reasons given by the Magistrate on 8 July 2003 for what he referred to as a decision. The third question is not before me in this proceeding.

The third order sought

32. In *R v War Pensions Entitlement Appeal Tribunal: Ex parte Bott*[3], Rich, Dixon and McTiernan JJ said:

> A writ of mandamus does not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law *de novo*, at any rate if a sufficient demand or request to do so has been made upon him.

33. I do not see that the Magistrate has failed to perform a duty in not considering whether an order under section 128A(2) should be made. As stated in [15] above, the evidence is that on 8 July he proposed that the matter be placed before himself or another magistrate that day to consider and decide that question and Mr Lurie objected to that course. It is open to the plaintiff to make a fresh application for an order under that section.

34. For the reasons given, the plaintiff's claim will be dismissed. In the course of the hearing I made orders that rules 5.03(1) and 8.02 be dispensed with. Counsel may wish to make submissions as to the form of the orders to be made and as to costs.

---

[1] [2001] VSC 215; (2001) 3 VR 114 at 119 ff.
[2] [1995] HCA 58; (1995) 184 CLR 163 at 175-176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[3] [1933] HCA 30; (1933) 50 CLR 228 at 242; 39 ALR 533; (1933) 7 ALJR 169.

APPEARANCES: For the plaintiff Rumbiak: Mr NB Batten, counsel. North Melbourne Legal Service Inc. solicitors. For the defendant Hough: Mr BM Dennis, counsel. Victorian Government Solicitor.
