48/94

SUPREME COURT OF VICTORIA

ROSSI v MARTLAND and ORS

Mandie J

17-18, 24 August 1994

PROCEDURE – PROPER VENUE – CRIMINAL PROCEEDING – PLEA OF GUILTY – OFFENCES/OFFENDER IN BALLARAT LOCALITY – TRANSFER OF CASE TO MELBOURNE – CONVENIENCE OF WITNESSES FOR DEFENDANT – NO OBJECTION BY POLICE PROSECUTOR – TRANSFER REFUSED BY MAGISTRATE - WHETHER ERROR DISCLOSED: *MAGISTRATES' COURT ACT* 1989, S3(1), Sched. 2 Cl.1.

Section 3(1) of the *Magistrates' Court Act* 1989 defines "proper venue" in relation to a criminal proceeding, as the mention court that is nearest to—

(i) the place where the offence is alleged to have been committed; or

(ii) the place of residence of the defendant.

R., whose address was in the Ballarat locality was charged with three indictable offences and two summary offences alleged to have been committed in the Ballarat locality. When the matters came on at Ballarat Magistrates' Court for Contest Mention, R. indicated he would plead guilty to the charges but sought to have the matters transferred to the Melbourne Magistrates' Court to suit the convenience of a number of professional and other witnesses who would be called to give evidence on the plea. The police prosecutor and informant had no objection to the transfer. The Magistrate refused the application for the transfer, expressing the view that the charges should be dealt with in the locality where they occur. Upon origination motion—

HELD: Application by originating motion dismissed.
It was open to the Magistrate to consider that greater weight should be attached to the locality of the defendant's address and that generally speaking, serious indictable offences should be dealt with in the locality at which they occur.

MANDIE J: *[After setting out the facts briefly, the relief sought and the grounds relied upon, His Honour continued]...* **[3]** It is necessary to consider what occurred in the Magistrates' Court. The affidavits contain accounts which to some extent conflict. There was no cross-examination of the deponents. Mr Defteros's affidavit is loosely drawn and somewhat ambiguous. It was potentially misleading if left unanswered.

The magistrate's affidavit is more precise in what it does say but areas of agreement with the account of Mr Defteros tend to be left to inference. I will endeavour to state a composite account. Where there is a clear conflict, I have preferred that version which tends to uphold the magistrate's order, having regard to the relevant rule of practice, to the onus of proof and to a general consideration of the weight of the material.

Mr Defteros applied, as I have said, for the matter to be adjourned to the Magistrates' Court at Melbourne. Mr Defteros said that the basis of the **[4]** application was to meet the convenience of a number of professional witnesses who would be called to give evidence. He mentioned that Mr Tim Watson-Munro, a consultant forensic psychologist, was one of the witnesses. He probably referred to "professional and character" witnesses but he did not name any other witnesses. At one stage during the course of the application, His Worship said that the application may give the appearance of forum shopping. He also said that, generally speaking, serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality.

Whilst His Worship was making the latter remark, Mr Defteros continued to address the magistrate and probably did not hear it. Mr Defteros said that it was not a question of "going forum shopping" but that his application was for the specific purpose of having the matter dealt with as a plea of guilty and that this would ultimately facilitate the Court process as the matter had to be booked in for a lengthy plea. He said further that it was his desire to call certain professional

witnesses such as Mr Tim Watson-Munro to give expert evidence and the convenience of these witness was an important matter.

Mr Defteros stated to His Worship that he had spoken with the informant, and the prosecutor at Ballarat who was present in Court and that they had no objection and that the informant was from Melton Police Station and that it was no inconvenience to him to be present at the Melbourne Magistrates' Court on 17th August 1994 in order to give evidence if required.

His Worship then said that it was not **[5]** a matter for the police informant to determine the venue and that, when a matter proceeds as a plea of guilty, the police informant very rarely attends Court when the case is being heard. Mr Defteros continued with his submission, talking over what the magistrate was then beginning to add to his comments.

At some stage in the middle of Mr Defteros's submission, the magistrate interrupted to say that the matter would not be adjourned to the Melbourne Magistrates' Court.

Mr Defteros made further submissions referring to various factors: that it was a lengthy plea, the basis of convenience of all parties and the overall circumstances, and the workload of the Ballarat Court being facilitated. His Worship asked Mr Defteros if he had anything else to say. He replied: "No". His Worship then said that the matter would be adjourned until next Friday (8th July) for a hearing on that day.

The matter has been further adjourned to await the result of this proceeding. It is apparent that something of a vigorous exchange took place between Mr Defteros and the magistrate but it is quite clear to me on a consideration of the whole of the material that the plaintiff's application was not cut off and that Mr Defteros was not prevented from making the full submissions he desired to make.

Nor do I think that a fair-minded and informed observer of the proceedings would have reasonably apprehended or suspected that the magistrate was guilty of bias in the sense of prejudgment. In my view the plaintiff has failed on the facts to establish any ground of denial of natural justice, denial of procedural fairness, or bias.

Accordingly, the principal arguments relied upon **[6]** before me to found the attack upon His Worship's ruling are rejected.

It was argued in the alternative that the magistrate had committed an error of law by failing to take into account relevant matters (such as the convenience of the parties) and by taking into account irrelevant matters (such as an unsubstantiated suggestion of "forum shopping"). It was conceded that there was no "record" which included His Worship's reasons so that relief in the nature of *certiorari* for error of law on the face of the record was not available.

However, it was submitted by the appellant that the magistrate's refusal to order a change of venue was void or nugatory and that relief in the nature of mandamus should be granted requiring the Magistrates' Court to perform its duty to properly consider an application under, and exercise its discretion pursuant to, Clause 1 of Schedule 2 to the *Magistrates' Court Act* 1989.

In effect it was submitted that the magistrate's conduct amounted to an actual or constructive refusal to perform that duty in the sense necessary to obtain relief in the nature of mandamus (see *Brygel v Stewart-Thornton* [1992] VicRp 70; [1992] 2 VR 387 391, 403; (1992) 67 A Crim R 243; *Waterhouse v Gilmore* (1988) 12 NSWLR 270, 276).

Clause 1 of Schedule 2 provides:

"1. Venue of Court
(1) A criminal proceeding is returnable at the proper venue of the Court ...
(2) If, before any evidence is given in support of the charge—
(a) the defendant objects to the venue of the Court; and **[7]**
(b) the Court is satisfied, having regard to the convenience of the parties, that the proceeding should be transferred to another venue—
the Court may adjourn the proceeding to another venue of the Court."

Section 3(1) of the *Magistrates' Court Act* 1989 defines "proper venue" in relation to a criminal proceeding to mean the mention court that is nearest to the place where the offence is alleged to have been committed or the place of residence of the defendant.

In my opinion the magistrate did not fail to properly exercise his discretion under Clause 1 of Schedule 2. It is apparent that, although he did not expressly refer to the convenience of the defendant's witnesses, the magistrate considered that the factor which he did mention was of greater weight in the circumstances – namely, that generally speaking serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality.

I do not consider that the magistrate took into account any irrelevant matters or ignored the convenience of the parties. Nor am I persuaded, had he done so, that the plaintiff would be entitled to, or should in the court's discretion be granted, relief in the nature of mandamus or any other form of relief.

It was argued by the third defendant that, in any event, Clause 1 of Schedule 2 was inapplicable in the circumstances but it is unnecessary to consider that argument. In the result, the plaintiff's application by originating motion is dismissed. It is ordered that the **[8]** plaintiff pay the costs of the third defendant including reserved costs.

APPEARANNCES: For the plaintiff Rossi: Mr D Grace, counsel. Pryles & Defteros, solicitors. For the third-named defendant A-G for the State of Victoria: Mr BM Dennis, counsel. Ronald C Beazley, Victorian Government Solicitor.
