9/97

SUPREME COURT OF VICTORIA

WILLIS v MAGISTRATES' COURT of VICTORIA and BUCK

Smith J

28-30 October, 2 December 1996 — [1996] 89 A Crim R 273

PROCEDURE – INFORMATION – WITHDRAWAL OF SOUGHT – INFORMATION STRUCK OUT – INFORMATION LATER REINSTATED – WHETHER SUCH ACTIONS WITHIN POWER OF COURT – GUILT FOUND ON ONE CHARGE OTHERS ADJOURNED TO A DATE TO BE FIXED – WHETHER WITHIN COURT'S POWER – WITNESS CALLED BY PROSECUTOR BUT NOT EXAMINED IN CHIEF – NO OBJECTION FROM DEFENCE COUNSEL – WHETHER MAGISTRATE IN ERROR IN ALLOWING SUCH A COURSE – WITNESS SOUGHT TO BE DECLARED HOSTILE IN RE-EXAMINATION – WHETHER SUCH COURSE OPEN: *EVIDENCE ACT* 1958, S34.

A charge against W. was sought to be withdrawn by the prosecutor and was struck out by the magistrate. At a subsequent hearing against W., the magistrate, upon application by the prosecutor, re-instated the charge. During the hearing, the prosecutor called a witness but did not ask him any questions in examination-in-chief. After the witness had been cross-examined by defence counsel, the prosecutor re-examined the witness and attempted to establish that the witness was an adverse witness. At the end of the hearing, the magistrate found one charge proved and adjourned the remaining charges to a date to be fixed. The magistrate said in adjourning the charges that he did not know what W. intended to do in respect of an appeal. Upon appeal—

HELD: Appeal as to allowing witness to be cross-examined by prosecutor dismissed. Origination motion concerning the allegation of apprehended bias successful. Remitted for further hearing.
1. To permit the withdrawal of, the striking out and the reinstating of an information are matters within the inherent jurisdiction or implied power of a magistrate to control the proceedings before the Court. Accordingly, in the present case, the magistrate was not in error in exercising his discretion in that manner.

2. The magistrate was not in error in allowing the prosecutor to call the witness and not examine him in chief. It was for counsel to object when the prosecutor stated his intention not to examine in chief. The magistrate was entitled in the exercise of his discretion to control the proceedings and allow the proceedings to continue in the absence of any such objection.

3. The magistrate was entitled to proceed on the basis that the prosecutor was seeking to establish that the witness was an adverse witness. For that purpose, it was permissible for the cross-examination by the prosecutor to proceed. It was also open for the prosecutor to apply to have the witness declared hostile during re-examination. However, the re-examination itself would be confined to matters arising out of cross-examination.

4. Whilst it was undesirable in the circumstances for the magistrate to adjourn the remaining charges indefinitely and that to strike them out was the preferable solution, the magistrate was not in error in exercising his discretion in that manner.

SMITH J: [1] On 2nd and 3rd November 1994 two charges brought by Constable Adrian Buck against Shane Willis were heard. The first was a charge of unlawful assault and the second, a composite charge of intentionally or recklessly causing injury. He pleaded not guilty to both charges. The offences were alleged to have been committed against Julius Canteri. The Magistrate (the first magistrate) found him guilty of intentionally causing injury and sentenced him to a community-based order with conviction. The remaining charge, the unlawful assault charge was dealt with according to the court record as follows: "Struck out. {Reason}: WITHDRAWN. DUPLICITOUS." Mr Willis was ordered to pay costs in the amount of $2,110. Mr Willis appealed to the Supreme Court from the order of the magistrate pursuant to s92 of the *Magistrates' Court Act* 1989. He also commenced proceedings by way of originating motion pursuant to order 56 of the *Supreme Court Rules* challenging the orders made by the magistrate.

On 23 February 1995 consent orders were made by a Master of the Court setting aside the conviction and other orders made and remitting "the matter" to be re-heard by the Magistrates'

Court. An order was made that the first defendant, Mr Buck, pay Mr Willis's costs of the proceeding other than those incurred on 9 January 1995 and that the question of the costs of the parties in respect of the Magistrates' Court proceedings be remitted to that court. **[2]** In early September 1995 Mr Willis received a document headed "Charge". It alleged that

> "1. The defendant at Ivanhoe on 26 October 1993 did without lawful excuse intentionally cause injury to one Julius Canteri.
>
> 2. The defendant at Ivanhoe on 26 October 1993 did without lawful excuse recklessly cause injury to one Julius Canteri."

At the same time a notice was received from the informant advising that the charge of "assault" listed for hearing at the Heidelberg Magistrates' Court on 2 November 1994 was adjourned to the Heidelberg Magistrates' Court on 18 September 1995. The hearing of the remitted proceeding and the new charges were fixed for hearing on 18 September 1995. They were booked in for a one-day hearing.

At the commencement of the hearing on 18 September 1995 the prosecutor applied to withdraw the original composite charge of intentionally or recklessly causing injury on which Mr Willis had been convicted. The prosecutor indicated he intended to proceed with the charge of unlawful assault and the two new charges. The magistrate said he had only two charges before him. His Worship left the court to enable the prosecutor to seek clarification of the situation. On the resumption of the hearing, the prosecutor said that the composite charge alleging intentionally or recklessly causing injury (the original charge) was withdrawn. He then applied to have the charge alleging unlawful assault reinstated. His Worship indicated his preparedness to do that. He then asked counsel for Mr Willis if he was ready to proceed. Counsel indicated he had two applications to make. The first was about the making of an informal tape-recording, and the second concerned costs. He said that that application involved opposing the prosecutor's **[3]** application to have the unlawful assault charge reinstated and the application for the new charge to be heard by the Court. A debate then ensued, inter alia, about the request to tape-record the proceedings. His Worship permitted the evidence to be recorded.

After further argument the magistrate ordered the reinstatement of the charge of an unlawful assault and directed that it be heard with the new charges of intentionally causing injury and recklessly causing injury. The hearing of the charges then commenced.

On the afternoon of 19 September 1995 the magistrate found the charge of intentionally causing injury had been proved and the proceedings then continued as a plea on sentence. The magistrate decided to adjourn the matter for a pre-sentence report and announced that he would remand Mr Willis in custody pending that report. Application was then made for bail for Mr Willis. The magistrate declined to grant bail. A little later His Worship indicated that the remaining charges would be adjourned to a date to be fixed. He said that he did not know what Mr Willis intended to do in respect of an appeal. Counsel for Mr Willis objected to this course stating it was inappropriate to adjourn the charges. The magistrate responded saying that there would be no prejudice caused to Mr Willis if they were adjourned. He also said that he did not want the situation to arise of Mr Willis submitting that the remaining charges could not be reactivated if he succeeded in an appeal to the County Court or Supreme Court pointing out that such an application had been made by Mr Willis's counsel on the case before him. Counsel for Mr Willis submitted the charges had all been heard and that Mr Willis was entitled to have all the charges disposed of forthwith. The **[4]** magistrate asked the prosecutor if he had anything to say and the prosecutor replied that the approach proposed by the magistrate was the correct one. A debate then ensued about the question of the costs of the earlier proceedings following which the magistrate indicated that he had re-considered the question of the defendant's bail and decided to release him on bail on his own undertaking.

Subsequently, on the morning of 20 September 1995, the pre-sentence report was obtained and submitted to his Worship. His Worship then invited Mr Willis's counsel to proceed with his application for costs prior to sentencing Mr Willis. Counsel submitted that the sentence should be finalized first. He submitted that the outcome of the application of costs might influence the sentence when it would not be proper for it to do so. He, however, went ahead with the submission on costs. His Worship ultimately imposed a community-based order of 12-months' duration upon

Mr Willis and ordered him to pay costs of $2,000 which represented the costs of expert witnesses. He declined to give the informant any other costs of the proceedings. His Worship decided not to grant Mr Willis's application for the costs of the proceedings before the first magistrate and the Supreme Court costs that were sought.

Mr Willis has brought two proceedings before this Court. The first is an appeal pursuant to the *Magistrates' Court Act* 1989 from the order made by his Worship on 21 September 1995 recording the conviction on the charge of intentionally causing injury, the sentencing of Mr Willis to a community-based order for a period of 12 months and the order for costs. The order of Master Wheeler made in that appeal **[5]** proceeding on 19 February 1996 notes the following question of law to be decided:

> "Did the Magistrate err in permitting the 'cross-examination' as to credit of a prosecution witness during re-examination on behalf of the informant?"

By the other proceeding commenced by originating motion filed 3 November 1995, Mr Willis sought interim and final relief. The final relief sought is as follows:

> 1. An order quashing the sentence and order made by the Magistrates' Court of Victoria constituted by the Magistrate on 21 September 1995 by which order the Magistrates' Court of Victoria convicted the plaintiff on one count of intentionally cause injury, sentenced him to a Community Based Order with the special condition that he perform 200 hours of unpaid community work over 12 months and ordered him to pay costs of $2,000.00.
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> 2. A declaration that the Magistrate did not have jurisdiction to reinstate the charge of unlawful assault which had been struck out by the first magistrate on 3 November 1994.
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> 3. An order striking out the charges of unlawful assault, intentionally cause injury and recklessly cause injury which were adjourned by the magistrate.
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> 4. An order quashing the orders made by the Magistrates' Court of Victoria constituted by the magistrate on 21 September 1995 by which order the Magistrates' Court of Victoria dismissed the plaintiff's application for the costs he incurred in defending the proceeding before the first magistrate on 2 and 3 November 1994 including the plaintiff's costs incidental to that proceeding.
> 5. An order remitting the further hearing of this matter to the Magistrates' Court of Victoria to be dealt with according to law.
>
> 6. Costs.

The grounds relied upon in support of the relief sought were as follows:

> **[6]** 1. The discretion exercised by the magistrate to allow the plaintiff to make an informal tape-recording of the proceeding miscarried when he imposed oppressive or unwarranted conditions upon the plaintiff.
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> 2. The magistrate erred in refusing the plaintiff's application that he deal with the application for costs of the proceeding before the first magistrate before dealing with any other matter and, in particular, the magistrate was wrong in determining an application by the prosecutor to reinstate the charge of unlawful assault before the said application of the plaintiff.
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> 3. The magistrate erred in reinstating the charge of unlawful assault when that charge had been struck out by the first magistrate on 3 November 1994 after a contested hearing.
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> 4. The magistrate erred in proceeding to hear two new charges of intentionally cause injury and recklessly cause injury when those charges were neither the subject of appeal before the Supreme Court of Victoria, nor ordered or authorized by the Supreme Court of Victoria to be instituted and heard before the Magistrates' Court of Victoria.
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> 5. The magistrate erred in proceeding to hear the charges against the plaintiff after he had been made aware of the fact that the plaintiff had been 'convicted' by the first magistrate.
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> 6. The magistrate erred in refusing or failing to make final orders in respect of the charges of unlawful assault, intentionally or recklessly cause injury and recklessly cause injury.
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> 7. The magistrate erred in not accepting the evidence of the prosecution witness, Khoder Sobh, when

his evidence was inherently credible and not contradicted by the prosecution evidence.

8. The magistrate erred in failing to give any or any sufficient weight to the evidence of Dr Shearer concerning the possible cause of the injuries sustained by the complainant.
9. The magistrate erred in relying on irrelevant matters.

[7] 10. The magistrate erred in failing to give any or any sufficient weight to relevant matters.

11. The magistrate erred in refusing the plaintiff's application for costs.

12. The procedure used by the magistrate in arriving at a sum of $750.00 for the plaintiff's solicitor's costs for the proceeding before the first magistrate is arbitrary, erroneous and based upon a misconception of the High Court case of *Latoudis v Casey*.

13. The magistrate failed to follow or apply the principles set forth in the judgement of Mandie J in the case of *Sobh v Children's Court of Victoria at South Melbourne*.

14. The conduct of the magistrate gives rise to a perception of bias on his part.

I note that the last ground was relied upon to raise an allegation of apprehended bias and not actual bias. I address first the question raised in the appeal, namely whether the Magistrate erred in permitting cross-examination of Mr Sobh by the prosecution during its re-examination of him. It appears that an eye-witness named Sobh was not called at the proceeding before the first magistrate and that this was one of the grounds of appeal raised in the proceedings brought following that decision. At the re-hearing the prosecutor called Mr Sobh but did not ask him any questions in examination in chief. In cross-examination defence counsel adduced evidence from him supporting the defence of Mr Willis. The prosecutor then re-examined Mr Sobh and attempted to cross-examine him on several alleged prior statements. It is submitted that this was permitted in error. What occurred was that after a few questions about what had occurred the prosecutor attempted to put matters to the witness that had been allegedly said by the witness to the **[8]** police. The following exchange occurred according to the transcript:

"PROSECUTOR: Now I just put this to you as a comment. I put it to you that you were spoken to by police about this.
Mr DEALEHR: I object to this.
PROSECUTOR: I withdraw that.
HIS WORSHIP: Why?
Mr DEALEHR: I object to that question being put, your Worship, that hasn't arisen in any way out of my examination in chief in this particular incident."

After correcting the reference to examination in chief the following occurred according to the transcript:

"HIS WORSHIP: I don't know yet, it's early days.
PROSECUTOR: He's doing what he has to do, I assume.
HIS WORSHIP: Maybe I'm wrong but I'm sure he's doing it under the Evidence Act. Maybe I'm wrong. Is that what you're doing?
PROSECUTOR: I'm just putting a matter to him asking him to comment on it ..."

A debate then ensued about what was happening and whether it was permissible. It may fairly be said, I think, that his Worship in the above and subsequent discussion flagged s34 of the *Evidence Act* 1958 for the prosecutor. The prosecutor appeared to have been unprepared to argue the point about whether he could put prior statements of the witness to the witness. He subsequently referred to s34 and said that that was what he had in mind – putting prior statements to the witness who was adverse. Section 34 *Evidence Act* 1958 provides:

"34. **Adverse witness may be contradicted by party calling witness**
[9] A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character but may contradict him by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of such court prove that he has made at other times a statement inconsistent with his present testimony. But before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness; and he must be asked whether or not he has made such statement."

Counsel for the defendant submitted that no statement had been made in any event. The transcript reveals that his Worship then said to counsel for the defendant:

> "What's your objection? (Indistinct) You know those provisions in the *Evidence Act*, don't you?"

Counsel for the defendant replied:

> "Yes I'm aware of that provision, your Worship. I'll wait and see how this matter proceeds".

Mr Sobh was then questioned about whether he had made written statement to the police and he said that he had not. He confirmed, *inter alia*, that he had been asked questions by the police. He then denied saying to the police that he had not seen anything. Objection was then taken on the basis that the question should have been put in evidence in chief. It was put also that the issue had not arisen out of cross-examination. His Worship responded:

> "I know, but, you see, this is an endeavour, I assume, to make the witness hostile on the (indistinct) the provisions of the *Evidence Act*, isn't it? Is that what you're doing?

The prosecutor replied: "Could be the effect of it, yes". There was then a statement that has not been transcribed with any clarity in which the prosecutor again referred to s34. An **[10]** argument then ensued, about which there is no complaint, whether the matters arose out of cross-examination. Reference was again made to s34 of the Act. The magistrate asked for assistance on the authorities from counsel for the defendant. Counsel for the defendant said he would have to look for authorities. He indicated he would go through *Cross*. His Worship suggested that this is a matter both should have had in mind when preparing for the case. Questioning continued. The defendant denied replying to questions put to him by the police. The prosecutor then proceeded to question him about questions put and answers given. By and large the witness said he had no recollection of being asked the questions that were put. He concluded saying:

> "Well, I got asked a couple of questions, about three questions, I didn't really answer. I answered, I didn't answer it. I didn't answer no questions and I didn't sign no paper, I didn't make no statements."

Asked by his Worship what he planned to do the prosecutor said: "I don't think I can take this matter any further, your Worship." He confirmed that he had finished questioning the witness. I am not persuaded that his Worship erred in dealing with the problem that emerged. While the proceedings appear to have become somewhat muddled, a fair assessment of what occurred, in my view, is that his Worship proceeded, as he was entitled to do, on the basis that the prosecutor was seeking to establish that Mr Sobh was an adverse witness. For that purpose it was permissible for the cross-examination to proceed. That, of course, may have created a difficulty later in that, as conceded by counsel for the respondent, his Worship had to ignore that cross-examination in weighing up the evidence when considering the credibility of Mr Sobh because Mr Sobh was not declared hostile. **[11]** Counsel for Mr Willis did not refer me to any authority which said that it is not open to a party who has called a witness to apply to have that witness declared hostile during re-examination and any such limitation would, in my view, be contrary to principle. The re-examination itself would be confined, however, to matters arising out of cross-examination (e.g., *R v Beezley* (1830) 4 Car & P 220).

In the course of submissions on this issue, counsel for Mr Willis submitted that his Worship had also erred in permitting the Crown to call the witness and not to examine him in chief. I note that there have been some judicial statements suggesting that this is an unsatisfactory course for the prosecution to follow. For example, in *R v Foley* [1984] 13 A Crim R 29 (at 34), Starke J was critical of the Crown adopting that course. He expressed the view that this course was a novelty in his experience and suggested that in the ordinary course the old and tried procedures should be adhered to and that the Crown should not be encouraged to adopt the procedure which had been adopted in that case despite the trial judge's protest. His Honour went on to say:

> "However, I might say, as indeed Deane J said, that in some cases the defence may wish that course to be adopted and may obtain great advantages from it: that, of course, is quite a different case. But in the normal case I am of opinion, speaking for myself, that the old practices should be adopted. (p35)"

Justice Murphy also commented (pp37-38):

> "There may be many reasons why defence counsel would prefer the Crown to call the witnesses and follow the course taken in the present case rather than have to call the witnesses himself. However, as has already been pointed out, the course that was taken in the present case ought perhaps not to be encouraged."

[12] Hampel J (at 38) observed that there may be some potential unfairness in the course followed. (See also *R v Kormornick* [1986] VicRp 81; [1986] VR 845; (1984) 14 A Crim R 256). Notwithstanding this criticism, it does not follow, however, that his Worship erred in allowing the course to be adopted. It must be borne in mind that counsel for Mr Willis did not object to that course being adopted. One could well understand counsel not objecting because he was able to place Mr Sobh's account before the magistrate in cross-examination without the possible disadvantage that may have occurred to his client if Mr Sobh had first given evidence in chief. Further, the prosecution would later be limited by the rules relating to re-examination. It was for counsel for the defence to object when the prosecutor stated his intention not to examine in chief and his Worship was entitled in the exercise of his discretion to control the proceedings to allow the proceedings to continue in the absence of any such objection.

For the foregoing reasons, I am not persuaded that the alleged error relied on in the appeal is made out and accordingly the appeal must fail. I turn to the originating motion. A number of issues have been raised on behalf of Mr Willis in the originating motion proceedings but in view of the conclusion I have reached on the allegation of bias it is unnecessary to explore all those issues. It is, therefore, convenient to deal with the bias allegation first. Counsel submitted that a reasonable apprehension of bias flowed from the conduct of his Worship. Reference was made to a number of instances where it was alleged the magistrate **[13]** acted in a way that gave rise to a reasonable apprehension of bias. It is also put that in combination these instances gave rise to a reasonable apprehension of bias.

[His Honour then dealt with this issue, referred to certain authorities and continued]...**[23]** It seems to me that the above matters in combination were such that a fair minded lay observer with knowledge of all material objective facts might entertain the reasonable apprehension that his Worship might not have brought an impartial and unprejudiced mind to his determination of sentence and the costs questions. A fair-minded observer could take the view that the Magistrate's attitudes were disclosed on different occasions when he let his guard slip. In my view such an observer could come to the conclusion that justice had not been manifestly and undoubtedly seen to be done. If the better view is that the latter two exchanges that I have mentioned were relevant only to the decision on sentence (and costs), it might be argued that if nothing else **[24]** was present only the order on sentence and costs should be set aside and the matter be remitted for re-determination of those issues. That, however, would be inappropriate. The matter could not be sent back to his Worship for reconsideration. When sent to a new magistrate, he or she would need to hear the evidence and form an independent view of the guilt of the accused before dealing with these questions.

The fact that the result was in the end not different from that in the first case does not, in my view, detract from my conclusion on the issue of apprehended bias. Nor does the fact that in at least two instances his Worship demonstrated impartiality towards Mr Willis. I refer to his analysis of the time taken in the hearing and his approach to the issue of an order for costs against Mr Willis. I also take the view that the apparent rationality of the oral and subsequently written reasons do not ameliorate the problem. I note that in the proceedings before me no point was taken that Mr Willis failed to raise the issue of bias raised before me before his Worship (cf *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568, 569; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193). For the foregoing reasons I have come to the conclusion that the appeal that has been brought by Mr Willis must fail but the originating motion proceeding should succeed.

I emphasise that my remarks should not in any way be construed as suggesting there was actual bias. It may well be that his Worship's remarks were made in passing and reflected no more than the pressure that he (like all magistrates) was under and his frustration that a relatively simple one-day case was taking so long to determine. It may also be that he was frustrated by the fact that its duration had been and was being prolonged by, for example, unmeritorious arguments about **[25]** a) the time of the costs applications and (b) an application for Supreme Court costs.

Further, there was nothing before his Worship to indicate the basis of the previous

appeal – in particular, Mr Sobh not being called at the previous hearing. As a result he had no reason to think that the evidence before him was any different from the evidence before the first magistrate. He may also have felt that the principal purpose of the application to tape record the proceedings was to have a transcript available for yet another appeal and not for assistance during the proceeding. Nonetheless, the above principles must be applied to the evidence of the events that transpired at the hearing before his Worship.

It will be necessary to remit the proceedings for further hearing. In those circumstances, it is also necessary to determine two other issues although there may be doubts about the availability of the relief sought in these proceedings particularly in the case of the second issue. The first issue is whether his Worship had jurisdiction to reinstate the charge of unlawful assault struck out by the first magistrate on 3 November 1994 after permission had been given to withdraw them and they had been withdrawn. (Final order 2 and ground 3). This issue requires consideration of the informant's power to withdraw an information, the first magistrate's power to permit such withdrawal and the effect of such withdrawal. There is limited material before me as to what occurred at the original hearing. That material is confined to the court record which is quoted above. It is reasonable to infer from that evidence that what occurred was that after the **[26]** informant secured a conviction on the charge of intentionally causing injury, he sought to withdraw the assault charge, a conviction having been obtained on the more serious of the charges. Withdrawal was permitted and, as a consequence, the magistrate purported to strike it out.

The power of an informant to withdraw an information, or the court to allow it, after the information has been heard has been a matter of some doubt as a result of comments made by Sir Charles Lowe in the case of *Bishop v Cody* [1939] VicLawRp 37; [1939] VLR 246; [1939] ALR 315. His Honour's doubts appear to have arisen from the fact that there was no express power contained in the then *Justices Act* 1928 to withdraw an information and his Honour commented that the procedure laid down in that Act suggested that once the hearing was entered upon the court must go on to hear and determine the case and either convict or dismiss the information. His Honour's comments on these matters was the subject of a commentary by William Paul in an article *"The Withdrawal of Informations for Offences"* (1940) 13 ALJ 444. Amongst other things, he makes the point that s88, upon which his Honour relied, contains the words "so far as such rules are respectively applicable thereto" and that they raise the implication that there might well be cases to which the code of rules set out in s88 did not apply. It is clear from his Honour's reasons and from the above article that there was a widespread practice then to permit withdrawal of informations and there is no reason to think that that practice has ceased to continue. In resolving the issue it is necessary first to refer to the relevant provisions of the *Magistrates Court Act* 1989. **[27]** They appear to be s51 of that Act and Schedule 2. Section 51 provides:

> "51. The hearing and determination of summary offences must, subject to section 99, be conducted in accordance with Schedule 2. (Section 99 deals with PERIN procedure)."

Clause 2 of the second schedule provides:

> "(2) Subject to sub-clause (3) the course of proceedings is the same as that followed in a criminal trial in the Supreme Court.
>
> (3) Leave of the court is necessary before the court may be addressed on evidence by on behalf of the informant or the defendant, whether the address is for the purpose of opening, or summing up, the evidence."

There do not appear to be any other provisions that may be relevant and counsel did not refer me to any. Thus there do not appear to me to be any statutory limits imposed upon the prosecutor or upon the Magistrates' Court in relation to the withdrawal of informations. Accordingly, the matters that concerned Sir Charles Lowe in *Bishop v Cody* need not concern us here. Rather, it would seem to me that permitting the withdrawal of the information was a matter for the exercise of inherent jurisdiction or implied power (Kirby P in *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 17; (1993) 82 LGERA 158) by the magistrate.

In striking out the information charging assault, his Worship may well have been exercising a discretion to impose terms upon permitting the withdrawal (see *Bishop v Cody* [1939] VicLawRp

37; [1939] VLR 246 at 252; [1939] ALR 315). Again it seems to me that the striking out of the information was a matter for and within the inherent jurisdiction or implied power of the magistrate to control the proceedings before the Magistrates' Court. **[28]** The power to reinstate proceedings that have been struck out again is part of the Magistrates' Court inherent or implied power to control the proceedings. It is clear that the withdrawal and the striking out of an information do not give rise to any form of *res judicata* (*R v Woodhouse* [1919] VicLawRp 105; [1919] VLR 736; 25 ALR 415; 41 ALT 98 (decision of the Full Court), *Bishop v Cody*, above, and *R v McGowan* [1984] VicRp 78; (1984) VR 1000).

It was, therefore, a matter for the magistrate at the second hearing in the exercise of his discretion to determine whether to reinstate the matter. That discretion protects any accused person from any abuse of process where an informant seeks to reinstate old proceedings. There was, in my view, no circumstance or principle of law that prevented his Worship reinstating the proceedings. The reinstatement did not, in my view, involve any double jeopardy; for the result of the successful appeal of Mr Willis was that he had to face the trial of charges again arising out of the same incident, "the matter" having been remitted for retrial. This occurred by consent. This case is not like the case of *Douglas v Birt* (1993) *Magistrates Cases* Part 1, p1, where the magistrate had refused an application for an adjournment by the informant, took pleas of not guilty and was then faced with the situation that the prosecution called no evidence. In that situation it would be appropriate to dismiss the informations on their merits. Thus it seems to me that the magistrate in this case did have the jurisdiction to reinstate the charge of unlawful assault.

The next matter raised concerns the magistrate's decision at the conclusion of the proceedings to adjourn the informations charging unlawful assault and recklessly causing injury (Final order 3, ground 6). A magistrate has an inherent **[29]** power or an implied power to adjourn proceedings to a date to be fixed (*Paroukas and Anor v Katsaris* [1987] VicRp 4; [1987] VR 39). The power is a discretionary power and has not been fettered. It must be exercised judicially and therefore must be exercised in accordance "with legal principle and upon relevant and not irrelevant considerations" (Herring CJ in *Lee v Saint* [1958] VicRp 25; [1958] VR 126 at 129; [1958] ALR 545, cited by McGarvie J in *Paroukas v Katsaris*, above). I note Herring, CJ's comment that an indefinite adjournment may in some circumstances amount to a refusal to exercise jurisdiction and thus may be exercised in error. In the present case it seems that his Worship was motivated by a concern that he did not know what Mr Willis intended to do in respect of any appeal. It seems reasonable to infer from that that his Worship was concerned that if there was an appeal and the appeal was successful, there was likely to be a re-hearing in which case the informant would wish to have the lesser charges heard. Mr Willis had already taken the position that the striking out of such informations in similar circumstances had the effect of dismissal. His Worship may well have been conscious of the doubts in the law resulting from *Bishop v Cody* about the power to withdraw and a magistrate's power to strike out an information at that point.

While it seems to me that it was undesirable in the circumstances that existed in this case to adjourn the criminal proceedings indefinitely and that to strike them out was the preferable solution, it cannot be said that it was not open to his Worship to exercise his discretion in the way he did. To do so did not place the defendant in any real jeopardy. Pending the outcome of the appeal, the prosecution would not be able to proceed with the other charges. If the appeal was not successful, the prosecution again would **[30]** not be able to proceed with the other charges and in that situation the defendant could, if he wished, have the proceedings brought on and dealt with. Thus it seems to me that the magistrate cannot be shown to have erred in adjourning the unlawful assault charge and the charge of recklessly causing injury. Before making any final orders I will hear counsel on the question of costs and the appropriate form of orders.

APPEARANCES: For the plaintiff: Mr D Perkins and Dr C Corns, counsel. Solicitors: Kuek & Associates. For the Magistrates' Court: Mr S Newton, counsel. Solicitor: Ronald C Beazley, Victorian Government Solicitor. For the Informant: Mr D Just, counsel. Solicitor: Peter Wood, Solicitor for the Director of Public Prosecutions.
