29/08; [2008] VSC 183

SUPREME COURT OF VICTORIA

HADJU v BREGUET & ANOR

Warren CJ

2, 30 May 2008

PRACTICE AND PROCEDURE – ABUSE OF PROCESS – INDICTABLE AND SUMMARY OFFENCES LISTED – DEFENDANTS COMMITTED FOR TRIAL ON INDICTABLE CONSPIRACY OFFENCES – SUMMARY OFFENCES ADJOURNED SINE DIE – APPLICATIONS MADE TO COUNTY COURT FOR PERMANENT STAY OF PROCEEDINGS – STAYS GRANTED – SUMMARY CHARGES BROUGHT ON FOR HEARING – APPLICATION THAT THE SUMMARY CHARGES SHOULD BE PERMANENTLY STAYED – GROUNDS OF DELAY AND PROSECUTORIAL CONDUCT – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR.

1. The adequacy of a judicial officer's reasons will depend upon the circumstances of the case. The reasons will be inadequate if –
(a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
(b) justice is not seen to have been done.
***Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8, applied.**

2. Where a magistrate provided considered reasons that upon analysis revealed an obvious process of reasoning that stated the facts, the argument, the applicable legal principles set out in the authorities, the argument of counsel on both sides and ultimately the reasoned conclusion, the reasons were not inadequate, nor did they disclose error on the face of the record.

3. The offences alleged against the defendants are serious. Though they are summary offences, they are not trivial. The delay that has occurred in these proceedings is not ideal. The public interest in charges being brought to trial includes an interest in them being brought expeditiously. Similarly, persons accused of offences have an interest, if not a right to, a speedy trial. In determining the application for a permanent stay of proceedings, the magistrate considered and reasoned all relevant matters sufficiently. Accordingly, there was no error on the face of the record or jurisdictional error present.

WARREN CJ:

1. Two related proceedings are brought before this Court in relation to a decision of the Magistrates' Court of Victoria, pursuant to order 56 of the Supreme Court Rules. The first defendant in both proceedings is the informant in two similar sets of charges filed in the Magistrates' Court. The charges relate to the theft of abalone between 19 November 2002 and 18 December 2003 by the plaintiff in each proceeding. On 9 January 2004, the charge and summons for Louis Hajdu[1] was filed and contained 22 summary offences and 2 indictable offences. On the same day, the charge and summons for Miklos Hajdu[2] was filed and contained 14 summary offences and 2 indictable offences. On 27 October 2004, the committal hearing was held. Counsel for the plaintiffs submitted that the indictable offences, which related to conspiracy, were an abuse of process given that there were other substantive charges available. The magistrate rejected the argument and the two plaintiffs were committed for trial in the County Court on the indictable offences. The summary offences were adjourned *sine die*.

2. On 14 June 2005, a presentment was filed ('the first presentment'). On 5 July 2005, a further presentment was filed ('the second presentment'), adding the names of other persons as co-conspirators and thereby substituting the first presentment. On 1 February 2006, the trial commenced. Counsel for the defendants (as they were below) sought a permanent stay of the presentment on the ground that the conspiracy charge constituted an abuse of process. On 3 February 2006, the judge permanently stayed the second presentment, finding that it would be difficult for a jury to find a specific agreement that could ground the conspiracy charges. Furthermore, the jury would be likely to be distracted from this task by the evidence of the theft of abalone. As such, his Honour permanently stayed the presentment.

3. Following the stay, in February 2006, another presentment ('the third presentment') was filed. It was in substantially the same terms as the second presentment, however, it removed the co-conspirators (other than the two plaintiffs). On 27 April 2006, a different judge heard argument concerning a stay of that presentment and on 11 August 2006, his Honour delivered his ruling, permanently staying the third presentment. In essence, his Honour found that the third presentment was not materially different from the second presentment and that if the prosecution was dissatisfied with the ruling in relation to the second presentment, then the proper course was to appeal the decision. Thus both the second and third presentments came to be permanently stayed.

4. On 11 October 2006, a charge and summons was filed in relation to each plaintiff, in substance pursuing the summary charges that had been adjourned *sine die* in October 2004. On 20 June 2007, a magistrate heard submissions from counsel for the defendants that the summary matters should be permanently stayed. The magistrate refused the application. Pursuant to order 56 of the *Supreme Court Rules*, the defendants seek that the magistrate's order be quashed on the grounds of error of law on the face of the record and/or jurisdictional error.

Error on the face of the record

5. The error of law on the face of the record was submitted to be disclosed in that the process of reasoning is not articulated and relevant matters were not taken into account. It was submitted that only delay was considered and that the relevant matter not considered was the prosecutorial conduct, which was so unsatisfactory as to result in injustice. It was submitted that such an omission was erroneous.

6. Counsel for the respondent submitted that it is a heavy onus on the plaintiffs to demonstrate error on the record for want of reasoning. Further, as the magistrate has considered a number of leading authorities, and it is not contended that those authorities or the principles applied from them are wrong, it would need to be a remarkable error of factual reasoning to be an error of law. It was further submitted that the magistrate considered the delay and the effect this may have on the trial, as well as the need to balance the public interest in having charges proceed to trial against any oppression or abuse of process, and concluded that the stay should not be granted. From this, it was submitted that the magistrate's reasoning is clear and that no error on the record is demonstrated.

7. The record comprises the documentation that initiated the proceedings, which grounds the jurisdiction of the court, the pleadings and the order or ruling.[3] It also comprises the reasons for judgment.[4] The adequacy of reasons was considered in *Sun Alliance Insurance Ltd v Massoud*,[5] in which Gray J said:

> The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if: –
> (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
>
> (b) justice is not seen to have been done.

The two above stated criteria of inadequacy will frequently overlap. If the primary Judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the losing party is denied knowledge of why his or her case was rejected.

8. The magistrate's reasons set out the plaintiffs' submission below that there had been an abuse of process and further set out the four arguments put in support of that submission: first, that the erroneous exercise of prosecutorial discretion when the charges were first laid in October 2004 to include the indictable offences led to significant injustice, oppression and undermined the integrity of the criminal justice system. Secondly, the summary offences comprised the same facts as the indictable offences in the presentment to the County Court which had been stayed and to proceed on these would be an abuse of process. Thirdly, that the first judge's decision had not been appealed implies that the presentment of the indictable offences was erroneous and led to delay and injustice; and fourthly, various consequential matters, such as the confiscation of property, strict bail conditions and delay confounded the abuse of process.

9. The magistrate then set out the arguments for the prosecution below which may be

summarised as that the summary charges were discrete and not alternatives to the indictable charges; involved different elements with no substantial overlap and had not been dealt with in the orders of the County Court judges. Further, there had not been unreasonable delay nor was there evidence that the prosecution had sought to manipulate the process. In addition, even if the indictable offences had been proved in the County Court, it would have been open to the prosecution to pursue the summary charges. Lastly, the plaintiffs below could only show 'disappointment', ie, that the charges had been reinstated, not abuse of process.

10. The magistrate set out briefly the procedural history and then turned to the authorities. Having considered and quoted from a number of the main authorities,[6] the magistrate observed that it was 'no small thing' to order a permanent stay of proceedings and that the discretion has been exercised in a variety of cases. His Honour then turned to the facts of the case at hand, turning first to the issue of delay. His Honour expressed that whilst the plaintiffs below were subject to anxiety and inconvenience, they had not shown how delay prejudiced their defence. His Honour then further drew upon *Jago v District Court of NSW*,[7] noting that delay is more likely to affect the prosecution and that he did not consider that the delay here would produce an unfair hearing for the plaintiffs. His Honour then stated that he was not persuaded that there was a fundamental defect in the case, nor that the summary charges were disposed of by the County Court. His Honour noted that the defendants were able to draw upon the County Court decisions in their defence. In concluding, his Honour stated:

> Having balanced the rights of the defendants to a fair trial with the expectations for the community that people charged with offences will be brought before the Courts, in the exercise of my discretion I am not satisfied that this is an appropriate and exceptional case requiring the permanent stay of proceedings as there is no abuse of process.

11. From this, the reasoning of the magistrate, and thereby the conclusion reached, can be ascertained. Dealing with each of the four arguments put by counsel for the defendants: first, concerning prosecutorial conduct in October 2004, whilst his Honour does not deal with this point in depth, he concluded that to proceed would not be oppressive, unfair or bring justice into disrepute. His Honour noted that the defendants were able to draw upon the procedural history and the County Court decisions in their defence.

12. As to the second argument, that the summary charges had been disposed of, it was not put before me that the defendants took issue with this conclusion. As to the third argument, that no appeal implied error and the error had led to delay and injustice, the magistrate did not deal specifically with the first part. However, that the prosecution may have made an error of that nature would not in itself ground an application to permanently stay the prosecution of other charges. It is not unreasonable, nor does it obscure the reasoning on which the decision is based. The magistrate did deal with the issue of delay and whether injustice resulted.

13. As to the fourth argument, that the consequences led to delay and injustice, the magistrate did not deal specifically with each of the consequences listed by counsel. However, his Honour considered the authorities and highlighted the seriousness and rarity of granting such a stay. His Honour proceeded to consider the effect of the history and delay on the trial of the plaintiffs and balanced this against the public interest. His Honour concluded that whilst there was delay, it was insufficient to tip the balance away from the public interest in the charges being pursued.

14. I do not consider that the reasons of his Honour were inadequate, nor that they disclose error on the face of the record. Clearly the learned magistrate provided considered reasons that upon analysis reveal an obvious process of reasoning that stated the facts, the argument, the applicable legal principles set out in the authorities, the argument of counsel on both sides and ultimately the reasoned conclusion.

Jurisdictional error

15. Counsel for the defendants submitted that the magistrate misunderstood the nature of his jurisdiction by holding that he was not satisfied that the cases of each of the plaintiffs was an 'exceptional case'. It was submitted that the jurisdiction to order a stay is not confined to 'exceptional' cases or limited to categories of abuse but is 'wide and dynamic', citing *Rogers v R.*[8]

16. Counsel for the informant drew my attention to *Champion v Richardson*,[9] in which Kellam

J said:[10]

> a permanent stay of criminal proceedings should be ordered only in rare and exceptional or extreme circumstances.

17. Counsel submitted that the magistrate had considered and applied well established principles the substance of which was not objected to. For present purposes, whether a situation is 'exceptional circumstances' or an 'exceptional case' avoids the point of the authorities. As set out in the magistrate's reasons, the authorities are clear that a permanent stay of proceedings, particularly criminal proceedings, will occur in 'rare and exceptional or extreme circumstances';[11] a discretionary power that is 'exercisable ... only in exceptional cases'[12] and 'sparingly and with utmost caution'.[13] I consider that the magistrate used the term 'exceptional case' to articulate that which the authorities indicate is appropriate to consider in the exercise of the discretion. There is no force to the argument that by so doing the magistrate narrowed his jurisdiction.

18. It was open to the learned magistrate to exercise the discretion as to whether the proceedings gave rise to an exceptional case. There is no basis under the principles in *House v R*[14] and *Australian Coal and Shale Employees' Federation v Commonwealth*[15] to set aside the exercise of the discretion.

Conclusion

19. The offences alleged against the plaintiffs are serious. Though they are summary offences, contrary to counsel for the plaintiffs' argument, they are not trivial. The delay that has occurred in these proceedings is not ideal. The public interest in charges being brought to trial includes an interest in them being brought expeditiously. Similarly, persons accused of offences have an interest, if not a right to, a speedy trial.[16]

20. In determining the application for a permanent stay of proceedings, I consider that the magistrate considered and reasoned all relevant matters sufficiently. I am not satisfied that there is error on the face of the record or jurisdictional error present.

21. I therefore refuse the relief sought and dismiss proceeding in both matters.

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[1] The plaintiff in proceeding 8165/2007.
[2] The plaintiff in proceeding 8166/2007.
[3] *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[4] *Administrative Law Act* 1978 (Vic) s10.
[5] [1989] VicRp 2; [1989] VR 8; see also, eg, *Alcoa Portland Aluminium Pty Ltd v Husson* [2007] VSCA 209; (2007) 18 VR 112.
[6] *Champion v Richardson and Anor* [2003] VSC 482; (2003) 40 MVR 529; *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307; *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431; *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462; and *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 177 CLR 378.
[7] (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.
[8] (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462.
[9] [2003] VSC 482; (2003) 40 MVR 529.
[10] Ibid [38].
[11] Ibid.
[12] *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23, 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.
[13] *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* [1987] HCA 27; (1987) 72 ALR 1; (1987) 61 ALJR 393.
[14] [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.
[15] [1953] HCA 25; (1953) 94 CLR 621.
[16] *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23, 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.

APPEARANCES: For the plaintiffs Hajdu: Mr GD Wendler, counsel. Willerby's, solicitors. For the first defendant Breguet: Mr JD McArdle, QC, counsel. Angela Cannon, Solicitor for Public Prosecutions.
