

5/77

SUPREME COURT OF VICTORIA

WALDRON v PACHOLLI

Harris J

15 December 1976

PRACTICE AND PROCEDURE – DEFENDANT CHARGED WITH TWO OFFENCES OF A CORPORATE NATURE – DEFENDANT ASSOCIATED WITH A COMPANY THE SUBJECT OF AN INVESTIGATION – APPLICATION FOR ADJOURNMENT OF CHARGES UNTIL INVESTIGATION COMPLETED – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR – WHETHER MAGISTRATE HAD REGARD TO EXTRANEOUS CONSIDERATIONS: MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, S79.

P., who was an undischarged bankrupt, was charged with two offences alleging he took part in corporate affairs without the leave of the Court. At the hearing, it was revealed that a company associated with P. was being investigated by an Inspector appointed under the *Companies Act*. P.'s counsel submitted that it would not be fair and just to proceed with the hearing of the charges. The Magistrate agreed and adjourned the hearing to a date to be fixed. Upon Order Nisi to review—

HELD: Order absolute. Magistrate's order set aside.

1. The Magistrate had power to adjourn the hearing of the proceedings but was required to do so in the interests of justice and fairness generally.

2. It was not possible to see why it was unfair to P. for the charges to be heard and determined in advance of the Inspector's report. If further charges were laid as a result of the investigation, that was a matter which P. would have to deal with if and when that occurred.

3. Accordingly, the Magistrate acted on an extraneous ground and there was no valid legal basis for the exercise of his discretion.

HARRIS J: In each of two informations, the informant, the Commissioner for Corporate Affairs, charged the defendant that at Melbourne in the State of Victoria, and at Perth in the State of West Australia, being an undischarged bankrupt:

(a) did take part in the management of Nickelodes Australia Proprietary Limited without leave of the court;

and a second information relating to the same period

(b) did act as a director of Nickelodes Australia Proprietary Limited without leave of the court, (both informations contrary to s117 of the *Companies Act* 1961).

At the hearing a preliminary objection was taken that although Nickelodes Australia Proprietary Limited was a Victorian Company, it was associated with a Western Australian public company called Nickelodes Australasia Limited which was the subject of an investigation by an Inspector appointed under the *Companies Act* in both Victoria and Western Australia.

Counsel submitted it would not be proper to proceed with the hearing of criminal charges against his client who was connected with both companies and whose conduct might be the subject of comment by the inspector in his report; that many of the proposed exhibits in the present case were documents produced before the inspector, hence it would not be fair and just to proceed with the present case when the inspector has not completed his investigation and the defendant may have to face further serious charges.

The Magistrate announced:

"As a number of the proposed exhibits were the same as the documents produced before the inspector, he thought that as a matter of fairness to the defendant the two informations should be adjourned until after the inspector had completed his investigation – and adjourned the informations to a date to be fixed."

[The order nisi was granted on the ground that the Magistrate had taken into account and acted on extraneous

and extra judicial considerations amounting to a refusal to hear and determine such informations according to law. His Honour continued:] "The Magistrate had power to adjourn the proceedings. That power is now to be found in s79 of the Magistrates (Summary Proceedings) Act 1975. The relevant part of the section provides that 'the Court may adjourn the hearing or further hearing to a time and place appointed and stated in the presence and hearing of the party or parties or their respective counsel or solicitors or other persons appearing for them or without appointing any time'. This is in s79(1)(b). Thus the Magistrate is given a general discretionary power to adjourn the hearing of the informations. The basis upon which the power to adjourn is not expressly stated in the section, but doubtless it is a power to be exercised in the interests of justice and fairness generally.

What is put here in support of the orders nisi is that the Magistrate acted upon an extraneous consideration or an extraneous ground in deciding to adjourn the proceedings. It is true that the exercise of discretionary powers by the Magistrates' Courts are not to be interfered with by this court merely because this court thinks that the discretion would have been exercised differently if this court had been doing that itself. It has got to be shown that there is something legally wrong with the decision. Thus if the ground upon which the adjournment was granted was an extraneous or an irrelevant ground, it follows that the discretion to adjourn has miscarried. Consequently this case can, in my opinion, be disposed of by considering whether the existence of the inspection into the affairs of the company that was related to the company mentioned in the informations, and the fact that some of the documents that were to be used in these cases were also to be used before the inspector, constituted a relevant ground which could properly justify the exercise of the Magistrate's power to adjourn the hearing of the informations.

The Magistrate said that he thought that the adjournment should be granted as a matter of fairness to the defendant. If there is any basis for thinking that to continue the hearing might have operated to prejudice the fair trial of the informations, then the power was properly exercised and this court should not intervene. In order to determine whether there was any such basis, one has to look to see whether there is any conceivable reason why the continuation of the hearing would have prejudiced the defendant's position, that is to say, would have prejudiced it unfairly.

It was asserted by counsel for the defendant that it would not be fair or just to proceed with the present cases when the inspector had not completed his investigation. But no actual explanation or reason for that was put to the Magistrate. Mr Perkins, who has appeared to represent the defendant in these proceedings before me, put it, as I understood him, that the Magistrate was entitled to take the view that all the proceedings in relation to the period specified in the informations and with respect to the people specified and indeed with respect to the people specified and indeed with respect to the company, should be completed and should be heard in such a way as to leave no possibility of future charges hanging over the defendant's head.

He submitted that as long as the investigation was proceeding there was at least a possibility that further charges would be laid against the defendant as a result of the inspector's investigation. He also pointed out that if the case went on the defendant would have to make a decision as to whether he was going to give evidence or not and that if he gave evidence, it was suggested that he might put himself in a position where he would have to give evidence that could present the informant with material for other charges against him.

That point seems to me to be one which does not relate to the existence of the inspection at all. It is a different matter and I do not see that it gives rise to a proper basis for the Magistrate exercising his discretion.

In any event it is not the basis upon which he exercised it. As to it being unfair for these charges to proceed until a time when it could be seen whether or not there were other charges to be laid against the defendant concerned, I just fail to see where it is unfair for these charges to be heard and determined in advance of the inspector's report, or indeed in advance of the inspector's examination of the defendant during the course of the inspection. These charges relate to particular matters. It is said that he was an undischarged bankrupt and that he acted in the management of the affairs of the company and he acted as a director of the company. That seems to me to be a distinct matter.

It may be that other charges perhaps of a more serious nature may be laid against the defendant

after the report has been prepared. Be that as it may, that is something that the defendant will have to deal with if and when that occurred. If those charges are laid, those proceedings will have to be heard in the normal way. I just do not see what it is that is unfair about proceeding with these matters.

When one comes to the quite limited basis upon which the Magistrate in fact acted, the matter is, I think, even clearer. The Magistrate actually said he would adjourn the informations because a number of proposed exhibits were the same documents as proposed before the inspector. For the life of me, I cannot see the slightest reason why that involved any unfairness as against the defendant.

If the matter had been presented on the basis that counsel then acting for the defendant, had not had the opportunity to properly prepare the defence because he had not had the opportunity for examining some books, that would have been a quite different matter. And if that were put to the Magistrate, the Magistrate might very well think that he should, as a matter of fairness, adjourn the proceedings to enable such an inspection to take place. I cannot think that if that had been the basis upon which the matter had been argued, that there would have been anything other than an adjournment for a specified and probably quite limited period of time.

So that in dealing with the decision of the Magistrate and the reasons upon which it is granted, I am satisfied that the Magistrate did act on an extraneous ground and that there is no valid legal basis for the exercise of the discretion which he purported to exercise.

... The Order below is set aside."
