50/93

SUPREME COURT OF VICTORIA

PEVITT v KOLOTYLO and ANOR

Southwell J

28 June 1993

PROCEDURE – BIAS – PROSECUTOR CONVERSING WITH DEFENDANT – DISCUSSION ABOUT EVIDENCE GIVEN AND THE QUALITY OF IT – ASSERTION BY PROSECUTOR THAT EVIDENCE WOULD BE LED IN REBUTTAL – INDICATION AS TO LIKELY RESULT OF HEARING – CONVERSATION MENTIONED TO PRESIDING MAGISTRATE – MAGISTRATE ACCEPTED PROSECUTOR'S VERSION IN PART WITHOUT HEARING DEFENDANT'S VERSION ON OATH – HEARING CONTINUED – WHETHER HEARING TAINTED OR UNFAIR – WHETHER PROHIBITION SHOULD GO.

Whilst a case was continuing, the prosecutor spoke to the defendant about the evidence he had given, that further witnesses would be called to show that the defendant had been untruthful and that he would be found guilty on some of the charges. When the hearing resumed, the defendant's counsel mentioned the conversation, sought to lead sworn evidence about it and also applied for the charges to be struck out as an abuse of process. After hearing from the prosecutor, the magistrate refused the application to lead evidence and made findings which when viewed objectively, were adverse to the version put forward by the defendant's counsel. The hearing of the charges then proceeded and upon the rising of the court, an originating motion for prohibition was sought by the defendant.

HELD: Prohibition granted. Magistrate restrained from the further hearing of the charges.
When the complaint was made by the defendant's counsel, the magistrate was required to properly investigate it in order to determine whether the trial could fairly proceed. In view of the failure to do this together with the making of findings adverse to the defendant, a fair-minded observer would have gained an impression of unfairness. Accordingly, the whole proceeding was tainted and the magistrate restrained from further hearing the charges.

SOUTHWELL J: **[1]** There is before the court an amended originating motion in which William Charles Pevitt is the plaintiff, but for reasons which will become apparent it will be convenient to refer to him as "the defendant", who seeks relief against one who informed against him in the Magistrates' Court at Portland and the Presiding Magistrate at Portland in respect of proceedings which are due to finish tomorrow morning. The urgency of the matter has forced me to reach conclusions without claiming time for deliberation. In the motion, orders in the nature of orders for prohibition are sought that the Magistrate be stayed from further hearing the relevant matters, although alternative relief that the proceedings themselves be forever stayed was not pushed in this court.

The defendant in October, 1992, was charged with 11 counts of obtaining property by deception, they being a series of WorkCare compensation payments made to him between 17 January, 1989 and 28 March, 1989 The alleged deception was that, while working for a company known as Bellan, and working as I understand it, in full-time employment, he continued to receive WorkCare payments to which he was not entitled. The proceedings commenced in the Portland Magistrates' Court on 5 April, 1993. The prosecutor, so this court was told, was a solicitor employed in the WorkCare Department; a member of counsel appeared for the defendant. The proceedings were part-heard on 5 and 6 April and 4 May and 1 June. Upon the latter date the Magistrate reserved his decision and has since indicated that that decision will be handed down tomorrow morning.

[2] There is, understandably enough, no transcript of the early proceedings but there is, more or less at any rate, a transcript of what occurred on 1 June. A reading of that transcript indicates that defending counsel at times used intemperate language towards the prosecutor and displayed belligerence towards the Magistrate in a display which brought little credit to the profession. It would appear that there were other early difficulties in the conduct of the trial all of which undoubtedly would have rendered the Magistrate's task much more difficult than it ought to have been. This application, however, is not concerned so much with what occurred on the earlier hearings but relates to an event on 5 May, 1993, the day after the second-last day of hearing, and the treatment of that subject on the last day of the hearing.

The defendant has sworn an affidavit in which he says that on 5 May, when he was on his way back to Melbourne with a truck driver from whom he was obtaining a lift, he went into a newsagency in Warrnambool where the truck driver was making a delivery and whilst in the newsagency he saw a man who he shortly thereafter recognised as being the prosecutor. He says that the prosecutor opened the conversation, which for a moment or two dealt with social niceties, but that the prosecutor then said that he was going back to Melbourne and, "I'll be glad to get there because I wish this was all over", and a moment or two later he said, "It will be all over next time we go to Court, it will be finished." The defendant's version then goes on to say that the prosecutor -

> **[3]** "... continued the conversation by telling me that he had been to the abattoirs and spoken to a witness Mayberry and his boss a person Menzies and that as a result of that conversation more documents had been found. He implied that these documents would demonstrate that I had not been telling the truth in my evidence up until that time, and he told me that he intended to reopen the prosecution case to produce more evidence. He went on to say he would also call one Jaboor to give evidence that that person had told him that he had never heard of me. This was a reference to the fact that I had previously given evidence to the effect that I had informed a person at Rehabilitation that I was in fact doing some minor labouring work at Bellan's. I tried to explain to (the prosecutor) that I did not know Jaboor but that I did see a person at Rehabilitation on at least 4 or 5 occasions in relation to this matter. I then described that person as being a big bloke with a beard who used to ride a motorcycle. I tried to do this in defence of my position because the way in which the firstnamed Defendant was putting these matters to me was that I had been lying in my evidence and that he was going to reopen his case to demonstrate that untruthfulness with these further witnesses. I continued to try to explain the situation to Mr Uncles but he cut me off by saying words to the effect, 'It will be over next time and you might get out of some but we've got you on the others.' He then added, 'You are gone.'"

The defendant says that the prosecutor asked him to keep the conversation confidential and that the prosecutor went on to -

> "... tell me that he had been to my bank, spoken with the bank manager and had checked through other accounts at that bank including the account of my then de facto wife with a view to proving that money had been transferred between accounts to conceal payments that I had been receiving which were relevant to the case. "The prosecutor then went on to allege that some of the money paid into the joint account with my then de facto wife had come from Bellan. He stated that my evidence about having worked at Bellan in 1988 was untrue because he said he had also been in touch with them and had been informed by an employee by the name of Vicky Crowther at Bellan that I was not working there at that time. "The prosecutor then went on to say that he had discovered that I was doing Class 3 labouring work with Bellan and he then asked me which hand I was using. The significance of this was that since my WorkCare claim at the time related to an injury and incapacity to my right hand I could not have **[4]** been using it to do the labouring work if it was incapacitated as I had claimed and therefore that my claim was fraudulent. "He said that I should have a talk to my barrister because he had made my case bad with the Magistrate. He went on to say that my barrister had stuffed up my case and that he had stuffed up other cases in the same way and that my barrister was very lucky that he had not been charged with contempt and that he should have been."

The defendant claims to have been greatly upset by this conversation and the sting of it is that, at that time, the cross-examination of the defendant by the prosecutor had not concluded. That is to say, at the close of proceedings on 4 May the defendant was being cross-examined and was to be further cross-examined at the resumed hearing which was due to take place on 1 June. I should say at once that the prosecutor has not filed any affidavit putting in issue his version. Counsel for the defendant in this proceeding did not see fit to suggest that the court cannot accept this version as accurate, nor did she submit that it was anything less than a case of gross impropriety by the prosecutor in saying what he did when he did. When the proceedings resumed on 1 June, counsel for the defendant said:

> "This case has become so tainted by the conduct of the prosecution that it would be wrong, improper and unlawful for this case to proceed. It should not proceed as it has been an abuse of process."

That was at least in part an inappropriate manner in which, I understand it, there was an attempt to roll up what counsel then saw as past improprieties of the prosecution and mistakes by the Magistrate into what had become his more recent complaint, that is the conversation the details of which have just been set out. **[5]** There were then some further general remarks going

back into the history of the matter, which might have been thought to detract somewhat from the real thrust of the submission that counsel was then endeavouring to make and, as I have said, some of the submissions were couched in language that seems to me to have been unfortunate, to say the least.

Be that as it may, it was obvious that counsel wanted to call evidence to show that there had been gross impropriety by the prosecutor. He made allegations about the conversation in the newsagency as being intimidation and harassment, suggesting that that was such as to constitute criminal behaviour on the part of the prosecutor and he also made it clear that he wished to call another witness, that is the truck driver who had been present, although not within earshot, during the relevant conversation. In due course the prosecutor replied and in part said, "I totally reject everything (Counsel) said". However, he quite obviously did not mean that to be taken literally because he went on the speak of the conversation, and his version is, in part, as follows: That he went into the newsagency and:

> "To my great surprise a voice attracted my attention as I was walking outside the shop. To my surprise Mr Pevitt addressed me. (Counsel) says the conversation was for several minutes. I dispute that strongly. The short conversation consisted of a very strong verbal attack from Mr Pevitt. I am reluctant to go any further. I totally and utterly reject the version given by (Counsel) and am happy to give evidence regarding this ..."

Later, he said:

> "I did not harass, assault or intimidate Mr Pevitt. I regarded it as a trivial outburst by someone under pressure and I ignored it. Perhaps I should have **[6]** reported it. I did not abuse (Counsel's) name to his client. I did not want to proceed and detail exactly what Mr Pevitt said to me."

Counsel for the defendant again pressed the Magistrate to hear evidence about what had occurred and in due course the Magistrate said:

> "That matter" (meaning the matter concerning the conversation in Warrnambool) "should proceed no further. The proper course will be to make a submission and then outline the facts. (The Prosecutor) was given the opportunity to present the submission further. Matters are properly put in submissions to the court and should make a ruling on the submission (sic). (The Prosecutor) has claimed that he did not initiate the conversation with the defendant. I am prepared to accept this. It would not be a proper course of action for a prosecution to discuss the facts of a case with a defendant, particularly when he is in cross-examination. (The Prosecutor) has claimed that the conversation was of short duration ... that the conversation took place does not mean there has been harassment of a defendant. I am not persuaded that the conversation was of great duration. The incident was a minor one and does not constitute grounds that the matter should not proceed further or be struck out. I don't believe the conduct of the prosecutor was so untoward as to deny justice. I intend to continue to hear this case. There have been continuous interruptions from the Bar table. I plan to conclude this case on this day so I call Mr Pevitt."

There was then a further application by counsel for the defendant to present evidence as to what had occurred and the Magistrate replied:

> "I refuse application to call sworn evidence. I am anxious to have this matter completed. We have spent 3 days on this case. I order Mr Pevitt to the stand."

Counsel then sought an adjournment to enable application to be made or at least consideration to be given to the making of an application to this court and after hearing from the prosecutor very briefly the Magistrate said:

> "Application made that the matter be adjourned indefinitely to allow matter to be taken to Supreme Court. There are any number of submissions made which may given either side grounds to take the **[7]** matter to the Supreme Court. These are usually made after the completion of the case. After the decision of the Supreme Court and the resumption of the case it would be open to either side to stand down and take the matter to the Supreme Court. That process is not conducive to justice. The proper course of action is for the matter to continue and to take any matters to the Supreme Court at the end of the case if necessary."

There was then a complaint that the Magistrate had in effect found in favour of the

prosecutor's version of the facts as against the version that the defendant might wish to put forward and which counsel had outlined from the Bar table and it was said that there was now the appearance of bias in the hearing. The Magistrate was urged to discontinue hearing the case and the Magistrate then said:

> "The ruling is not a finding against the defendant. I did make a ruling that (the Prosecutor) did not instigate the conversation and that it was of a short duration. (Counsel) had opportunity to dispute this but did not. I did not make any rulings in relation to the contents of the conversation. I find the fact that the conversation occurred but did not involve harassment or intimidation of the defendant and that there is not sufficient grounds for the case to not proceed. I am not in any way finding against Mr Pevitt's character or reflecting on the veracity of the defendant."

The cross-examination of the defendant then proceeded. A transcript of that cross-examination does not reveal that the defendant was so upset or oppressed by the event of 5 May as to render him incapable of doing himself justice. **[8]** Indeed, he matched counsel in trading accusations and, as was said during this hearing, appeared to give as good as he got.

As I have earlier indicated, there can be no question but that, upon the version given by the defendant, the prosecutor was guilty of grave impropriety. No doubt there are many ways in which the fair trial of a criminal proceeding can be put at risk, but surely one way is for the prosecutor or anyone on his behalf to so harass the accused between hearings of the accused's cross-examination as is indicated on the material presently before this Court. As I have also indicated, the issue is not really whether there was gross impropriety but whether the fact of that conversation and the manner in which it was dealt with by the Magistrate on 1st June constitutes such a departure from the ordinary rules of procedure in a criminal case and the ordinary standards of conduct that it must be said either that the trial itself was unfair, in that the prosecutor's conduct was such as to render it necessary for the Magistrate to end the hearing, or at least do his best to end the prosecutor's role in it, or whether the Magistrate himself was gravely in error in failing to investigate properly the allegations made by counsel for the defendant.

Before referring to some of the legal principles, I should add that counsel for the informant in this case has argued that the Magistrate's findings were not of the type which showed that he had made up his mind against the defendant, that they did not show bias, and in any event related to a collateral matter. In my view, the fair-minded **[9]** observer would conclude that the Magistrate had accepted the word of the prosecutor from the Bar table against the version, whatever it was, which would be put forward by the defendant. The Magistrate made a finding that the incident was a minor one; he made a finding that there was no harassment or intimidation; he made a finding that the prosecutor did not instigate the conversation – and in all those aspects he made findings which, as I have said, must be regarded by the fair-minded observer as findings adverse to the version which the defendant wished to put forward.

I have little doubt that, if the Magistrate had heard evidence about this matter, he would have been persuaded that there was not only a real issue to be tried as to what occurred, but a real issue to be tried as to whether, if that conversation did occur, the fair trial of the defendant could continue – whether in all the circumstances a prosecutor who had said these things to a defendant ought to be permitted to continue to cross-examine that defendant, who on the defendant's version had given some things away, it might be thought, because of the pressure he was put under in that conversation – and pressure, of course, which ought never to have been applied to him. The Magistrate, without hearing the defendant or the independent witness, reached conclusions in a manner which denied him the opportunity of deciding whether in all the circumstances the hearing could continue with the appearance of justice.

[10] What, then, is the effect of the observations I have just made? Counsel have been good enough to refer me to a number of authorities which underline the undesirability of this Court interfering during the course of criminal proceedings in another court. Reference in particular was made to *R v Judge Mullaly ex parte the Attorney-General for the Commonwealth* [1984] VicRp 66; (1984) VR 745, where Brooking J referred to the distinction between errors that relate to such things as the admissibility of certain evidence and errors which go to the root of the proceedings. His Honour said at p748:

> "This is not a case in which there has been some grave departure from the fundamental rules governing the conduct of criminal proceedings as by refusing to permit the defendant to give evidence."

It is true, as counsel for the defendant has submitted, that the defendant was in this case permitted to give evidence upon the principal issues, and it was further said that the refusal to hear evidence was only a refusal in relation to what is a collateral matter and it did not involve such a grave departure from the fundamental rules governing the conduct of criminal proceedings to justify the intervention of this Court. It has been said many times that the Court must be slow to intervene; that has often been said in relation to such questions as the admissibility of evidence. I have not been pointed to a case having much similarity to the present case, but I am in the end persuaded that the conduct complained of was such as to demand that the Magistrate properly investigate it in order to **[11]** determine whether the trial fairly could proceed.

The Magistrate did not do so, and in my view thereby deprived himself of the material which would have enabled him to form a considered judgment as to whether the trial could proceed. I think that error was compounded by the making of findings which, as I have said, would be regarded by the fair-minded observer as having involved the Magistrate reaching at least some conclusions favourable to the prosecution and adverse to the defendant. His later statement that he was not in any way finding against Mr Pevitt's character or reflecting on the veracity of the defendant cannot, in my view, repair the damage.

I do not regard the situation as tolerable. I believe that what has occurred has given the impression of unfairness, and while the Court is, as I have said, slow to act in an interlocutory manner, the discretionary remedy to restrain the Magistrate should go. I might say that I had considered whether, in all the circumstances, at this late stage the defendant ought to accept the risk of conviction against the benefit of a possible acquittal, but, having reached the view that the whole proceeding is tainted, it seems to me that the Court ought not to withhold judgment upon it. Accordingly, relief of the nature sought will be granted, and I shall discuss with counsel the precise form of the order.

Mr WILLEE: Your Honour, I have some draft minutes here. (Discussion ensued).

HIS HONOUR: As it seems to me, this Court ought not to avoid the question of costs. I see no reason why the order **[12]** should not in effect be following the event. They are costs thrown away, and they are thrown away by reason of the conduct of the prosecutor. In those circumstances, no good reason is shown that costs should not follow the event, so the order will read "including costs of the proceedings in the Magistrates' Court". Otherwise there will be an order as in the minute filed.

APPEARANCES: For the plaintiff Pevitt: Mr P Willee QC with Mr T Monti, counsel. Stringer Clark, solicitors. For the first-named defendant Kolotylo: Ms L Lieder QC with Mr R Lancy, counsel.
