32/96

SUPREME COURT OF VICTORIA

HOLDING v BECK and PURCELL

McDonald J

22, 23 May 1996

PRACTICE AND PROCEDURE – COSTS – LEGAL PRACTITIONER NOT PRESENT AT HEARING – HEARING ADJOURNED – APPLICATION FOR COSTS – COSTS ORDERED AGAINST LEGAL PRACTITIONER – LEGAL PRACTITIONER NOT GIVEN OPPORTUNITY TO BE HEARD BEFORE ORDER MADE – WHETHER JURISDICTIONAL ERROR ESTABLISHED – WHETHER COSTS ORDER SHOULD BE QUASHED: *MAGISTRATES' COURT ACT* 1989, S132.

1. By the terms of s132 of the *Magistrates' Court Act* 1989 ('Act'), the discretion given to a court to order costs against a legal practitioner is wide. However, before such an order is made, the terms of s132(3) of the Act make it mandatory that the court first give the legal practitioner a reasonable opportunity to be heard.

2. Where a legal practitioner who was not present in the proceedings was not given an opportunity to be heard before an order for costs was made against him, the magistrate in making the order for costs fell into jurisdictional error and accordingly, the order must be quashed.

McDONALD J: **[1]** These proceedings were commenced by originating motion filed on 4 April 1996. By the proceedings the plaintiff, who is a solicitor, and who carries on practice in Melbourne, seeks relief in the nature of *certiorari*. He seeks an order that the court quash an order made by the Children's Court at Geelong on 9 February 1996. The Children's Court at Geelong was on that day constituted by the first defendant who is a Magistrate of this State. The second-named defendant to the present proceedings, a Detective Senior Constable of Police, was the informant in the criminal proceedings before the court that day. The defendant to those criminal proceedings was a client of the plaintiff. He was 16 years of age and I shall hereafter refer to him as the "client". The Magistrate on 9 February 1996 ordered that the hearing of the proceedings before him that day, being criminal proceedings against the client, be adjourned to 7 and 8 May 1996 and further ordered that the plaintiff pay "prosecution witness costs" of the aborted hearing that day, fixed at the sum of $550.

By these proceedings the plaintiff seeks an order that the order against him for costs be quashed. By an order made by a Master on 1 May 1996, it was ordered that the originating motion be amended. By the amended originating motion, the plaintiff sought, in the alternative to the above, an order that the matter, the subject of the present proceedings, be referred back to the Children's Court at Geelong constituted other than by the first defendant, in order that it may be determined according to law. At the commencement of the hearing of these **[2]** proceedings before this court, counsel who appeared on behalf of the second defendant, and who was instructed by the Victorian Government Solicitor, stated that her instructions were that, having regard to the material before the court, the informant would be making no submission that the relief sought, that is, that the order for costs be quashed, should not be granted. She further informed the court that in the event of the order for costs being quashed, the second defendant would not be seeking an order that the matter be remitted to the Children's Court for further determination, as the second defendant did not intend to pursue any application for costs of the adjournment. She later informed the court that one of the relevant matters taken into account by the second defendant, causing him to adopt the position referred to, was the fact that, in fixing the amount of the costs ordered, there were costs ordered which could not properly be included in such an order. From the material before this court it is apparent that the said costs ordered included the alleged costs of two police officers when there was no material before the court that they would in fact incur loss by reason or the adjournment. cf: *Fitzgerald v Golden and Ors* (Beach J, 5 December 1995, unreported).

The Magistrate has filed an affidavit in the proceedings exhibiting a transcript of what

occurred in the court on 9 February. As appears from his affidavit, in order to assist his note-taking on 9 February 1996, the Magistrate used a small tape recorder to record the proceedings. He caused a transcript of the proceedings to be prepared from the tape recording, which transcript he **[3]** exhibited to his affidavit, deposing that it accurately represented the matters that occurred in his court that day. In *Parkin v Crisp and Ors* (27 October 1995, McDonald J, unreported), in which prohibition was sought against a Magistrate, I said at 1-2:

> "In a letter addressed to the Acting Prothonotary, the Victorian Government Solicitor informed the court that the Magistrate would not take an active role in those proceedings but would abide the decision of this court. In such proceedings as this, particularly where both parties appearing before the Magistrate are represented before this court, the position taken by the Magistrate is appropriate – *R v Australian Broadcasting Tribunal (ex parte Hardiman)* [1980] HCA 13; (1980) 144 CLR 13 at 35; 29 ALR 289; (1980) 54 ALJR 314. However, there may be cases where no transcript of the proceedings in the Court below is taken or is available and where a Magistrate in such a case as this considers that the material put before this court does not accurately or fully state the evidence or the events that occurred. Then it would be appropriate for that Magistrate to file an affidavit deposing as to such matters as is necessary".

See also *Custom Credit Corporation Ltd v Lupi* [1992] VicRp 8; [1992] 1 VR 99; [1991] ASC 56-024, O'Bryan J at VR 111-117; McDonald J at VR 126-7.

At the outset of the hearing, counsel other than counsel for the second defendant informed the court that he had been retained on behalf of the Magistrate. After some discussion he informed the court that he did not intend to appear, nor did he seek to appear in the proceedings on behalf of the Magistrate, who would abide the decision of the court. He further informed the court that he proposed to remain in attendance in court during the course of the hearing in the event that the court may wish to obtain assistance from him. Accordingly, the Magistrate did not seek to take an active role in the proceeding. This, in my view, was appropriate. It was also appropriate for him to file an **[4]** affidavit setting out in transcript form what occurred in his court on the relevant day.

However, after argument had concluded on the substantive issues to be determined, counsel for the plaintiff sought an order for costs against the Magistrate. Counsel briefed on behalf of the Magistrate made submissions why the Magistrate should not be ordered to pay costs, and also sought on behalf of the Magistrate an indemnity certificate pursuant to the *Appeal Costs Act*.

In an affidavit sworn by the plaintiff and filed in support of his claim for relief, the plaintiff has deposed that on 27 September 1995 he was consulted and received instructions to act on behalf of the client in relation to rape and other related charges brought against him which were to be heard in the Children's Court at Geelong. S21(2)(c) of the *Children and Young Persons Act* 1989 provides that a child must be legally represented in proceedings in the Criminal Division of the Children's Court, being the "hearing of a charge for an offence punishable, in the case of an adult, by imprisonment". The penalty for the crime of rape, pursuant to s38 of the *Crimes Act* 1958 is 25 years. Accordingly, it was necessary for the client to be legally represented before the Children's Court on the hearing of the charge of rape which was one of the charges in respect of which the client had retained the plaintiff to act on his behalf.

From the plaintiff's affidavit, the following facts appear:

- The plaintiff instructed counsel to act on behalf of the client on applications for bail, made 13, **[5]** 23 October and 10 November 1995. Counsel's brief was extended for him to represent the client on hearing of the charges.
- On 20 November the plaintiff received a memorandum from counsel setting out the bail conditions that had been fixed on 10 November and informing him that the client's case had been listed for a "contest mention" on 1 December 1995. The memorandum further contained the advice of counsel that the client should plead not guilty to all charges.
- Counsel appeared for the client on 1 December 1995. On 4 December 1995, the plaintiff received a further memorandum from counsel informing him that the client's case had been adjourned until 8 December 1995 for a further mention hearing. The memorandum also made reference to negotiations that were proceeding relevant to the charge of rape being withdrawn.
- On 5 December 1995, counsel contacted the office of the plaintiff's employers and left a message with a secretary to the effect that the case had not been resolved, that it would be listed in the new year for a contested hearing, but at that time a date had not been fixed.

• On 22 December 1995 the plaintiff was told by a secretary at his office that they had received a Christmas card on behalf of the plaintiff. However, he did not read it.

• At about 10.15am on 9 February 1996, the plaintiff received a telephone call from a **[6]** registrar at the Geelong Children's Court who advised him that the client's case was listed that morning as a contest and that a number of prosecution witnesses were present at the court. He advised the registrar of the name of counsel who had been briefed to appear on behalf of the client and gave him counsel's telephone number. At this time the plaintiff was in his office in Melbourne.

• At 10.20am the plaintiff spoke to counsel, who was unaware that the case had been listed for hearing. Counsel explained that he had not attended court on 8 December, as he had been advised by the prosecutor that the case was to be adjourned for a contested hearing and that his attendance was not necessary on 8 December 1995. After speaking to counsel the plaintiff immediately commenced to dictate a letter to be sent to the court explaining why the client was not legally represented that day.

• At approximately 10.40am and at a time that the letter was being typed, the plaintiff received a telephone call from another officer of the Children's Court at Geelong who said that the Magistrate wanted someone to appear before the court at 11am. The plaintiff explained to the court officer that he was writing a letter to the court and that it would be sent by facsimile transmission in a few moments.

• The registrar then informed the plaintiff that the Magistrate was looking to make an award of costs **[7]** and that he should brief a local solicitor. The plaintiff told the registrar that he did not have time and that he would send the letter, but that the registrar said, "Well, I am just warning you that you are doing this at your own peril".

• The plaintiff asked the court officer whether the court file contained anything which indicated that he had received notice from the court of the hearing date and was told by the officer that there was no such note on the file.

• The plaintiff completed the letter and sent the same by facsimile transmission to the court at 10.55am. The letter set out a number of previously referred to facts and also stated that the plaintiff believed that counsel had the matter in hand and that he had only ascertained that day that counsel had expected him to be notified of the date of the hearing and that he in turn would advise counsel of the date. The plaintiff in his letter stated that he regretted the "breakdown in communications" and regretted any inconvenience to the witnesses.

• While the letter was being transmitted or at about that time, the plaintiff telephoned the court and spoke to one Laffan, a solicitor, who was at that time in attendance at the court as the duty solicitor. The plaintiff asked Laffan to obtain a copy of the letter that he had sent to the court and asked him to appear on behalf of the client and request an adjournment of the hearing listed that day.

• **[8]** At a few moments after 11am the mother of the client telephoned the plaintiff and told him that she had spoken to the prosecutor and told the prosecutor that she had sent the plaintiff a letter advising that the hearing date was 9 February. However, in the course of further conversation had between the plaintiff and the mother, she told him that it was on the back of a Christmas card. He advised her to speak to the duty solicitor Laffan.

• That afternoon the plaintiff telephoned the Children's Court at Geelong and was informed that an award for costs had been made against him in the sum of $550. He was informed how that award was made up. The costs included an amount of $232, being costs of attendance of two police officers for attending the court for half a day. I have previously referred to this matter.

The court order made by the court that day was as follows:

> "Hearing adjourned to 7th and 8th May 1996. (Counsel briefed for Patterson [sic] failed to appear due to breakdown in communication between he and his solicitor). Defendant's bail is extended. Order that Mr DP Holding of the firm of Slades and Parsons, Solicitors, 572 Lonsdale Street, Melbourne pay Prosecution Witness costs in this aborted hearing fixed at $550. Stay 1 month".

Counsel who had been briefed on behalf of the client was in fact Mr Patterson. It is to be noted that in his affidavit the plaintiff has deposed that he asked the duty solicitor, Laffan, to appear on behalf of the client and to request an **[9]** adjournment. Laffan was not asked nor retained by the plaintiff to represent him before the court that morning. In an affidavit sworn by Laffan and filed in these proceedings, he has deposed to the conversation that he had with the plaintiff, including that the plaintiff asked him to appear on behalf of the client and ask for an adjournment. He has deposed that he agreed to appear on behalf of the client and ask for an adjournment and that shortly after the conversation, at about 11am, he was called before the Magistrate and that he appeared and asked for the adjournment. He has deposed that at no stage did he appear on behalf of the plaintiff before the Magistrate.

The prosecutor, who appeared before the court that day, Senior Constable Murrihy, and the informant, the second defendant, have each sworn affidavits as to the events that occurred in court that day. However, counsel for the plaintiff and the second defendant were in agreement that I should have regard to the transcript of the proceedings attached to the Magistrate's affidavit as

evidence of the matters that occurred and as to what was said in the court on that day. I am of the view that insofar as the Magistrate has provided by his affidavit a transcript of the proceedings, taken in the manner referred to, that should be had regard to by this court as providing evidence in these proceedings as to what did occur in the court that day and what was said. From that transcript the following facts appear and are established:

> On the proceeding being called on, the Magistrate asked Laffan if he appeared in the matter. Laffan **[10]** said that he had asked to appear "on behalf of the defendant", that is the client. The Magistrate identified the client by name and Laffan confirmed that he was the defendant for whom he appeared. Laffan stated that he understood that the matter was listed for a contest and that the solicitors had instructed him that they were totally unaware that the matter had been listed before the court that morning. He enquired whether the Magistrate had had the opportunity to read the solicitor's letter which had been 'faxed' to the court. The Magistrate said that he had seen the letter in his chambers earlier.
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> There then followed a discussion between Laffan and the Magistrate relating to the circumstances why the client was not represented before the court that day and as to the breakdown in communications between the plaintiff and the counsel who had been briefed on behalf of the client. In answer to a question from the Magistrate, Laffan told him that neither counsel or the solicitor had made enquiries from the court as to the date of the hearing of the charge, and, further, that as he understood it, there had been no communication between the defence lawyers and the prosecution.
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> The Magistrate said:
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> > "Your application is to have this case adjourned. I don't think the court's got any choice in that matter because these charges are very serious charges, and the Children's Court Act and that's the jurisdiction we are in, makes it quite clear that children must **[11]** be represented by counsel, and particularly the thrust of the Act is that in a case like this it is essential".
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> To this Laffan replied, "Yes, that's so, Sir".
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> The Prosecutor said to the Magistrate that to say that there was a lack of communications was an understatement. He submitted that there was negligence on the part of the plaintiff and counsel, in not ascertaining the date of the hearing. He informed the Magistrate that he had spoken to the client's mother who had informed him that she had written to the client's solicitor, the plaintiff, so that he knew of the date of the hearing. The Prosecutor made an application for costs in the sum of $550 and informed the court that he had a "breakdown" of that amount.

[His Honour then set out the provisions of the Children and Young Persons Act *1989 relating to the power to adjourn proceedings and to ss131 and 132 of the Act dealing with the question of costs, and continued]...***[13]** Of significance to these proceedings are the provisions of subs(3) of section 132 which provides:

> "(3) The court must not make any order under subs(1) without giving the solicitor a reasonable opportunity to be heard".

At no time did the Prosecutor specifically apply for the order for costs to be made against the plaintiff; rather, his application was in general terms. During the course of discussion that took place in the proceedings between Laffan and the Prosecutor and the Magistrate as to the amount and breakdown of the costs, the Magistrate said that he would like the client's mother to go into the witness box to explain about the letter she had written. She was sworn as a witness and in answer to questions directed to her by the Magistrate she said that she had sent a Christmas card to the plaintiff and had written on the "other side" of the card the date on which the case was to be heard. After further discussion between Laffan and the Magistrate and the Prosecutor, the Magistrate said: *[After setting out these comments, His Honour continued]...***[14]** Having said that, the Magistrate then proceeded on and made specific findings against the plaintiff, including that he had a duty to his young client to ascertain the date on which the severe charges against him were to be heard and that his failure to do so was negligent. He then made the order that I have referred to.

Counsel for the plaintiff in these proceedings made a number of submissions in support of the application that the order for costs made against the plaintiff be quashed. The first and second of those submissions taken together were that the Magistrate had no power to make the order for costs against the plaintiff without giving him a **[15]** reasonable opportunity to be heard and that in the circumstances of this case such opportunity had not been given to the plaintiff, and therefore the order made was beyond power of the Magistrate.

In *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, the High Court, when dealing with the scope of proceedings for relief in the nature of *certiorari*, at ALR 599 said: *[After setting out passages of the judgment, His Honour continued]...***[16]** By the terms of s132(3) of the Magistrates' Court Act, before the Magistrate could make the subject order for costs against the plaintiff, it was mandatory that he first give him a reasonable opportunity to be heard.

It is apparent from that said by the Magistrate that he was aware of this. The question of fact that arises is did the Magistrate give the plaintiff a reasonable opportunity to be heard, before making the order? Although referring to the necessity to do so, it does not **[17]** appear that the Magistrate otherwise addressed that question. I am satisfied that the Magistrate did not give the plaintiff reasonable opportunity to be heard before he made the order for costs against him in the circumstances of this case. It is not disputed that Laffan appeared before the court to represent the client and not the plaintiff. Whether or not there existed a factual basis of negligence, misconduct or default enabling the Magistrate to exercise his discretion as to costs under s132 of the *Magistrates' Court Act* and to make a costs order against the solicitor on the adjournment, could not have been ascertained by the Magistrate before hearing the matters put to him in court. At no time in the proceedings and before the order was made, in the circumstances where the plaintiff was not present, was he given an opportunity to be heard.

The fact that the officer of the court gave warning to the solicitor that the Magistrate was looking to make an order for costs is, in the circumstances, rather surprising as it preceded the application to be made to the court on behalf of the client for an adjournment and preceded the application by the Prosecutor for costs, which, having been made, gave rise to the Magistrate's discretion in respect of making an order for costs, including his discretion to exercise powers under s132 of the Act against a practitioner. The informal statement made by the officer of the court, at the time of the proceedings, cannot in my opinion be regarded as providing notice to the plaintiff that the Magistrate was **[18]** considering exercising his powers under s132 of the *Magistrates' Court Act* against him so as to provide a starting point in time during which the plaintiff could seek to be heard, if he wished, before the order was made. It would have been different had such notice been given to the solicitor after the Magistrate had heard the matters addressed to the court on the adjournment application. It was at that time that the Magistrate should have given the solicitor the opportunity to be heard, bearing in mind the fact that at that time the plaintiff was in Melbourne and the court was sitting in Geelong.

In the circumstances of this case, I am satisfied that in failing to give the plaintiff a reasonable opportunity to be heard before the order for costs was made against him, the Magistrate fell into jurisdictional error. It was an essential condition to the exercise of the Magistrate's jurisdiction under s132 of the *Magistrates' Court Act*, that before an order was made under that section, the practitioner must be given reasonable opportunity to be heard. This condition was not satisfied. The order for costs against the plaintiff must be quashed. Having reached this conclusion, it is not necessary for me to address or consider the other submissions made on behalf of the plaintiff in support of the order sought by him in those proceedings. Further, having regard to the position taken by the second defendant, it is not appropriate to remit this matter to the court.

The plaintiff has made application in these proceedings for costs against both respondents. I was at **[19]** first mindful not to make an order for costs in his favour having regard to the small amount involved in this case and also having regard to the fact that the only issue that was involved in this case was that concerning an order for costs. However, I have concluded that on it being established that there was jurisdictional error, requiring the order to be quashed, the fact that it has been conceded on behalf of the second defendant that the costs that were ordered included amounts which could not properly be included in such an order, and also taking into account that the second defendant does not seek to have the matter remitted to the Children's Court, as the second defendant does not seek to pursue an application for costs, I should order that the plaintiff should have his costs against the second defendant. However, I also intend to order that the second defendant should have an indemnity certificate under s13(1) of the *Appeal Costs Act*.

The first defendant, the Magistrate, has also sought a certificate under that Act. It was apparent from the time that these proceedings were commenced that it may be necessary and would

probably be appropriate for the Magistrate to file an affidavit in the proceedings. This is what he did. In my view it was appropriate for him to do so. However, in my view, it was not appropriate for the Magistrate to be represented at these proceedings and to have counsel appear and inform the court of his presence and inform the court that the Magistrate would abide the order and decision of the court. It is my view that the Magistrate should have an indemnity certificate **[20]** under s13(1) of the *Appeal Costs Act*, but that that certificate should be limited to the costs of and incidental to him filing, in those proceedings, the affidavit which he filed.

ORDER: For the above reasons, I make the following orders:

1. That the order made by the Children's Court at Geelong on 9 February 1996 wherein it was ordered that the plaintiff pay prosecution witness costs on the aborted hearing, fixed at $550, is quashed.

2. That the second defendant pay the plaintiff's costs of the proceedings.

3. That the second defendant be granted an indemnity certificate under s13(1) of the *Appeal Costs Act*.

4. That the first defendant be granted an indemnity certificate under the *Appeal Costs Act* limited to the costs of and incidental to him filing an affidavit in these proceedings.

APPEARANCES: For the Plaintiff: Mr Webb, counsel. Solicitors for the Plaintiff: Mr D Holding. For the First Defendant: Mr Pirrie, counsel. Solicitors for the First Defendant: TG Mulvaney and Co. For the Second Defendant: Mrs Davis, counsel. Solicitors for the Second Defendant: Victorian Government Solicitor.
