32/03; [2003] VSC 460

SUPREME COURT OF VICTORIA

THOMAS v CAMPBELL & ORS

Nettle J

21, 22 October, 21 November 2003 — (2003) 9 VR 136

PRACTICE AND PROCEDURE – CRIMINAL LAW – EVIDENCE – SUMMONS TO WITNESS TO PRODUCE DOCUMENTS – CROWN FILES RELATING TO CRIMINAL PROSECUTIONS OF A PRINCIPAL PROSECUTION WITNESS SOUGHT – SUCH FILES LIKELY TO ASSIST DEFENDANT IN CONDUCT OF HIS DEFENCE – ACCESS TO DOCUMENTS REFUSED BY MAGISTRATE – DOCUMENTS NOT INSPECTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR IN SETTING SUMMONS ASIDE – DEFENDANT FOUND GUILTY AT SUBSEQUENT HEARING – WHETHER EARLIER DECISION TO SET ASIDE THE SUMMONS WAS AN ERROR WHICH WAS INVOLVED IN THE SUBSEQUENT ORDER TO CONVICT DEFENDANT – DOUBLE JEOPARDY – DEFENDANT CHARGED WITH STALKING AND SPECIFIC OFFENCES OF ASSAULT IN RELATION TO SAME WITNESS – ELEMENTS OF STALKING AND UNLAWFUL ASSAULT OFFENCES – WHETHER THE SAME – WHETHER OPEN TO CONVICT DEFENDANT ON BOTH CHARGES – TWO INCIDENTS NINE MONTHS APART – WHETHER COURSE OF CONDUCT COMMITTED WITH A CONTINUITY OF PURPOSE ESTABLISHED – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE OF STALKING PROVED.

T. was charged with offences of assault and stalking against B. who previously was a police officer. Over a period of years a number of criminal prosecutions had been taken against B. and those files were highly likely to contain material which may have affected B's credit and assist the defendant in the conduct of his defence. Prior to the hearing of the charges, T. issued a witness summons seeking production of certain documents including the criminal files relating to B. Upon an application to set aside the summons, the magistrate did not inspect the criminal files and after hearing evidence from B. and T. decided to set the summons aside. Subsequently, the charges came on for hearing before another magistrate who found the charges proved. The two charged assaults committed some nine months apart were relied on by the prosecution to establish a course of conduct committed with a continuity of purpose. Upon appeal—

HELD: Appeal granted. Orders of both magistrates quashed. Remitted for hearing and determination according to law.

1. An accused is *prima facie* entitled to inspect any document which may give him an opportunity to pursue a proper and fruitful course in cross-examination, whether it goes to a matter in issue or simply to credit. The test is no stricter for documents which go solely to credit than for those which may go to a matter in issue. The test is whether the material is properly capable of acceptance, and if so would so affect credit of a witness that, having regard to the part played in the trial by that witness, it is likely that a jury would have arrived at a different verdict.

2. The prosecution files relating to B's appearances before the Magistrates' Court and County Court would be highly likely to contain material which may affect B's credit and thus to change the view taken of the reliability of his testimony. The magistrate should have inspected the files in order to reach a view whether the documents were sought for a legitimate forensic purpose such as to aid cross examination as to credit of a principal prosecution witness. In failing to consider the documents and proceeding in the manner he did, the magistrate erred in law. This was an error which was involved in the final orders to convict T. of the offences with which he was charged.

3. The elements of stalking are not the same as the elements of unlawful assault and not all of the elements of either offence are included in the elements of the other. It would not be necessary to prove an offence of unlawful assault in order to prove an offence of stalking and equally proof of an offence of assault would not be enough to establish an offence of stalking. A person cannot be convicted of two offences of which one is merely an aggravated form of the other, but stalking is not merely an aggravated form of assault, and the fact that both offences may arise out of the same facts is not enough in itself to preclude conviction of both offences.

4. There cannot be an offence of stalking without a course of conduct, and that in order to constitute a course of conduct, the conduct must be protracted or engaged in on more than one occasion and committed with a continuity of purpose. The incidents which were ultimately relied upon were some nine months apart and no incident involved any premeditation. Whilst there may have been enough in those two incidents to constitute several acts, given the lack of premeditation,

there was not enough in those two incidents to establish a continuity of purpose of the kind that was required to establish the charge of stalking. The magistrate fell into error in finding the charge of stalking proved.

NETTLE J:

1. This matter arises out of final orders made by the Magistrates Court at Melbourne on 18 February 2003. The Appellant was convicted of offences of assault with a weapon, breach of an intervention order and stalking. The matter comes before this Court essentially by way of appeal pursuant to s92 of the *Magistrates Court Act* 1989. There are, however, some complications in the form of the proceedings which it is desirable to record.

2. The Appellant filed notices of appeal against each of the convictions on 20 March 2003, but on 8 May 2003 the Master made orders refusing to make orders under Rule 58.09 (and the appeals thereupon came to an end). Each of those proceedings now comes before this Court as an appeal from the Master's refusal to state the questions of law shown to be raised by the appeal. There is a separate appeal in respect of each conviction: the appeal in respect of the assault conviction is proceeding 4995 of 2003; the appeal in respect of the breach of intervention order is proceeding 4496 of 2003; and the appeal in respect of the stalking conviction is proceeding 4997 of 2003.

3. In addition to the appeals, there are two applications pursuant to Order 56 of the Rules of Court for orders in the nature of certiorari: an originating motion (proceeding 5758 of 2003) for an order in the nature of certiorari to quash the Magistrates' Court final orders of 18 February 2003 and a further originating motion (proceeding 7853 of 2003) for an order in the nature of certiorari to quash an interlocutory order made by the Magistrates Court on 28 August 2002 to set aside a summons to produce documents. Counsel for the Appellant said that the originating motions had been filed in case it were thought that the appeals were incompetent. There is no question that the proper course for impeaching error of law in a final order is by appeal under Order 58 of the Rules of Court[1]. It was feared, however, that inasmuch as the error in the final orders sprang from the earlier interlocutory order to set aside the summons to produce documents, the appeals may be said to be appeals against an interlocutory order.[2]

The facts

4. The facts of the matter are set out in the Appellant's affidavit of 19 March 2003, as follows:

> "The first Charge: 31 October 2001 ... 3. On 16 November 2001 the first respondent, Senior Constable Robert Campbell (**hereinafter referred to as S/C Campbell**), charged me with four offences, namely that I: *(1) ... at Hurstbridge on the 31/10/01 did without lawful excuse recklessly engage in conduct by driving a motor vehicle on the wrong side of the road towards Robert BOOT that placed Robert BOOT in danger of death. (2) ... at Hurstbridge on the 31/10/01 did unlawfully assault one Robert BOOT with a weapon namely a motor vehicle. (3) ... at Hurstbridge on the 31/10/01 did unlawfully assault one Robert BOOT. (4) ... at Hurstbridge on the 31/10/01 did commit an offence punishable by imprisonment and therefore breached a suspended sentence of imprisonment which had been imposed at Moonee Ponds on 18/10/01.* 4. The second respondent, Mr. Robert Boot (**hereinafter referred to as Mr. Boot**) who was formerly a police officer, was the complainant in the matter. I had met, and got to know, Mr. Boot for a while through dating his older daughter. ... 6. I engaged Access Law, Lawyers, to represent me on the Charge. I instructed them that I wished to plead not guilty. I provided them with instructions concerning my past dealings with Mr. Boot and the circumstances from which the charges arose. 7. Access Law obtained a copy of the brief of evidence from S/C Campbell. ... 9. The charges were fixed for hearing on 21 and 22 August 2002. 10. From what Mr. Boot had told me about his past conduct as a member of Victoria Police and from what I had heard about him, I believed that members of the public had complained about him and that he had been made to leave Victoria Police. He also informed me that he had killed two people whilst working as a police officer. Further, from the brief of evidence it is apparent that Mr. Boot had previously been found guilty of criminal offences. 11. Mr. Boot's character and credit were very significant in this case. I wished to attack them to demonstrate that he was not a witness of truth and that his testimony in court could not be believed. 12. On my instructions, Access Law had a Witness Summons issued and served on the Chief Commissioner of Police to produce Mr. Boot's files at the hearing of the criminal charges. ... 14. On 21 August 2002, I attended before the Magistrates' Court at Heidelberg for the hearing of the charges. [The first Magistrate] presided. Mr. David Perkins, barrister, represented me. S/C Anthony Campbell-Burns appeared to prosecute on behalf of S/C Campbell. Mr Steve Dewberry, barrister, appeared for Mr. Boot to oppose the production of Mr. Boot's police files sought in the Witness Summons. A lady barrister appeared for the Chief Commissioner of Police. 15. A police officer attended Court to deliver a bundle of documents to the Magistrate's clerk. 16. My barrister called Mr.

> Boot, then I, to give evidence in support of compliance with the Witness Summons. Both Mr. Boot and I were subjected to cross-examination. 17. The hearing concerning the production of Mr. Boot's files occurred on 21, 23 and 27 August 2002. 18. On 28 August 2002, [the first Magistrate] delivered his ruling setting aside the Witness Summons and ordering that the files be returned to the Chief Commissioner of Police. He also ordered that I pay Mr. Boot's costs, which he fixed at $4,000.00. He then disqualified himself from further hearing the matter. Thereafter the case was adjourned for a five day contested hearing to commence on 3 February 2003. ...
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> The second Charge: 1 August 2002 22. On 6 August 2002, S/C Campbell filed a second Charge against me alleging two offences, namely that I: *(1) ... at Diamond Creek on 01/08/2002 being a person against whom an order has been made pursuant to section 4 of the Act, and having been served with a copy of such order did contravene that order by point his hand at the victim in a gesture like he was firing a gun. (2) ... at Diamond Creek on 01/08/2002 did commit an offence punishable by imprisonment namely BREACH INTERVENTION ORDER 87/19.22 and therefore breached a suspended sentence of imprisonment which had been imposed at Moonee Ponds Magistrates' Court on 18/10/2001.* ... 24. I instructed Access Law to represent me on this second Charge as well. The Third Charge: 15 December 2002 25. On 17 December 2002, I was arrested, charged with a third set of offences and remanded in custody by S/C Campbell. The Charge against me alleged four further offences, namely that I: *(1) ... at Hurstbridge and Diamond Creek between 01/10/2001 and 15/12/2002 did stalk another person named Robert BOOT in that the defendant did enter or loiter outside or near the victim's place of residence and business or any other place frequented by the victim or any other person. (2) at Hurstbridge on 15/12/2002 being a person against whom an order has been made pursuant to section 4 of the Act, and having been served with a copy of such order did contravene that order by being at 3 Milton Way, Hurstbridge and damaging victim's car. (3) at Hurstbridge on 15/12/2002 intentionally and without lawful excuse did damage property namely a white Mercedes van registration number ROX226 belonging to Robert BOOT and value at approximately $500.00. (4) at Hurstbridge on 15/12/2002 did commit an offence punishable by imprisonment, namely Stalking and therefore breached a suspended sentence of imprisonment which had been imposed at Moonee Ponds Magistrates' Court on 18/10/2001.* 26. I applied for bail but was unsuccessful. 27. I instructed Access Law to represent me on this third Charge as well."

5. The hearing of all charges proceeded before a second Magistrate beginning on 3 February 2003, and on 18 February 2003 the second Magistrate made the final orders which are the subject of appeal.

The grounds of appeal

6. As has already been recorded, the Master refused to state any questions of law pursuant to Rule 58.09 and so far as appears the Appellant never formulated any questions for submission to the Master. Apparently, the Master took the view that the Appellant did not show a *prima facie* case for relief and so he dismissed the appeals. The Appellant submits, however, that the questions of law for the purposes of this appeal are:

> (1) In respect of all charges, whether there was a denial of natural justice or lack of procedural fairness by reason of the first Magistrate's order of 28 August 2002 to set aside the summons to produce documents and thus to deny the Appellant access to the files the subject of the summons.
>
> (2) Whether the second Magistrate erred in law in convicting the Appellant of the charge of stalking when the facts alleged to constitute the offence of stalking had already resulted in separate convictions for assault with a weapon.
>
> (3) Whether the second Magistrate erred in law in holding that the events of 1 August 2001 and 31 October 2002 constituted a course of conduct within the meaning of s21A of the *Crimes Act* 1958.

The decision to set aside the summons

(i) Error of law

7. The summons to witness sought production of the following documents:

> • Ethical Standards Department files relating to Robert Boot
> • Personnel files relating to Robert Boot
> • Reports, complaints, findings, recommendations and decisions relating to Robert Boot
> • Intelligence files relating to Robert Boot
> • Criminal files relating to Robert Boot including, but not limited to appearances before the Heidelberg Magistrates' Court on 4 December 1998, the County Court at Melbourne on 29 June 1993, the Heidelberg Magistrates' Court on 17 March 1993, the County Court at Melbourne on 29 April 1987 and the Preston Magistrates' Court on 10 April 1986.

8. In ruling that the summons should be set aside, the first Magistrate stated:

> "The defendant seeks compliance with a subpoena *duces tecum* served on the Chief Commissioner of Police. The subpoena was issued pursuant to section 43(3) of the Magistrates' Court Act 1989. The class of documents sought are set out in the subpoena and can be numbered 1 to 5. They included ethical standards department files relating to Boot, personal files relating to Robert Toot, reports, complaints, findings, recommendations and decisions relating to Robert Boot, intelligence files relating to Boot *and the fifth one dealing with criminal files etc., and the last class might be said to be of a general public record and relate to apparent court appearances of the alleged victim of the charge before the court, one Robert Boot, and the defendant has the criminal records of Boot. I don't know whether much hangs on number 5.* (Emphasis added) It is common ground that a file is available to the defence concerning an alleged physical confrontation between the defendant and Boot, which took place at Diamond Creek. It wasn't clear to me whether it was May or June of '01; if I get that wrong, I am wrong. Apparently no police charges were laid. I will say something briefly about this incident in due course. The two charges before the court I am told relate to an assertion by the prosecution that on 31 October of last year Thomas, the defendant, deliberately drove his car towards Boot when Boot was close to his own car. I understand that the defendant denied any such action when interviewed and the defence is clearly that Boot has deliberately manufactured a version which is untrue and known by him to be untrue. Until recently I understood that there were no alleged witnesses to the incident but I was told on Monday that one of Boot's daughters is a witness but nothing hinges on that fact on this application. To use Mr Perkins' words, the credit is central in the hearing of the charge. Not surprisingly, he seeks to have access to as many arrows as he can to show or attempt to show that Boot should not be believed. It is his basic argument that it is reasonably possible – DPPB Debbs v. Roberts, No. 1527 of 2000, referred to in cases like Allister and Saleem to be examined would materially assist the defence in this defence. On the authorities, e.g. Hutt and Boyce v. de Punto 77 ACR 447, this would include any document which might not be admissible in itself, but provide material of value for cross-examination, so it's got the wider sense and counsel I think is quite correct in that aspect. Counsel for Thomas says that a legitimate forensic purpose exists for their production, either all or some, I think he says all, and says that it is of paramount importance that it can impugn the credit of Boot by any means available. No-one was able to assist me directly by reference to any authority as to the manner that one should proceed in an application of this sort. Often, as counsel correctly said, they are on affidavit and you can make use of the affidavit material, but here you have a situation where what was relied upon was oral evidence together with submissions and I expressed a concern as to how this application should proceed. It seemed to me it was necessary for the defendant to show that some legitimate forensic purpose was demonstrated from evidence called and argument in support and, anyway, in the long run the defendant called two witnesses, Boot firstly and then Thomas. It can be concluded from the two witnesses that there is no love lost between them. The defendant apparently had an on/off relationship with Boot's daughter Annette. I think it was from some time in 1998. If I am wrong about that, I am wrong. Clearly Boot did not approve of Thomas and Thomas took the view that Boot was playing an unnecessary role in Thomas' relationship with Annette. It would be my conclusion that if the only evidence called on this application was that of Boot, the defence did not come near to showing a legitimate forensic purpose for access to the documents. The substance of Boot's evidence is that he was a member of the police force form 1981 to 1988. It follows that the files before the court relate to a period between 13 to 20 years from the date of the alleged offence. None of the files relate to any complaint made by Thomas to the Chief Commissioner of police or any allied body such ESD. He gave evidence - and I hope I am right, my notes perhaps aren't as good as they might be - but he gave evidence that he was a member of the police force between 1981 and 1988. He said he left the police force of his own volition to pursue a different career and was not asked to resign and I permitted in the long run, because of certain matter that had been raised, him to put into evidence some certificate signed by the then Commissioner of Police dealing with a member of the police force."

9. His Worship then dealt at some length with the evidence given by Boot and Thomas, and concluded:

> "When it comes to credit, having seen both give evidence, I prefer Boot's testimony, particularly in respect to the conversation at the house and the telephone calls. It also seemed to me that you have to be an extremely brazen witness, that is Boot, to assert that he knows nothing of any substance in the police files, e.g. complaints, if he is fact knows that matters significantly related to his credit and background do in fact exist. I do not believe, having considered all the authorities here, that there is some reason to suppose that he documents sought to be examined will contain any material in the broad sense relevant to the case. I am not unmindful that these are criminal proceedings and that the charges are quite serious. Those matters are referred to in Saleem's case at page 408, 39 ACR and the other authorities. Whilst the alleged legitimate forensic purpose for access to the documents has been broadly expressed as credit, I do not find, one, there is some concrete ground for believing that the documents would likely or may materially assist the accused in the preparation of his defence

> and do not find it is on the cards or reasonably possible that the material produced will materially assist the defendant in the preparation of his defence. I don't propose to say anything about the arguments dealing with the finality-type arguments, issues of credit, nor the section 37 Evidence act matters. In my view that is to some extent putting the cart before the horse. *But the section 37 matters, it might be said, are relevant to the issue of the length of time that has passed since the files came into existence.* But I don't propose to - I will set the subpoena aside." (Emphasis added)

10. In this appeal no criticism is made of the first Magistrate's identification of the relevant principles. Nor is it suggested that his Worship erred in the application of those principles to the first four categories of documents. Despite the unusual nature of the procedure adopted by his Worship, the Appellant accepts that the view was open to be taken that none of the first four categories of documents would have materially assisted the Appellant in the defence of the charges he faced. The gravamen of the appeal is the first Magistrate's refusal of access to the fifth category of documents. In the Appellant's submission it was obvious that Crown files relating to criminal prosecutions of a principal prosecution witness were likely to assist the Appellant in the conduct of his defence. Thus in the Appellant's contention, it must be concluded that the Magistrate erred in adopting the contrary view.

11. The respondent contends that the first Magistrate made no error about the relevance of the documents. In the respondent's submission his Worship correctly identified the test of whether it was "on the cards" or reasonably likely that the documents would be of assistance to the Appellant in the conduct of his defence[3] and that his Worship was entitled to come to the view that the fifth category of documents was not of that type. Alternatively, the respondent says, any error that the Magistrate might have made was no more than an error of fact and thus not susceptible to appeal[4].

12. In my opinion the first Magistrate did err in his decision to refuse access to the fifth category of documents. Notwithstanding that his Worship correctly identified the test as one of whether it was "on the cards" or reasonably likely that the documents would be of assistance to the Appellant in the conduct of his defence, what is said elsewhere in his Worship's ruling shows that his Worship either did not understand the meaning of that test or that he simply did not apply it.

13. According to the authorities, an accused is prima facie entitled to inspect any document which may give him an opportunity to pursue a proper and fruitful course in cross-examination, whether it goes to a matter in issue or simply to credit. As opposed to the position in civil proceedings[5], in criminal proceedings the test is no stricter for documents which go solely to credit than for those which may go to a matter in issue. The test is whether the material is properly capable of acceptance, and if so would so affect credit of a witness that, having regard to the part played in the trial by that witness, it is likely that a jury would have arrived at a different verdict[6].

14. In my opinion, prosecution files relating to Robert Boot's appearances before the Heidelberg Magistrates' Court on 4 December 1998, the County Court at Melbourne on 29 June 1993, the Heidelberg Magistrates' Court on 17 March 1993, the County Court at Melbourne on 29 April 1987 and the Preston Magistrates' Court on 10 April 1986 would be highly likely to contain material which may affect Boot's credit and thus to change the view taken of the reliability of his testimony. Given that Boot was the prosecution's principal witness, and that his only corroboration was to come from his daughter, the case for allowing access to the documents was very strong indeed.

15. One of the more remarkable features of the first Magistrate's ruling is his Worship's observation that he did not know if much hung on the fifth category of documents. It is almost as if the fifth category were not pursued before the Magistrate and is only now said to have the importance which the Appellant attaches to it. But plainly that is not the case. The fact that the Magistrate listed the fifth category of documents shows that the Appellant wanted access to those documents. And it has not been suggested on either side that the Appellant ever changed that stance during the course of the hearing.

16. A possible interpretation of the Magistrate's observation is that it was known that the prosecution had already given the Appellant details of Boot's convictions,[7] and that the Magistrate thought the contents of the files to be unlikely to take the matter much further. Another possibility is suggested by a passage in the ruling in which it was said that "the files before the court relate to

a period between 13 and 20 years from the date of the alleged offence". It implies that the Magistrate thought the files to be concerned with matters which took place so long ago as to be devoid of significant relevance. A third possibility arises out of the fact that when the summons was first called on before the Magistrate, the Chief Commissioner's representative told the Magistrate that there was no objection to production to the fifth category of documents. It was only later in the hearing that counsel for the complainant opposed production of the documents and the contest proceeded accordingly. Perhaps when the first Magistrate composed his ruling he had in mind the willingness of the Chief Commissioner to produce the documents but had forgotten about the recalcitrance of the prosecutor.

17. But whatever the explanation, the Magistrate was in error. The Appellant sought the fifth category of documents and the prosecutor opposed their production. It is just not right to say that not much hung on their production. They were central to the application.

18. Another remarkable feature of the first Magistrate's ruling is what it discloses about the procedure that his Worship adopted. Authority establishes and common sense dictates that when a judge or magistrate is faced with a subpoena to produce documents and objection is taken to their production, the judge or magistrate should require counsel for the accused to identify his purpose in seeking access to the documents. If the reason stated appears to be a legitimate forensic purpose, as it would if it were to aid cross examination as to credit of a principal prosecution witness, but the prosecution persists in its objection to production, the judge or magistrate should ordinarily inspect the documents himself in order to reach a view upon the matter.

19. In this case, the first Magistrate followed the first part of that procedure, and elicited the response from counsel for the accused that the fifth category of documents was sought as going to credit of the prosecution's principal witness. As I have said already, in the circumstances of this case that was a *prima facie* legitimate forensic purpose; for self evidently, a file relating to the prosecution of a principal witness is likely to contain material which would assist in the cross examination as to credit of that witness and thus in conduct of the defence. Consequently, when the prosecution persisted in the objection to the production of those documents, the proper course was for the Magistrate himself to look at the documents in order to determine what if any thing there was or was not in the documents which might justify that objection. But his Worship did not do that.

20. If the first Magistrate had followed the course of looking at the documents it is likely that the exercise would have been completed within an hour or two. As it was, however, and despite the Magistrate's solemn declaration that he had considered "all the authorities" (in which, it is to be noted, that the usual course of proceeding is sanctioned), his Worship did not look at the documents but instead embarked upon an extraordinary pre-trial hearing lasting several days – in which both the Appellant and Boot were cross examined about the issues the subject of the criminal charges – and then decided to set aside the summons on the basis of an assessment of Boot's credit as compared to that of the Appellant. Thus as the first Magistrate said in his ruling:

> • "…it was necessary for the defendant to show that some legitimate forensic purpose was demonstrated from evidence called"
>
> • "When it comes to credit, having seen both give evidence, I prefer Boot's testimony, particularly in respect to the conversation at the house and the telephone calls." and
>
> • "It also seemed to me that you have to be an extremely brazen witness, that is Boot, to assert that he knows nothing of any substance in the police files, e.g. complaints, if he is fact knows that matters significantly related to his credit and background do in fact exist."

21. All of this appears to me to be redolent of error. Contrary to what the first Magistrate stated, it was not necessary for the Appellant to adduce evidence to establish the relevance of the fifth category of documents. Relevance was to be decided by reference to the issues[8], including credit[9] and in this case having regard to the fact that Boot was to be the principal witness for the prosecution. The first Magistrate's assessment of the Appellant's and Boot's credit was equally misdirected. The Appellant was seeking the production of documents in order to attack Boot's credit. The only question was whether it was likely that the contents of the documents would assist in that aim. A subjective assessment of Boot's credit said nothing about the contents of

the documents and the Magistrate's assessment of the Appellant's credit was even more wide of the mark. Finally, and regardless of whether Boot was a "brazen" witness or not, an accused is granted access to documents of the kind which were sought in this case just because there are brazen witnesses who can only be caught out with the aid of access to the documents.

22. The respondent contends that even if the Magistrate erred as a matter of law in respect of the fifth category of documents, there was no error in respect of the first four categories and hence that the Magistrate was entitled to set aside the summons in whole and leave it to the Appellant to file a fresh summons directed only to the fifth category of documents. I also reject that contention.

23. In some circumstances it may be right to say that there is no error in setting aside a summons in whole even if it is invalid only as to part. One example is where a summons seeks such a broad category of documents that it is unduly onerous and is set aside on that basis. Depending upon the facts, it may be quite unreasonable to expect a magistrate to go painstakingly through broad categories of documents in order to single out what is legitimately salvageable. In such a case the magistrate would be entitled to set aside the summons altogether and the onus should be upon the party who issued the summons to redraft it and issue it afresh in permissible form.

24. But this case was not of that sort. There was no suggestion here that the summons was so broad as to be oppressive or so imprecise as to create uncertainty as the fifth category of the documents. There was no difficulty here in the Magistrate setting aside the summons only as to the first four categories of documents and leaving it stand in so far as it applied to the fifth. And so far as the fifth category of documents was concerned, the Magistrate did not purport to act on any basis other than that it was not sufficiently relevant to be made the subject of the summons. It can hardly be doubted that if the Appellant had issued a fresh summons limited to the fifth category of documents it would have been treated in exactly the same way.

25. The respondent next contends that even if the Magistrate made an error in deciding to set aside the summons it was an error upon a matter of practice and procedure or at least one made in running for the purpose of regulating the conduct of a judicial hearing, and that that is the sort of matter which must be left to the good judgment of the judicial officer concerned, in accordance with what was said by the Court of Appeal in *Wong v Carter*[10].

26. I also reject that contention. It is not possible to say on the material which was before the first Magistrate, or upon the material which is before me, that the denial of access to the fifth category of documents and the opportunity to cross examine upon them did not deprive the Appellant of an opportunity of acquittal.[11] To the contrary, without having seen the documents the indications are that refusal of access to the documents may well have deprived the Appellant of an opportunity to cast real doubt upon the whole of Boot's evidence. Thus in my opinion, even if the decision to refuse the Appellant access to the documents is properly to be characterised as one of practice and procedure, this is one of those cases in which an attack upon a decision of that character should be allowed to succeed.

27. The respondent further contends that whatever error there may have been in the first Magistrate's decision to set aside the summons, there was no denial of natural justice or unfairness in the way in which the final hearing of the charges was conducted by the second Magistrate. In particular, the respondent submits:

> (a) it is plain from the transcript that counsel for the Appellant went to great lengths in the pursuit of the defence, including seeking and obtaining from the second Magistrate warrants to bring before the court two witnesses to give evidence as to Boot's poor character and reputation;
>
> (b) it is apparent that defence counsel had considerable material and was extended considerable patience and liberty in the conduct of his cross-examination of prosecution witnesses. He made a strong attack on their credit and it failed; and
>
> (c) there is in any event no reason to suppose that access to criminal files would have enhanced the ability of defence counsel to attack Boot's credit. Boot had admitted his prior convictions and gave an account of the circumstances surrounding the convictions which it is said did not paint him in a

particularly favourable light. It should not be thought, it is said, that access to the files would have permitted defence counsel to take it any further; especially because counsel would not have been permitted to adduce evidence to contradict testimony going only to credit.

28. I do not find any of those submissions persuasive. Putting to one side the question of why the second Magistrate allowed evidence to be given about Boot's character and reputation[12], the fact that it may not have helped the Appellant in my view adds to the probability that the criminal files would have assisted the Appellant in attacking Boot's credit and thus in defending the charges. The same can be said in respect of such latitude as may have been afforded to defence counsel in the conduct of defence. The fact that cross examination without access to the documents was not successful adds to the probability that access to the documents would have been of assistance. Finally, the point about Boot having deposed to his convictions in ways which may not have been favourable to him is met by the consideration that the circumstance that other material before the court might make the court doubt the veracity of a witness is not a reason for refusing the defence access to documents which might well add further strength to the attack on that witness[13].

29. In my opinion the first Magistrate erred in law:

(a) in failing to consider or to keep in mind the fifth category of documents at all;

(b) in misconceiving the test to be applied in the determination of whether the documents which were sought should have been produced; and

(c) in basing the outcome of the application upon his Worship's assessment of the relative credit of Boot and the Appellant rather than upon the capacity of the documents to aid in the cross examination of Boot.

(ii) Error of law involved in the final determination?

30. The respondent contends that even if the first Magistrate did make an error of law in setting aside the summons, the error cannot be characterised as an error of law involved in the final orders of the second Magistrate. After all, the respondent says, the second Magistrate was never asked to reconsider the question of the summons. To all intents and purposes the Appellant accepted the first Magistrate's ruling and was content to abide it. In those circumstances, how can it be said that there was error of law involved in the final orders?

31. Consider, however, what the position would have been if the one magistrate had dealt at the outset or in a preliminary hearing with the application to set aside the summons and then gone on to hear the charges against the Appellant. I doubt that there would be too much hesitation in those circumstances in characterising an error in the decision to set aside the summons as an error involved in the final orders. Granted that the decision to set aside the summons would have preceded the final hearing, perhaps even by a considerable period of time, and that the order to set aside the subpoena would have been an interlocutory order, it would still have borne just as much on the orders to convict as if made in the course of the final hearing[14]. Why then should it make any difference that one magistrate was appointed to deal with evidential objections and the like in advance of the final hearing and that a second magistrate was appointed to conduct the final hearing? Common sense and experience dictate that practices of that kind are sometimes necessary and frequently desirable. It is in the interests of expedition, good case management and everyone's convenience that they be adopted and it would be most unfortunate if the consequence were to deny an accused a chance of appeal which otherwise may have existed. In my opinion it should not be thought to make a difference to the Appellant's rights of appeal that the summons was dealt with in advance of the final hearing.

32. The respondents submit that since the second Magistrate was not bound by the first Magistrate's ruling and, if asked to reconsider the matter, might have decided differently to the first Magistrate, it is to be assumed that the Appellant accepted the first Magistrate's ruling and that there is nothing unfair or inappropriate in holding the Appellant to it. But I do not think that is so. As a general proposition it would be most inconvenient and, so far as I can see, productive of nothing of any value, if in order to preserve a right of appeal in respect of matters decided by one magistrate at a preliminary hearing counsel were obliged to re-litigate each such matter before another magistrate at the final hearing.

33. That does not mean that a party who has lost an interlocutory application before one magistrate at a preliminary hearing should be precluded from revisiting the matter with another magistrate at the final hearing. Plainly, it would be open to do so.[15] And it does not mean that the magistrate who conducts the final hearing should always be slow to depart from an earlier interlocutory order of the another magistrate, at least where it is clear that the earlier decision is wrong or inapplicable in the way in which circumstances may have developed since it was made. Nor does it mean that a failure to take up an interlocutory order with the magistrate at the final hearing may not sometimes be regarded as acceptance of the interlocutory decision: for example, if the magistrate at final hearing were to raise the matter with counsel and counsel responded that there was no longer any dispute about the ruling. But cases like that apart, I consider that a magistrate who conducts a final hearing should be able to proceed without re-litigation of interlocutory orders made by another magistrate at a pre-trial hearing, without prejudice to such rights of appeal against conviction as might arise out of any error in the interlocutory orders.

34. It was submitted for the respondents that so to hold would open up the intolerable possibility of appellants advancing as grounds of appeal from final orders every arguably erroneous interlocutory order made in the course of the interlocutory stages of the proceeding. But I do not think that is right either. The only orders which may be made the subject of appeal under s92 of the *Magistrates' Court Act* are orders that are "involved in the final orders". That limits the range considerably. And while the characterisation of orders of that kind is inevitably a question of fact and degree, the task is unlikely to be made much more difficult by the number of magistrates that play a part in the conduct of the proceeding.

35. Moreover and more importantly, it would be illogical and unsatisfactory that rights of appeal should depend upon the fortuitous circumstance that one magistrate may be assigned to decide on evidential objections before final hearing and that another magistrate may later be assigned to conduct the final hearing. In practice, no doubt in the Magistrates' Court as much as in this court, interlocutory decisions upon the admissibility of evidence and other questions of adjectival law are frequently made by one judicial officer before the final hearing and thereafter the final hearing is conducted by another judicial officer on the basis of what has been so decided. In this court the practice is expressly sanctioned by ss5, 6 and 7 of the *Crimes (Criminal Trials) Act* 1997, although it is not dependent upon that legislation for its efficacy. It is part of the inherent or, in the Magistrates' Court, implied jurisdiction to manage proceedings in a fashion which is efficient and fair.

36. In my opinion the decision of the first Magistrate to set aside the summons to witness in this case was informed by error of law and in the circumstances of this case it was an error which was involved in the final orders to convict the Appellant of the offences with which he was charged.

Double jeopardy

37. The Appellant submits that the charge of stalking was duplicitous, in that its existence depended upon marrying the alleged assault with a weapon to the alleged assault constituted of the hand gesture. In the Appellant's contention it was an abuse of process for the prosecution to charge him with stalking as well as the specific offences of assault[16] and the Court ought stay the proceeding in order to prevent the accused being exposed to double jeopardy of that kind[17]. The Appellant relies in particular on the observations of Winneke P in *R v GJB*[18] that:

> "[14] …where the prosecution alleges an offence against an accused person of `maintaining a sexual relationship', it now…bears the burden of proving that, within the period of relationship allege – the accused did three or more acts with a child each of which would constitute an offence under a provision of sub-divisions (8A), (8B) or (8C) of the *Crimes Act*.
>
> [15] It seems to me to necessarily follow that, where the Crown alleges – either on the one presentment or otherwise – that the accused has committed the offence of unlawfully maintaining a sexual relationship with a girl under the age of 16 years during a specific period, and further alleged that, during the same period, he has committed specific offences contrary to the provisions of sub-divisions 8A, 8B or 8C the specific offences averred must be particulars of – and alternatives to – the offence of maintaining a sexual relationship. …
>
> [19] If this view were incorrect then the County Court Judge, in the exercise of the inherent power which he has to prevent abuses of that court process, should not have proceeded to convict and impose punishment on the [specific] offences."

38. I do not think that the Appellant is correct. The essence of the sort of problem considered in *GJB* arises where there has been a prosecution of an offender for a number of offences of which the elements are identical or in respect of which all of the elements of one offence are wholly included in the other. Absent correspondence of elements of that kind it is not an abuse to prosecute for a number of offences arising out of the same set of facts[19]. To the contrary, as the High Court said in *Pearce*,[20] as the range of crimes and punishments for crime has expanded it has become apparent that a single series of events can give rise to several different criminal offences to which different penalties attach.

39. The elements of stalking are not the same as the elements of unlawful assault and not all of the elements of either offence are included in the elements of the other. The *actus reus* of unlawful assault is an act raising in the mind of the victim the fear of immediate violence to the victim. Contrastingly, the *actus reus* of stalking is engaging in a course of conduct that includes acting in a way that could reasonably be expected to arouse apprehension or fear in the victim for his own safety or that of any other person, where the course of conduct engaged in actually has that effect. The *mens rea* for assault is an intention to produce fear of unlawful physical contact with the victim or recklessness (in the sense of realisation that it may have that effect, and still persisting with it). The *mens rea* for stalking is an intention to cause physical or mental harm or of arousing apprehension or fear in the victim for the victim's own safety or that of any other person. Consequently, it would not be necessary to prove an offence of unlawful assault in order to prove an offence of stalking and equally proof of an offence of assault would not be enough to establish an offence of stalking.

40. In some cases, of which this appears to be one, the acts which are relied upon as establishing a course of conduct amounting to stalking may also be relied upon as establishing individual assaults. But even in those cases the elements of the offence of stalking are still not the same as the elements of the individual assaults.[21] A person cannot be convicted of two offences of which one is merely an aggravated form of the other, but as has already been seen, stalking is not merely an aggravated form of assault, and the fact that both offences may arise out of the same facts is not enough in itself to preclude conviction of both offences. While there are circumstances in which an accused should not be charged with more that one offence arising out of the same facts – and if he is and is convicted on both, the conviction on one is liable to be set aside – that will not be the case where the principles essayed in *R v Newman and Turnbull*[22] mandate that both charges be joined together[23]. In my opinion this is a case in which those principles may apply. The "course of conduct" which is the essence of the offence of stalking creates the potential – if not the inevitable consequence – that in some circumstances the charge of stalking will be more serious than any individual offences which constitute the course of conduct and in other circumstances charges of individual assault will be far more serious than the charge of stalking[24].

41. It would no doubt be wrong to punish an offender twice for the commission of elements which are common to unlawful assault and stalking[25]. But that is a different matter to the question of whether the offender may be convicted of both offences. Hence, even if it were shown to have been unnecessary to charge the offender with both offences, that fact alone would not be enough to warrant that one or other of the convictions be quashed.[26]

Stalking

42. The Appellant also makes the point that there cannot be an offence of stalking without a course of conduct, and that in order to constitute a course of conduct, the conduct must be protracted or engaged in on more than one occasion and committed with a continuity of purpose. I think that to be correct. The offence of stalking consists of four elements: (1) there must be a course of conduct, (2) that course of conduct must involve a protracted act or several acts, (3) the accused must have performed the act or acts with the intention of causing physical or mental harm to the victim or of arousing apprehension of fear in the victim for his or her own safety or that of another person, and (4) the course of conduct must have aroused apprehension or fear in the victim for his or her own safety or that of another persons[27]. A course of conduct requires a continuity of purpose.[28]

43. In this case the only acts relied upon by the prosecutor to establish the course of conduct were the assault with the car on 31 October 2001 and the assault with the hand motion on 1 August 2002. To begin with the prosecutor had also placed reliance on a further alleged offence

of 15 December 2002, but the allegations in respect of that matter were later withdrawn. The two incidents which were ultimately relied upon were thus some nine months apart and as the second Magistrate found, neither incident involved any premeditation.

44. In the result there may have been enough in those two incidents to constitute several acts but given the lack of premeditation, there was not enough in those two incidents to establish a continuity of purpose of the kind that was required.

45. In order to fill the void the Magistrate then went on to hold that it was in order to rely upon three further incidents, albeit that they were not the subject of any charge and were outside the period which was the subject of the charge, and on the basis of those further incidents that the acts which were charged were committed with a continuity of purpose. Thus and despite the absence of any application to amend the charge to include those other incidents, the Magistrate convicted the Appellant of stalking within the period as charged.

46. The Appellant submits and I agree that the Magistrate was in error in adopting that course. The charge had been particularised in a way which limited the offence of stalking to a course of conduct said to have been constituted by only two charged assaults. If other incidents were to be relied upon as constituting the course of conduct alleged, it was incumbent upon the prosecution to amend the charge accordingly and to prosecute the Appellant on that basis.

47. That is not to deny the possibility of a prosecutor placing reliance upon uncharged acts in order to establish a motive or relationship. As McHugh J pointed out recently in *KRM v R*[29]:

> "... one of the best known examples of these categories of evidence [of uncharged acts] is 'relationship evidence' - evidence which explains the nature of the relationship between the accused and the complainant and which often tends to show that the accused is guilty of the offence charged. Thus, in *O'Leary v R* [1946] HCA 44; (1946) 73 CLR 566; [1946] ALR 535 , evidence was admitted that, on the day and early evening of the killing, the accused, the victim and others had taken part in a 'drunken orgy' at a bush camp and that, during the drinking, the accused had assaulted or threatened to assault persons other than the victim. Although the evidence showed violent and criminal conduct on the part of the accused, this Court held that it was admissible. Dixon J said that '[w]ithout evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event'. In holding that the evidence was admissible, Latham CJ, Dixon and Williams JJ said that it was admissible because it was 'relevant' or 'logically probable' or went `to show the probability' that the accused was the killer. They did not require the evidence to be consistent with no rational view other than the guilt of the accused. Similarly, in *Wilson v R* [1970] HCA 17; (1970) 123 CLR 334; (1970) 44 ALJR 221, this Court held that statements made by the victim in the presence of the accused on two occasions were admissible although they indicated that the victim knew that the accused intended to kill her for her money. The evidence was admissible to show the mutual enmity between the parties and to negate the accused's explanation that the shooting of the victim was accidental. In *R v Garner*, where the accused was charged with assault, evidence of uncharged assaults extending over several months was admitted because 'it was a connected series of events'."

48. In the circumstances of this case, however, once the second Magistrate found that the two charged assaults were committed without premeditation, and given that there were no other acts relied upon, it was simply not possible for the prosecution to succeed in establishing a course of conduct committed with a continuity of purpose in respect of those two acts. To put it another way, no amount of uncharged acts could establish, contrary to the express finding of lack of premeditation, that those two offences had been committed with a continuity of purpose. Hence, if the prosecutor were to succeed he had to amend the charge to allege some other acts which were committed with a continuity of purpose, and that he did not do. In my opinion the charge of stalking should have been dismissed.

49. The Appellant further submits that once the charges concerning the incident on 15 December 2002 had been withdrawn there was no evidence at all of any course of conduct after the incident of 1 August 2002, and that in those circumstances it was not open to the Magistrate to find that the offence of stalking had been committed over the period of stalking alleged. The Appellant notes that the second Magistrate did indeed invite the prosecutor to amend the charge,

so as to restrict it to a period ending on 1 August 2002, but that the invitation was refused. It follows in the Appellant's contention that the charge should have been dismissed.

50. I do not consider that there is anything in that point. The Appellant relies in part upon the observations of Ormiston J in *R v Giretti*[30]. But what his Honour said in that case appears to me to be opposed to the Appellant's contention. His Honour said that:

> "...Where the allegation is one relating to the carrying on of a trade or business of dealing in drugs, it will normally be in respect of a continuous period, and so the inference drawn must be in respect of that period, *but failure to prove that the business was carried on precisely during the period alleged in the presentment will not deny the prosecution the right to a conviction, for allegations of time are ordinarily considered immaterial*; cf. *Dossi* (1918) 87 LJKB 1024; 13 Cr App R 158."[31]

And:

> "I am not suggesting that it would be essential for the jury to be satisfied that the offence was committed precisely during the alleged dates, for, as I have said before, ordinarily such matters of time in a presentment are immaterial. However, if the jury are being invited to reach a verdict in respect of a continuing activity over an extended period, for this purpose, at the least, *they should be told that they should be satisfied that the alleged commercial activity of the accused extended over a period of time which broadly corresponds to the allegation, unless the Crown chose in the course of the trial to confine its allegation to a shorter period and was not required to amend the presentment..."* (Emphasis added).[32]

51. Assuming that his Honour's observations may be applied as much to a charge of stalking as to the sort of offence of trafficking with which he was concerned, they suggest that although the course of conduct alleged to constitute stalking may need to be specified in terms of the dates on which it is said to have begun and ended, it is not essential for the Crown to prove that the course of conduct continued precisely between those dates. And thus unless the Crown is required to amend the charge, the fact that it may in the course of hearing confine its allegation to a shorter period does not preclude the possibility of conviction of the charge as drawn. As his Honour noted, ordinarily such matters of time in a presentment are immaterial.

Certiorari

52. In light of the conclusions which I have reached about the appeals under s92 of the *Magistrates' Court Act*, it is unnecessary that I say a great deal about the applications for orders in the nature of certiorari. In my opinion they were unnecessary and should be dismissed. But given the respondent's and the defendants' attitude that the order to set aside the summons was not susceptible to appeal, I do not regard it as imprudent of the Appellant to guard against the possibility of an adverse ruling by issuing the applications for certiorari. In all the circumstances, I think that the costs of those applications should lie where they fall.

Orders on the appeals

53. It follows from what I have already said that I consider that the appeals from the Master's decisions under Rule 58.09 should be allowed and that the appeals from the second Magistrate's final orders should also be allowed and that the Appellant should have his costs of the appeals. Subject to anything counsel may say upon the form of orders, I consider that the matter should be remitted to the Magistrates' Court to be dealt with according to law.

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[1] *Wong v Carter* [2000] VSCA 53 at [44].
[2] cf. *Kuek v Victorian Legal Aid* [2001] VSCA 80; (2001) 3 VR 289.
[3] *R v Alister* [1984] HCA 85; (1984) 154 CLR 404 at 456; (1983) 50 ALR 41; (1984) 58 ALJR 97;; *R v Saleam* (1989) 16 NSWLR 14 at pp19-20; 39 A Crim R 406; *Fitzgerald v Magistrates' Court & Ors* [2001] VSC 348 at [19] and [20]; (2001) 34 MVR 448.
[4] *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301; *Ericsson v Popovski* [2000] VSCA 52 at [14]; (2000) 1 VR 260.
[5] As to which see the synthesis of authorities undertaken by Weinberg J in *Fried v National Australia Bank* [2000] FCA 31 May 2000, esp at [24] to [29].
[6] *R v Saleam supra* at 19-20.
[7] In accordance with the principles discussed in *R v Ward* [1993] 2 All ER 577; [1993] 1 WLR 619 at 643; (1992) 96 Cr App R 1 and *R v Garofalo* [1998] VSCA 145; [1999] 2 VR 625 at 631-634, per Ormiston JA.
[8] *National Employers Mutual General Association Ltd v Waind* [1978] NSWLR 372; *R v Saleam, supra.*
[9] *R v Spizzivi* [2000] QCA 469; [2001] 2 Qd R 686 at p690; 117 A Crim R 101.
[10] *supra* at [44], per Tadgell JA.

[11] cf *R v Polley* (1997) 68 SASR 223.
[12] as to which see, for example, *Piddington v Bennett & Wood Pty Ltd* [1940] HCA 2; (1940) 63 CLR 533 at 546; *Goldsmith v Sandilands* [2002] HCA 31; (2002) 190 ALR 370; (2002) 76 ALJR 1024 at [3], [42] and [81]; (2002) 23 Leg Rep 17; *Palmer v R* [1998] HCA 2; (1998) 193 CLR 1 at [53]; (1998) 151 ALR 16; (1998) 96 A Crim R 213; (1998) 72 ALJR 254; [1998] 1 Leg Rep C16; *Cross on Evidence*, Australian Edition at [17-585].
[13] *R v Spizziri*, *supra*.
[14] cf *R v Polley* (1997) 68 SASR 223.
[15] ibid at p234.
[16] *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289; (1993) 177 CLR 378 at p397; *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at p521; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431.
[17] *Neill v County Court of Victoria* [2003] VSC 328 at [37; (2003) 40 MVR 265].
[18] [2002] VSCA 54; (2002) 4 VR 355 at [14]; (2002) 129 A Crim R 479.
[19] *Pearce v R* [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610 at [24]; *R v Henderson* [1998] VSCA 83; [1999] 1 VR 830 at [19], per Batt JA.
[20] ibid at [11].
[21] *Environmental Protection Authority v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502 at p508; (1992) 64 A Crim R 124; (1992) 77 LGRA 373; *Nadarajamoortly v Moreton* [2003] VSC 283 at [45]-[46].
[22] [1999] 1 VR 146.
[23] *R v Henderson*, *supra* at [21].
[24] cf *R v Hoar* [1981] HCA 67; (1981) 148 CLR 32 at 38; 37 ALR 357; 56 ALJR 43.
[25] *Pearce, supra* at [40]; *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 660 [60]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[26] *R v Sessions* [1998] 2 VR 304 at p314; (1997) 95 A Crim R 151.
[27] *Nadarajamoorthy v Morton*, *supra*.
[28] ibid at [377].
[29] [2001] HCA 11 at [23]; (2001) 206 CLR 221; (2001) 75 ALJR 550; (2001) 22 Leg Rep C1.
[30] (1986) 24 A Crim R 112.
[31] ibid at 130 - 1.
[32] ibid at 140; see also *R v Allen,* [1995] VSC 223; [1995] VICSC 223, unreported, SCVCA, 14 December 1995 at pp5 and 9, per Callaway JA.

APPEARANCES: For the plaintiff/appellant Thomas: Mr G Nash QC with Mr R Williams, counsel. Access Law Lawyers. For the first defendant/respondent Campbell: Mr A Tinney, counsel. Kay Robertson, Solicitor for Public Prosecutions. For the second defendant Boot: Mr BM Dennis, counsel. Victorian Government Solicitor.
