16/12; [2012] VSC 183

SUPREME COURT OF VICTORIA

ZIGOURIS v SUNSHINE MAGISTRATES' COURT & ANOR

Zammit AsJ

23 April, 8 May 2012

PRACTICE AND PROCEDURE – PROCEDURAL FAIRNESS – WARRANT ISSUED BY MAGISTRATE FOR DEFENDANT'S FAILURE TO ATTEND COURT – APPLICATION LATER MADE BY DEFENDANT FOR WARRANT TO BE WITHDRAWN – APPLICATION GRANTED AND WARRANT RECALLED AND CANCELLED – APPLICATION BY DEFENDANT FOR COSTS – APPLICATION REFUSED – WHETHER BREACH OF THE RULES OF PROCEDURAL FAIRNESS – WHETHER MAGISTRATE GAVE ADEQUATE REASONS IN REFUSING APPLICATION.

Z. was charged with the offence of driving a motor vehicle whilst his licence was suspended. Z.'s solicitors wrote to the Police Prosecutors' Office requesting that the matter be booked in for a contested hearing. When Z. did not appear at Court, the Magistrate issued a warrant to apprehend Z. Subsequently Z. applied to the Magistrate for the warrant to be recalled and cancelled which was granted. Z.'s application for costs was refused. Upon application for relief in the nature of *certiorari*—

HELD: Application for judicial review dismissed.

1. In relation to the alleged denial of procedural fairness, the Magistrate determined to refuse Z.'s application for costs against the prosecution without hearing oral argument from Z.'s counsel. However, the Magistrate did consider the affidavit material filed on Z.'s behalf, and listened to the tape of the hearing on 25 May 2011 when by her own motion she issued the warrant. Further, the Magistrate identified at the hearing on 1 June 2011 why she issued the warrant. Her reasons were because of Z.'s failure to appear at the hearing on 25 May 2011. Z. had ample opportunity to put evidence before the Court as to why there was no appearance on 25 May 2011 and this was not done when the costs issue was determined.

2. While there may have been a technical breach of procedural fairness by the Magistrate on 22 August 2011, in that she did not entertain oral argument, there was no basis for *certiorari* because the Magistrate had considered the argument in that she had read the affidavit material. On close analysis, Z. was not denied an opportunity to put forward his argument but rather was denied an opportunity to say it again.

3. Further, there was no injustice in what occurred because ultimately there was nothing the prosecution did which could have attracted a costs order against the prosecution. The Magistrate was at pains to stress that she issued the warrant at her own motion and that she stopped the prosecution from continuing to read from the letter dated 28 April 2011.

4. Whilst a failure to give reasons can amount to an error of law, it is not necessary for a court such as a Magistrates' Court to deliver extensive and expansive reasons for its decision. In the present case, the Magistrate's reasons were concise. Z. submitted that the Magistrate failed to explain how the fact that she issued the arrest warrant on her own motion affected her decision. The Magistrate set out in her reasons that she issued the arrest warrant of her own motion on the basis that there was no correspondence with the Court on 25 May 2011. In her reasons, the Magistrate identified how Z.'s failure to communicate with the Court affected her decision.

5. Accordingly, the Ground which alleged that the Magistrate failed to give sufficient reasons for her decision failed.

ZAMMIT AsJ:

1. The plaintiff, Mr Zigouris, applies for relief in the nature of *certiorari*, quashing an order made on 22 August 2011 by the Magistrates' Court at Sunshine constituted by Magistrate Cure, rejecting his application for costs. The costs application was refused following the recall and cancellation of an arrest warrant issued against Mr Zigouris on the Court's own motion.

2. Mr Zigouris challenges the learned Magistrate's decision on the following bases:

1. that the learned Magistrate's reasons for refusing him costs are inadequate, demonstrating

an error of law apparent on the face of the record;
2. that the learned Magistrate took into account irrelevant considerations demonstrating an error of law apparent on the face of the record; and
3. that the plaintiff was denied natural justice and/or procedural fairness, in that the learned Magistrate pre-judged the matter and/or denied Mr Zigouris a fair opportunity to be heard.

3. The first defendant took no part in the proceeding but agreed to abide by the decision of this Court in accordance with the principles in *R v Australian Broadcasting; Ex parte Hardiman.* [1] The first defendant asked to be heard in relation to any adverse costs order.

Material before the Court

4. In support of his application, Mr Zigouris relies upon the affidavits of Gabriel Kuek, affirmed on 27 September 2011 and 14 October 2011.

Background Facts

5. Mr Zigouris was charged by the second defendant, Senior Constable Lane, with one count of driving a motor vehicle on 8 February 2011 whilst his licence was suspended. On 28 April 2011, Mr Zigouris' lawyers wrote to the Case Conference Coordinator at the Sunshine Prosecutors' Office. The letter from Mr Zigouris' solicitors said, amongst other things:

> Should you decide to not withdraw the charge and consider it unnecessary to contact us please treat this letter as compliance with the requirement of a Case Conference and arrange for the matter to be booked in for a contested hearing of two hours.

6. The charge was listed for mention on 25 May 2011 before the Sunshine Magistrates' Court.

7. Mr Zigouris' solicitors made three further attempts to contact Acting Sergeant Andy Oakley, the prosecutor handling this case, but did not receive a response from him before the mention on 25 May 2011.

8. On 25 May 2011 at the mention hearing, the prosecutor asked Magistrate Cure if she had a letter on the file from Gabriel Kuek, Mr Zigouris' solicitor. Magistrate Cure did not have a letter on the court file. The prosecutor commenced reading the letter from Mr Zigouris' solicitors dated 28 April 2011 but Magistrate Cure stopped her. Magistrate Cure said:[2]

> Oh forget it, just don't even waste my time reading it, I'll issue a warrant ... Not even a case, there's no application to the Court to say that is (sic) not happening.

9. When Mr Zigouris' solicitors discovered a warrant had been issued for Mr Zigouris' arrest, they contacted Senior Constable Oakley and asked that his office apply to the Court to recall and cancel the warrant. Senior Constable Oakley refused. Mr Kuek on behalf of Mr Zigouris informed Senior Constable Oakley that if the prosecution declined to make the application, Mr Zigouris would have to make the application himself and that in that event, costs would be sought against the Chief Commissioner of Police.[3]

10. On 1 June 2011 an application was made to Magistrate Cure on Mr Zigouris' behalf to have the warrant recalled and cancelled. The application was successful.

11. Mr Zigouris, in support of the application, filed an affidavit.[4]

12. The following exchange occurred on 1 June 2011 between counsel for Mr Zigouris and Magistrate Cure:[5]

> MAGISTRATE: --- What I was going to say to you was ... this Court was not notified of the uh ... request for an adjournment or this Court was not contacted. When the matter was raised in Court that there had been no appearance, the police officer prosecuting, and I'm not sure who it was, commenced reading a letter he had received from your instructor. And it's a letter that's been given to me in the affidavit – it's annexed to the affidavit. And I'll tell you now, as soon as I heard the words "we are instructed our client did not know his licence had been suspended", I said "I am not interested in the negotiations between the parties; there is no contact been made with the Court, therefore I will issue a warrant". There is nothing magical about that; it is not the prosecution's job to make an application to adjourn the matter or book the matter in. It's up to you or your instructor or your

> client to appear at Court to make that request. And that's why a warrant was issued. Now, it can be set aside, and the matter can be booked in; but there is nothing at all that concerns me about that. And I do not want to know what negotiations are occurring between the prosecution and your side/ bar table. And that's why I look for communication with the Court. A solicitor or barrister has an obligation to either appear or communicate with the Court. And in the absence of such communication, a warrant was issued. And that's where the matter lies.

13. On 1 June 2011 Magistrate Cure adjourned the costs application to be determined at the conclusion of the substantive matter and authorised provision of the digital recording of the 25 May 2011 hearing.

14. Transcript of the costs application on 22 August 2011 is Exhibit GK-5 to the affidavit of Gabriel Kuek affirmed 27 September 2011.

15. It is convenient to refer to the transcript of the 22 August 2011 costs hearing in some detail:[6]

> MR MANDY - - - jointly, or severally; if I can put it that way, fell into error by issuing the warrant. Um ... we hold the Prosecution responsible to a large extent for misleading Your Honour inadvertently about the position in relation to Mr Zigouris on that day. Um, I understand that the events transpired at the end of a busy mention day and may have been the matters before and after may have been warrants sought by the prosecution ...
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> MAGISTRATE: No, let's make this quite clear, and I've given this some thought, a person who fails to appear, on summons or bail for a matter, has to either communicate with the Court themselves or through their representatives. I was not interested in hearing what had gone on between the prosecution and the defence solicitors because I was concerned that I may enter into an arena of some sort of negotiations and that's why I told them to stop reading the letter. And there was communication between them, but I asked the question 'Has there been communication with the Court'. When the answer was no, I issued a warrant. We did make it quite clear, I am told, that the defendant's solicitors, or he, could've had that warrant set aside with very little difficulty. It's a frequent occurrence of this Court that warrants are issued and then set aside after a phone call to say we should've been there; we should have sent you a note. It was set aside immediately upon an application ... Well the reality is: I issued the warrant; there was no communication with the Court; the police are not obliged to make an application on behalf of another party ... Alright, well let's make this quite clear ... I issued the warrant; there was no communication with the Court; solicitors for your client have an obligation, in my view, to communicate with the Court and have failed to do so. ...
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> MAGISTRATE: Mr Mandy, I'm going to refuse the application for costs. I've made it quite clear what my reasons are. I take the view that there was no communication with the Court. When the prosecutor endeavoured to tell me what had gone on between your instructor and the prosecutor, I said I was not interested in hearing that because it sounded to me like negotiations between the parties; discussions between the parties which the Court is not interested in. I issued the warrant; there had been no communication with the Court; and I will not grant costs in those circumstances. So the application is refused. Alright. Thank you.
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> MR MANDY: Well, Your Honour, I mean ... that ... I know what Your Honour but ...
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> MAGISTRATE: This really ... I mean there's no point really in telling me to hear what you say; I've refused the application. So now you've got other avenues to pursue it, but not before me. So I've read an affidavit; I've listened to the tape; I've given it consideration and I refuse your application. Alright? Thank you very much.

Decision

16. Sections 401 and 349 of the *Criminal Procedure Act* 2009 provide that the costs in a summary proceeding and committal proceeding and incidental to any proceeding in the Magistrates' Court are in the discretion of the Court. Section 131 of the *Magistrates' Court Act* 1989 relates to costs in all proceedings in the Magistrates' Court. The discretion as to costs is the same for the purposes of s131 of the *Magistrates' Court Act* and ss349 and 401 of the *Criminal Procedure Act*. The two Acts are to be read together.

17. The relevant legal principles relating to the award of costs for a successful defendant in a criminal proceeding are to be found in the High Court decision of *Latoudis v Casey*.[7] The discretion however remains a general, unfettered one to be exercised according to what is "just and reasonable" in the particular circumstances of the case.[8]

18. In *Latoudis*, Toohey J recognised that it would "ordinarily be just and reasonable" to award costs to a successful defendant to a prosecution. It was not argued that the learned Magistrate acted beyond her power in refusing the costs application.

19. Grounds 1(a) and (b) and 3(a) and (b) in the originating motion assert that there was a denial of procedural fairness afforded to Mr Zigouris, while ground 2(a) to (e) asserts that the learned Magistrate's reasons were inadequate.

Procedural Fairness – Grounds 1(a) and (b) and 3(a) and (b)

20. The primary submission made on Mr Zigouris' behalf was concerned with procedural fairness and the hearing rule. A general principle of the hearing rule is that the requirements of the rule are flexible and will be determined by what is fair in all the circumstances of a particular case. The flexibility of natural justice was emphasised by Tucker LJ in *Russell v Duke of Norfolk*:[9] The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

21. I have set out the circumstances giving rise to the learned Magistrate's decision to refuse Mr Zigouris' application for costs against the prosecution. The hearing on 22 August 2011 before Magistrate Cure was convened to explain why Mr Zigouris or his legal representative did not appear on 25 May 2011, when Magistrate Cure of her own motion issued an arrest warrant. For the purpose of the costs hearing on 22 August 2011, Mr Zigouris was given an opportunity to put evidence before the Court. The learned Magistrate considered the evidence, including Mr Zigouris' affidavit affirmed 25 May 2011 and a tape of the hearing on 25 May 2011.[10] The material filed on behalf of Mr Zigouris was directed at making a case as to why the prosecution was responsible for the issuing of the warrant and why the prosecution should be liable for Mr Zigouris' costs. That case had to be put by Mr Zigouris because he could not get a costs order against the Magistrate.

22. On 22 August 2011, Magistrate Cure determined to refuse Mr Zigouris' application for costs against the prosecution without hearing oral argument from Mr Zigouris' counsel. However, Magistrate Cure did consider the affidavit material filed on Mr Zigouris' behalf, and she had listened to the tape of the hearing on 25 May 2011 when by her own motion she issued the warrant. Further, Magistrate Cure identified at the hearing on 1 June 2011 why she issued the warrant. Her reasons were because of Mr Zigouris' failure to appear at the hearing on 25 May 2011. Mr Zigouris had ample opportunity to put evidence before the Court as to why there was no appearance on 25 May 2011 and this was not done when the costs issue was determined on 22 August 2011.

23. The question for this Court in a supervisory role is limited to ensuring the decision maker has acted within lawful authority. There is no evidence before the Court that Magistrate Cure acted outside of the scope of ss349 and 401 of the *Criminal Procedure Act* 2009 or s131 of the *Magistrates' Court Act* 1989.

24. Mr Zigouris' real grievance is the fact that the arrest warrant was issued. However, this is not a review of the Magistrate's decision to issue the warrant, it concerns the exercise of a discretion as to costs. I do not find a denial of natural justice has occurred.

25. While there may have been a technical breach of procedural fairness by Magistrate Cure on 22 August 2011, in that she would not entertain oral argument, there is no basis for *certiorari* because the Magistrate had considered the argument, in that she had read the affidavit material. On close analysis, Mr Zigouris was not denied an opportunity to put forward his argument but rather was denied an opportunity to say it again.

26. Further, I do not consider there was any injustice in what occurred because ultimately there is nothing the prosecution did which could have attracted a costs order against the prosecution. The learned Magistrate was at pains to stress that she issued the warrant at her own motion and that she stopped the prosecution from continuing to read from the letter dated 28 April 2011.

27. Having considered the transcript from 25 May, 1 June and 22 August 2011, I detect that the plaintiff's submission was that the Magistrate was acting high-handedly and was not prepared to entertain what Mr Zigouris' counsel had to say. As Mukhtar AsJ said in *AB v Magistrates' Court at Heidelberg*:[11]

> This Court is not here to judge the manner of magistrates or to make pronouncements about judicial etiquette. For one thing, the Magistrate cannot respond personally to the complaint or defend herself and maybe tell me what she was experiencing in Court. Magistrates are at the coalface and have to do practical justice in cases that are emotionally charged and troublesome. There is a growing expectation that Courts should take a more interventionist role than in the past and some may want to run a tight ship (citation omitted). Courts have to act with courtesy but above all with authority. Instances of sharp words, incredulity, sarcasm or urgings may be no more than a technique to try and ensure parties concentrate on the issues before the Court and act constructively. Litigation in courts would simply be unworkable if relief was available by way of *certiorari* each time a judge in effect was telling parties to "get on with it" or each time a judge revealed what his or her preliminary thinking was so as to encourage the parties to reach agreement. ...

28. I consider that grounds 1 and 3 must fail.

The obligation to give reasons – Ground 2(a) – (e)

29. Ground 2 alleges error on the face of the record for the failure by the learned Magistrate to give sufficient reasons for her decision. What is left under this ground is an allegation that the Magistrate failed to provide any adequate reasons for her decision to refuse Mr Zigouris' costs application. Ground 2(e) also weaves in an attack on the reasonableness of the decision, based on *Wednesbury* grounds.[12]

30. In my view, there is no possible basis for alleging *Wednesbury* unreasonableness. What the Magistrate did was within power. This is not a situation where the decision eventually made was in some way so manifestly bad or irrational that it bespeaks some sort of error of adjudication. Nor were any submissions made to that effect.

31. By operation of s10 of the *Administrative Law Act* 1978, reasons are incorporated as part of the record. A transcript may be incorporated into the record by reference at least to the extent that the transcript shows the Court's orders and the reasons for the decision.

32. A failure to give reasons can amount to an error of law.[13] However, it is not necessary for a court such as a Magistrates' Court to deliver extensive and expansive reasons for its decision.[14]

33. The Magistrate's reasons are concise. Mr Zigouris submits that the Magistrate failed to explain how the fact that she issued the arrest warrant on her own motion affected her decision. The Magistrate sets out in her reasons that she issued the arrest warrant of her own motion on the basis that there was no correspondence with the Court on 25 May 2011. In her reasons, the learned Magistrate identifies how Mr Zigouris' failure to communicate with the Court affected her decision.

34. Particulars (c) and (d) of Ground 2 go to matters which the learned Magistrate was not required to ventilate, that is the prosecution's conduct on 25 May 2011.

35. Her Honour's decision for refusing Mr Zigouris' costs application was because there was no appearance by Mr Zigouris on 25 May 2011. This issue was not addressed by Gabriel Kuek's affidavit affirmed on 25 May 2011 or in oral submissions by Mr Zigouris' counsel on 22 August 2011.

36. Accordingly, I consider that Ground 2 must fail.

Conclusion

37. For those reasons, in my view this application for judicial review must fail. I would order that the proceedings be dismissed.

38. I will hear the parties on costs.

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[1] [1980] HCA 13; (1980) 144 CLR 13.

[2] Affidavit of Gabriel Kuek affirmed 27 April 2011, Exhibit GK-3.
[3] Affidavit of Gabriel Kuek affirmed 27 September 2011, Exhibit GK-2 at paragraphs 17 – 19.
[4] Affidavit of Gabriel Kuek affirmed 27 September 2011, Exhibit GK-2.
[5] Affidavit of Gabriel Kuek affirmed 27 April 2011, Exhibit GK-4 at pages 3 and 4.
[6] Affidavit of Gabriel Kuek affirmed 27 April 2011, Exhibit GK-5 at pp1 - 5.
[7] [1990] HCA 59; (1990) 170 CLR 534.
[8] *Hobsons Bay City Council v Viking Group Holdings Pty Ltd* [2010] VSC 386, at [10]; *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, at p626.
[9] (1949) 1 All ER 109, at 118; The High Court has approved this passage in *R v Commonwealth Conciliation and Arbitration Commissioner; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546.
[10] Affidavit of Gabriel Kuek affirmed 27 September 2011, Exhibit GK-2.
[11] [2011] VSC 61, at [93].
[12] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] EWCA Civ 1; (1948) 1 KB 223.
[13] *Shu Zhang v West Sands Pty Ltd* [2010] VSC 36, at [15].
[14] *Kuek v Victoria Legal Aid* [1999] VSC 447, at [12].

APPEARANCES: For the plaintiff Zigouris: Mr PG Nash QC with Mr DJ Hancock, counsel. Access Law. For the second defendant Lane: Ms C Melis, counsel. Victorian Government Solicitor's office.
