**23/75**

## SUPREME COURT OF VICTORIA

# *R v VISITING JUSTICE at PENTRIDGE: ex parte WALKER*

**Harris J**

**3-5, 24 June 1975 — [1975] VicRp 86; [1975] VR 883**

**PROCEDURE – VISITING JUSTICE – DEALING WITH OFFENCES COMMITTED BY PRISONER WHILST IN PRISON – WHETHER PRISONER HAS A RIGHT TO LEGAL REPRESENTATION – PRISONER DENIED LEGAL REPRESENTATION – CHARGE PROCEEDED AND PRISONER WAS GIVEN OPPORTUNITY TO CROSS-EXAMINE WITNESSES AND GIVE EVIDENCE – WHETHER PRISONER DENIED NATURAL JUSTICE – WHETHER MAGISTRATE IN ERROR IN DENYING PRISONER LEGAL REPRESENTATION: *SOCIAL WELFARE ACT* 1970, SS120, 137, 145; *LEGAL PROFESSION PRACTICE ACT* 1958, SS 5(3), 111.**

**HELD: Order nisi discharged. Not a proper case for the grant of *certiorari*.**

**1. Members of the Victorian legal profession were entitled to a right of audience before certain courts and persons. This right was a statutory right, which was established by the *Legal Profession Practice Act* 1958, s5(3). That sub-section provided, so far as was material, that: "every person duly admitted as a barrister and solicitor" of the Supreme Court of Victoria was "entitled to practise in or before the courts or persons mentioned" in s111 of the Act. The courts and persons mentioned in that section were: "the Supreme Court, County Court, Court of Mines, Court of General Sessions, or Court of Petty Sessions or before any judge or chairman of any of such Courts or before any warden, justice or justices".**

**2. The position of a visiting justice was exceptional. He did not sit in open court. There was no right of access by a legal practitioner to the room in which the visiting justice sat within the prison. Thus the defendant before the visiting justice could not be ensured legal representation by the exercise by his barrister or solicitor of a right of audience, because the legal practitioner could not get there to assert his right, although if the legal practitioner were permitted to be present, he would be entitled to assert his right of audience under the *Legal Profession Practice Act* 1958. It did not follow from the existence of the statutory right of the legal practitioner to be heard, that there was to be implied a right, statutory or otherwise, in the prisoner who was a defendant before the visiting justice, to insist on being legally represented.**

**3. The authorities established that, at common law, a defendant to summary proceedings before justices had no right to demand that he be defended by a legal practitioner, because the justices had a discretionary power to regulate the proceedings of their own courts. This was a power which must also be possessed by the visiting justice and, consequently, it followed that the visiting justice was not obliged by any common law principle to allow the applicant in this case to be legally represented.**

**4. The position, so far as the visiting justice was concerned, was unless some other express statutory provision be found to cover the situation that the justice had a discretion as to whether or not he would permit an accused person to be legally represented in proceedings which he was hearing summarily under s137 or s138 of the *Social Welfare Act* 1970. In the present case the magistrate appeared to have regarded himself as not having any discretion about the matter.**

**5. Accordingly, there was no basis for interfering with the course taken by the visiting justice on the ground that the applicant was entitled to be legally represented in the proceedings before him, either by reason of s5(3) of the *Legal Profession Practice Act* 1958 or otherwise.**

**6. An examination of the facts and circumstances led to the conclusion that no injustice had been done to the applicant by the refusal of the visiting justice to allow him to be defended by a legal practitioner. The result was that no case of a denial of natural justice had been made out, so that this was not a case in which *certiorari* could go.**

**HARRIS J:** Peter John Walker is a prisoner at Her Majesty's Prison, Pentridge. He has been a prisoner there since 1965 and he says that by reason of the sentences imposed on him he does not expect to be released until at least the year 1991. Early in March 1974, James F. Geaney, a senior prison officer, laid three informations against Walker with respect to events which had

occurred at Pentridge on 31 December 1973. The first information alleged: "That the abovenamed defendant (i.e. Walker) on 31 December 1973, at Coburg in the said State did commit a breach of the *Social Welfare Act* 1970 (8089) s138(1)--attempt to escape—to wit; from cell No. 138 'B' Division."

The second information alleged: "That the abovenamed defendant on 31 December 1973, at Coburg in the said State did commit a breach of the *Social Welfare Act* 1970 (8089) s137(1)—wilful and malicious destruction of prison and prison furniture—to wit; damage cell window and tear up mattress cover of cell No. 138 'B' Division."

The third information alleged: "That the abovenamed defendant on 31 December 1973, at Coburg in the said State did commit a breach of the *Social Welfare (Prisons) Regulations* 1972 reg26(d): Except with the permission of the Director-General has in his possession any article or thing which has not been issued to him by any officer, to wit; 1 hacksaw blade with wooden frame in the shape of a saw; 1 grappling hook bound to a piece of wood; 1 shoe last; 1 alarm clock; 3 ten dollar notes."

These informations were served on Walker in about early March 1974. On 13 March 1974, Walker was taken before a visiting justice at Pentridge with respect to these matters. The charges were then adjourned for a week. On 20 March 1974 Walker was again taken before a visiting justice. The visiting justice was the respondent Mr Geoffrey S. Hoare, Stipendiary Magistrate. When Walker was brought before the visiting justice, he said to him: "Is this my trial for escape?" The visiting magistrate replied: "Yes." Walker then said to the visiting magistrate: "I would like to be represented by legal counsel." To that the visiting magistrate said: "There is no representation in this court."

The justice's clerk then read to Walker the charges which had been laid against him and asked whether he pleaded guilty or not guilty. Walker pleaded not guilty to each charge. Evidence was then called with respect to the three informations. There were three witnesses, all of them prison officers. The substance of their evidence was that on the evening of 31 December 1973 what was described as "a light coloured object" was seen being drawn across the bar of a cell window. The cell was cell No. 138. This was the cell occupied by Walker. When the prison officers went to the cell, they found Walker standing on his bed with his back up against the wall. The light globe had been removed. When that was replaced it was found that part of the glass in the window was broken and there was glass thrown on the cell floor. There was an alarm clock on the window sill and one bar was cut to a depth of about a half inch. A metal shoe last was lying on the prisoner's bed and there was also a hacksaw blade set in a wooden frame there. On the bed there was a pillow stuffed into a prisoner's jacket and a rope made from bedspread material. There was also a grappling hook attached to a length of wood. When Walker was searched, three ten dollar notes and some pieces of paper containing addresses were found on his person.

Walker was given the opportunity to cross-examine each of the witnesses. Some he asked no questions. Others he asked a few inconsequential ones. At the end of the case for the prosecution, the visiting justice cautioned Walker in relation to his rights to give evidence or to make an unsworn statement. Walker did not give evidence but made a submission to the Justice that the prosecution had not proved its case. The points upon which Walker relied were that the prosecution had not proved that he was a prisoner or that Pentridge was a prison. On the basis of this submission Walker submitted that the charges should be "squashed". The visiting justice said that he had taken due notice of those matters and that he found the accused guilty. He stated that it was clear that at the time he was the only prisoner in the cell and that the money and articles were accessories to his attempt to escape. Walker then admitted four prior convictions for offences within Pentridge. The visiting justice then said: "This is your second offence under s138(1) of the *Social Welfare Act*. I sentence you on the charge of attempting to escape to four months' imprisonment cumulative on your present sentence; on the charge of wilful and malicious destruction of a prison to one month's imprisonment concurrent and on the charge of possessing articles not issued I sentence you to one month's imprisonment concurrent."

Thereafter Walker made some requests with respect to appealing against the visiting justice's decision. On 2 August 1974 he gave notice of intention to appeal to the County Court against the sentence. As this notice was given out of time, it was in fact a notice of intention to

apply for leave to appeal out of time. On 8 August 1974 Walker made a written application for legal assistance pursuant to the *Legal Aid Act* 1969. On 27 August 1974 the County Court proceedings were adjourned *sine die*. By that time Walker had been granted legal aid and was in the course of taking steps to apply to the Supreme Court for an order nisi for a writ of *certiorari* to quash the convictions imposed upon him by the visiting justice on 20 March 1974. Thereafter, on four separate occasions, Mr Gorrie of counsel made application to Norris J for such an order nisi.

On 14 November 1974 Norris J granted an order nisi to Walker calling upon the visiting justice and James F. Geaney to show cause before the Supreme Court on 29 November 1974 why a writ of *certiorari* should not be issued and directed to Mr Hoare to bring up to the Supreme Court the record and all other proceedings concerning certain orders made by him whereby Walker was convicted to the three offences on 20 March 1974, together with all other things touching those orders, so that the orders might be further dealt with by the Supreme Court. The order further called upon Mr Hoare and Mr Geaney to show cause why further or other relief should not be granted on the ground:

> "That the said visiting justice was wrong in law in holding on 20 March 1974 that a barrister and solicitor of the Supreme Court of Victoria was not entitled to practise before a visiting justice at Her Majesty's Prison Pentridge and in refusing on that date to permit the said Peter John Walker to be represented before him by such a barrister and solicitor on the hearing of the informations charging the said offences respectively."

On 29 November 1974, on the return of the order nisi, the matter was adjourned into the Miscellaneous Causes List. In that way it came on for hearing before me on 3, 4 and 5 June 1975. Mr Marks QC, and Mr Gorrie appeared as counsel for Walker. Mr D Graham appeared as counsel for the respondents.

Walker, Mr Heaney and Joseph Gladwin Van Gramberg had sworn affidavits in the matter. Each was cross-examined, but in the end, the evidence was not really in dispute.

Mr Marks submitted that a barrister and solicitor of the Supreme Court was entitled to practise before the visiting justice by virtue of s5(3) and s111 of the *Legal Profession Practice Act* 1958 and that as a consequence of this, the applicant (Walker) was entitled to defend the proceedings against him by such a barrister and solicitor. He further submitted that, apart from the provisions of the *Legal Profession Practice Act* 1958, the applicant had a right at common law to defend the proceedings by a legal practitioner. This submission was based on the argument that the applicant, as a defendant to summary proceedings before a justice, had a right at common law to legal representation, or, alternatively, that the applicant, being a person who was entitled to be heard before the visiting justice, was entitled to appear by an agent, and was entitled to choose as such agent a legal practitioner. He also put submissions to the effect that s91(1) of the *Justices Act* 1958 gave the applicant a right to legal representation before the visiting justice. Although the words of the ground of the order nisi related only to the point which arises under the *Legal Profession Practice Act* 1958, the second part of the ground was treated as raising the further points and no objection was taken to this.

Mr Graham's primary submission was that the visiting justice had a discretion whether he would permit the defendant to be legally represented and that the justice had validly exercised his discretion against the applicant. This was based on the argument that, except where a statute expressly gave a defendant a right to defend by counsel or solicitor in summary proceedings before justices or a justice, the justices or justice had the power to control the conduct of proceedings before them and that this included a discretion whether they would permit a defendant to be legally represented. Alternatively, he submitted that, if the visiting justice had refused the applicant legal representation on the ground that such representation could not legally be had before him, this was not a case in which *certiorari* should be granted.

The arguments of counsel involved a consideration of many statutes and much case law. I am indebted to them for their researches and assistance.

The first matter to deal with is the statutory provisions relating to visiting justices. The *Social Welfare Act* 1970 provides that the Governor-in-Council "may appoint any number of fit and proper persons being justices to be visiting justices of a prison" (s120(1)). Every stipendiary

magistrate is "by virtue of his office and without further appointment or authority than this Act itself...a visiting justice of every prison and "has" and may exercise at or in relation to a prison all the powers and authority of a visiting justice" (s120(3)). Every visiting justice has and may exercise all the powers and authority of a visiting justice appointed under the Act (s120(2)).

Section 137 and s138 set out the powers of a visiting justice to inquire into certain offences committed by prisoners and to convict and impose sentences upon prisoners. Section 137 empowers a visiting justice to inquire in a summary way into, amongst other things, any charge of any wilful and malicious destruction of a prison or any furniture thereof (s137(1)). The justice may, upon convicting a prisoner of such a charge, sentence him to be kept to hard labour for a term of not more than two years and may order the prisoner to be kept in solitary confinement for any portion of that term of not more than three months in period, none of which shall exceed one month and which shall be at intervals of at least one month (s137(2)).

Under s138 a visiting justice is empowered to inquire in a summary way into, amongst other things, any charge of attempting to escape or breach of any rule or regulation brought against a prisoner. In such cases the visiting justice may sentence a prisoner upon conviction to be imprisoned for a term of not more than six months for a first offence and of not more than eighteen months for a second or subsequent offence or to be kept in solitary confinement either continuously or at such intervals as a visiting justice thinks fit for a period of not more than twenty-one days for a first offence and of not more than thirty days for a second or subsequent offence. (It may be noted that the *Social Welfare Act* 1970 has been amended by the *Social Welfare Act* 1973 (Act No. 8493), but so far as is relevant to this case, that Act has not been brought into operation.)

The *Social Welfare Act* 1970 does not make any provision for prisoners brought before a visiting justice to be legally represented. Hence that Act does not itself provide the solution to the problem in this case (contrast s22 of the *Social Welfare Act* 1973).

Members of the Victorian legal profession are entitled to a right of audience before certain courts and persons. This right is a statutory right, which is established by the *Legal Profession Practice Act* 1958, s5(3). That sub-section provides, so far as is material, that: "every person duly admitted as a barrister and solicitor" of the Supreme Court of Victoria is "entitled to practise in or before the courts or persons mentioned" in s111 of the Act. The courts and persons mentioned in that section are: "the Supreme Court, County Court, Court of Mines, Court of General Sessions, or Court of Petty Sessions or before any judge or chairman of any of such Courts or before any warden, justice or justices".

As Gowans J, delivering the judgment of the Full Court in *Hubbard Association of Scientologists International v Anderson and Just* [1972] VicRp 37; [1972] VR 340, at p341, said:

> "...it is necessary to bear in mind that what is being dealt with (in s5(3)) is the 'right' to appear or the 'right' of audience, of the persons concerned, not the power of the Court to permit persons to appear."

Mr Marks submitted that a visiting justice was a "justice" within s111 and that therefore a barrister and solicitor had a right of audience before a visiting justice. To this he added the proposition that it followed that the applicant Walker was entitled to have a barrister and solicitor appear for him before the visiting justice. Mr Graham did not contend that a visiting justice was not a "justice" within s111. What he put was that s5(3) was dealing with the rights of legal practitioners and ensuring that they could not be denied audience before the courts and persons mentioned and that this did not of itself confer any rights upon litigants.

In my opinion, Mr Graham's argument is sound. No doubt, in many cases, the fact that a legal practitioner is entitled to audience before a court or justice would have the result that a defendant could be ensured legal representation before that court or justice. Where the court is an open court, the legal practitioner can attend. Being present, he can insist on his right of audience and hence bring about the result that the litigant who is his client can be represented, whether or not there are other statutory provisions giving the litigant himself the right to defend or prosecute by counsel or solicitor. However, the position of a visiting justice is exceptional. He does not sit in open court. There is no right of access by a legal practitioner to the room in which

the visiting justice sits within the prison. Thus the defendant before the visiting justice cannot be ensured legal representation by the exercise by his barrister or solicitor of a right of audience, because the legal practitioner cannot get there to assert his right, although, in my opinion, if the legal practitioner were permitted to be present, he would be entitled to assert his right of audience under the *Legal Profession Practice Act* 1958. In my opinion, it does not follow from the existence of the statutory right of the legal practitioner to be heard, that there is to be implied a right, statutory or otherwise, in the prisoner who is a defendant before the visiting justice, to insist on being legally represented.

The wording of the order nisi proceeds on the assumption that the ruling by the visiting justice refusing legal representation to the applicant was based upon the view that a barrister and solicitor of the Supreme Court of Victoria was not entitled to practise before a visiting justice at Pentridge. I doubt whether the magistrate adverted to that aspect of the matter when he gave his ruling, but in so far as the ruling did involve a denial of the right of audience by a barrister and solicitor before a visiting justice, then, in my opinion, the visiting justice was in error.

Before considering whether that error vitiates the decision of the visiting justice, it is appropriate to consider the other arguments raised in the case. This necessitates considering whether a defendant in summary proceedings before justices has a right to be legally represented (where the position is not governed by statute).

In England, over the course of centuries, justices were invested with jurisdiction to hear and determine certain cases summarily (the development of this jurisdiction is described by Jordan CJ, in *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at p165; 55 WN (NSW) 63). Justices often enough allowed a defendant to defend by counsel or solicitor, but a litigant had no right to be defended by a legal practitioner and the legal practitioner had no right of audience. In 1831, the Court of King's Bench stated the common law position in *Collier v Hicks* [1831] EngR 686; (1831) 2 B & Ad 663; 109 ER 1290. In that case Lord Tenterden CJ, said (2 B and Ad at p669; 109 ER at p1292):

> "On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own courts, may decide who shall appear as advocates, and whether, when the parties are before them, they will hear anyone but them. It may be, and is, in some cases, very convenient that magistrates should hear counsel or attorneys as advocates, and allow them, as they frequently do, to expound the law, examine witnesses, and reason on the facts; but it has never been decided that anyone can claim, as a right, to act in that capacity, without the consent, and against the will of the magistrates. Any person, whether he be a professional man or not, may attend as a friend of either party, and may take notes, may quietly make suggestions, and give advice; but no-one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

In 1836 in England defendants in summary proceedings (and in felonies also) were given a statutory right to defend by a legal practitioner. This was enacted by the *Prisoners' Counsel Act* (6 and 7 Will IV c. 114), which, by s2, provided that:

> "in all cases of summary convictions persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney".

In 1840, this Act was adopted in New South Wales (Act 4 Vict. No. 27). In 1848 in England the right to legal representation before justices exercising summary jurisdiction was made applicable to both defendants and informants by the Acts known as *Jervis's Acts* (11 and 12 Vict. c42, c43 and c44). In 1850, those Acts were adopted in New South Wales (14 Vict. c43). In 1865, in Victoria, both the English and the New South Wales legislation was repealed by the *Justices of the Peace Statute* 1865 (28 Vict. No. 267). That Act itself, by s100, provided for defendants and informants to be legally represented in summary proceedings before justices. Such a provision has been part of the statute law in Victoria ever since. It is now contained in s91(1) of the *Justices Act* 1958, which is in substantially the same terms as s100 of the 1865 Act.

The effect of the legislation referred to has been to require justices exercising summary jurisdiction to allow a defendant to be legally represented, but their discretionary power to regulate the proceedings before them has not otherwise been interfered with. This is shown by cases which

have dealt with the power of justices to permit persons other than legal practitioners to appear for parties (see *McGrath v Dobie* [1890] VicLawRp 133; (1890) 16 VLR 646 (FC); *Ritter v Charlton* [1904] VicLawRp 75; (1904) 29 VLR 558 (FC) (over-ruling *O'Sullivan v McMahon* (1896) 22 VLR 55); *Posner v Collector for Interstate Destitute Persons (Vic.)* [1946] HCA 50; (1946) 74 CLR 461; [1947] ALR 61; *O'Toole v Scott* [1965] AC 939; [1965] 2 All ER 240 (PC); [1965] 2 WLR 1160; *Ex parte Chambers; Re Schetrumpf and Hobbs* [1969] 2 NSWR 272 (CA); *Hubbard Association of Scientologists International v Anderson and Just* [1972] VicRp 37; [1972] VR 340, esp. at p342).

In two of these cases, the judgments contain passages which reiterate the common law principle. Thus, in *O'Toole v Scott* (AC at p952; All ER at pp242-3, the Privy Council said: "In *Collier v Hicks* [1831] EngR 686; (1831) 2 B & Ad 663; 109 ER 1290, it was held that no person had by law a right to act as an advocate on the trial of an information before justices of the peace without their permission....Other cases illustrating the general principle that, subject to usage or statutory provisions, courts or tribunals may exercise a discretion whether they will allow any, and what persons, to act as advocates before them are...." (and then are set out the names of some illustrative cases).

In *Ex parte Chambers* ([1969] 2 NSWR at p278), Sugerman JA, said:

> "The historical reasoning stated in *O'Toole v Scott* permits the newly created statutory right to representation by counsel or attorney to stand with the ancient discretionary power of magistrates to determine who should appear as advocates in their courts in the one case as in the other. In the case of any of these sections they merely qualify, and do not abrogate that discretion (AC at pp953-4). They create a right in counsel and attorneys which did not exist before, but otherwise they leave the discretion of magistrates intact. Under s70(2) (which corresponds with s91(1) of the *Justices Act* 1958) the magistrate must now allow the conduct of the case by counsel or attorney, but still may allow, as he always could its conduct by some other person (*O'Toole v Scott*)."

There is one case in which there are some suggestions that *Collier v Hicks*, *supra*, should not be regarded as authoritative after the passing of the *Prisoners' Counsel Act* in 1836. This is *Ex parte Nichols* (1839) 1 Legge 123. In that case, the Supreme Court of New South Wales held that a justice of the peace was bound to allow an attorney to conduct the defence of an accused person in summary proceedings. The case was heard shortly after the enactment of the *Prisoners' Counsel Act* and before the New South Wales legislature had expressly adopted its provisions. Two members of the court (Dowling CJ, and Willis J) held that the English Act applied in New South Wales. The third member of the court (Stephen J) disagreed on that point, but said (at p139) that the English Act was declaratory and that "though of no value as an enactment, yet decisive as a legislative affirmation of a fact, as an authoritative statement, that the privilege claimed (in the case before the court) always existed". He regarded the section, "especially when coupled with the reasonableness of the claim" and what he referred to as "the general opinions which prevailed in its favour, prior to *Collier v Hicks*, founded on principle and analogy, as equivalent to a reversal of the decision in that case".

Mr Marks submitted that I should adopt the reasoning of Stephen J, in *Ex parte Nichols*, *supra*, and should find that *Collier v Hicks* does not correctly state the law. He pointed out that what was said in *O'Toole v Scott*, *supra*, on the matter was said *obiter*. In my opinion, it is quite impossible to regard *Collier v Hicks* as wrongly decided on the basis of the decision in *Ex parte Nichols*. The grounds for decision in that case, expressed by all the judges, are, in my respectful opinion, of doubtful validity. No doubt has otherwise been cast on the correctness of the decision in *Collier v Hicks*. Indeed, the passage in *O'Toole v Scott*, though it may be *obiter*, is a clear expression of approval of the case, as are also the references to it in the other authorities to which I have referred (reference may also be made to *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591; [1971] 1 All ER 215, per Lord Denning MR (Ch at p605; All ER at p218).

Thus, the authorities establish that, at common law, a defendant to summary proceedings before justices has no right to demand that he be defended by a legal practitioner, because the justices have a discretionary power to regulate the proceedings of their own courts. This is a power which, in my opinion, must also be possessed by the visiting justice and, consequently, it follows that the visiting justice was not obliged by any common law principle to allow the applicant in this case to be legally represented.

The true principle is that enunciated in *Collier v Hicks* and re-stated again in later cases including the decision of the Privy Council in *O'Toole v Scott*, *supra*. Thus the position, so far as the visiting justice is concerned, is unless some other express statutory provision be found to cover the situation that the justice has a discretion as to whether or not he will permit an accused person to be legally represented in proceedings which he is hearing summarily under s137 or s138 of the *Social Welfare Act* 1970. In the present case the magistrate would appear to have regarded himself as not having any discretion about the matter. Whether that affects the decision in this case will have to be considered again somewhat later. I point out that the proposition which I have just enunciated about the discretionary power of the magistrate is in accord with the primary submission put by Mr Graham in this case.

The authorities which I have referred to relate expressly to the question of legal representation of parties in proceedings before justices or magistrates. There is another line of authority which deals with the situation where parties are entitled to be heard by statutory tribunals and domestic tribunals.

Mr Marks' alternative argument to support the conclusion that the applicant was entitled to have legal representation before the visiting justice was based on a line of cases dealing with appearances before statutory tribunals. It has been held that, where a person has a right to be heard by a statutory tribunal, the tribunal is not entitled to refuse to hear an agent who appears on behalf of that person. Sometimes, the language in the judgments has been phrased in terms of there being a right in the person concerned to be represented by an agent (including a legal practitioner). In some instances, the difference in expression is immaterial, but, in my opinion, the correct analysis of what is involved in the cases is that they really only concerned to ensure that a statutory tribunal does not prevent a party who is entitled to be heard from exercising that right through an agent, where the only ground for the tribunal's refusal to hear the agent is that he is not the party himself.

The first of the cases is *R v Assessment Committee of Saint Mary Abbotts, Kensington* [1891] 1 QB 378. A surveyor, acting on behalf of a householder who was an objector to a valuation list, sought to appear before the assessment committee, set up under statute, to hear and determine the objections. The committee refused to hear him on the ground that their rule was to hear no-one other than the objector himself or a member of his family or household, or a member of the legal profession (see pp378, 379). Both at first instance and in the Court of Appeal it was held that mandamus should go to compel the committee to hear the objector through his surveyor.

Lord Esher MR said (at pp. 382, 383) that:

> "The question here is whether, being such as they (i.e. the members of the committee) are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by any agent authorized by them.... No doubt the assessment committee would have some discretion, and might refuse to hear a manifestly improper person as agent, but I do not think that they have the power which they claim to exercise in this case."

In *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125; [1968] 2 All ER 545, Lord Denning MR said (QB at p132; All ER at p549), after speaking of the right of a person to appoint an agent for any purpose whatsoever, including the exercise of a statutory right, that that principle had been applied in *R v Assessment Committee of Saint Mary Abbotts, Kensington*, *supra*, and that in that case, it had been held "that a ratepayer had a right to have a surveyor appear for him".

In one sense, it had been so held, but in *R v North Worcestershire Assessment Committee; Ex parte Hadley* [1929] 2 KB 397. Lord Hewart CJ spoke of the case in words which, I respectfully suggest, bring out more clearly what it did decide and what is conveyed in Lord Esher's words. What the learned Chief Justice said (at pp403-4) about *R v Assessment Committee of Saint Mary Abbotts, Kensington*, *supra*, was that it was:

> "A case in which a writ of mandamus was sought to compel an assessment committee...to hear a particular agent, and the decision was that as the statute gave the objector the right to appear and

> be heard in support of his objections, and contained no provision prohibiting him from appearing by an agent, the committee were bound to hear the agent, and that a mandamus must be granted."

In 1916, the High Court made an order for mandamus against the Public Service Board of Appeal directing it to permit counsel to appear for an appellant and conduct the appeal. This was *R v Board of Appeal; Ex parte Kay* [1916] HCA 63; (1916) 22 CLR 183; 22 ALR 382. Counsel for the applicant for the writ cited *R v Assessment Committee of Saint Mary Abbotts, Kensington, supra*.

Isaacs J said (CLR at p186; ALR at p383):

> "That case establishes the *prima facie* common law right of any person who has a statutory right to appear before a non-judicial tribunal to conduct his business before the tribunal by an agent as well as personally."

Griffith CJ said (CLR at p185; ALR at p383):

> "It is also urged that at common law any person in such a position [i.e. as the appellant] is entitled to appear by an agent unless there is some law to the contrary....On the whole, the better opinion appears to me to be that the appellant is entitled to be heard by an agent, and, if so, then she has just as much right to demand to be heard by counsel as to be heard by any other agent."

In 1949, in *R v City of Melbourne; Ex parte Whyte* [1949] VicLawRp 48; [1949] VLR 257, O'Bryan J discharged an order nisi for prohibition against the City of Melbourne. The writ had been sought to prohibit the council from considering the revocation, cancellation or suspension of certain hackney carriage licences held by the applicant without affording him an opportunity of appearing before the Licensed Vehicles Committee by his solicitor. O'Bryan J discharged the order nisi because he held that the applicant did not have a right to appear in person and therefore could not have a right to appear by his solicitor. His Honour considered, in some detail, both *R v Saint Mary Abbotts, Kensington*, *supra*, and *R v Board of Appeal; Ex parte Kay*, *supra*. He concluded by saying (at p268):

> "It will be observed in both these cases that the statute which gave a right of appeal to the tribunal was interpreted as giving to the appellant the right to appear before it and it is as ancillary to that right that it was held that the appellant was entitled to be represented before the tribunal by such agent as he chose."

It is true that both the members of the High Court and O'Bryan J spoke in terms of a right of the person concerned to appear before the statutory tribunal by an agent. However, *R v Board of Appeal; Ex parte Kay* was a case where the tribunal had refused to hear the party when she appeared by her counsel and *R v City of Melbourne; Ex parte Whyte* was a case where the tribunal, though bound to give the party an adequate opportunity of presenting his case, was held to have a discretion as to the way in which it would inform its mind of relevant matters. It was therefore not bound to hear the party in person, or by his agent. Had prohibition been granted in that case, in my opinion, it would have been on the basis that, the party being entitled to appear in person, he could also appear by his agent and that the Committee should not be allowed to proceed until it recognized that an appearance by the party's agent was an appearance by the party.

Often, it would be immaterial whether the principle with respect to appearances before statutory tribunals was stated in terms of a right to appear in person or by an agent, or in terms of a right to be represented by an agent (compare the position with respect to the right of audience granted to legal practitioners under s5(3) of the *Legal Profession Practice Act* 1958). But where the distinction is material, as it is in the present case, the result is that the principle enunciated in cases dealing with statutory tribunals does not afford the applicant a basis for establishing a right to be legally represented before the visiting justice. I add that I have considered this point as elaborately as I have because counsel placed considerable reliance upon it, but, in fact, I am unable to see how it could assist the applicant, no matter how the principle is expressed, in view of the clear authority which establishes that, apart from statute, a defendant has no right of legal representation before justices. (As to the absence of any right to legal representation before domestic tribunals, see *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591; [1971] 1 All ER 215, esp. per Lord Denning MR (Ch at p605; All ER at p218); and compare *Pett v*

*Greyhound Racing Association Ltd* [1969] 1 QB 125; [1968] 2 All ER 545; *Pett v Greyhound Racing Association Ltd (No. 2)* [1970] 1 QB 46; [1970] 1 QB 67n. Note also the comments of Professor de Smith in *Judicial Review of Administrative Action*, 3rd ed., p187.)

Mr Marks also submitted that the applicant had a statutory right to be legally represented before the visiting justice. For its proposition he referred to s91(1) of the *Justices Act* 1958, but, in my opinion, that sub-section only applies to proceedings in Magistrates' Courts. It makes the room in which the Magistrates' Court sits to hear any information an open court and it provides that the party against whom "such information" is laid is entitled to defend in person or by his counsel or solicitor. There is a reference to "any information" in the opening words of s91, which speak of "all cases of summary jurisdiction", but, in my opinion, the words "such information" in s91(1) do not relate back to those opening words (see also the heading to Pt IV of the Act, which is "Magistrates' Courts"; and s112).

At one stage, Mr Marks also sought to argue that the provisions of the *Prisoners' Counsel Act* 1836 itself were applicable in Victoria, but I did not understand him to persist with that point which was, in my opinion, quite untenable.

Having now considered the arguments put on behalf of the applicant to support the proposition that he had a right to be legally represented before the visiting justice, it can be seen that I have come to the conclusion that none of those arguments sustain the proposition. There is, therefore, no basis for interfering with the course taken by the visiting justice on the ground that the applicant was entitled to be legally represented in the proceedings before him, either by reason of s5(3) of the *Legal Profession Practice Act* 1958 or otherwise.

However, the matter cannot be disposed of at this point. What I have done is to accept as a correct statement of principle the submission of Mr Graham that the visiting justice had a discretion whether he would permit the applicant to be legally represented or not. Mr Graham submitted that what the magistrate had done was to exercise his discretion against the applicant and that this had been done validly, but, in my opinion, the evidence of the words used by the magistrate shows that he refused the applicant's request on the ground that legal representation could not legally be had before him. In so doing, he was in error. Mr Graham submitted that, even if this were the position, *certiorari* should still be refused.

In dealing with this submission, the first point to consider is whether *certiorari* can be available against a visiting justice. Section 145 of the *Social Welfare Act* 1970 is in these terms: "All proceedings under this Act other than proceedings in respect of indictable offences shall be had and taken in a summary way and no such proceedings shall be removed by *certiorari* into the Supreme Court." Notwithstanding a "privative" provision such as this, the Supreme Court retains jurisdiction to control proceedings in an inferior court by *certiorari* upon the grounds of "manifest defect of jurisdiction" or of "manifest fraud" in the party procuring the order (see *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417). Here it is not disputed that the visiting justice was an "inferior court" to which *certiorari* would go if the Act did not contain s145. There is no suggestion of fraud. Hence the question is whether what the magistrate did constituted a "manifest defect of jurisdiction".

One ground upon which *certiorari* is granted is that the proceedings below were conducted in violation of the principles of natural justice. Thus, in *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at p165, Jordan CJ, speaking of the control of justices exercising summary jurisdiction in England before *Jervis' Acts* effectively prevented convictions before justices from being quashed for error on the face of the record, said:

> "Since the exercise of the summary jurisdiction exposed the subject to penalties imposed by law by justices without the protection of trial by jury, the Court of King's Bench, by means of the prerogative writ of *certiorari*, exercised a vigilant supervision over this jurisdiction, not by way of appeal, but in order to ensure that the rules of natural justice should not be violated, and to ensure also that the justices should not exceed their authority."

Then, speaking of the present, in *R v Wandsworth Justices; Ex parte Read* [1942] 1 KB 281 at p284; [1942] 1 All ER 56 at p57, Viscount Caldecote LCJ said:

> "If it appears that there has been a denial of natural justice, the court will interfere and order that the conviction shall not stand." And he spoke of a case which was based upon a denial of natural justice as being analogous to a case where the allegation was want of jurisdiction. In the same case Humphreys J said (KB at p284; All ER at p58) that "If a person can satisfy this court that he has been convicted of a criminal offence as a result of a complete disregard by an inferior tribunal of the laws of natural justice, he is entitled to the protection of the Court."

Again, in *Rigby v Woodward* [1957] 1 WLR 250 at p253; [1957] 1 All ER 391 at p393, Lord Goddard CJ, speaking of the use of the remedy of *certiorari*, said:

> "Ordinarily speaking this matter would have been brought before the court by *certiorari* and on *certiorari* it would have been said that not to allow cross-examination of a witness who had given evidence against the appellant was a departure from the common principles of justice. We should then have had to consider whether the irregularity was such that we ought to quash the conviction."

In 1959, the Full Court followed these cases in *R v Chairman of General Sessions at Hamilton; Ex parte Atterby* [1959] VicRp 101; [1959] VR 800, and granted *certiorari* to quash proceedings in General Sessions which were held to have been conducted in violation of the principles of natural justice, although the *Justices Act*, under which the proceedings had been heard, contained a "privative" section somewhat similar to s145 of the *Social Welfare Act* 1970: see *Justices Act* 1957, s164; see now *Justices Act* 1958, s164 (see per Lowe and O'Bryan JJ at p806).

These authorities show that s145 of the *Social Welfare Act* 1970 does not prevent this Court from controlling proceedings before a visiting justice by *certiorari* in all cases. If there has been an irregularity in the proceedings before the visiting justice, that irregularity may amount to a denial of natural justice and such a denial is regarded as amounting to a want of jurisdiction. In such circumstances, the proceedings can be quashed by *certiorari*, despite s145.

In my opinion, the authorities do show that proof of an irregularity in the proceedings in the lower court does not always amount to proof of a denial of natural justice. This, in my opinion, is shown by the passages from the two English cases cited above and from the approach of Lowe and O'Bryan JJ in *R v Chairman of General Sessions at Hamilton; Ex parte Atterby*, *supra*.

In the present case, the refusal by the visiting justice to allow the applicant legal representation was something more than a mere error in procedure. Where a defendant had a right to legal representation, a conviction was quashed on appeal when the exercise of his right had been denied by a refusal to adjourn the trial, without any examination of the merits by the Court of Criminal Appeal (*R v Kingston* (1948) 32 Cr App R 183). Here, the visiting justice had a discretion whether he would allow the applicant to be legally represented.

At first sight, it may appear to be a serious matter for a visiting justice to refuse to allow a defendant to be legally represented, especially when the magistrate did not appreciate that he had a discretionary power to allow such representation, but, in my opinion, this Court must examine the circumstances of the case to determine whether the refusal does amount to a denial of natural justice. In my opinion, at least in a case such as this, it does not necessarily follow that the magistrate's failure to exercise a discretion results in a situation which justifies rectification by quashing the conviction, whether with or without a remission of the matter for further hearing.

The plain fact of the matter is this. The applicant was given a fair opportunity to question the witnesses for the prosecution, to give evidence himself, and to put any submissions he wished to the magistrate. The evidence against him clearly established his guilt and that evidence was not challenged, either before the visiting justice, or in this Court. The submission made by the applicant that the information should be dismissed because it was not proved that he was a prisoner or that Pentridge was a prison, was properly rejected by the visiting justice, who was quite entitled, in the circumstances, to say that he had taken due notice of those matters. It was not seriously suggested in this Court that there was any substance in the points taken, in view of the place where the visiting justice sat and in view of the way in which the applicant was brought before the visiting justice and the way in which the witnesses referred to him in their evidence. It was not suggested that there was any other point involved. There is nothing to suggest that the penalties imposed are such that justice requires that the applicant should have the opportunity of seeking to address the magistrate on sentence. There is nothing to suggest that the visiting justice

would have allowed the applicant to be legally represented in this case if he had appreciated that he had a discretionary power to allow him to be represented. Finally, the applicant has pending an application for leave to appeal out of time to the County Court. Such an appeal would be by way of rehearing and it cannot be said that the applicant will not be granted leave to appeal.

Thus, an examination of the facts and circumstances leads to the conclusion that no injustice has been done to the applicant by the refusal of the visiting justice to allow him to be defended by a legal practitioner. The result is that, in my opinion, no case of a denial of natural justice has been made out, so that this is not a case in which *certiorari* could go.

At the hearing before me, the matter was discussed rather on the basis that, even if there was power to grant *certiorari* on the ground of denial of natural justice, this Court should refuse to make the order nisi absolute in the exercise of its discretion, *certiorari* being a discretionary remedy. On consideration, I have come to the conclusion that the proper approach is the one I have made. It seems to me that to find there is a denial of natural justice and then to refuse to rectify that situation as a matter of discretion is an unsatisfactory way of dealing with the situation, but even if the conduct of the visiting justice in refusing to allow the applicant to be legally represented should be held to be a denial of natural justice, and thus to afford a basis for the grant of *certiorari*, I am satisfied that this is not a proper case in which the relief should be granted. Order nisi discharged.

Solicitors for the applicant: Michael Niall and Co.
Solicitor for the respondents: John Downey, Crown Solicitor.

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