25/77

SUPREME COURT OF VICTORIA

DETTMAN v ROFF

Starke J

23 November 1976

PRACTICE AND PROCEDURE – DEFENDANT WISHED TO CALL MEDICAL PRACTITIONER IN RELATION TO THE DEFENDANT'S AUTOMATISM AT THE TIME OF THE OFFENCE – WITNESS NOT CALLED BY PROSECUTION OR DEFENCE – ADJOURNMENT NOT GRANTED BY MAGISTRATE – NO APPLICATION FOR AN ADJOURNMENT BY DEFENDANT – WHETHER MAGISTRATE IN ERROR.

The complaint was that the Magistrate, when the matters came before him was in error in not permitting an adjournment so that either the Crown, or the defendant (who was the applicant before His Honour) could call a medical witness, namely Dr Birrell, the police surgeon. The facts, very broadly, were that the applicant whilst driving his motor car hit a wall, fence post, a white post, clipped another car, crossed a school crossing at high speed and eventually went on the wrong side of the road and collided head on with an oncoming vehicle, as a result of which a passenger in the vehicle was killed. The applicant had been acquitted of culpable driving by the local County Court where during the trial Dr Birrell was called and apparently gave evidence which supported the defence of automatism on the basis that the applicant was suffering from hypoglycaemia (a condition brought about in diabetic people where the insulin intake causes an imbalance with the sugar in the blood). After his acquittal at the County Court the applicant was charged at the Magistrates' Court and convicted on two of three charges. At this hearing the defendant gave evidence he could remember nothing of the circumstances of the accident or indeed, the events of that day. Upon Order Nisi to review, the Magistrate stated in an affidavit that the defendant's counsel indicated that no adjournment should be granted and that the matter should proceed —

HELD: Order discharged.

1. The question of the weight of an affidavit filed by a Magistrate has been often canvassed in the Supreme Court and other courts. It has always been understood that the facts stated in a Magistrate's affidavit are next door to conclusive.

2. It cannot be argued that once a solicitor representing a defendant in a Magistrates' Court has been given the opportunity to call evidence which he may think is relevant and admissible and has refused an adjournment to achieve that end, he can then raise the matter before the Supreme Court on review. The order nisi must be discharged.

STARKE J: ... The first step to making out his grounds in these orders to review is for the applicant to establish that he was denied an opportunity of calling Dr Birrell or having the Crown call Dr Birrell, so as there would be evidence which would form a basis for a submission that the applicant was in an automatic state and that such a defence is available in the case of strict liability informations.

The matter, in my view, was not very satisfactorily covered in the affidavit of the solicitor for the applicant. Paragraph 5 is in these terms:

> 'I then requested an adjournment on the basis that the prosecution were not calling Dr Birrell as a witness in these proceedings. I submitted that in view of the *R v Lucas* [1973] VicRp 68; [1973] VR 693, the prosecution had a duty to call him as a material witness and I outlined to the court the nature of the evidence which Dr Birrell had given at the committal proceedings and at a subsequent trial.' An argument then ensued between myself and the magistrate, in which the Magistrate took the view that he could not know what any witness intended to say in advance and therefore he could not decide whether a proposed witness was material or not, and he therefore was unable to grant an adjournment on the basis that the prosecution were not calling a material witness. He also seemed to be saying that in any event there was no duty upon the prosecution to call material witnesses. The evidence then proceeded.'

I should say, I think at once, that the position is not, I think, in any way parallel to the matters that were considered by the High Court in *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46; (1957) 97 CLR 279; [1957] ALR 620; (1957) 31 ALJR 424. In that case a police sergeant was able to give evidence both favourable to the Crown and favourable to the accused.

The Crown refused to call a witness who was a police sergeant and forced the defence to call him, which resulted in the Crown being in a very favourable position so far as cross-examination was concerned. It is quite clear, in my view, from a perusal of the judgments in that case, particularly that of Fullagar J that the High Court arrived at the conclusion that the Crown was simply playing tactics and refrained from calling material witnesses, not because they mistrusted him in any way, but to force the defence to call him and so open him to cross-examination, and no doubt also having the result that the defence would lose the last word.

In this case it is not suggested that it really mattered at all who called Dr Birrell; his evidence was all on record. He is an expert in the sense he is a qualified medical practitioner and it is not suggested – and I do not think really could be suggested – that he would bend his evidence depending on who called him. The question that was raised was that the Magistrate who, having been asked for an adjournment, refused to allow it to enable the attendance of a man who was based in Melbourne and that by so refusing he deprived the defence of the crucial witness on whom their defence very largely depended. In relation to paragraph 5 of Mr McNamara's affidavit I find it extremely surprising that if he did in fact make an application for an adjournment on the basis that he wished to call Dr Birrell, that he did not refer to that fact in his affidavit. It was after all the foundation of the whole argument that was to be presented to me. What my decision would have been had the matter been left to rest at that point I need not pause to consider.

However, the matter was not left in that state. The Stipendiary Magistrate, swore an affidavit on 20 July 1976, which has been filed, and in paragraph 4 he says this:

> 'I refer to clause 5 of the affidavit of Mr John McNamara in which an adjournment was requested by him for the prosecution to call Dr Birrell. Mr McNamara's submission that the Court had no power at that stage to enter the arena and order witnesses to be called either for the prosecution or for the defence, but if it was felt that Dr Birrell was an important witness for the defence, then an adjournment would be allowed for him to be so called. Mr McNamara then said the matter should proceed.'

The question of the weight of an affidavit filed by a Magistrate has been often canvassed in this and other courts. I have always understood that the facts stated in a Magistrate's affidavit are next door to conclusive, and indeed cite, I think, only one authority to support that view. It is *Larkin v Penfold* [1906] VicLawRp 90; [1906] VLR 535 at pp541-542; 12 ALR 337; 28 ALT 42. The decision is one of Cussen J. He says:

> 'Assuming – as should always be the case – that the justices have not identified themselves with either of the litigants, so as to make their affidavit a party document, the statements in it of the grounds of the decision, or of facts having, in their opinion, a material bearing upon the questions at issue, which, I suppose, refer to the grounds of the order nisi, should in most, if not all cases, be accepted as conclusive, whether or not they support the decision below.'

There is no suggestion in this case that the Magistrate has been in any way partisan, and, despite a valiant attempt by Mr Kendall for the applicant, I am of the opinion that His Honour correctly stated the rule in the passage I have just read, and that I should apply it in this case. That being so, I am faced with a situation where the legal representative of the applicant has deliberately elected to proceed without the evidence of Dr Birrell. It was suggested by Mr Kendall in effect that there would be no reason for him to do this. However, I can think of more than one reason why in the circumstances the applicant found himself the solicitor may have formed the view that he was better served by proceeding rather than seeking an adjournment for Dr Birrell's attendance. Although, of course, it is a rule that once the evidence is in a criminal trial before a jury the Judge must instruct a jury as to all matters of law which are open on the facts. This was not a trial by jury and I think it cannot be argued that once a solicitor representing a defendant in a Court of Petty Sessions has been given the opportunity to call evidence which he may think is relevant and admissible and has refused an adjournment to achieve that end, he can then raise the matter before this Court on review. The order nisi must be discharged."
