17/03; [2003] VSC 257

SUPREME COURT OF VICTORIA

HOARE BROS v MAGISTRATES' COURT & GAHAN

Balmford J

23 June, 4 July 2003 — (2003) 142 A Crim R 330

NATURAL JUSTICE – APPREHENDED BIAS BY MAGISTRATE – QUESTIONING OF WITNESS BY MAGISTRATE DURING EXAMINATION IN CHIEF – LEADING QUESTIONS ASKED – SUCH QUESTIONS INTENDED BY MAGISTRATE FOR THE PURPOSE OF CLARIFICATION – QUESTIONS APPEARED TO BE CALCULATED TO REMEDY DEFICIENCIES IN THE PROSECUTION CASE – TEST TO BE APPLIED IN DETERMINING WHETHER JUDICIAL OFFICER IS DISQUALIFIED BY REASON OF THE APPEARANCE OF BIAS – WHETHER MAGISTRATE'S QUESTIONS APPROPRIATE – WHETHER HEARING INFECTED BY APPREHENDED BIAS – WHETHER MAGISTRATE SHOULD BE PROHIBITED FROM THE FURTHER HEARING AND DETERMINATION OF THE CHARGE.

At the end of examination in chief of a principal prosecution witness, the presiding magistrate asked a series of questions of the witness. The magistrate indicated that the questions were intended purely for the purpose of clarification. However, the questions were leading in nature and appeared to be calculated to remedy deficiencies in the prosecution case. It was also said that by asking the questions which could have been asked by defence counsel in cross-examination, the magistrate had effectively given an explanation to the witness. Upon an application for an order in the nature of prohibition, prohibiting the magistrate from the further hearing and determination of the charge—

HELD: Order made in the nature of prohibition.

1. The test to be applied in determining whether a judicial officer is disqualified by reason of the appearance of bias, is whether a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial and unprejudiced mind to the resolution of the question required to be decided. The observer is taken to be reasonable, and that the person being observed is a professional judicial officer whose training, tradition and oath or affirmation require the officer to discard the irrelevant, the immaterial and the prejudicial. The presiding judicial officer has a responsibility to see that such evidence comes out fairly and intelligibly and whilst exercising great care to avoid interfering with the course of examination, cross-examination or re-examination, it is permissible and proper practice for the judicial officer to ask a question or questions to elucidate answers given by the witness where the officer considers this course desirable in the interests of justice.

***Johnson v Johnson* [2000] HCA 48; 201 CLR 488; 174 ALR 655; 74 ALJR 138; and**
***Re Damic* [1982] 2 NSWLR 750; (1982) 6 A Crim R 35, applied.**

2. The boundary between on the one hand the permissible elucidation, by questions from the judicial officer, in the interests of justice, of answers given by the witness, and on the other hand an impermissible entry by the judicial officer into the arena of conflict, is a fine line, particularly in a criminal case. Whilst the questions asked by the Magistrate in the present case were intended, as he indicated, purely for the purpose of clarification, those questions were, in the form in which they were asked, such that a fair-minded lay observer, with knowledge of the circumstances of the case, might reasonably apprehend that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide, namely whether the defendant before him had committed the offence with which it was charged. The questions were, as the Magistrate conceded, leading questions; and they appeared to be calculated to remedy deficiencies in the prosecution case. Accordingly, it was appropriate in those circumstances to make an order prohibiting the magistrate from the further hearing and determination of the charge.

BALMFORD J:

Introduction

1. In this proceeding, commenced by originating motion on 6 March 2003, the plaintiff seeks an order in the nature of prohibition, prohibiting the first defendant, constituted by Mr Beck, Magistrate ("the Magistrate") from the further hearing and determination of the charge filed by the second defendant ("the informant") against the plaintiff pursuant to the provisions of section 40 of the *Agricultural and Veterinary Chemicals (Control of Use) Act* 1992 ("the Act").

2. The submission of the plaintiff is that in the circumstances any further hearing by the Magistrate in relation to the charge would be, or would be seen to be, infected by apprehended bias and would constitute a denial to the plaintiff of procedural fairness. It is not suggested that the Magistrate was affected by actual bias.

3. By a letter of 18 March 2003 Ms Popovic, Deputy Chief Magistrate, requested that the Prothonotary enter a formal appearance on behalf of the Magistrates' Court and indicated that the Magistrate was content to abide by the decision of this Court. Accordingly there was no appearance for the Magistrate.

4. Section 40 of the Act reads, so far as relevant:

> **40. Damage by spray drift**
> (1) A person must not carry out agricultural spraying which injuriously affects—
> (a) any plants or stock outside the target area; or . . .
> Penalty: In the case of a corporation, 400 penalty units.

5. The plaintiff is the operator of a farming property known as "Liberton" situated at Stonehaven, west of Geelong. An adjoining property is known as "Warrah".

6. In October and November 2000 spraying of Davidson Glyphosate Gold 5000 Herbicide ("Glyphosate") was carried out on Liberton as part of a plan for the control of serrated tussock. The plaintiff has pleaded not guilty to the charge before the Magistrate, which reads, so far as relevant:

> At Stonehaven between 1 October and 4 November 2000 you were the employer of [TR and GO] who committed an offence against section 40(1)(a) in the course of their employment.
> Particulars:
> 1. [TR and GO] carried out agricultural spraying.
>
> 2. The target area was the property known as Liberton, Hamilton Highway, Stonehaven.
>
> 3. The spraying of [Glyphosate] injuriously affected organic linseed plants on the neighbouring "Warrah" property.

7. Warrah is separated from Liberton by a tree plantation approximately 15 metres wide, containing four rows of established trees, said to have been planted in 1996, being three rows of pine trees and one row of eucalypts.

8. Mr Cummins, solicitor for the plaintiff, deposes that matters in issue in the prosecution include:

> (a) whether spray drifted from Liberton to Warrah in October/November 2000;
>
> (b) whether, if spray drifted from Liberton to Warrah, one would expect signs of damage to the pine trees, eucalyptus trees and natural and perennial grasses located within the plantation adjoining the two properties;
>
> (c) whether spray injuriously affected the crop grown on Warrah;
>
> (d) the effect of Glyphosate spray on pine trees, eucalyptus trees and natural grasses;
>
> (e) whether the damage to the crop on Warrah was consistent with Glyphosate over-spray.

9. He deposes also that the case for the defence includes:

> (a) there was no spray drift;
>
> (b) there was no injurious effect to the crop;
>
> (c) if spray drifted from Liberton to Warrah, there would have been signs of damage to the pine trees, eucalyptus trees, and natural and perennial grasses within the plantation.

10. The hearing commenced on 17 February 2003 and the first witnesses called were two of the owners of Warrah. The third witness, Mr Leslie Toohey, was called at 12.25 p.m. on the second day, 18 February, and the prosecutor concluded his examination in chief at 3.30 p.m. on that day. At this point the Magistrate indicated his intention of asking a question. Mr Szabo, counsel for the defence, objected, and the Magistrate overruled his objection and asked several questions, concluding shortly before 4 p.m. Mr Szabo then proceeded with his cross-examination of Mr Toohey. At the end of that day the evidence of Mr Toohey had not finished.

11. Mr Cummins deposes that at the conclusion of the hearing on 18 February Mr Matthew Hoare, the duly authorised representative of the plaintiff, who had been present throughout the entire proceeding, told him that he was of the view that the Magistrate had predetermined the matter, appeared to favour the prosecution, and appeared to be biased against the plaintiff.

12. On the morning of 19 February, Mr Cummins and Mr Szabo received instructions from the plaintiff to make an application to the Magistrate that he disqualify himself from the further hearing and determination of the charge. That application was duly made and rejected, the Magistrate giving reasons for that rejection. The prosecutor then consented to an application made by Mr Szabo that the Magistrate refrain from further hearing and determining the matter until the determination of an application to this Court. After hearing argument, the Magistrate acceded to that application. The prosecution has indicated its intention of calling another nine witnesses, and the defence has indicated its intention of calling a possible six witnesses.

13. Mr Toohey is an "authorised officer" appointed under section 53 of the Act, which gives an authorised officer wide powers in connection with the administration of the Act and the enforcement of its provisions. He has academic qualifications in agricultural science, and has been with the Department of Primary Industry or its precursors for 28 years, and has been farming himself since 1977. His lengthy witness statement describing his investigation of a complaint lodged by the owners of Warrah had been made available to the solicitors for the plaintiff well before the commencement of the hearing by the Magistrate.

Authorities

14. In *Johnson v Johnson* Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:[1]

> It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.

Their Honours emphasised[2] the need to remember that the observer is taken to be reasonable, and that the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial".

15. Mr Szabo, for the plaintiff, relied on the footnote supporting the first passage quoted in the preceding paragraph. That footnote reads:

> eg, *Re Lusink; Ex parte Shaw* [1980] FLC 90-884; 32 ALR 47; (1980) 55 ALJR 12; 6 Fam LR 230; *Livesey v NSW Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420; *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277; *Webb v R* [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258.

He pointed out that in both *Livesey v NSW Bar Association*[3] and *Vakauta v Kelly*[4] the Court had framed the test in terms that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. He submitted that by including in the footnote references to those two decisions, the Court in *Johnson* had endorsed the formulation of the test in those terms, and in particular the reference to a reasonable apprehension entertained by a party. He referred to the evidence as to the view of Mr Hoare set out in [11] above.

16. Mr Szabo referred to the authorities as to the particular position of a judicial officer conducting a criminal trial, as was the case here, and relied on the well-known statements of principle in *R v Mawson*[5], *Jones v National Coal Board*[6], *Ratten v R*[7] and *Yuill v Yuill*[8] as to the fundamental nature of the adversary system and the dangers of the judge descending into the arena and appearing to take part in the conflict. The Full Court in *R v Mawson* went on to say :

> A departure from due and regular process in any such respect as those mentioned may infringe another fundamental principle of criminal law, namely, that criminal justice must not only be done but must also appear to be done.

17. A most cogent passage in this regard appears in the judgment of Dawson J in *Whitehorn v R*[9] , where His Honour said:

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel.

18. Mr Lawrie, for the informant, referred to the passage in *Re Damic*[10] where Street CJ, with whom Slattery and Miles JJ agreed, said:

> It is to be recognized that the power of a judge to call a witness of his own motion involves an inroad upon the ordinary rule that a judge should not descend into the adversarial arena. Upholding the existence of this independent power does not, however, carry over so as to authorize undue intrusion by the judge into the ordinary course of eliciting evidence from witnesses called by the parties. The presiding judge has a responsibility to see that such evidence comes out fairly and intelligibly. Whilst he must exercise great care to avoid interfering with the course of examination, cross-examination or re-examination, it is permissible and proper practice for the judge to ask a question or questions to elucidate answers given by the witness where he considers this course desirable in the interests of justice. . . . It is difficult to be any more specific than to identify this right to ask questions as being exercisable where the judge thinks it desirable in order to elucidate the evidence of the witness or which the witness is attempting to give, being, of course, evidence relevant to a matter requiring deliberation by the jury: cf *Jones v National Coal Board* [1957] 2 QB 55, at p 64.

The Magistrate's questions

19. The passages complained of by the plaintiff appear in the transcript at pages 281 to 286, which read (omitting ums and ahs):

> Prosecutor: That's the evidence in chief of this witness, Your Worship.
> Magistrate: Thank you. Can I just ask a question before I hand you over to Mr Szabo. Given that in this case, the case is, that is the allegation is, that the spraying of Glyphosate in paddock 9 [on Liberton] if we call it that, drifted into paddock A [on Warrah] and did the damage to the crop over the western side of paddock 9.
> Witness: That's what appeared to have happened, yes.
> Magistrate: Yes and, and is it your evidence that, that the damage to the crop in paddock A is consistent with Glyphosate over-spray? Is that what you're saying?
> Witness: Yes.
> Magistrate: Right. That being the case . . .

[Here Mr Szabo objected on the grounds that these were questions which the prosecutor should have been putting, that it could be seen that the Magistrate was "taking up the bat for the prosecution, and that the questions tended "to suggest a yes/no answer". The Magistrate responded that he was entitled to put leading questions to the witness "to get matters clarified", and dismissed the objection. The Magistrate continued.]

> Magistrate: Given that that's the case and that's my understanding of your evidence, given that the damage occurred to the crop from Glyphosate, let's presume that to be the case, it's not saying that's proven at this stage, but let's presume that's the case, did you notice, my question is, did you notice any damage to the plantation, the trees or anything in the plantation area that was also so consistent?
> Witness: No I didn't.

> Magistrate: Did you look?
> Witness: I did.

[The witness then described at some length what he had seen and not seen in the plantation. The Magistrate continued.]

> Magistrate: Well, how is that explicable. Is it that certain species are more susceptible to Glyphosate than others or, or is there any other explanation? I mean, why didn't the Glyphosate affect the trees is what I'm getting at?

[The answer to this question occupied more than one page of the transcript. The Magistrate continued.]

> Magistrate: I'm sorry, does it take a stronger dose of Glyphosate to have an adverse effect say on a, a bigger stronger plant such as a tree than?
> Witness: A tree, to actually kill a tree with Glyphosate is, is not easy. In fact the accepted method of doing it is to cut the tree down, and get at the, and actually paint neat Glyphosate on the stump at the point that you cut it down. That's the, the best way of killing a tree and it is on the label for doing that.
> Magistrate: Right. So the circumstances that you discovered here, are not surprising to you?
> Witness: Not surprising at all.
> Magistrate: Yes, thanks. Mr Szabo.

[Mr Szabo then proceeded with his cross-examination.]

20. In evidence in chief Mr Toohey, with the consent of counsel for the defence, had tendered certificates of analysis from the State Chemistry Laboratory, showing that Glyphosate was present in samples of the linseed crop collected from paddock A on Warrah. He had not given evidence to the effect that the presence of Glyphosate in those samples was consistent with Glyphosate over-spray. Nor had he given any evidence as to whether he had seen any damage to the plantation, or as to the effect of Glyphosate on trees. These matters were very much in issue.[11]

21. The boundary between on one hand the permissible elucidation, by questions from the judge, in the interests of justice, of answers given by the witness[12] , and on the other hand an impermissible entry by the judge into the arena of conflict, is a fine line, particularly in a criminal case. I appreciate that the questions asked by the Magistrate were intended, as his Worship indicated, purely for the purpose of clarification. However, I find, with some reluctance, that those questions were, in the form in which they were asked, such that a fair-minded lay observer, with knowledge of the circumstances of the case, might reasonably apprehend that his Worship might not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide, namely whether the defendant before him had committed the offence with which it was charged. The questions were, as the Magistrate conceded, leading questions; and they appeared to be calculated to remedy deficiencies in the prosecution case.[13]

22. Mr Lawrie, for the informant, submitted that the questions, coming as they did at the end of examination in chief, were timed so as not to interrupt cross-examination. However, the fact that the questions might have been asked in less appropriate circumstances, does not render the circumstances of their asking appropriate.

23. He submitted further that the questions did not impair the plaintiff's ability to put its case fully and fairly. However, Mr Szabo properly submitted that by asking questions which could have been asked in cross-examination, the Magistrate had effectively given an explanation to the witness, before he was cross-examined, as to why there was no observable signs of damage to the trees in the plantation. He relied on the following passage from the judgment of Lord Greene MR in *Yuill v Yuill*[14]:

> In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.

24. Mr Lawrie also relied on the following passage from the majority judgment in *Johnson v Johnson*[15]:

> . . . the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. . . . At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. . . . Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

However, that passage relates to dialogue with counsel, rather than to the situation here in issue, that is, the putting of questions to a witness from the Bench.

Conclusion

25. Accordingly, for the reasons set out in [21] and [23] above, there will be an order in the nature of prohibition, prohibiting the Magistrate from the further hearing and determination of the charge. I should say that there were other issues raised by Mr Szabo as to which I have not found it necessary to form a view. Counsel may wish to make submissions as to the form of the order and as to costs.

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[1] [2000] HCA 48; (2000) 201 CLR 488 at 492; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21.
[2] at 493.
[3] by Mason, Murphy, Brennan, Deane and Dawson JJ at 293-4.
[4] by Dawson J at 575.
[5] [1967] VicRp 23; (1967) VR 205 at 207-8.
[6] [1957] EWCA Civ 3; [1957] 2 QB 55 at 63-4; [1957] 2 All ER 155; [1957] 2 WLR 760.
[7] [1974] HCA 35; (1974) 131 CLR 510 at 517; 4 ALR 93; 48 ALJR 380.
[8] (1945) 1 All ER 183 at 185; [1945] P 15; 61 TLR 176.
[9] [1983] HCA 42; (1983) 152 CLR 657 at 682; 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107.
[10] [1982] 2 NSWLR 750 at 762-3; (1982) 6 A Crim R 35.
[11] see [8] and [9] above.
[12] see the passage from *Re Damic* cited in [18] above.
[13] As to which, see the passage from *Whitehorn v R* cited at [17] above.
[14] at 185.
[15] at 493.

APPEARANCES: For the plaintiff Hoare Bros: Mr EJS Szabo, counsel. Coulter Roache, solicitors. For the second defendant Gahan: Mr P Lawrie, counsel. Victorian Government Solicitor.
