

07/11; [2011] VSC 160

SUPREME COURT OF VICTORIA

ZUKANOVIC v MAGISTRATES' COURT at MOORABBIN (No 2)

J Forrest J

29 March, 20, 28 April, 3 May 2011

COSTS – COURTS AND JUDGES – MAGISTRATES' COURT – COSTS ORDER AGAINST INFERIOR COURT – MAGISTRATE CHARGED AND CONVICTED DEFENDANT OF CONTEMPT IN FACE OF COURT – DEFENDANT SENTENCED TO IMPRISONMENT – MAGISTRATE DENIED DEFENDANT PROCEDURAL FAIRNESS – PRINCIPLES – WHETHER MAGISTRATE ACTED PERVERSELY – MEANING OF "PERVERSE" – WHETHER MAGISTRATE DISREGARDED HIS JUDICIAL POSITION – WHETHER MAGISTRATES' COURT LIABLE FOR COSTS.

Following the judge's determination that Z. had been denied procedural fairness in *Zukanovic v Magistrates' Court at Moorabbin* [2011] VSC 141; MC06/2011, an application was made by Z. for an order for costs to be made against the Magistrates' Court.

HELD: Application granted. Order for costs made against the Magistrates' Court at Moorabbin.

1. Whilst orders against a Magistrate for costs are a rarity, they will only be made where there is either serious misconduct or where it can be concluded that the Magistrate behaved perversely.

Magistrates' Court of Victoria at Heidelberg v Robinson [2000] VSCA 198; (2000) VR 233; (2000) 117 A Crim R 155; MC03/2001, applied.

2. The word "perverse" is a word used to suggest something more than an error or manifest error and conveys some such notion as obstinacy or persistence in error. Where a Magistrate acts perversely he is disregarding his judicial position.

3. In Z.'s case, once the Magistrate perceived an arguable slight on the Court's authority he made up his mind as to how to deal with Z. and chose to ignore essential aspects of procedural fairness.

4. In dealing with the charge in less than a minute and in failing to give Z. any opportunity to answer it, the Magistrate did not exercise the caution necessary, indeed vital, in the circumstances. Here, the Magistrate's exercise of judicial power extended to imposing a period of imprisonment. Notwithstanding judicial statements of the highest authority over many decades as to the procedure to be followed given the unique position he occupied, the Magistrate proceeded, hastily and without due process, to convict Z.

5. In the circumstances, the Magistrate acted perversely (in the legal sense as explained in *Robinson*) and that an order for costs should be made against the Magistrates' Court at Moorabbin.

J FORREST J:

Introduction

1. On 20 April 2011, I quashed the decision of the Magistrate who had convicted the plaintiff, Mr Zukanovic, of contempt in the face of the court.

2. I concluded that Mr Zukanovic had been denied procedural fairness by the Magistrate prior to the determination of the charge and the gist of my reasoning is set out at [41] to [45] of those reasons.^[1]

3. Mr Zukanovic now seeks costs against the Magistrates' Court. Following the handing down of my judgment, I heard submissions on behalf of Mr Zukanovic and the Magistrates' Court (which opposed the making of the order) on the issue of costs.

4. I subsequently ordered that the Magistrates' Court pay Mr Zukanovic's costs and said that I would provide reasons for my conclusion which now follow.

Principles

5. The principles in relation to the making of an order for costs against a Magistrate were set out in *Ex parte Blume; re Osborn*:^[2]

If misconduct is charged against a magistrate he is entitled to appear but even where prohibition is ordered an order for costs is not ordinarily made against him unless there is a clear case of serious misconduct.* The rule has been stated that the magistrate must have been perverse or guilty of corruption or gross ignorance.* But even if he falls into what the Court characterised as an astonishing blunder, he does not necessarily act perversely.

It has been said elsewhere that it is "a very rare case" in which the power to award costs against a Magistrate will be exercised.^[3]

6. In this State, the leading authority in relation to an award of costs where judicial review has been granted by reason of a Magistrate's conduct is that of *Magistrates' Court of Victoria at Heidelberg v Robinson*.^[4] Brooking JA (with whom Charles and Buchanan JJA agreed) carried out a scholarly and exhaustive analysis of the authorities concerning circumstances in which an award of costs may be made against a Magistrate where his or her conduct has been impugned.^[5]

7. His Honour noted that such orders are a rarity^[6] and that they will only be made where there is either serious misconduct or where it can be concluded that the Magistrate has behaved perversely.^[7]

"Perverse" is a word often found in the cases in New South Wales. The word is used to suggest something more than error, or manifest error, and conveys some such notion as obstinacy or persistence in error: *Cummins v Mackenzie*. So in the early case of *Smith Stephen*, J said of the magistrate, "I take it for granted that with this section before him couched in terms as plain as words could be, he refused to follow it." In *Ex parte Vincent* the Full Court of New South Wales, faced with what it regarded as "an extraordinary and astounding blunder", was not prepared to say that the magistrate had behaved perversely. The idea seems to be that a magistrate is not to be ordered to pay costs for acting on an erroneous view of the law, even though it is very plain that that view was wrong, unless the magistrate has really chosen to ignore the law.

His Honour then referred to what was said by Owen J in *Ex parte Taylor; re Butler*:^[8]

It is clear to my mind that the magistrate has not attempted to apply his mind to the facts or the law of the case. He obviously had come into Court with his mind made up, and without allowing the solicitor for the husband to be heard, said: I have made up my mind, I won't listen to you. Is that justice? ... It is contrary to natural justice. ... Where a magistrate has made an honest mistake in attempting to carry out his duties the Court does not punish him by awarding costs against him. But in this case I am satisfied that the magistrate disregarded his judicial position, and his conduct ... is such as to justify the Court in awarding costs against him.

Brooking JA concluded:^[9]

I think it may be said that where a magistrate acts "perversely", in the sense in which the cases use that word, he is disregarding his judicial position, as Owen J put it.

Analysis

8. The application by Mr Zukanovic was made on the basis that the Magistrate's decision and consequent order was perverse in the sense that I have just explained. This was not a case in which it could be said that the Magistrate was guilty of misconduct or impropriety.

9. It is tolerably clear that once the Magistrate perceived an arguable slight on the Court's authority he made up his mind as to how to deal with Mr Zukanovic and chose to ignore essential aspects of procedural fairness.

10. His Honour made a deliberate decision to deal with Mr Zukanovic on the spot – this was not a mistake or an error of law^[10]; he was appalled by the conduct of Mr Zukanovic (whether another Magistrate or Judge would have been is not to the point). It was imperative given that he was laying and determining a charge of contempt, that he exercised his judicial power fairly and properly. He failed to do this.

11. In dealing with the charge in less than a minute and in failing to give Mr Zukanovic any opportunity to answer it, the Magistrate did not exercise the caution necessary, indeed vital, in the circumstances. Here, the Magistrate's exercise of judicial power extended to imposing a period of imprisonment. Notwithstanding judicial statements of the highest authority over many decades as to the procedure to be followed given the unique position he occupied, the Magistrate proceeded, hastily and without due process, to convict Mr Zukanovic.

12. Finally, there was no requirement for the Magistrate to determine the matter immediately. During the adjournment there was an opportunity for his Honour to reconsider Mr Zukanovic's position, particularly in light of the authorities I referred to in my earlier reasons. His Honour, however, persisted with the course of action he had embarked upon, formulating a written charge (notwithstanding having already found the charge proved) and then sentencing Mr Zukanovic to 30 days imprisonment.

13. I am satisfied that the Magistrate acted perversely (in the legal sense as explained in *Robinson*) and that an order for costs should be made against the Magistrates' Court of Victoria at Moorabbin.

[1] [2011] VSC 141.

[2] (1958) 58 SR (NSW) 334.

[3] *Ex parte Corbishley; re Locke* (1967) 67 SR (NSW) 396, 403.

[4] [2000] VSCA 198; (2000) 2 VR 233; (2000) 117 A Crim R 155 – "*Robinson*".

[5] *Robinson* [5] – [11].

[6] *Robinson* [5].

[7] *Robinson* [7].

[8] (1924) 41 WN (NSW) 81.

[9] *Robinson* [7].

[10] See *Anstee v Eyers* (No. 2) [2011] VSC 86 [13] – [14].

APPEARANCES: For the plaintiff Zukanovic: Mr M Bearman and Mr T Alexander, counsel. Defteros Lawyers. For the defendant Magistrates' Court: Mr J Bayly, counsel. Victorian Government Solicitors Office. For the Attorney-General (as *amicus curiae*): Ms F Forsyth, counsel. Victorian Government Solicitors Office.
