1/97

SUPREME COURT OF VICTORIA

HALLIDAY v ARNOL

Gray J

7-9, 12, 27 August 1996

PROCEDURE – WITNESSES ORDERED OUT OF COURT – DEFENDANT'S BROTHER REMAINED IN COURT – APPLICATION SUBSEQUENTLY MADE BY DEFENDANT TO CALL BROTHER AS A WITNESS – LEAVE REFUSED – WITNESS' EVIDENCE CAPABLE OF SUPPORTING DEFENDANT'S CASE – WHETHER MAGISTRATE IN ERROR IN REFUSING TO HEAR WITNESS' EVIDENCE.

At the start of proceedings against H., the presiding magistrate made an order that witnesses leave the court. H.'s brother remained in court. During the prosecution case, H. stated that he intended to call his brother as a witness. Counsel for the prosecution submitted that because of the brother's non-compliance with the order to leave court he should not be allowed to give evidence. The magistrate told H. that if his brother remained in court he could not be called as a witness. H. said that he would not call his brother unless the magistrate gave leave. Near the close of H.'s case, H. sought leave to call his brother as a witness which was refused. H. was later convicted on each charge and fined. Upon appeal—

HELD: Appeal allowed. Convictions set aside. Remitted for re-hearing before a different magistrate. In both civil and criminal cases there is no discretion to exclude the evidence of a witness who has disobeyed an order to leave the court. Further, it was not open to the magistrate to put H. to his election. However, the magistrate could have told H. that his brother might be punished if it later appeared he had flagrantly disobeyed the magistrate's order. Furthermore, if the magistrate had heard the witness' evidence, the magistrate would have been entitled to take into account the witness' disobedience and his continued presence in deciding what weight should be attached to his evidence.

GRAY J: [1] On 8 September 1993, Peter Halliday ("Halliday") was convicted on two charges laid under s12 of the *Fair Trading Act* 1985. Those charges were laid in the following terms: [*His Honour set out the charges and continued*]... The hearing of the charges occupied the Magistrates' Court over 20 sitting days extending over 10 months from 5 November 1992 to 8 September 1993. Halliday appeared in person and conducted his own defence with great tenacity. During an interval in the **[2]** proceedings Halliday took proceedings in the nature of prohibition in an endeavour to bring the prosecutions to an end.

This application was rejected by Nathan J. In the meantime, the hearing of the prosecutions continued until September 1993. Halliday was convicted on each charge. He was fined $2,500 with $15,015 costs. Halliday then made application to Master Wheeler for leave to appeal pursuant to s92 of the *Magistrates' Court Act.* This application occupied the Master intermittently between October 1993 and 23 February 1996 when it was refused. Halliday then appealed against Master Wheeler's order. This appeal came on before O'Bryan, J who, on 8 May 1996 gave Halliday leave to appeal the orders of the Magistrates' Court of September 1993. O'Bryan J gave leave to appeal and directed that the following questions of law had been shown to be raised by the appeal.

(a) Whether the learned Magistrate erred in admitting in evidence a 'booking slip' (Ex.H)?

(b) Whether the learned Magistrate erred in admitting in evidence a 'facsimile transmission' when one Geoffrey Pratt was called as a witness?

(c) Whether the learned Magistrate erred in finding that the appellant was knowingly concerned in the contravention by Spectra Systems Pty Ltd of Section 12(d) of the *Fair Trading Act* 1985 on 19 August 1990?

(d) Whether the learned Magistrate erred in finding that the appellant was knowingly concerned in the contravention by Spectra Systems Pty Ltd of Section 12(i) of the *Fair Trading Act* 1985 on 19 August 1990?

(e) Whether the learned Magistrate erred in finding that on or about 19 August 1990 the 'Spectra Core' software package did not have an accessory namely a 'video trainer'?

[3] (f) Whether the learned Magistrate erred in finding that on or about 19 August 1990 Spectra Systems Pty Ltd falsely represented that it would supply a training course to the first 200 buyers of the Spectra Core software package if requested?

(g) Whether the learned Magistrate wrongly refused to permit the appellant to call one Robert Halliday as a witness in the defence case?"

When the appeal came on for hearing, Halliday was unrepresented. Mr Wilson QC with Mr Alstergren of counsel appeared for the respondent. The appeal provided for in ss91 and 92 of the *Magistrates' Court Act* replaces the old order to review procedure but does not alter its character. Mr Wilson took me to a number of authorities which demonstrate that the appellant must satisfy the Court that there has been an error of law in the Court below. Furthermore, even if error is shown, the Court has a discretion to dismiss the appeal if the Court considers that there has been no substantial miscarriage of justice. In the case of an appeal against a criminal conviction the position is, in my view, indistinguishable from that which prevails when the Court is dealing with an appeal from a conviction for an indictable offence and is called upon to consider the application of the proviso contained in s568 of the *Crimes Act*. Each of the stated grounds of appeal were argued by Halliday and by Mr Wilson. However, in the light of the way the appeal developed I find it necessary to consider only ground (g) which complains that Halliday was not allowed by the learned Magistrate to call his brother Robert Halliday as a witness in the defence case.

[4] In order to understand this ground it is necessary to make some general observations about the prosecution case against Halliday. There was no transcript of the evidence, but a fairly full note of the evidence was taken by the solicitor instructing counsel for the prosecution and by Robert Halliday who was helping Halliday. Although there are some differences, the facts I will speak of emerge clearly enough from the two sources. At the time of the transaction giving rise to the charges, Halliday was a director of a company (Spectra Systems Pty Ltd) which was endeavouring to sell a software package which was compatible with a certain IBM computer. On 19 August 1990 the *Sunday Sun* newspaper published an extensive advertisement of the software package. The Crown case was that the advertisement contained two false statements, first that the package had an accessory called a "video trainer" and, second, that the seller would provide a training course for the first 200 buyers of the package. Halliday's defence involved a denial that either representation was false and a denial that he was knowingly concerned in the placing of the advertisement. Essentially, Halliday's case was that although he played some part in the preparation of the advertising material, it was inserted prematurely and without his authority by over enthusiastic representatives of the company.

The prosecution case was that Halliday had himself booked the advertising space on 16 August 1990. This was said to be evidenced by a booking slip filled out by one Howarth, an employee of the newspaper, which recorded Halliday as the person booking the space. Howarth was not called as a witness **[5]** but the booking slip was received into evidence pursuant to s55 of the *Evidence Act*. The tender was objected to by Halliday on a number of grounds which form the subject of ground (a) of the present appeal. Another document which tended to implicate Halliday went into evidence after Halliday had called for it and cross-examined upon it. The question of the admission of this document is the subject of ground (b) of the present appeal.

Apart from the documentary evidence, the other evidence which supported a finding that Halliday was knowingly concerned in the placing of the advertisement came from the witnesses Toula Mantis and Jeffrey Pratt. Ms Mantis swore that she received material for the advertisement from Halliday and his wife in early August 1990. On 15 August there was a meeting with Halliday, his wife and Pratt in which the form of the advertisement was further discussed. Ms Mantis said that she and Pratt worked on the advertisement on the evening of 16 August and presented the end result to Halliday and his wife on the morning of 17 August. Halliday congratulated Ms Mantis on her work. Pratt swore that he conducted a business which prepared art work for advertisements. He said he was contacted by Spectra Systems in August 1990 to organise a marketing campaign for the company's software package. Pratt generally confirmed the evidence of Ms Mantis and added that Halliday authorised the publication of the advertisement on 19 August and that Howarth had extended the time for the delivery of the advertisement to 5.00 p.m. on 17 August. After receiving approval from Halliday at the meeting of 17 August, **[6]** Pratt delivered the advertisement to the newspaper on that day. The foregoing is the gist of the evidence which connected Halliday to the

publication on 19 August 1990. There was a considerable body of prosecution evidence which amply justified the learned Magistrate's finding that there was no video trainer available to buyers and that no training course was offered. This evidence came primarily from Barry McGann who purchased the software package after seeing the advertisement but was supported by other witnesses.

The part of Halliday's evidence which is germane to ground (g) can be simply expressed. Halliday swore that he did not authorise Ms Mantis, Pratt or anyone else to arrange for the publication on 19 August. He said that the video trainer which was to accompany the software package was being produced by RMIT but was not expected to be available until sometime in September. Halliday conceded that some work had been done in August by Ms Mantis in preparing an advertisement and that he had provided information. He specifically denied being present at a meeting with Ms Mantis and Pratt on 17 August, saying that his diary records that he was in Footscray on that morning. Halliday said that a publication of this sort had to be approved by IBM and that no such approval had been obtained. He said that Spectra Systems past dealings with the *Sun Herald* showed that they were, at this time, desperate for advertising business. He specifically denied giving the authority which is stated in the booking slip and said that Ms Mantis had earlier placed advertisements in a newspaper without Spectra Systems' authority.

[7] I now turn to discuss the course of events which gives rise to ground (g) of the appeal. At the start of the proceedings the learned Magistrate made an order that witnesses leave the Court. Robert Halliday remained in Court. It appears that Robert Halliday has been admitted to legal practice. In any event, he seems to have been acting as an instructing solicitor to his brother which included keeping a note of the evidence. Robert Halliday was also a director of Spectra Systems at the relevant time together with Halliday and Mrs Halliday. As the hearing progressed it became apparent that Halliday intended to call Robert Halliday as a witness. This became clear from the way Halliday cross-examined some of the prosecution witnesses.

On 17 May 1993 during the currency of the prosecution case Halliday expressly stated that he intended to call Robert Halliday as a witness. At that stage counsel for the prosecution made no reference to the earlier order concerning witnesses. On 20 May, counsel for the prosecution raised the issue and submitted that because of Robert Halliday's non-compliance with the order concerning witnesses he should not be allowed to give evidence. Halliday submitted that Robert Halliday was entitled to remain in Court because he was a director of Spectra Systems which was a party before the Court. After some discussion, the learned Magistrate rejected this submission. In the upshot, the learned Magistrate ruled that, if Halliday wished to call his brother, Robert Halliday must leave the Court until called as a witness. If he was not to be called he could remain in Court.

[8] Halliday sought and obtained a short adjournment to consider his position. When the Court resumed Halliday said, in substance, that he would not call Robert Halliday unless the learned Magistrate later gave him leave to do so. On 25 August, near the close of Halliday's case, he sought the learned Magistrate's leave to call Robert Halliday as a witness. The learned Magistrate said "No.". Although it is not clear from the material before the Court, I was told by Halliday that a good deal of the evidence capable of being given by his brother was capable of being identified through Halliday's cross-examination of prosecution witnesses.

Because of the terms of ground (g) I allowed Halliday to file an affidavit of Robert Halliday in which he exhibits a statement which he prepared in order to give evidence. The material in the statement makes it clear that Robert Halliday was able to give evidence concerning a number of matters relevant to the question whether Halliday was "knowingly concerned" in the publication. Without being exhaustive, Robert Halliday was able to say that he was present at Spectra's office on the morning of 17 August when Mrs Halliday showed him a video of a television advertisement. He said that there was no presentation of a newspaper advertisement and that Halliday was not present in the office. He said that he did not see the advertisement at any time before 19 August. He said that Ms Mantis had placed advertisements in other publications without the authority of the company. He had discovered this in September 1990 and this led to the institution of proceedings against Ms Mantis' company in the Magistrates' **[9]** Court. Robert Halliday said that on 12 September 1990 he reminded Ms Mantis that the company required the signatures of two directors to authorise commitments to outside suppliers. At Ms Mantis' request Robert Halliday

wrote her a letter confirming the company's requirements in this regard. He said that he acted as the company's legal officer during the relevant period and was a director. Robert Halliday's statement referred to a number of other matters, the relevance of which is arguable but which tended to support Halliday's case.

In refusing to hear the evidence of Robert Halliday, the learned Magistrate was in error. It was, in my view, an error brought about by the misconception that the witness' disobedience of the order that he leave the Court justified a refusal to hear his evidence. This misconception was clearly shared by counsel for the prosecution whose submissions probably misled the learned Magistrate. The authorities to which I was referred show that in earlier times the Court had a discretion to refuse to hear a witness who had disobeyed an order to leave the Court. See the discussion in *Cross on Evidence*, 5th Australian Edition at p390 and the cases there referred to. But it has long been the law that in both civil and criminal cases there is no discretion to exclude the evidence of such a witness. See *R v Guthridge & Anor* [1878] VicLawRp 89; (1878) 4 VLR (L) 77 where the Full Court quashed a conviction where the Justices had declined to hear the evidence of a defence witness who had disobeyed an order. The Court did so despite evidence from the Justices that the evidence which the witness would have given "would not have altered their decision".

In **[10]** the course of the Court's judgment delivered by Stawell CJ, it was pointed out that the proper course for the Justices was to punish the witness for disobedience. That comment is equally applicable here. It was not open to the learned Magistrate to put Halliday to his election as she did on 20 May 1993. She could have told Halliday that she could not refuse to hear Robert Halliday as a witness but that he might be punished if it later appeared that he had flagrantly disobeyed the learned Magistrate's order. Furthermore, if the learned Magistrate had heard Robert Halliday's evidence she was, of course, entitled to take into account his disobedience and his continued presence in Court in deciding what weight should be attached to his evidence.

But as things stand, it is impossible to say what might have been the effect of Robert Halliday's evidence on the outcome of the prosecution. In cases of the erroneous rejection of defence evidence it is almost inevitable that the conviction must be quashed. Neither my researches nor those of counsel have revealed any case where a Court has dismissed an appeal in such a case. The error is of a fundamental character and the possibility of a miscarriage of justice cannot be disregarded. As Fullagar J said in *Mraz v R* [1955] HCA 59; (1955) 93 CLR 493 at p514; [1955] ALR 929:

> "Every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice".

[11] A fairly recent instance of an erroneous rejection of evidence leading to the quashing of a conviction is *R v Ransom* (1979) 22 SASR 283 where the Court of Criminal Appeal pointed out the difficulty in applying the proviso in such a case. Mr Wilson clearly felt the weight of the difficulty created by the learned Magistrate's unfortunate error. Although he initially contended that Halliday's conduct amounted to an abuse of process which should lead to the dismissal of the appeal, he did not feel able to strenuously oppose the inevitable conclusion adverse to his interest. For the reasons I have endeavoured to express, I consider that the appeal must be allowed and a new trial ordered. Subject to anything which the parties may wish to say, I propose the following orders: Appeal allowed with costs to be taxed. Order that the orders below made on 8 September 1993 be set aside. Direct that the information be remitted for re-hearing before a different Magistrate. An indemnity certificate under the *Appeal Costs Act* is granted in respect of the respondent's costs.

APPEARANCES: For the Appellant: In person. For the Respondent: S Wilson QC with W Alstergren, counsel. Solicitors: Office of Fair Trading and Business Affairs.
