17/00; [2000] VSC 53

SUPREME COURT OF VICTORIA

PHAM v TAYLOR & ANOR

Nathan J

8-10 February, 1 March 2000

NATURAL JUSTICE – OSTENSIBLE BIAS – PROCEDURAL FAIRNESS – EXCESS OF JURISDICTION – PRE-HEARING APPLICATION FOR PRODUCTION OF DOCUMENTS – REFUSED BY MAGISTRATE – APPLICATION LATER MADE FOR DISQUALIFICATION OF MAGISTRATE ON GROUNDS THAT MAGISTRATE HAD DEALT WITH PREVIOUS APPLICATION AND HAD HEARD CRIMINAL CHARGES AGAINST COUNSEL – APPLICATION TO DISQUALIFY REFUSED – COUNSEL WITHDREW – MATTER ADJOURNED FOR DEFENDANT TO RETAIN NEW COUNSEL – MAGISTRATE ASKED FOR CASE TO BE STOOD DOWN PENDING SERVICE OF SUPREME COURT PROCESS – APPLICATION REFUSED – CASE PROCEEDED – WHETHER MAGISTRATE DISPLAYED OSTENSIBLE BIAS – WHETHER DEFENDANT DENIED PROCEDURAL FAIRNESS – WHETHER MAGISTRATE IN ERROR IN SETTING SUB-POENAS ASIDE.

P. was charged with trafficking in and possession of heroin and possession of property suspected of being the proceeds of crime. Prior to the hearing of the charges, P. issued sub-poenas to the Chief Commissioner of Police and Telstra for the telephone records relating to all telephone traffic in and out of the police station during the time P. was being interviewed by police. P's solicitor refused to reveal the reason for the sub-poena or its breadth. Telstra indicated that it could produce the necessary documentation but it would take three or four months' work to do so. The magistrate set aside the sub-poenas. When the charges came on for hearing some time later, P's counsel asked the magistrate to disqualify himself from hearing the case on the grounds that the magistrate had:

(1) previously dealt with the sub-poenas; and
(2) heard a case in which counsel was defendant.

The magistrate refused to disqualify himself whereupon counsel withdrew from the case. P's solicitor applied for further and better particulars of the charges. This application was refused. The magistrate then adjourned the matter for 1½ days to enable P. to obtain new counsel. When new counsel appeared, counsel stated from the Bar table that P's solicitor had attended the Supreme Court and filed a Notice of Motion and accordingly made an application that the magistrate should stand the matter down until a copy of the Notice was received at the court. The magistrate refused this application and after the charges were read, P elected to have the matters dealt with by a judge and jury. Upon notice of motion alleging that the magistrate failed to accord P. procedural fairness which gave rise to the display of ostensible bias and excess of jurisdiction—

HELD: Proceedings dismissed.

1. Sub-poenas require definition of the documents which it is reasonably suspected the addressee may hold. Open and wide-ranging 'fishing' expeditions are not permitted. In this case, P's solicitor refused to divulge the reasons for the sub-poenas and their breadth. No evidence was produced which pointed to any conspiracy by the police. The magistrate's exercise of discretion could not be challenged as displaying ostensible bias.

2. The authorities establish that a person accused of serious criminal offences is entitled to be represented by competent counsel. That does not mean a particular counsel, although circumstances may arise, when to retain counsel other than the individual of particular choice might create injustice. The charges in the present case did not reveal a fact-situation or complexities of any novelty. Nor were there any special circumstances or an area of legal expertise which warranted retaining counsel and him alone. The magistrate had a statutory duty to proceed with the hearing of the case and the obligation lay with P's solicitor to retain counsel who would not be personally embarrassed by appearing before the assigned magistrate. In those circumstances the fair-minded and informed observer knowing that the magistrate had previously made findings adverse to counsel and knowing the nature of those offences, would not consider that the magistrate would betray his oath and make findings adverse to, or exercise a discretion against, any person in a subsequent case for whom that counsel appeared.

3. The Originating Motion itself is not a court order; it is merely the document which institutes the proceeding by which an order might be obtained. No order of the Supreme Court prohibiting the magistrate from continuing the case was ever taken out. Notification from the Bar table that some sort of process is either afoot or underway should not, *ipso facto*, oblige a magistrate to cease adjudication. Much will depend upon the strength of the assertions from the Bar table that an order in the nature

of prohibition has been sought and is likely to be made. Any magistrate is entitled to presume that jurisdiction inures until it is suspended by a Supreme Court order. By continuing to hear the case, the magistrate did not exceed his jurisdiction nor did he display bias to P. or his counsel.

4. In relation to the request for further and better particulars of the charges, P's solicitor had been supplied with a copy of the police brief in respect of all charges. This included witness and police statements which in turn detailed the time, place, nature and facts surrounding each of the offences. The request for further particulars was fatuous and no bias attached to the magistrate's refusal of the application.

NATHAN J:

Introduction

1. In November 1998, the plaintiff (Mr Pham) was charged at Springvale, with trafficking in, and possession of heroin, contrary to the terms of the *Drugs Poisons and Controlled Substances Act* ("the Act") and also possession of property suspected of being the proceeds of crime.

2. He was bailed to appear at the Magistrates' Court at Dandenong. He then retained a solicitor, Mr Kuek ("the solicitor"), whom notified both the defendant and the court, that the charges would be contested. He then briefed Mr Perkins of counsel to appear.

3. This matter, which is the hearing of an amended Notice of Motion seeks relief, *inter alia*, in the nature of *certiorari*. It is addressed to the court, and the magistrate concerned (Couzens M).

4. Eight events occurred during the hearing of preliminary applications relating to the terms of subpoenas directed to the Chief Commissioner of Police and Telstra, and for Better Particulars, which, it is contended, illustrate the magistrate displayed ostensible bias leading him to exceed his jurisdiction. Those events occurred on 13th May and 7th, 8th and 9th June 1999.

Relief sought

5. I will deal with each of the eight episodes *seriatim* but pause here to recite more fully the relief sought in the Notice of Motion. Firstly, it is for an order in the nature of *certiorari* to quash the decision of the magistrate referring the proceedings to the County Court for trial. This relief is directed at the election of Mr Pham which it is said, was a decision forced upon him by the display of ostensible bias by the magistrate. Collateral relief is sought by way of directing a mandatory injunction to the magistrate restraining him from continuing to hear the matter and an order in the nature of prohibition restraining him from proceeding until adequate particulars of the manner of each of Mr Pham's alleged acts and omissions constituting the indictable offences are supplied.

6. The core of the submissions advanced by Mr Nash who appeared to argue the motion on behalf of the plaintiff was the alleged failure by the magistrate to accord the plaintiff procedural fairness, which gave rise to the display of ostensible bias and the excess of jurisdiction.

Facts: Ostensible Bias

7. Before I turn to the events in June which form the foundation for Mr Nash's assertions I deal briefly with the events of 13 May. On that day the case came before the magistrate upon the plaintiff's application to inspect documents subject to subpoenas. The subpoena addressed to the Chief Commissioner of Police sought the telephone records relating to all the traffic in and out of the Springvale Police Station during the time Mr Pham was being interviewed; the one addressed to Telstra sought the same records.

8. The proceedings had, apparently, been before other magistrates on other occasions. On this day the matter must have been argued for some hours as it occupies some 68 pages of transcript. Mr Kuek appeared for Mr Pham and Inspector Moffatt for the Chief Commissioner.

9. The magistrate was extraordinarily indulgent to allow an argument over the terms of a subpoena to carry on so long. It will be apparent when I come to review this matter further, that Mr Kuek was on a fishing expedition in pursuit of what was later alleged to be a conspiracy by police members stationed at Springvale to pervert the course of justice and deny to Mr Pham his rights or else to unduly pressure and intimidate him.

10. Mr Kuek failed, despite requests, to tell either the magistrate or Inspector Moffatt what it was he was actually seeking, but later conceded he was prepared to examine the documents in the absence of the prosecutor to ascertain whether they disclosed the information he was after. The courtesy and patience of the magistrate on this occasion attained impressive proportions. I have read the whole of the transcript, as indeed I was urged to do by Mr Nash, and have ascertained the entire nature of the case in order to come to this conclusion. As the events in May were contended to form part of the matrix of the case, and should be taken into account when characterising the happenings in June, I can now say I find the magistrate's forbearance in May to be entirely commendable.

11. I turn now to the series of events in June, which it is said, either singly or in any combination, show the relief sought ought to be granted because Couzens M was biased.

4.1 Representation by Counsel of choice

12. The first ground of bias alleged is that the magistrate failed to permit Pham to be represented by his counsel of choice. The facts supporting this contention are as follows. Mr Pham was arrested on 11 November 1998 and charged with the drug offences. He retained Mr Kuek as his solicitor. On the same day Kuek wrote to the informant requesting copies of the documents available pursuant to the *Magistrates' Court Act* Schedule II. A letter in similar terms was sent the following day to the Freedom of Information officer of the Victoria Police. On 18 December Kuek received from the police 13 pages of material which included an exhibit and witness list and statements of the informant and another policeman.

13. On 11 February 1999 the matter was called on at the Magistrates' Court for Contested Mention. At this hearing Mr Kuek informed the informant, the whole of the Crown evidence was inadmissible, the police operation was illegal and the record of interview made under duress. This startling array of allegations was supported by a further contention that the prosecution evidence, as set out in the list of witnesses and their statements was insufficient to result in a conviction and to this was then added an allegation of assault upon the plaintiff by the police. It is not necessary for me to rehearse the heated exchange between Mr Kuek and the informant.

14. Mr Kuek alerted the magistrate to a note from Telstra Corporation which he had found in the police documents and then submitted to the magistrate that both the Chief Commissioner and a representative of Telstra should be represented upon the return of the matter. Perhaps more startling was Mr Kuek's next submission to the magistrate namely that he did not want anyone involved with the prosecution or the informant to see the documents and accordingly the prosecution should not have access to the documents. The matter was then adjourned until 7 June.

15. Shortly after being retained, Mr Kuek instructed Mr D Perkins of counsel to appear on behalf of his client. On 19 February, Mr Kuek was informed by an officer from the Magistrates' Court at Dandenong that Couzens M had been listed to preside over the case and also the application to inspect the police and Telstra documents. On the same day Mr Kuek wrote to the criminal co-ordinator at Dandenong stating, *inter alia*, that Mr David Perkins had been retained and "the case involved the exercise of discretions the force of submissions in respect of the exercise of discretions depends in part on the particular counsel putting them. Magistrate Couzens knows Mr Perkins. We consider he should not hear the matter if Mr Perkins is involved". And further, "The prosecution should not be present when the subpoena issue is argued. The subpoena documents include material that is critical to our client's defence."

16. On 7 June Mr Kuek attended at the Magistrates' Court together with Mr Perkins. The magistrate, Mr Couzens, presided. A short interlocutory matter of no moment was disposed of and then Mr Perkins made an application that the magistrate discharge himself from hearing the case. The application was made on two grounds First, that as Couzens M had dealt with the application in respect of releasing the Telstra documents he could have arrived at views about the matter and have become aware of the defence and its tactics. The second was that as Mr Couzens had heard a criminal case in which Mr Perkins had been the defendant, then it was inappropriate for him to preside over a case in which he, Perkins appeared, because he would be called upon to exercise discretions during the hearing. Although the application was not opposed by the prosecutor, Couzens M dismissed it.

17. The matters in which Mr Perkins was a defendant were street offences not involving personal dishonesty or professional probity, although in reaching his conclusion in those matters Couzens M did make observations adverse to Mr Perkins and said he was not persuaded by his evidence.

18. In dealing with this submission the magistrate had this to say (as appropriately edited). "My only involvement in this case was in respect of the issue ... of the subpoena against Telstra ... He (Kuek) was meticulous, absolutely meticulous ensuring that at no time I was told of what purpose would or could be made of those Telstra records ... There were several instances I recall on the last occasion when Mr Kuek expressly stated that he did not wish in any way to reveal the purpose. In the end he did not have to because there was no issue about Mr Kuek having access to them. (He therefore dismissed the application on the first ground.)

19. So far as the second ground was concerned the magistrate said this "But as far as my involvement with you is concerned the issue of your case in no way involved any attack on your integrity, your honesty, your ability and in fact I recall having held in certain summary charges one of which was dismissed and two of which were found proven when deciding on the disposition that I extended to you which if I am not mistaken was a good behaviour bond I made it very clear for a short period that a very modest contribution to the court was made. I made it very clear that you were held in the highest regard as a barrister ... It is not as if you were facing charges of dishonesty or something about which I can form any adverse view about you. In deciding whether or not and what you are really saying I suppose is there may be some suggestion of bias on my part against you personally. Chief Justice Mason and McHugh J in the case of *Webb v R* [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582 put the following as the proper test for a judicial officer to ask himself on the question of bias. The proper test is whether a fair minded person might at least reasonably apprehend or suspect that the judge has pre-judged or might pre-judge the case. It's my view that having firstly said that I have in relation to my involvement in the case that you were a party which I am sure you will find is completely accurate ... no fair minded person could form a view that I have pre-judged or might pre-judge this case because I know nothing about it." He then raised the matter of the defendant's election as to whether he might proceed to trial and this is an issue to which I shall return.

20. Upon the application being refused Mr Perkins then withdrew.

21. In support of a contention that the magistrate failed to permit Pham to be represented by the counsel of his choice Mr Nash presented authorities ranging from the *International Covenant on Civil and Political Rights* to the much more relevant cases of *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176 and *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446. None of these authorities are of any assistance to the plaintiff and the law is clear. As I shall go on to find, what the plaintiff really sought here, was not representation by counsel of his choice, but that the case be heard by a magistrate of his choice, at least insofar as it should be a Dandenong magistrate other than Mr Couzens.

22. In my view Couzens M accurately stated the test as to the perception of ostensible bias and was clearly aware of the authorities which bound him. *Webb's* case was referred to in *Grimwade v Meagher*. I consider that the fair minded and informed observer knowing the magistrate had made findings adverse to counsel and had then proceeded to convict him albeit imposing a non-custodial sentence and knowing the nature of those offences, would not consider, even for a fleeting moment, that a magistrate would betray his oath and make findings adverse to, or exercise a discretion against, any person in a subsequent case for whom that counsel appeared. In this case the magistrate plainly stated the issues dispatched in the cases against Perkins were irrelevant to the cases now before him.

23. I appreciate that the argument of ostensible bias is directed towards the exercise of discretion as well as fact finding, but the test is the perception of a fair minded and informed observer, that is, a person having some familiarity with the judicial process at the Magistrates' Court level. A fair minded person could not accept that a magistrate could be so petty, perverse or capricious that he would abandon the independent exercise of a discretion in order to express bias not against the person who sought its exercise but against counsel who put the argument. An informed person would not, in my opinion, entertain any reasonable apprehension that there was any danger the magistrate could or would be so petty, perverse or capricious or would bring a

partial or prejudicial mind to the resolution of the issues in dispute. See also *Galea v Galea* (1990) 19 NSWLR 263 per Kirby ACJ (as he then was) and *Psaila v Lamb* (1999) unreported, Victorian Court of Appeal, judgment of 29 November 1999, particularly per Brooking JA, paragraph 37.

24. The authorities to which I have referred establish a person accused of serious criminal offences is entitled to be represented by competent counsel. That does not mean a particular counsel, although circumstances may arise, when to retain counsel other than the individual of particular choice might create an injustice. It is commonplace that a particular counsel of first choice is not available. Therefore a second, third and even fourth choice may be required. No judicial system could operate upon the basis of scheduling its calendar of cases upon the availability of counsel of individual choice, although most jurisdictions will make every effort to accommodate both the wishes of the defendants personally and counsel of their choice. However it cannot be, that when a magistrate elects to proceed where the counsel of first choice of the defendant is not available but when many others are, the magistrate thereby expresses ostensible bias towards the defendant.

25. In this case Mr Perkins perceived he might be personally embarrassed if he were to appear in a case before Mr Couzens. The embarrassment had nothing to do with the individual defendant Mr Pham. Rather it was an embarrassment attaching to counsel. It is inappropriate now for Mr Pham to contend as he does through Mr Nash, that because Mr Perkins was embarrassed to appear before Mr Couzens therefore Mr Couzens should have excused himself, rather than the other way about.

26. It was always appropriate for Mr Perkins to decline the brief or withdraw as he eventually did. It must be recalled that the magistrate had a statutory duty to proceed with the cases listed before him. It was not his function to list those cases nor indeed did he do so in this case. He merely accepted those cases assigned to him by the criminal co-ordinator at Dandenong. Having been assigned the case and Mr Kuek having been made aware of that fact, the obligation lay with a responsible solicitor to retain counsel whom would not be personally embarrassed by appearing before the assigned magistrate. As from 10 February Mr Kuek and Mr Perkins both knew that Couzens M would hear the case as a fixture over three days. They created the circumstances which led to embarrassment, an embarrassment wholly unjustified.

27. No special circumstances attach to this case, nor is there an area of legal expertise which would warrant retaining Mr Perkins and him alone. The charges are anything but novel. I glean from the witness statements that the method of detection through a police informer were anything but novel. The police brief delivered to Mr Kuek in response to his request for particulars does not reveal a fact situation or complexities of any novelty. Accordingly it cannot be suggested that Mr Perkins' retainer was so essential to the plaintiff's defence that any other counsel would not do. To the contrary the Victorian Bar is well serviced by many junior criminal barristers and many who have great familiarity with the Act.

28. The argument reduces itself to the contention that Mr Couzens should disqualify himself from any case in which Mr Perkins is retained regardless of whom the defendant or any instructing solicitor might be.

4.2 Wrongfully setting aside subpoena to police

29. Mr Nash contended the magistrate displayed ostensible bias when he set aside the entire subpoena addressed to the Police Commissioner, at a time when the Chief Commissioner's representative had agreed to the production of certain documents and a request for others had been withdrawn. This matter was raised on 8 June and consumed scores of pages of transcript. I can only assume it took some hours in argument. The magistrate expressed some degree of exasperation with Mr Kuek, and for my part I am surprised at the degree of forbearance shown by him.

30. The subpoena sought the production of the records of the Springvale Police Station relating to every incoming and outgoing phone call during the time Pham was in custody. Steadfastly and resolutely Mr Kuek refused to reveal the reason for the breadth of the inquiry. It was initially framed in such extensive terms that the Chief Commissioner was unable to respond to it at all, but in the course of argument it was narrowed down to the telephone conversations to which I have

referred. At the hearing before me I was informed from the Bar table the substantive reason for the inquiry was to pursue a belief that members of the police force at Springvale had conspired to pervert the course of justice. That is when a policeman told Mr Pham he had phoned the solicitor of Pham's choice, he had not done so, or that if he had made a phone call it was to some other solicitor. The suggestion, articulated before the magistrate, was that the interviewing policeman and/or other members of the police force at Springvale conspired together, to tell Mr Pham that his legal rights concerning contact with his solicitor had been satisfied, but that was untrue. Accordingly the record of interview taken thereafter was obtained falsely or under duress.

31. Subpoenas require definition of such documents, which it is reasonably suspected the addressee may hold. Open and wide range fishing expeditions are not permitted. In this case it would have been a simple matter to address the subpoena to the telephone number of the solicitor concerned and ascertain whether or not there were any calls made to that number during the subject period. The subpoena may have been wide enough to encompass any other solicitor whom it might have been suspected the police had contacted on behalf of Mr Pham.

32. As I have noted Mr Kuek resolutely refused to reveal the reasons for his inquiry but did consent to doing so in the absence of the prosecution. This is a novel approach to the law and the magistrate rejected the suggestion. He ruled thus:

> "Mr Kuek having been invited to state for what legitimate forensic purpose documents subpoenaed from Telstra and also from the Chief Commissioner to his client's case firstly in relation to the application for an adjournment so that further compliance can be done in relation to the Telstra subpoena, that application is refused. Secondly in relation to the application in respect of the Chief Commissioner of Police or his delegate, once again Mr Kuek having failed to disclose for what legitimate forensic purposes those documents are being sought that subpoena is set aside. Unless there any other matters I will certainly not be ordering any further compliance with the Telstra subpoena."

33. In my view the exercise of the magistrate's discretion cannot be challenged as displaying ostensible bias either individually or in conjunction with all the other matters to which I will refer in this judgment. He was, in my view, guided into a blind alley by Mr Pham's legal representatives and then obstructed when he attempted to get out of it. The plaintiff's difficulties were entirely of his own construction. No complaint was ever made about the alleged conspiracy; the magistrate's ruling appears to me to be faultless.

4.3 The refusal to adjourn to brief new counsel

34. Mr Nash contends that after Mr Perkins withdrew from the case on 7 June an application for the adjournment of the matter for a longer period than that which was granted should have been given. The failure to adjourn for a time period nominated by the plaintiff is said to reveal the ostensible bias of the magistrate. I cannot accept this contention. The matter was set down in March. It had gone through the contested mention process and three days of the court's time set aside to dispose of it. Mr Kuek knew the court's calendar had been fixed in order to dispatch his applications. In my view he either knew or should have known of Mr Perkins' possible embarrassment because he was the instructing solicitor in Mr Perkin's personal defence, or the fact that Mr Perkins was unlikely to continue to appear if the magistrate insisted upon proceeding. He appears to have taken no steps to meet this contingency.

35. Mr Perkins withdrew on 7 June and fresh counsel was briefed later that afternoon. Upon the case being called upon the next morning, the 8th June the magistrate granted a further adjournment until the morning of 9 June. In my view an adjournment for a day-and-a-half in a case of this kind, is quite sufficient, especially when the solicitor was on notice of the time assigned by the court specifically to hear this case. I am aware of *Queensland v JLHoldings Ltd* [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294 which stands for the proposition that the interests of justice prevail over the convenience of the court. However in this case I have read the material in the police brief handed to Mr Kuek. It poses no difficulty of comprehension nor is it unduly lengthy, this case is of a common kind and I refer to my observations in paragraph [15]. A conference with Mr Pham would have been desirable if not required, but there were two evenings in which this could have been done and many hours of ordinary office working time in which it could have been accomplished. In my view the interests of justice were in no way compromised by requiring this case to proceed after an adjournment period of almost two days.

4.4 Refusing application to adjourn to enable Telstra to respond

36. I have already referred to the subpoena addressed to the Chief Commissioner. The efficacy of that subpoena was argued in tandem with a similar one addressed to Telstra. The subpoena sought the records of the telephone company relating to every call made in and out of the Springvale Police Station during the relevant period. Mr Kuek refused to divulge the reasons for the subpoena or its breadth. It appears to have been in pursuit of the allegations of a conspiracy to pervert justice. Initially Telstra said that it would be mechanically and physically impossible to produce the records but when it was made clear that which was sought were the numbers for a limited period Telstra indicated it could produce such documentation but it would take three or four months' work to do so. The magistrate then discharged the subpoena. In my view and for the reasons he stated he was entitled to do so. Not a scintilla of evidence was produced by Mr Kuek to support his apparent belief that the police had conspired. No application was made to amend the subpoena. There is no reason, should this case ultimately proceed to trial or be summarily dispatched, that a subpoena in appropriate form could not be issued.

4.5 Failure to adjourn to enable an application for an order to review

37. On the afternoon of 8 June the magistrate ruled that both subpoenas be discharged, he then said:

> "Unless there are any other matters I propose to adjourn these proceedings until tomorrow morning when I expect to start. Mr Kuek intervened and said, 'There are other matters, Your Worship'. He then replied, 'Mr Kuek, I am conscious of the need for your client to seek counsel. What other matters could not be dealt with tomorrow with counsel represented?' Mr Kuek: 'I have an application to Your Worship to stay the operation of the orders you just made on the basis that we will be making an application to the Supreme Court tomorrow'. The magistrate responded, 'You have got sufficient time this afternoon to do. I will not stay the hearing of these proceedings given that time is now ten past two. You have ample time to make an application to the Supreme Court and this case will start at 10.00am tomorrow morning'."

38. Mr Kuek attempted to object further but the magistrate cut him short, reiterating that the matter would commence the following morning at 10.00am.

39. The fact is that Mr Kuek did attend the Supreme Court later that afternoon and took out a Notice of Motion seeking orders in the nature of *certiorari* to which I have already referred. He did not seek an order to review in the terms of the *Rules of the Supreme Court* Order 56 but rather simply filed a Notice of Motion. Notices of Motion ordinarily require filing and the payment of the appropriate fee. Orders to Review under Order 56 can be obtained from the Practice Court judge, if the case so warrants verbally or upon an undertaking to file the appropriate documentation and payment of fees at a latter time. In this case Mr Kuek selected the incorrect process but that does not result in the magistrate showing ostensible bias.

40. In any event, given the reasons already stated, there was sufficient time for Mr Kuek to have issued proceedings under Order 56 and might have obtained an order to the effect of halting the magistrate. So much is evidenced by the fact that at 10.05 or 10.10 the following morning a faxed copy of the Notice of Motion found its way to the Dandenong Court. In any event, the plaintiff had some 20 hours to obtain such orders as he thought fit to halt the proceedings if the Practice Court judge had so ordered. The matter was plainly urgent so much must have been appreciated by Mr Kuek because the magistrate was adamant the matter would proceed the following morning at 10.00am. I do not consider the adjournment albeit short, granted by this magistrate displays any ostensible bias.

4.6 Failing or refusing to stand the matter down when advised the originating motion had been filed

41. On 9 June the matter was called on by Mr Couzens at 10.00am. Mr Clarke of counsel appeared for the plaintiff. He said this: "Your Worship, this morning I am instructed that Mr Kuek has attended at the Supreme Court of Victoria and filed a Notice of Motion in regards to not having Your Worship hear the matter any further. The matter has been filed. I spoke to him at approximately ten or five to ten this morning. He informed me that he had filed the matter. I asked him if he would fax a copy through but he is attending court this morning with the material to bring it before Your Worship ... It has to be brought to the court this morning ... by way of service and my instructions would be firstly to stand it down until that has been received. Then

depending on what Your Worship's point of view as to the material that is before Your Worship and can be determined then and there the matter should proceed or not". The magistrate replied, "Mr Clarke, I am not determining the issue. The Supreme Court will determine whether or not an order is made prohibiting me from hearing the case. (Indistinct) I will be served with the process". And then the magistrate said, "I'm not going to stand the matter down. I'm going to call on the defendant to state whether or not he consents to jurisdiction. Are you ready to proceed? And if the Supreme Court stops me from hearing so be it but in the meantime I'm going to hear the case."

42. After an interpreter was sworn the magistrate addressed Mr Pham and said, "I'm going to read the charge to you and after I read each of them to you I will explain your rights and thereafter if appropriate I will ask you how you wish to plead to any charge." The charges were duly read and he continued - "Mr Pham, in relation to each of those matters you are entitled to have them dealt with by a judge and jury at another time or at another place or you can have them dealt with by me today. What is your choice, you may seek advice from Mr Clarke as to what you wish to do? Mr Pham, you have consulted with Mr Clarke of counsel who represents you today. What do you wish to do? Do you wish me to deal with the matter today or alternatively do you wish to go to the County Court at another time and have these matters dealt with there?" Response: "I want it dealt with on another day".

43. In the case of the *Magistrates' Court at Prahran v Murphy* (1997) 2 VR 186; (1996) 89 A Crim R 403 a similar but not identical situation arose where a magistrate granted a 30 minute adjournment for counsel to obtain an order from the Supreme Court prohibiting him from continuing to hear contempt charges which the magistrate had instituted against the barrister. The magistrate expressed in that case, as here, his desire to proceed with the substantive hearing. In my view Charles JA epitomised the law which binds me. He said (at VR p212):

> "In my view, having regard to all the foregoing circumstances, the independent and fair-minded observer might reasonably have been led to suspect that the magistrate's exchanges with the respondent had brought about a situation in which the magistrate might not bring an impartial or unprejudiced mind to the question whether the respondent (the barrister) was guilty of contempt on 20 July. The possibility that such a conclusion might be reached by the fair-minded observer could only have been increased upon discovering that the contempt for which the magistrate intended to deal with the respondent was substantially different from that with which he had been formally charged."

44. It must also be observed that the Court of Appeal in *Murphy's case* did decide that the magistrate's decision to continue with the summary procedure could not in the circumstances provide any basis for the conclusion of bias. The court referred to *Balogh v St Albans Crown Court* (1975) 1 QB 73; [1974] 3 All ER 283 and *Fraser v R* (1984) 3 NSWLR 212; 15 A Crim R 58.

45. It would appear that at about ten past ten the criminal co-ordinator at Dandenong did receive a fax copy of the Originating Motion but that is all that it is a step, albeit an essential one in initiating process. The Originating Motion itself is not a court order. It is merely the document which institutes the proceeding by which an order might be obtained. No order of the Supreme Court actually prohibiting the magistrate from continuing to hear the process has ever been taken out. All the magistrate had before him was verbal notice that something in the nature of that process had probably been issued and which might, during the course of the morning, be served upon him. Nothing to that effect occurred. It follows from these observations that by continuing to hear the case despite being told from the Bar table that something in the nature of prohibition had been filed, the magistrate was not exceeding his jurisdiction. Nothing had been served upon him and counsel was not able to produce or assure him that an order in the nature of prohibition had been obtained.

46. I do not consider that a magistrate proceeding to hear a matter in the light of these circumstances can be said to have displayed ostensible bias. On the previous day he had indicated to the parties the matter would proceed and he did nothing more than was his duty. Notification from the Bar table that some sort of process is either afoot or underway should not, *ipso facto*, oblige a magistrate to cease adjudication. Much will depend upon the strength of the assertions from the Bar table that an order in the nature of prohibition has been sought and is likely to be made. There will be circumstances where, in the light of this knowledge it would be prudent for the magistrate to cease hearing a matter, but should he fail to do so, I do not consider the fair minded and informed observer would necessarily or even inferentially conclude the magistrate

displayed bias to the offender or to the offender's counsel by continuing to hear the case. In light of the circumstances here, I am able to comfortably conclude, that the informed and fair minded bystander would think it quite fair for Couzens M to have continued hearing the case.

4.7 Refusing an application for further and better particulars

47. On 8 June Mr Kuek had made an application for further and better particulars of the charges, contending that on its face, one of them was void for duplicity. The fact is Mr Kuek had been supplied with the police brief in respect of all charges. This included witness statements and police statements which in turn detailed the time, place, nature and facts surrounding each of the offences. The request for further particulars was fatuous. Any magistrate should have dismissed it and no possible bias can be manufactured out of that ruling.

4.8 The plaintiff's election for trial after notification of the originating motion

48. The plaintiff's contention is that as the magistrate having been notified of the existence of the Notice of Motion should then have ceased dealing with the case. Moreover, by putting Mr Pham to his election, he did not, in the circumstances offer Mr Pham any choice at all. This contention was elaborated thus. As Mr Pham had seen each and every one of his applications rejected and was aware of the fact that his solicitors had taken Supreme Court proceedings to stop the magistrate from hearing his case, thus, when presented with the choice of a trial by jury or further adjudication by this magistrate he had no real option but to accede to a jury trial.

49. He now wishes to resile from that course. I am informed from the Bar table that no procedure for taking that step has been set down but the prosecution would almost invariably accede to it. The matter would almost certainly be remitted for adjudication before a magistrate at Melbourne or possibly Dandenong. I do not comment further about any steps which may be taken in that direction because I do not consider Mr Pham's election, at the time made, can be impugned.

50. In substance the plaintiff's contention is that the jurisdiction of the magistrate was suspended once the originating motion was filed or, alternatively, notice of it was given to the magistrate or, alternatively, when it was served upon the court of which he was a member.

51. Reliance was placed upon *Batchelor v R* (1978) 81 3rd Ed. 241; (1978) 2 SCR 988 a decision of the Full Court of the Canadian Supreme Court on appeal from the Court of Appeal for Ontario.

52. For reasons I shall go on to consider this case albeit persuasive is of little assistance to the plaintiff because it turns very much upon the operation of the Rules of Court of Ontario which were at the time a reflection of the old common law rules relating to writs of *certiorari* and which, incidentally, have long since been replaced in this jurisdiction.

53. The proper procedure for Mr Kuek to have pursued was an order to review under the provisions of Order 56 RSC. The Practice Court can be approached any time of the day or night seeking an order to review in the nature of *certiorari*. That was not done. In this case the filing of the Notice of Motion required no judicial input or oversight. A faxed copy of it was apparently sent to the court at Dandenong but it was not brought to the notice of the magistrate before he put the plaintiff to his election. All the magistrate had was an assertion that a Notice of Motion seeking relief in the nature of *certiorari* and probably prohibition had been issued and filed in the Supreme Court. As he properly observed no order to that or any other effect had been served upon him.

54. I do not consider that the mere issuing of a Notice of Motion has the effect of suspending a magistrate's jurisdiction. Suspension of that jurisdiction comes into effect the moment an order for review is obtained. That is at the instant the judge pronounces the order. Up until that time, the magistrate's jurisdiction has not been impugned and continues to be exercisable. In fact the legal responsibility of the magistrate to proceed would seem to be impelling. The situation might conceivably be different if the magistrate were told that a motion for an order to review was currently before a judge. But in this case that was not the situation. I consider the mere issuing and filing of a Notice of Motion is not enough to signal the suspension of the jurisdiction of a magistrate.

55. I return now to *Batchelor's case*.

56. Mr Bachelor moved to quash a magistrate's order adjourning his case and to prohibit any provincial court judge from proceeding with the matter. A Notice of Motion to that effect prescribed under the Ontario Criminal Appeals Rules was served on the presiding provincial court judge. The matter came on for hearing before a provincial court judge before the day directed for the return of a Notice of Motion and counsel for Mr Bachelor did not draw the court's attention to the fact that he had moved for prohibition. Thereafter and by steps which are immaterial two further motions for prohibition in the matter were issued. Ultimately Mr Bachelor forfeited his bail. When the three Notices of Motion for Prohibition were heard, they were dismissed on the basis that the services of the Notice of Motion to prohibit did not deprive, suspend or strip the jurisdiction of the local provincial court judge. This finding of the Court of Appeal was taken to the Supreme Court of Canada which allowed it. Laskin CJ said –

> "However the matter is regarded there must be a suspension of jurisdiction when an application to quash or an application to prohibit and to quash is served on an inferior court with the command under the Rules to make a return forthwith."

57. The other members of the court, Martland, Ritchie, Pidgeon, Dixon, Beetz and De Grandpré JJ said –

> "Section 714 of the Criminal Code contemplates the suspension of the provincial court's jurisdiction between service of the notice and disposal of the motion by the Supreme Court. The jurisdiction continues though dormant at least until such time as the motion is granted."

58. It can be seen that this case turns upon the application of the Ontario Criminal Rules Accordingly, it is appropriate to refer to them. Rule 7 of Part 1 reads –

> "Respecting criminal proceedings of the Supreme Court of Ontario you are upon receiving this notice to return forthwith to the Registrar's office at Toronto the orders herein referred to together with the information exhibits and other papers or documents touching the matter as fully and as entirely as they remain in your custody together with this notice and the certificate prescribed in the said rules"

59. Furthermore, Rules 4 to 8 prescribe –

> "Rule 4(1). Proceedings in criminal matters by way of *certiorari* ... shall be brought by originating notice ... (2) Such proceedings shall be brought before a judge of the High Court of Justice sitting in court."

60. In my view these rules provide in much the same way as does Order 56 that if a court order is made it becomes effective upon service. The Chief Justice said this –

> "The material point for present purposes is that the common law was clear that upon the service of the writ of *certiorari* upon the judge of the inferior court the proceedings before him out of which they arose were suspended - see 4 *Blackstone's Commentaries* 1st ed. reprint Book IV C24 p315 ... When the Ontario judges adopted their criminal rules in 1908 and provided therein for a simplified procedure in respect of *certiorari* to quash which, upon a return being made, would be dealt with on the merits by the superior court (and thus displace the elaborate procedure of first seeking a writ of *certiorari* to which, if issued, a return would be made and then going back for a hearing on the merits) a question was raised in *R v Titmarsh* (1914) 32 OLR 569 whether the rule making authorisation in the criminal code empowered the judges to abolish the writ of *certiorari* and to substitute the simplified procedure of a Notice of Motion. The power to do so was upheld ... "

61. Order 56(5) provides –

> "The court shall not grant any relief or remedy in the nature of *certiorari* unless ... "

62. In my view the very limited persuasiveness of *Batchelor's case* is diminished by noting that it turns upon the operation of the Ontario Criminal Rules which then provided for prohibition to run as from the time of service. Order 56 is pellucid. It recites the jurisdiction of the court to grant any relief – in the nature of *certiorari* – shall be exercised *only by way of judgment or order* (including interlocutory orders) and in a proceeding commenced in accordance with these rules. (Emphasis added.)

63. Words would be rinsed of all meaning if the same did not require court order to be attained before *certiorari* would run.

64. In this case no court order was ever obtained, the magistrate was merely told that a Notice of Motion had been issued and ultimately a copy of that notice was delivered to his court although not to him. Therefore his jurisdiction to hear the case was never suspended or foreshortened in any way.

65. The next issue is whether the informed and fair minded observer, knowing of the existence of the Notice of Motion, but also cognisant of the fact that it did not operate to suspend the magistrate's jurisdiction, nevertheless would have considered it unreasonable for the magistrate to have pressed on with hearing the case? Put another way did the magistrate expose himself to the prospect of displaying bias by insisting upon proceeding despite knowing the plaintiff was attempting to stop him?

66. In my opinion both questions should be answered negatively. Any magistrate is entitled to presume that jurisdiction inures until it is suspended by a Supreme Court order.

67. In the particular circumstances of this case Couzens M had been met with obfuscation and fatuity in the highest degree. The assertion about a Notice of Motion must have been perceived by him, and certainly would have been so perceived by an informed and fair minded observer, as yet another example of obfuscation and fatuousness. All the applications for adjournments were without much merit. The dispute over the terms of the subpoenas was tendentious if not mendacious. The request for further particulars was unnecessary. The fair minded observer would have perceived that the magistrate's patience was being abused. As Mr Perkins was no longer involved, the plaintiff was simply using a device to thwart the magistrate from continuing. There was no longer any issue about the suitability of counsel, therefore the fair minded observer would have concluded that the plaintiff was prepared to pursue almost any course, including the filing of a Notice of Motion to prevent the magistrate from continuing.

68. The matrix of events must be taken into account when answering these questions and not just the events of the morning of 9 June. Doing so I come to the view that applying the appropriate objective test, Couzens M did not display at any time any bias towards Mr Pham. This is so whether the eight events are considered *in toto*, singularly, or in any shandy of them.

Excess of jurisdiction

69. After having dispatched all the preliminary and interlocutory matters the magistrate was obliged to inform Mr Pham of his statutory rights, he properly put Mr Pham to his election. Mr Pham selected trial by jury, a perfectly legitimate course, and one which he may even now decide to pursue. Thus these proceedings may be entirely otiose.

70. Mr Nash contended that as bias had been displayed, the magistrate then exceeded his jurisdiction by continuing to hear the matter and by putting Mr Pham to his election. Thus the election itself must be seen to be invalid.

71. It will be apparent from my reasons above that this submission cannot succeed. At no time was there a display of bias either ostensibly or otherwise. At no time did the magistrate exceed his jurisdiction or fail to exercise it properly. These proceedings must be dismissed.

72. I shall hear counsel as to costs.

APPEARANCES: For the plaintiff Pham: Mr PG Nash QC with Mr LA Thompson, counsel. Kuek & Associates, solicitors. For the first defendant Taylor: Mr J McArdle QC, counsel. Office of Public Prosecutions. For the second defendant (The Magistrates' Court of Victoria): Mr PC Golombek, counsel. Victorian Government Solicitor.
