11/02; [2002] VSC 65

SUPREME COURT OF VICTORIA

KASSIONIS v THE MAGISTRATES' COURT OF VICTORIA & ANOR

14, 20 March 2002

Pagone J

PRACTICE AND PROCEDURE – DEFENDANT CHARGED WITH BURGLARY, GOING EQUIPPED FOR THEFT AND FAILING TO ANSWER BAIL – CONTEST MENTION HEARING – MATTERS ADJOURNED FOR HEARING – WHETHER THERE HAD BEEN A JOINDER OF OFFENCES – EXTENT TO WHICH CASE IS TO BE DISCLOSED AT CONTEST MENTION HEARING – SIGNED COPY OF STATEMENT NOT GIVEN TO ACCUSED – NO EVIDENCE THAT SIGNED COPY EXISTED – WHETHER MAGISTRATE IN ERROR IN DECLINING TO ORDER FURTHER STATEMENT – PARTICULARS OF CHARGE – WHETHER SUFFICIENT – WHETHER MAGISTRATE FAILED TO ACCORD PROCEDURAL RIGHTS TO DEFENDANT: *MAGISTRATES' COURT ACT* 1989, Sch 2, S51.

K. attended a contest mention hearing in relation to charges of burglary, going equipped for theft and failing to answer bail. The magistrate adjourned the matters for further hearing but made no order that there had been a joinder of the charges. K. had been supplied with written summaries of the substance of evidence likely to be given at the hearing and requested that the prosecution be ordered to provide K. with a statement of a key witness. The magistrate declined to make the order. K. had been provided with an unsigned copy of a witness's statement but claimed he was entitled to receive a signed copy. There was no evidence that a signed copy existed. The magistrate declined to order any further statement by the witness. K. also claimed that he was not provided with sufficient particulars of the burglary charge. Finally, when a minor amendment was made to the burglary charge at the contest hearing, the magistrate declined to order that the prosecution provide written confirmation of the making of the amendment. Upon appeal—

HELD: Motion seeking order to quash dismissed.

1. The magistrate did not decide that the bail charge be heard at the same time as the burglary charge. There was no joinder of offences. The matters had been simply adjourned in the express contemplation that the magistrate dealing with the matters on the day would be able to deal with such application as K. wished to make concerning their hearing.

2. K. had been given a witness list identifying the key witness and a summary of the evidence that witness was to give. There was no evidence of the existence of any written statement of the key witness or a signed copy of another witness's statement. In those circumstances there had been substantial compliance with the obligations imposed by schedule 2 of the *Magistrates' Court Act* 1989.

3. The summary of charges identified the location at which K. was discovered. K. had been informed of the address of the property at which it was alleged K. was apprehended and in particular which part of that property where it was said she was found. This was sufficient particularisation of the place to satisfy the requirements of natural justice.

4. The amendment to the burglary charge was made in K's presence in open court. The magistrate was not in error in declining to order that the prosecution provide K. with written confirmation of the making of the amendment.

PAGONE J:

1. The plaintiff in this proceeding seeks orders of, and in nature of, *certiorari* and prohibition in relation to orders and rulings made by a Magistrate on 7 August 2001. The plaintiff is charged with offences under ss76(1) and 91(1) of the *Crimes Act* 1958. It is alleged in those proceedings that he entered a secondary school as a trespasser with intent to steal and in possession of articles for use in the course of a burglary. On 7 August 2001 he appeared in person as the defendant in a contested mention hearing in the Magistrates' Court at Sunshine presided by Magistrate Ms. Wakeling. The plaintiff, who also appeared in person before me, now complains in this proceeding about rulings made by the Magistrate on that day.

2. The first complaint is that the Magistrate refused or failed to accord the plaintiff significant procedural rights by listing the burglary charges already referred to on the same day as a charge

under s30(1) of the *Bail Act* 1977 alleging that the plaintiff had failed to appear in accordance with his bail undertaking on 19 April 2001. The plaintiff at first contended before me that the burglary offences and the bail offences had been joined contrary to s31 of the M*agistrates' Court Act* 1989. In fact the evidence discloses that there has not been a joinder of the offences and that the Magistrate has done no more than to have adjourned all three charges together in the express contemplation that the Magistrate dealing with the matters on the day will be able to deal with such application as the plaintiff may wish to make concerning their hearing.

3. The plaintiff draws attention to substantial and serious prejudice that he may suffer if the bail charge were to be heard at the same as the burglary charges. Counsel for the second defendant correctly accepted that a Magistrate hearing the bail charge should not permit cross-examination of the plaintiff in the bail matter about matters which stray into the burglary charges. There is, I think, much force in the plaintiff's claim that the bail charge should not be heard at the same as the burglary charges, however, the fact is that the Magistrate did not decide that they should be heard together. Accordingly, the plaintiff does not make out this claim.

4. The second complaint is that the Magistrate erred in not ordering the prosecution to provide him with a statement regarding the proposed testimony of a key prosecution witness. The witness in question is a Constable Campbell who it seems is likely to give evidence corroborating the primary evidence of the second defendant in these proceedings (and is the informant in the burglary and bail charges). The provision of such information is an important aspect of the proper conduct of criminal proceedings. Section 51 of the *Magistrates' Court Act* 1989 provides that the hearing and determination of summary offences "must" be conducted in accordance in the terms of schedule 2. Schedule 2 contains provisions for the pre-hearing disclosure of the case against an accused including the provision of copies of statements of claim and written summaries of the substance of evidence likely to be given. The significance attaching to the word "must" in such a provision was considered in *Brygel v Stewart-Thornton*[1]. In the case before me the relevant question is whether, as a question of fact, there has been substantial compliance with the obligations imposed by schedule 2 of the *Magistrates' Court Act* 1989. In my view there has. The plaintiff has been given a witness list identifying Mr Campbell as a witness containing a summary of the evidence which he is to give. There is no evidence of any written statement by Mr Campbell which has not been supplied to the plaintiff.

5. A related complaint by the plaintiff was that he had not been given a signed copy of a statement by the Headmaster. Counsel for the second defendant accepted that such information should be given pursuant to schedule 2 of the *Magistrates' Court Act* 1989 but said that it had been provided. The plaintiff accepted that he had been provided with an unsigned copy but claimed that he was entitled to receive a signed copy. There is no evidence that there exists any version of the statement by the Headmaster other than in the form in which the plaintiff has received it. Accordingly, I find that the plaintiff has not established any error on the part of the Magistrate in not ordering any further statement regarding the proposed testimony of the Headmaster or Mr Campbell.

6. The third complaint by the plaintiff is that he has not been supplied with adequate particulars of the burglary charges. The summary of charges identifies the location at which it is alleged that the plaintiff was discovered and localises the place in particular as the "trade wing" of the school where it is said that the police observed the plaintiff "hiding under a table in the classroom". It seems to me that this description identifies the place sufficiently for the requirements of natural justice[2]. The plaintiff has been informed of the address of the school at which it is alleged that he was apprehended and has been told in particular in which part of that establishment it is said that he was found. On the material available to me I am satisfied that this is a sufficient particularisation of the place which may need to be identified.

7. The final complaint is that the plaintiff was not provided with written confirmation of an amendment made to the charge of burglary. The issue arose from a submission by the plaintiff before the Magistrate that the information should specify whether the offence was said to have been committed by entering "a building" or, alternatively, "part of a building". His submission to the learned Magistrate was that the charge should specify whether it be a building or a part of a building but not both without the charge being "bad for duplicity". The Magistrate sought a response from the Sergeant who informed the Magistrate, and therefore also the plaintiff in open

court, that he was content for the charge sheet to leave the words as merely "a building" deleting the reference to "part of a building". The plaintiff subsequently sought the Magistrate to order that the prosecution provide information to him in writing confirming that amendment. The Magistrate declined to do so on the basis that it had been provided to him in open court that day and on an occasion when he had the opportunity to take notes and when the changes had been recorded on the Court record. I agree. The transcript of the proceeding before the Magistrate appears to indicate that the plaintiff also agreed at the time but, whether he did or not, the Magistrate was, in my view, correct in her conclusion.

8. Accordingly, I dismiss the plaintiff's motion and will hear the parties on the question of costs.

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[1] [1992] VicRp 70; [1992] 2 VR 387 esp. 398-400; (1992) 67 A Crim R 243.
[2] *R v Magistrates' Court* [1976] VicRp 73; [1976] VR 680 at 683; *Quai Hoi v Larkman* (unreported, 29 August 1995) Byrne J, pp4-6; *Quai Hoi v Larkman* (unreported, Court of Appeal, 19 February 1997) pp7-9.

APPEARANCES: The plaintiff appeared in person. For the second defendant Hanley: Mr B Kayser, counsel. Solicitor for Public Prosecutions.
