10/12; [2012] NSWSC 180

SUPREME COURT OF NEW SOUTH WALES

MURPHY v McMILLAN

Grove AJ

2, 9 March 2012

PRACTICE AND PROCEDURE – REQUIREMENT FOR MAGISTRATES TO GIVE REASONS FOR DECISION – MATTERS TO BE CONSIDERED IN DECIDING WHETHER THE MAGISTRATE GAVE ADEQUATE REASONS – READING OF JUDGMENT DISCLOSED NO REASON FOR THE RESULT OTHER THAN THE PREFERENCE OF ONE SET OF WITNESSES OVER THE OTHER – NO STATEMENT BY THE PRESIDING MAGISTRATE THAT HIS FINDINGS WERE DERIVED FROM OBSERVATIONS OF RESPECTIVE DEMEANOURS OR FOR ANY OTHER DISCLOSED REASON – ISSUE OF CONTRIBUTORY NEGLIGENCE DEALT WITH IN A BALD STATEMENT THAT THE PLAINTIFF WAS NOT NEGLIGENT – WHETHER OUTCOME OF CASE WAS INEVITABLE – WHETHER MAGISTRATE'S ORDER SHOULD BE SET ASIDE AND REHEARD BEFORE ANOTHER MAGISTRATE.

McM. is the owner of a rural property from which a cow escaped and collided with a motor vehicle owned and driven by M. M. subsequently sued for the damage caused to his vehicle by the collision and McM cross-claimed for the value of the cow. A verdict was given on the claim and cross-claim for M. Upon appeal, it was claimed that the presiding Magistrate gave "inadequate or no reasons".

HELD: Appeal allowed. Judgments and orders made by the Magistrate set aside. Remitted to the Local Court for re-hearing before another Magistrate.

1. As was said in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110, the giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes a sense of grievance and denies both the fact and the appearance of justice being done.

See also *Beale v GIO* (1997) 48 NSWLR 430 and;
***Mifsud v Campbell* (1991) 21 NSWLR 725, applied.**

2. When a ground such as was raised in the present case is advanced, authority requires that a number of matters be borne in mind. For example, it is necessary to determine whether the primary judge had canvassed the issues and explained why one case was preferred over another. Significantly, if an issue of credit was determined, explanation was required as to why a witness or witnesses were preferred to another or others. Accordingly it is not appropriate for a first instance tribunal merely to set out the evidence on each side and then assert that the evidence of one and not the other is preferred.

***Jones v Bradley* [2003] NSWCA 81;**
***Palmer v Clarke* (1989) 19 NSWLR 158; and**
***Goodrich Aerospace Pty Ltd v Arsic* [2006] NSWCA 187; [2006] 66 NSWLR 186, applied.**

3. A reading of the Magistrate's judgment as a whole disclosed no reason for the result other than the preference of one set of witnesses over the other. Although his Honour described the plaintiff as reliable and the defendant as unconvincing, there was no statement that these findings derived from observations of respective demeanours nor for any other disclosed reason. The only reference to the presentation of a witness was to Ms Doyle who testified about alleged pre-accident damage to the plaintiff's vehicle of whom he said he found her to be a "convenient and dutiful (?)" witness who was uneasy and whose evidence "offended commonsense". How such offence was detected was not recorded.

4. The issue of contributory negligence by the plaintiff was dealt with in a bald statement that "the plaintiff was not negligent in failing to avoid the collision" on which basis, apparently, the cross-claim was dismissed.

5. This was not a case where the outcome was inevitable and to the extent that discretion needs to be exercised, a new trial should take place.

6. In the circumstances the litigation should be returned to the Local Court to be heard afresh by a magistrate other than the one who constituted the court at the previous hearing.

GROVE AJ:

1. This is an appeal from the presiding magistrate at the Local Court in Moree. The ground of appeal is that "inadequate or no reasons" were given for the decision. If made out, such a ground constitutes error of law and the jurisdiction of this Court is enlivened pursuant to s70(1)(c) of the *Local Courts Act* 2007 which incorporates relevant parts of the *Crimes (Appeal and Review) Act* 2001.

2. The appellant/plaintiff was the defendant in the court below and for ease of reference I shall refer to both parties in their capacities as plaintiff and defendant in that court.

3. The defendant owns a rural property of some 326 acres called Goodrum which was described by the Magistrate as "bounded by a stock route which runs along the highway and two other properties". The road is titled the Carnavon Highway and runs between Moree and Mungindi. There was no finding as to how busy this road was although his Honour "noted" the decision in *Gregory's (Properties) Pty Ltd v Muir* (1993) 17 MVR 86 and observed that he needed to take into account, *inter alia*, "the known traffic on the highway".

4. At about 7:00 pm on 3 October 2008 the plaintiff was driving on Carnarvon Highway towards Mungindi in a Mitsubishi Triton vehicle when he collided with a Hereford cow owned by the defendant which had escaped from Goodrum property. The plaintiff sued for the damage caused to the vehicle by the collision and the defendant cross-claimed for the value of the beast which was killed in the impact. A verdict was found for the plaintiff both in the action and on the cross-claim.

5. The hearing took place on 27 July and 2 August 2010 and judgment was delivered on 24 August 2010.

6. When a ground such as raised in the present instance is advanced, authority requires that a number of matters be borne in mind. I do not purport to schedule such matters exhaustively but I should be conscious of the pressures under which busy magistrates must deal with the volume of cases before them: cf *Maviglia v Maviglia* [1999] NSWCA 188. In this case, judgment was reserved for some three weeks before it was delivered.

7. In analysing the reasons given it is necessary to determine whether the primary judge has canvassed the issues and explained why one case is preferred over another: *Jones v Bradley* [2003] NSWCA 81. Significantly, if an issue of credit is determined, explanation is required as to why a witness or witnesses are preferred to another or others: *Palmer v Clarke* (1989) 19 NSWLR 158. Accordingly it is not appropriate for a first instance tribunal merely to set out the evidence on each side and then assert that the evidence of one and not the other is preferred: *Goodrich Aerospace Pty Ltd v Arsic* [2006] NSWCA 187; [2006] 66 NSWLR 186.

8. Bearing these things in mind, if a conclusion is reached that reasons given have been inadequate, a discretion must be exercised as to whether there should be a new trial. One would not be ordered, for example, if, notwithstanding the inadequacy of reasons, the only conclusion open was that which had been reached: *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110.

9. I turn then to the reasons for judgment under consideration.

10. Following an introduction concerning the facts out of which the claims had arisen, reference was made to various authorities which were generally described by the learned magistrate as "noted". These included the supersession of the so called rule in *Searle v Wallbank* [1947] AC 341 in this State by the *Animals Act* 1977.

11. His Honour also recited the following:

> "The Court notes in the High Court in *Swinton v China Mutual Steam Navigation Co* [1951] HCA 54; (1951) 83 CLR 553 at 566-7. In that case the court held that the measure of care increases in proportion with the danger involved".

12. There is no explanation in the reasons as to why this was referred to or how, if it was, it was applied to the present case. The obvious danger was the escape of a beast onto the highway but whether some scaling had been applied to proportion such danger to the measure of care was entirely unexpressed.

13. The judgment proceeded to the evidence. It was recorded that the Court "notes" the evidence of the plaintiff and "takes into account" the evidence of his son. Initially the latter was related to his presence at the incident and locating it. His Honour then observed that there was a further affidavit by the son which "related to response to the fencing issue". No finding was attached to this observation.

14. There followed a reference to an affidavit by the plaintiff's daughter which was said to be "not subject to dispute". Exactly what was meant by this is not clear but, in the light of the contest, it could not have meant that it was undisputed that the fence was not in good repair. The reasons for judgment read:

> "...she took photographs depicting the state of the fence as it was on that day. The court notes that in her statement on 12 April 2010 she stated that these photos were taken. The court notes that the incident in this matter occurred some time before some two years before and the court needs to take that into account when examining the photographs. The photographs showed an old fence and on the face of it not in good repair. The court also notes one side where there are tree branches across some of the fencing. Nevertheless the court takes those photographs into account and then will also consider the evidence provided by the defendant".

15. This would seem to record that the photographs, although taken some two years after the incident, purported to portray the fence as it was on 3 October 2008. However, there was no indication of what it was that was observable on the photographs so as to classify the fence as old nor what it was that showed that the fence was not in good repair. Age is not, of course, inevitably definitive of defect. If the mention of repair relates to the tree branches, then some explanation as to why they remain significant in a photograph two years after the event would be expected. There was no elaboration as to what was meant by "across some of the fencing". If it was intended to convey that the branches were reducing the efficacy of the fence by damaging it or reducing its capacity as an enclosure for stock, it would have been easy to say so. If, as one literal meaning could be applied to the words "across some of the fencing" describes passing above the fence, it is difficult to see how this could be germane to the escape of a Hereford cow.

16. The next reference was to viewing a video about which it was said "the court watched the video and the state of the fence". What was detected by this viewing remained unstated.

17. The reasons then turn to the testimony of the defendant, and witnesses called by him, a Mr Glass and Ms Doyle. It was said in various ways that this evidence was "noted".

18. The learned magistrate then recorded that he found the plaintiff, his son and his wife (who had produced the video above-mentioned) to be reliable witnesses. He recorded that he found the defendant to be an unconvincing witness. He did not say why he so found but having not accepted his evidence, he stated his conclusion that "the court was not satisfied that the fencing had been provided in a manner which would retain an animal should that animal choose to leave". There was no finding of what the inadequacy in fact was. It was not said, for example, that the fence was too low or that it had gaps or that it had been allowed to fall over at some location or locations.

19. I do not ignore that, after pronouncing verdict, his Honour added that the view that the defendant had failed to provide adequate fencing was formed "after examining the photographic evidence produced and the fact that the animal had clearly escaped". Again, there is no finding of what was seen when the photographs were examined.

20. As said in *Pollard*, the giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes a sense of grievance and denies both the fact and the appearance of justice being done. See also *Beale v GIO* (1997) 48 NSWLR 430 and *Mifsud v Campbell* (1991) 21 NSWLR 725.

21. The constant repetition that matters had been "noted" gave the impression that the necessity to make findings and to express the reasons for them was overlooked or, at least, there had been a diversion from fulfilling that task.

22. A reading of the judgment as a whole discloses no reason for the result other than the preference of one set of witnesses over the other. Although his Honour described the plaintiff as reliable and the defendant as unconvincing, there was no statement that these findings derived

from observations of respective demeanours nor, as above stated, for any other disclosed reason. The only reference to the presentation of a witness was to Ms Doyle who testified about alleged pre-accident damage to the plaintiff's vehicle of whom he said he found her to be a "convenient and dutiful (?)" witness who was uneasy and whose evidence "offended commonsense". How such offence was detected was not recorded.

23. The appellant/defendant has made good his ground of appeal.

24. In order to reach that conclusion, it has not been necessary to direct separate attention to the subsidiary issue of alleged pre-incident damage to the vehicle nor to deal with the cross-claim. The issue of contributory negligence by the plaintiff was dealt with in a bald statement that "the plaintiff was not negligent in failing to avoid the collision" on which basis, apparently, the cross-claim was dismissed.

25. This is not a case where the outcome was inevitable and to the extent that discretion needs to be exercised, a new trial should take place.

26. In the circumstances the litigation should be returned to the Local Court to be heard afresh by a magistrate other than the one who constituted the court at the previous hearing.

27. I make the following orders:

1. Appeal allowed.
2. Judgments and orders made in the Local Court set aside.
3. Action and cross-claim remitted to the Local Court for re-hearing.
4. Respondent/plaintiff to pay the appellant's costs of the appeal and, if qualified, to have a certificate under the *Suitor's Fund Act* in respect of those costs.

APPEARANCES: For the plaintiff Murphy: C Hickey, counsel. Cole & Butler, Solicitors. For the defendant McMillan: JP Donohoe, counsel. Webb & Boland, solicitors.
