

34/80; [1979] HCA 65

## HIGH COURT OF AUSTRALIA

*McINNIS v R*

Barwick CJ, Murphy, Mason, Aickin and Wilson JJ

29 August 1979

(1979) 143 CLR 575; 54 ALJR 122; 27 ALR 449; noted 54 ALJ 541; 19 Mon LR 256

**CRIMINAL LAW AND PRACTICE (W.A.) – TRIAL – APPLICATION FOR ADJOURNMENT – ACCUSED THROUGH NO FAULT OF HIS OWN SUDDENLY WITHOUT COUNSEL – ADJOURNMENT REFUSED – CONDUCT OF DEFENCE BY ACCUSED – WHETHER MISCARRIAGE OF JUSTICE: CRIMINAL CODE OF WESTERN AUSTRALIA, S689(1)**

M. who was charged with rape and other offences and who was unable to afford legal assistance had done everything he could to secure Legal Aid. His application, through no fault of his own, did not reach the Legal Aid Commission until the day prior to the date set for trial. The application was refused and later that day P was advised that his application for assistance had been unsuccessful. On the day of trial M. requested that the case be adjourned so that he might apply for reconsideration of his application by the Legal Aid Commission. He also informed the judge that, anticipating legal aid, he had not tried to obtain money from his family to pay for private legal assistance.

Crown Counsel opposed M's application for an adjournment. The trial judge, who was not made aware of facts which showed that M's lack of representation was not his own fault, declined to adjourn to trial. The trial judge refused an adjournment because it was "imperative that justice be attended to swiftly, as swiftly as possible", that seven months had elapsed since M had been charged, that the complainant was under considerable nervous stress and that both she and the other witnesses had been brought to the court on three occasions. The trial judge allowed M about half an hour to read a copy of the depositions of the committal proceedings and then the trial commenced; M. was thus forced to trial unrepresented.

The trial judge when refusing M's request for adjournment, said: "It will be my obligation to assist you as much as I can in the conduct of your defence." He also interrupted M's address to the jury, observing: "You are saying lots of irrelevant things." M. was convicted by the jury and sentenced to a term of imprisonment. The Court of Criminal Appeal, by a majority, dismissed M's appeal.

**HELD: Special leave to appeal refused by the High Court.**

**It could not be said that the trial judge erred in his exercise of judgment, and in his refusal of an adjournment and if on the assumption that the trial judge was in error in the exercise of his judgment in refusing an adjournment, such a refusal itself neither amounted to nor brought about a miscarriage of justice.**

**BARWICK CJ:** (with whom Aickin and Wilson JJ agreed) said: ... It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense. He has no absolute right to Legal Aid. He has a right, of course, to have the procedures of the Legal Aid Commission Act duly followed, including the hearing of an appeal and review if these are sought. Nothing I say, nor what follows, can be taken to cast any doubt on my own belief that a defence conducted by a competent counsel has an advantage to an accused and that it is in the best interests of the administration of justice that an accused be so represented.

Consequently, in my opinion, the trial judge ought very seriously to consider whether an accused should be forced on without counsel in any case in which there is a reasonable possibility that he may obtain the services of counsel in his defence without unbearable delay: but, of course, a trial judge must also have in mind the interests of the Crown and of the witnesses, including a prosecutrix in such a case as the present, and of the jurors. In the present case, the case had been specially fixed for trial on the day in question, the jurors had been summoned and the witnesses were present. It is indeed a close balance and a matter of judgment whether in those circumstances the chance that the refusal of legal aid might on appeal or review be reversed outweighed other considerations. I would not be prepared myself to say that the trial judge erred in his exercise of judgment and in his refusal of an adjournment. But in so saying, I would emphasize the need

for the most careful weighing of the interests of the accused, of Crown, witnesses, jurors and, generally, of the administration of justice, when an adjournment is sought in order to obtain or to endeavour to obtain the services of counsel for the conduct of the defence. ...

**MASON J:** Although I am in agreement with what the Privy Council said in the case of *Galos Hired v R* (1944) AC 149, at p155, concerning "The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts", an accused in Australia does not have a right to present his case by counsel provided at public expense. However, he does have a right to apply for legal aid under statutory procedures and the importance of obtaining legal aid cannot be over-estimated: see Lord Parker CJ in *R v Howes* (1964) 2 QB 459, at p463.

Here the applicant had applied for legal aid under s36(1) of the *Legal Aid Commission Act* 1976. However, due to circumstances outside the knowledge and control of the accused his application only came before the Committee in time to be considered on the day preceding the day of the trial. The accused did not have time to pursue the procedures for review given to him under ss48 and 49 of the *Legal Aid Commission Act*. Nor had he applied to his family for legal assistance as he had been under the misapprehension until the evening before the trial that he would be granted legal aid.

The trial judge in considering an application for an adjournment of a trial is called upon to exercise a judicial discretion. "The judge in exercising his discretion is not confined to regarding the interests of the accused. He is entitled to regard the interests of justice which may well be a very different matter." (*R v Cox* [1960] VicRp 102; (1960) VR 665, at p667.) Although I appreciate the importance of the factors which led the trial judge in the present case to refuse an adjournment, I am of the opinion that he failed to attach sufficient importance to the desirability of the accused's case in answer to a very serious charge being presented by counsel. The importance of representation by counsel or solicitor in a serious criminal charge cannot be too highly stressed. Had the trial judge recognized its importance he would have perceived that the applicant should have been allowed to pursue all avenues of obtaining legal aid to their conclusion. The factors called in aid by his Honour were not so overwhelming as to require that the trial should proceed without the accused having the benefit of counsel. Here the accused himself had not been slow to pursue his rights; it was not suggested that the responsibility for seven months' delay rested with the applicant. ...

**MURPHY J:** Right to counsel. The right to counsel derives from the disadvantage of being unrepresented in a judicial system which claims to dispense equal justice in accordance with the rule of law. Whatever the position in minor cases may be, it is fundamental to the administration of justice in serious cases (which undoubtedly include rape) that an accused has the right to legal representation, even if he has no means to engage counsel. Legal Aid. If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel. If necessary, the trial should be postponed until legal assistance is provided, and in an extreme case, the accused, if not already on bail, should be granted bail.

Judge acting as counsel for an accused. The trial judge, when refusing the applicant's request for adjournment, said: "it will be my obligation to assist you as much as I can in the conduct of your defence". A judge's assistance to an unrepresented accused does not make up for lack of counsel. In an adversary system, it is not his function to assist one party. An attempt to do so generally serves only to gloss over procedural injustice; how can a judge assist effectively without having conferred with the accused and his witnesses in circumstances in which the accused has the protection of the confidentiality rule?

**WILSON J:** I would refuse special leave in this case, for the reasons given by Barwick CJ. I wish merely to add two observations. The first is the obvious one that the decision whether or not to grant an adjournment calls for the exercise of a judicial discretion on the part of the trial judge, in the exercise of which he must have regard to all the relevant circumstances. In my opinion, it cannot be said that that trial judge erred in the exercise of his discretion in the present case. The acute distress which previous adjournments had occasioned to the prosecutrix was a proper matter for the judge to take into account. ...