19/92

SUPREME COURT OF VICTORIA

WALSH v SLEEP

Marks J

13 January 1992

PROCEDURE – JOINDER OF OFFENCES – PART OF A SERIES OF OFFENCES OF SIMILAR CHARACTER – WHETHER CHARGES SHOULD BE HEARD SEPARATELY: *MAGISTRATES' COURT ACT* 1989, S31.

By virtue of s31 of the *Magistrates' Court Act* 1989, where offences form part of a series of offences of the same or a similar character, a magistrate has a primary statutory obligation to hear the charges together. Accordingly, where a defendant was charged with indecent assault in a similar or analogous way on separate occasions against 4 female children, the magistrate was not in error in refusing to order that the charges be heard separately.

MARKS J: [1] This is an originating motion under order 56 of the Rules of the Supreme Court for *certiorari*, alternatively prohibition, arising out of a ruling by a Magistrate sitting in the Magistrates' Court at Wodonga on 10 October 1991 refusing to order that charges against the plaintiff be heard separately.

The charges were indecent assault against four female children alleged to have taken place between May 1989 and July 1991. Three of the charges concerned alleged indecent assault in a bus and one in a bus shelter. Particulars were sought and given. They indicate that in respect of three girls, the plaintiff is alleged to have touched their thighs and in one case a buttock, and in respect of the girl in the bus shelter, he allegedly cuddled her and touched her on the back.

The charges have not proceeded pending the outcome of the originating motion on which a summons has been taken out seeking the same relief. The grounds in the originating motion which are repeated in the summons are that the Magistrate erred in law in failing to order severance of the various charges against the plaintiff; in finding the evidence to be of similar fact; in not conducting a *voir dire* as to the admissibility of evidence of one charge in (sic) another.

Counsel for the plaintiff has not sought to sustain the second ground or, if he has, I have not been able to discern any proper basis for it as the Magistrate clearly did not find that evidence was admissible under the similar fact rule. Substantially the argument has turned on whether the Magistrate made an error in law and **[2]** if he did, whether it would found prohibition or *certiorari*, and in any case, whether the court would exercise its discretion to issue the prerogative writs or one of them.

It may well be unusual to start at the end but in this case I think it is appropriate. Approach to this court so early in the hearing of criminal charges by a Magistrates' Court is to be strongly discouraged. If there were the error of law suggested, I would exercise my discretion against granting the relief sought. In ruling on an application for special leave in *R v Iorlano; Re Mullaly; Ex parte The Attorney-General for the Commonwealth* [1983] HCA 43; (1983) 151 CLR 678; (1983) 50 ALR 291; (1984) 58 ALJR 22, the High Court said:-

> '... it seems necessary to repeat that it is highly undesirable to interrupt the ordinary course of criminal proceedings by applications for leave to appeal or prerogative relief for the purpose of challenging rulings on questions of admissibility of evidence. The fact that the court has expressed its conclusion on the substantive question and issue in the present case is not intended to encourage applications of this kind.'

The application for leave to appeal there was against the decision of Brooking J in *R v Judge Mullaly; Ex parte The Attorney-General for the Commonwealth* [1984] VicRp 66; (1984) VR 745.

It is true that in the present case the ruling was not on the admissibility of evidence but as to whether the charges should be separately heard. The principle, however, is important as the Magistrate clearly had a discretion on the question and it is, in my opinion, quite inimical to the proper administration of justice that rulings in the course of hearings should be interrupted by applications to this court.

In *Re Waterford* (1978) 22 ACTR 25 at page 29, **[3]** Davies J said:-

> "There is one further ground on which I would refuse the grant of the order nisi. A grant of a writ of prohibition is discretionary. It should not be granted where there is a more appropriate remedy. In my view, the preferable course is that the ordinary process of appeal should be adopted if, after hearing the evidence, the Magistrate convicts the defendant. In that event, the appellate court will be able to consider the questions of law founded by the defendant in relation to facts which have been proved. This is a more satisfactory course than an argument on a point of law in relation to facts which have been neither proved nor agreed."

The discretion of the Magistrate, to which I referred, is conferred by s31 of the *Magistrates' Court Act* 1989 which provides:

> "31(1) A charge-sheet may obtain charges for more than one offence if those offences—
> (a) are founded on the same facts; or
> (b) form part of a series of offences of the same or a similar character—
> and those charges must be heard together unless an order is made under sub-section (3).
>
> (2) If more than one charge is contained in a charge-sheet under subsection (1), the particulars of each offence must be set out in a separate numbered paragraph.
>
> (3) Any charge contained in a charge-sheet under sub-section (1) may, on the application of the prosecutor or defendant, be heard separately if the Court thinks fit.
>
> (4) Any number of charges contained in separate charge-sheets may, on the application of the prosecutor or defendant, be heard together if the Court thinks fit."

It is common ground that by virtue of s31(1) the Magistrate was obliged to hear the charges at the one time, although at one point Mr Gillespie-Jones, for the plaintiff, submitted that the offences did not necessarily form part of a series of offences of a same or similar character. In fairness to him it may well be that he **[4]** submitted that they were not. He based that submission on an assertion that it was impossible to say whether they were of the same or a similar character until the evidence had been heard. On their face, however, they seem to me to be clearly offences of the same or similar character. All the charges, considered with their particulars, in effect allege that the plaintiff committed indecent assaults in a similar or analogous way on separate occasions on different girls. The question is whether the Magistrate was obliged to exercise his discretion under s31(3) to hear the charges separately.

It was put that the High Court's observations, if not decisions, in *De Jesus v R* [1986] HCA 65; (1986) 68 ALR 1; (1986) 61 ALJR 1; (1986) 22 A Crim R 375 and *Hoch v R* [1988] HCA 50; (1988) 165 CLR 292; 81 ALR 225; (1988) 62 ALJR 582; 35 A Crim R 47 demanded that the Magistrate exercise his discretion the one way, namely, by separate hearings. In the course of hearing the submissions of counsel in support of an application for separate hearings – the details of which are set out in the supporting affidavit – the Magistrate said that the High Court decisions, in his opinion, governed jury trials and did not necessarily apply to Magistrates.

It is submitted by Mr Gillespie-Jones, on behalf of the plaintiff, that what the Magistrate said was an error of law. If one has recourse to the precise words of the Magistrate, it may be that some criticism can be made as to whether he accurately summarized the effect of the High Court decisions. He was not incorrect, in my opinion, and not in error if what he intended was no more than that the decisions of the High Court were not to the effect that a Magistrate was obliged in the present circumstances to order separate hearings.

[5] The High Court clearly directed their observations and decision to indictable offences heard and decided by juries. Whether it was intended that the principles discussed by the High Court are to apply to magistrates and judges sitting alone might be a matter of speculation, but

the Court did not say so and there is good reason to think it was not implied. **[6]** The reason is that Magistrates like Judges are trained to exclude from their minds evidence which they have heard but which they have ruled to be inadmissible.

Mr Gillespie-Jones founded his submissions for the most part on the assumption that a Magistrate was more akin to a jury if not similar to a jury but in any event different from or to be considered less trained than a Judge in a higher court in the art of expelling from the mind matters which, as a matter of law, were inadmissible.

In my opinion no such distinction is permissible. A Magistrate is a trained judicial officer and the observations adopted by Mr Justice Beach in *Egan v Bott* [1985] VicRp 75; (1985) VR 787 of what was said by Justice Wells in *Furnell v Betts* (1978) 20 SASR 300 at page 302 are applicable and pertinent. Mr Vassie for the defendant who was the informant in the court below submitted that there was no error by the Magistrate, that even if there was, it is not reviewable on the prerogative writs here sought; in any event, relief should be refused as a matter of discretion. I have dealt with the discretionary aspect.

As to the first submission, I am of a view that at this point no error by the Magistrate has indeed been shown and I mean no error in the exercise of discretion. There is no material before me which indicates that it will not be open to the Magistrate to find that evidence admissible to support one charge will also be regarded as evidence of a similar fact to support evidence on another. He has not yet ruled on the question. I am unable to say what he will be entitled to do and it is idle to speculate.

[7] The Magistrate might need to consider on the basis of *Hoch* whether he should admit evidence as of similar facts where there is a possibility that the victims had motive and opportunity to collude and concoct the evidence. The Magistrate did not have material on which such an evaluation could be made, nor do I have any.

The Magistrate was first asked by counsel for the plaintiff to separate the trials on the basis that the pre-condition in s31(1)(b) had not been fulfilled; in other words, that the charges in the information did not form part of a series of offences of a same or similar character. The Magistrate, in my opinion, was entitled to reject that submission and he did so.

It is not clear whether just before or just after the ruling counsel asked the Magistrate to hear the evidence for the prosecution on a *voir dire*. This may be a generous account of the submission because as I understand the material, counsel merely asked for a "*voir dire*" without indicating clearly what evidence was to be called on it. It is clear that counsel did not seek to call evidence himself. It was conceded by Mr Gillespie-Jones here that whatever it was that was to be heard on the *voir dire*, it was to be evidence of the prosecution. How much of it was to be heard and to what effect, I cannot say. The suspicion is that counsel sought to have two cross-examinations of the complainants, no doubt in the hope that they would contradict themselves.

The application for *voir dire* could only have been for a preliminary hearing of evidence in order to determine its admissibility. I understand the Magistrate **[8]** to have said, and I think correctly, that the evidence in support of the charges would have to be heard in any event. The Magistrate undoubtedly meant that if the evidence was admissible in support of a charge, a question whether it was also admissible as similar fact evidence was, at that time, irrelevant. The Magistrate said in effect that he would be in a position at a later time to determine how the evidence in support of one charge may be regarded in relation to another.

It is true that the High Court held that in a situation such as the present, on a trial before a Judge and jury, there should be separation unless the evidence in support of one charge is admissible in support of another. It is far from clear that this rule applies to a Judge or a Magistrate. Even if it is thought that it does apply, the matter is relevant to the exercise of my discretion as to whether prohibition or *certiorari* should go, because the Magistrate at the time was not in a position to direct himself until the conclusion of the hearing. It was not necessary that he do so. The importance of this observation is that if the charges are heard together and the plaintiff is convicted he has rights of appeal if there are good grounds.

At this stage the material suggests that the similar fact rule might well be available and that the possibility of motive and concoction does not, other than in a fanciful way, exist. There is of course the question, ably argued by Mr Vassie, that even if there was error it did not go to jurisdiction and therefore prohibition is not available. This point seems to me to be unanswerable having regard to **[9]** the fact that the Magistrate was clearly seized with jurisdiction to exercise a discretion not to sever the charges. Indeed, he had a primary statutory obligation to hear the charges together. It seems to me that prohibition is not available. Whether there was an error on the face of the record is perhaps more arguable but on balance I am not satisfied that any error has been demonstrated. The suggested error is that the Magistrate was not in a position to satisfy himself that the evidence to support one charge was admissible as evidence to support another and that accordingly he could not decide the extent to which he should take into account the considerations required by *Hoch* and *De Jesus*.

This submission, if correct, would have required the Magistrate, in effect, to have heard the whole of the case on a *voir dire* and then decide whether there should be separate trials. If he decided that there should not be, he would have had to hear the case again. If he decided there should be separate trials he would necessarily, in order to comply with the principle, order that each charge be heard separately by different Magistrates. If this result is required by the law it can only be said that the administration of justice in the Magistrates' Court would be rendered chaotic.

In my opinion, it was not necessary that the Magistrate proceed in that way. I am not satisfied that any error does appear on the face of the record. I have dealt with the substantive arguments in deference to counsel having put them. The fact that I have done so should not encourage the procedure followed here on behalf **[10]** of the plaintiff of interrupting the due process in the courts before completion. The summons and originating motion are dismissed with costs, including reserved costs.

APPEARANCES: For the plaintiff Walsh: Mr S Gillespie-Jones, counsel. Trivett Keating Price, solicitors. For the defendant Sleep: Mr A Vassie, counsel. Ronald C Beazley, Victorian Government Solicitor.
