30/93

SUPREME COURT OF VICTORIA

NGUYEN v WOOD and ANOR (No. 1)

Coldrey J

17 August, 3 September 1993 — [1994] VicRp 5; [1994] 1 VR 88

PROCEDURE – TAPE RECORDING PROCEEDINGS IN MAGISTRATES' COURTS – WHETHER PARTY HAS A RIGHT TO RECORD PROCEEDINGS – WHETHER COURT HAS DISCRETION: *MAGISTRATES' COURT ACT* 1989, S136.

1. No absolute right exists for a litigant to tape record informally proceedings in a Magistrates' Court. The Court has a discretion to exercise judicially in each case when such an application is made.

2. A magistrate's discretion miscarried where an application to record proceedings was refused on the grounds that such a proceeding was not usually recorded and the type of recording instrument proposed to be used was unknown.

COLDREY J: **[1]** Truong Dong Nguyen (the plaintiff) was charged by Steve Wood (the secondnamed defendant) with five counts of theft from cars, three counts of attempted theft from cars and eight counts of tampering with cars. All the offences are alleged to have occurred on 9 February 1993. The charges first came before the Magistrates' Court of Victoria at Broadmeadows (the Magistrates' Court) on 15 April 1993 for the purpose of the resolution of several interlocutory applications by the plaintiff (the defendant in the Magistrates' Court) in which he sought (*inter alia*) that the secondnamed defendant (the informant in the Magistrates' Court) provide further and better particulars of the relevant information pursuant to a written request dated 24 March 1993 and that the prosecution provide the plaintiff with a list of all documents held in the prosecution brief. Prior to the commencement of these applications counsel for the plaintiff informed the Magistrate that he desired to tape record the proceedings. Legal argument ensued on this issue.

The ruling of the learned Magistrate, which I take from the affidavit of Gabriel Kuek affirmed on 28 June 1993 and not the subject of any factual challenge, was as follows:

> "Historically, proceedings are not tape recorded, unlike New South Wales and the ACT where there is legislation allowing it. There are some proceedings in the Magistrates' Courts which are recorded. This is well known to both counsel and the prosecutor, like committal proceedings. But they are recorded by a licensed and sworn recorder. Magistrates have control of proceedings as the prosecutor correctly pointed out, under s136 of the *Magistrates' Court Act*. It is my view that there is no right to tape record proceedings. I have listened to many arguments for the recording of proceedings. I have nothing against them. I make the following comments: Firstly there is no legislation that affects me in my decision and to allow this **[2]** proceeding to be tape recorded is to set a precedent. The cost factor is one reason why proceedings are not recorded. In relation to this application, I don't know what instrument will be used. There is no sworn or licensed recorder with the right equipment. I don't know anything about the case. There is no tape recording instrument referred to in the case of *Barrow [R v Leicester City Justices & Anor; Ex pane Barrow & Anor* [1991] 2 QB 260; [1991] 3 All ER 935; [1991] 3 WLR 368; [1991] Crim LR 556]. This is not an unusual proceeding. Tape recording is not allowed."

Subsequently counsel for the plaintiff requested the Magistrate to formulate his ruling in the form of a direction or order. The Magistrate then expressed his ruling as follows: "I direct you not to tape record the proceedings." For the purposes of this judgment I will assume the formulation to be an order.

The matter comes before this Court by way of summons on an originating motion wherein the plaintiff seeks an order in the nature of *certiorari* to quash the decision and/or ruling of the Magistrate that the plaintiff or his solicitor were prohibited from making a tape recording of the Magistrates' Court proceedings and further, an order that the plaintiff be at liberty to make a tape recording of the proceedings before the Magistrates' Court.

It was first submitted by Mr Howie, who appeared on behalf of the plaintiff that the plaintiff had an absolute right to tape record proceedings in the Magistrates' Court rather than a right subject to the exercise of the Magistrate's discretion. In support of that proposition he cited the decision of *R v Leicester City Justices* (*ibid*). In that case the applicants had appeared before the Justices in answer to summonses issued by the local authority for liability orders in respect of alleged non-payment of community charges. A **[3]** solicitor from the Leicester Rights Centre informed the Bench that, whilst she was not appearing on behalf of the applicants in relation to the summonses, she was instructed on their behalf to request the Court to allow a Mr John to provide assistance to them. In making that application she referred to the case of *McKenzie v McKenzie* [1970] 3 All ER 1034; [1970] 3 WLR 472; [1971] P 33, the headnote of which reads: "... every party has the right to have a friend present in Court beside him to assist by prompting, taking notes, and quietly giving advice ...". The solicitor asserted that the Bench had no discretion in the matter. (It appears that such an adviser is known as a "McKenzie friend"). For reasons that are not material to the instant case, the Justices refused the request and the matter came via the District Court to the Court of Appeal.

Mr Howie relied on various statements of principle enunciated by the appellate Judges. Lord Donaldson MR observed (at p374):

> "The courts exist in order to give effect to and enforce rights, duties and liabilities as between citizens (including juridical persons) and as between citizens and the State. In performing this function, courts have a duty to act in accordance with the law, whether it be the common law or statute and everyone is 'entitled' to expect the Judges (including Magistrates) to discharge this duty to the best of their ability and they do. This is not to say that they always succeed and the hierarchy of the courts with their appellate processes is designed to correct the inevitable errors. When it is said, as it is said in this case, that a court had denied a citizen a 'right' which is his, what is really meant is that the court has failed to perform its function in accordance with the law. That the citizen has a 'right' to expect a court to do its duty is not in question, but it is not the same kind of 'right' as those upon which courts adjudicate as between the litigants appearing before them. There are many basic rules covering the administration of justice by the courts, but they can be summed up by saying that it must be **[4]** administered fairly and, unless the interests of justice otherwise require, it must be administered openly and its administration must not only be fair but be seen to be fair."

He continued (at p376):

> "They [the applicants] have a right to be heard in their own defence. Fairness which is fundamental to all court proceedings, dictates that they shall be given all reasonable facilities for exercising this right and, in case of doubt, they should be given the benefit of that doubt. The courts must not only act fairly but be seen to act fairly."

In commenting that the "McKenzie friend" did not exist at all as such and had neither status nor rights Lord Donaldson remarked:

> "The only right is that of the litigant and his right is to reasonable assistance which can take many forms. If he is blind, he may need someone to read documents to him, if he is hard of hearing, he may need someone sitting next to him who can make a note so he can read what he cannot hear. The possibilities, if not endless, are at least extensive."

Again, at p379 Lord Donaldson observed:

> "A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thinks appropriate, subject to the right of the court to intervene. Thus he can bring books and papers with him, pens, pencils, his spectacles, hearing aid and any other form of material assistance which he thinks appropriate. Subject to their not being of extraordinary volume and unusual nature, there is no need for the matter to be mentioned to the Justices or their clerks.
>
> ... if a party arms himself with assistance in order to better himself to present his case, it is not a question of seeking a leave of the Court. It is a question of the court objecting and restricting him in the use of this assistance if it is clearly unreasonable in nature or degree or if it becomes apparent that the "assistance" is not being provided *bona fide* but with an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing the party to waste time, advising introduction of irrelevant issues or the asking of irrelevant or repetitious questions.
>
> ... The point is that it is not for the Court to consider in advance whether the applicants need

> assistance. Unless there are clear grounds, in the **[5]** interests of the proper administration of justice, denying the applicants such assistance as Mr John could provide, it suffices that the applicants should have thought that they needed it."

The other members of the Court agreed with this reasoning which resulted in the upholding of the appeal. Mr Howie also referred the Court to an American decision by the Supreme Court of Michigan in *People v Jasper* 393 Mich 149; 224 NW2d 22. That was a case in which the defendant, Jasper, appeared in the Traffic and Ordinance Division of the Recorder's Court of the City of Detroit to contest a citation issued for an alleged parking meter violation. He brought with him a tape recorder and asked if the referee had any objections to his taping the conversation for his own record. Instead of answering the defendant's question the referee ordered him to turn the tape recorder off and found him in contempt of court. Thereupon the defendant was brought before a Judge of the Court and when he again asked if there were any objections to the tape recorder, was ordered to turn it off. The Judge pointed out the Court reporter who was recording the proceedings and said that there would be no tape recorder in the courtroom.

Upon the defendant's refusal to turn the recorder off and his attempt to leave the courtroom he was subdued by police officers, summarily found guilty of contempt of court and sentenced to serve 10 days in the Detroit House of Correction. The defendant was released upon appeal bond after serving five days. The appellate Court examined the operative Canons of Judicial Ethics and observed that they did not prohibit tape recordings. The relevant portion of Judicial Canon 35 read:

> **[6]** "Proceedings in Court should be conducted with fitting dignity and decorum. The taking of photographs in the Courtroom, during sessions of the Court or recesses between sessions, and the broadcasting or televising of Court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the Court, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

The Court held:

> "Since the recording was not prohibited at the time of trial, and as the record will not support the assertion that the defendant wished to publicise or disrupt the trial, we conclude that the referee and the Judge abused their discretion in demanding the tape recorder be turned off."

It was submitted by Mr Howie that the powers of the Magistrates' Court to control its proceedings are essentially set out in the *Magistrates' Court Act* 1989 (the Act). He referred to s136 which reads:

> "The Court may, except where otherwise provided by this or any other Act, at any stage of a proceeding, give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination."

(This is, of course, apart from other powers such as that contained in s126 of the Act enabling the closing of the Court and the prohibition of publication of Court proceedings in certain circumstances.) In *Margaritisi v Collins* (an unreported decision of McDonald J, 3/8/89) His Honour observed (at p17):

> "The Magistrates' Court, subject to any express statutory provision and to the requirement to duly and properly administer justice, has the same rights as any other Court to regulate and to control its own proceedings – *McGrath v Dobie* [1890] VicLawRp 133; 16 VLR 646 (FC) and *Ritter v Charlton* 25 ALT 190."

It was submitted however that any inherent powers referred to in this passage should be regarded as similar if not identical to those enumerated in s136 of the Act. **[7]** Moreover there was a real distinction to be drawn between the conduct of proceedings to which s136 of the Act had relevance and the conduct by the plaintiff of his or her case. The Courts' power did not, for example, extend to directing the party as to how he or she should conduct litigation by, for example, directing that a party's solicitor should not take notes of proceedings.

The correct approach for a Magistrates' Court to adopt was that enunciated by the English Court of Appeal in *R v Leicester City Justices* and the use of a tape recorder by a party was

consistent with the concept of assistance contemplated by that court. It could not be said (and there was no suggestion) that the proposed use of a tape recorder (particularly in the instant case) was unreasonable or intrusive or would have interfered in any way with the orderly and efficient conduct of the hearing. Accordingly the use of a tape recorder did not fall foul of s136 of the Act nor did it impinge upon any inherent power of the Magistrates' Court to regulate and control its own proceedings.

Whilst a record could equally be kept by a stenographer it was both convenient and reasonable to adopt this more modern form of technology. Indeed the necessary adaption by the courts to new technologies was evidenced in the common use of lap-top computers in the courtroom setting. Mr Howie further submitted that the use of tape recorders for the purpose of assisting the litigant was not entirely new. Tape recordings have been made in the Planning Division of the Administrative Appeals Tribunal and County Court tipstaves informally record proceedings for future use if required. **[8]** In arguing that the criminal law must adapt to and utilise the advantages of modern technology Mr Howie referred to the observations of Brooking J in *Sobh v Police Force of Victoria* ([1994] VicRp 2; [1994] 1 VR 41; (1993) 65 A Crim R 466, Full Court dated 25/3/93) as revealing the organic and progressive nature of the criminal law. It was put that there could be no doubt that the use of the tape recorder could be of considerable assistance in the presentation of a case.

The benefits to be derived by a litigant from the use of a tape recorder included that it facilitated the review by counsel of the daily proceedings in the courtroom on the basis of a full and accurate record; it permitted the resolution of any questions as to the precise evidence given by a witness; and if necessary, enabled counsel in the course of cross-examination to put to a witness previous inconsistent evidence or the relevant evidence of a prior witness. Frequently counsel addressing the Court or leading or cross-examining a witness could not take any, or any accurate notes of the evidence. The use of a tape recorder would eliminate that disability. In essence it was argued that a tape recorder was of value in any instance where a written note of proceedings would be of assistance to a party.

Apart from the assistance which a tape recorder may provide in a hearing at first instance, Mr Howie submitted that a record of the Magistrates' Court proceedings would be of great value on an appeal to the County Court pursuant to ss83 and 84 of the Act where it may be very important, in the conduct of a hearing *de novo*, for an appellant to be armed with **[9]** the precise evidence given by witnesses in the Magistrates' Court. In relation to the appellate processes generally, Mr Howie referred to the potential for injustice that existed where no accurate record was kept of the reasons for a court's decision. In this regard he referred to the difficulties confronting the parties in *Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8 (at p9). Moreover in the prosecution of appeals to the Supreme court on a question of law pursuant to s92 of the Act (the old Order to Review procedure) a tape recording of proceedings would be an invaluable *aide memoire* in compiling accurate affidavits of the lower court proceedings.

Where the procedure set out under s92 of the Act is adopted problems presently arise where there is no agreement as to what has occurred in the Magistrates' Court. Hence in *Buzatu v Vournazos* [1970] VicRp 63; [1970] VR 476, when faced with conflicting affidavit account of proceedings in the Magistrates' Court Newton, J observed:

> "In all the circumstances it appears to me that I must follow the arbitrary rule that where there is appeal or conflict between the parties' affidavits as to the evidence or other proceedings in the Court of Petty Sessions, the version which supports the decision of the Court of Petty Sessions should be accepted, in the absence of any fair and practicable method of resolving the conflict."

A similar situation presented itself to Kaye J in *Yeates v Hoare* [1981] VicRp 91; [1981] VR 1034.

Mr Howie submitted that a "fair and practicable method of resolving the conflict" could be provided by the use of a tape recording of what had transpired. **[10]** It was finally submitted by Mr Howie that I should have regard to Article 14.3(b) of the Convention on Human Rights contained in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act* 1986. It reads;

> "3. In the determination of any criminal charge against him, everyone should be entitled to the

following minimum guarantees, in full equality;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ..."

It was put that "adequate time and facilities for the preparation of his defence" should be construed as encompassing the right to tape record court proceedings. In response, Mr Rapke, who appeared on behalf of the secondnamed defendant conceded that, in some circumstances, there were strong arguments for recording hearings in a Magistrates' Court. For example the tape recording of proceedings, if full and accurate, may well be of assistance where an appeal is brought pursuant to s92 of the Act. However, the real question for determination, submitted Mr Rapke, was whether the use of a tape recorder by a litigant in the Magistrates' Court should be regarded as a procedure which could be adopted as of right or whether the Court had a discretion to permit or refuse its utilisation. Mr Rapke submitted that a reading of s136 of the Act made it clear that such a section incorporated a discretion. Moreover, the asserted distinction between the directions which a Court may give for the conduct of its own proceedings and the litigants conduct of his or her case was not a valid one.

[11] The inherent power of every Court to control its own proceedings unless that power is restricted by some competent authority is not only affirmed in *Margaritisi's Case* but also in *R v Callaghan*, *R v Thomas* [1966] VicRp 4; [1966] VR 17 (at p19). Further, the case of *R v Leicester City Justices* should be read as being limited to the special situation of the right of the litigant to be assisted in the presentation of a case by lay advisers. In any event, it was submitted that it was not open to read this case as authority for the proposition that a Court cannot control the method of assistance sought to be employed by those appearing before it. The infinite variation of proceedings in a Magistrates' Court involving as they do interlocutory applications, pleas, contests, and single and multiple parties make the flexibility of the discretionary approach appropriate.

Among the factors a court may have to take into account are the quality of the tape recorder including the obtrusiveness or otherwise of its operation, its capacity, depending on where it is placed in a courtroom, to distract or intimidate witnesses, its ability to accurately record the hearing, its appropriateness when used *in camera* and the potential for the misuse of recordings made. It was further submitted on behalf of the secondnamed defendant that support for the discretionary approach could be found in the provisions of Part VI of the *Evidence Act* 1958 – Recording of Evidence. Section 130(1) of that Act states:

"Any person acting judicially if in his discretion he thinks fit may on the application of any party to any legal proceedings before him, and such person shall upon the application of all the parties to any legal proceeding before him, direct that any **[12]** evidence to be given in the legal proceeding be recorded and transcribed in any manner authorised by this Part."

Whilst that sub-section relates to persons licensed to record evidence and the record itself is given an authoritative status (s135), the court retains a discretion in determining whether to direct the official recording (including tape recording) of proceedings save where the application is made by all of the parties in the case. It was argued that, albeit that the instant case involves the informal recording of proceedings, it would be inconsistent to find that a court's discretion is limited to the circumstance of official recording of the evidence. The issue presented for decision by this Court is a novel one and there appears to be no relevant authority upon it in this country.

As a basic proposition it cannot, I think, be disputed that the use of a tape recorder in a Court where there is no official transcription of proceedings may assist a litigant. The benefits of an accurate record may accrue not only during the proceedings at first instance but in the exercise of any rights of appeal. The type of assistance to be derived is set out in the submissions of Mr Howie to which I have already referred. Indeed, the value of a tape recording of proceedings in certain circumstances was conceded on behalf of the respondent. On the other hand where there may be some real difficulties created by the use of a tape recorder, a major one being its capacity to a adversely affect witnesses.

Another problem which may arise is the effect of the use of a tape recorder in inhibiting the conduct of the other **[13]** party in an adversary proceeding by making it virtually impossible for counsel to obtain instructions from a client seated behind him or her in court or to discuss tactics with an instructing solicitor without a tape recorder picking up such communications. No

doubt that problem would be multiplied if there were to be a number of counsel at the Bar table each wishing to tape record proceedings.

Any problem in relation to *in camera* hearings could, I think, be controlled by orders under s126 of the Act and appropriate limitations on the use to be made of recorded material could be secured by obtaining undertakings from legal practitioners. It was not argued before this Court that the use of a tape recording device should be prohibited as having the effect of holding a Magistrate "in terrorem". Nor could such an argument be advanced in view of the wide-spread use of official recording devices in many jurisdictions.

Apart from *Jasper's Case*, referred to in argument there are some other United States cases where this issue has been the subject of consideration. For example *Martha Davey v City of Atlanta* 130 GAPP 687; 204 Se 2d 322; 67 ALR 3d 1010, a decision of the Court of Appeals of Georgia delivered in January 1974. In that case, after the defendant entered a plea of not guilty to the charge against him, his counsel attempted to record the proceedings on a small pocket sized tape recorder. The trial Judge however would not permit its use. Chief Justice Bell, in delivering a judgment with which the other members of the Court concurred observed:

> "The City Court Judge admitted that he refused to permit the use of the tape recorder by counsel as counsel was obviously attempting to make a verbatim **[14]** transcript of the proceedings. In this the Judge erred. There is no valid reason why a party or his counsel may not use a recording device in order to assist in perfecting a record. The use of an electronic device, of course, is subject to the supervision of the trial Judge who may take reasonable measures to assure that the use of the device does not interfere with the dignity, order and decorum of the court. What the trial judge may not do is to arbitrarily deny counsel the right to use a recording device. Under the facts of this case, the court's refusal to permit the use of the recording device was arbitrary and constituted a denial of due process."

In an article entitled "Use in State Court by Counsel or Party of Tape Recorder or Other Electronic Device to Make Transcript of Criminal Trial Proceedings" (an Annotation to this decision) it is noted:

> "A contrary result was reached however in *Amsler v United States* [1967] USCA9 375; (1967) CA 9 Cal) 381 F 2d 37, where, while reversing kidnapping convictions on other grounds, the Court held that an assignment of error alleging that one of the defendant's was denied the right to tape record the trial proceeding was wholly without merit. Concluding that there had been no occasion for an unofficial tape recording, the Court pointed out that the trial proceedings were recorded by an official court recorder and that, apparently, counsel was furnished with a daily transcript.

See *Re Hagan* (1964) 224 Cal App 2d 590; 36 Cal Rptr 828, finding no basis for an adjudication that the conduct of the defendant was contemptuous where he used a recording device to make a record of a proceeding to modify a pre-trial conference order. The Court noted that the record was intended to aid the defendant's memory and for his own proper use, and that there was no basis for an inference that the visibility and noise of the recording device was such as to interfere with the proper conduct of the proceedings."

Whilst the principles enunciated in *R v Leicester City Justices* deserve wholehearted endorsement, an analysis of that authority and the American cases discloses that, underlying each decision is the assumption of a discretion in the courts to control their own proceedings, albeit that there may be scope for some argument as to the ambit of such discretion. **[15]** Reverting to the Victorian situation, authorities such as *Margaritisi's Case* and *R v Callaghan* (*ibid*) clearly support the proposition that a Magistrates' Court acting within its jurisdiction has inherent power to regulate and control its own proceedings. Nothing in s136 of the Act (which contains broad terminology) serves to limit that power. In my view, the argument that a distinction exists between the power of the court to control its proceedings and its power to control the manner in which a litigant chooses to present his case within that court is unsustainable.

Moreover, it would, I think, be surprising if the limited discretion accorded the Courts in s130 of the *Evidence Act* in relation to formal recording of proceedings should not exist at all where the proposed recording is informal. The Convention on Human Rights referred to in argument does not, I think, advance the matter. To assert that the provisions of Article 14 3(b) extend to court proceedings is to attempt to attribute to the words a meaning that they will not reasonably bear.

It is not therefore appropriate to make the order sought, namely that the plaintiff be at liberty to make a tape recording of the proceedings before the Magistrates' Court. The fact that a discretion exists in the Magistrates' Court to prohibit the use of informal tape recording is not an end to this matter. Such a discretion must of course, be exercised judicially. This will involve a consideration of such factors as the assistance which may be derived from a taped record of proceedings together with a consideration of those factors (if any) which would render such recording inappropriate in the circumstances of the case.

[16] The context in which the Magistrate was required to consider the instant application was that of an interlocutory proceeding and not a contested hearing involving the calling of witnesses. From his reasons the Magistrate appears to have placed weight upon the fact that historically summary proceedings in Magistrates' Courts were not tape recorded. Allied to this factor was concern at the lack of precedent or legislative warrant for what was being proposed.

One can understand the learned Magistrate's concern at the lack of the guidance that the existence of a precedent or legislation would otherwise have provided. However, given the novel nature of this application such factors could be accorded little if any weight.

The Magistrate's reference to the cost factor is not easy to interpret unless it relates to the cost of obtaining a licensed recorder with the right equipment, a matter to which reference is also made. If so it would not appear to be relevant to the purpose of the application. The indication by the Magistrate that he did not know what instrument would be used cannot be an appropriate reason for rejecting the application where an inquiry would no doubt have brought forth the relevant information.

Further, the mere fact that a proceeding may not be regarded as unusual (albeit that the Magistrate also intimated that he did not know anything about the case) is not necessarily a factor which would justify the exercise of discretion adversely to the applicant. Whilst it is unnecessary, and indeed unwise, to seek to list all of the factors which may be regarded as relevant to the determination of an application of this kind, an analysis **[17]** of the reasons given by the Magistrate for his decision demonstrates that his discretion miscarried.

However, since the matters the subject of the interlocutory application of 15 April 1993 (and subsequently the subject of the present summons) have, according to counsel, been resolved, the occasion for tape recording of those preliminary applications no longer exists. Consequently there is no purpose in quashing the Magistrate's order prohibiting tape recording and remitting this matter to the Magistrates' Court. I have nonetheless published my conclusions as to the legal principles involved as I apprehend a further application for permission to informally tape record the Magistrates' Court proceedings is contemplated when the substantive hearing of these charges occurs.

Solicitors for the plaintiff: Kuek and Associates.
Solicitor for the second defendant: Victorian Government Solicitor.
