16/94

SUPREME COURT OF VICTORIA

CROFT v PETERSON

Mandie J

16, 24 May 1994

NATURAL JUSTICE – BIAS – INTIMATION TO COUNSEL THAT CROSS-EXAMINATION OF DEFENDANT AND WITNESS NOT NECESSARY – DEFENDANT'S EVIDENCE REJECTED ON DEMEANOUR – NO REASONS GIVEN FOR REJECTION OF WITNESS' EVIDENCE – WHETHER DENIAL OF NATURAL JUSTICE – NO COMPLAINT BY DEFENCE COUNSEL – WHETHER RIGHT TO COMPLAIN WAIVED.

At the completion of examination-in-chief of the defendant and a defence witness, the presiding magistrate said to counsel that he need not bother cross-examining them. In giving his decision for the plaintiff, the magistrate said he disregarded the defendant's evidence because of his demeanour but gave no reasons for rejecting the evidence of the other witness. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for hearing before another magistrate.
1. Having regard to the intimation to counsel and the rejection of the defendant's evidence because of the way in which he displayed himself and took the oath, the case was one of ostensible, if not actual bias in the sense of prejudgment and a denial of natural justice or procedural fairness.
***R v Watson; ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, applied.**

2. The rejection of the second witness' evidence called for some specific explanation by the magistrate. The failure by the magistrate to give adequate reasons meant that the defendant did not know why his case was rejected and accordingly, was denied natural justice.
***Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; (1989) VR 8, applied.**

3. The defendant could not be taken to have waived the right to complain of the magistrate's apparent prejudgment because the magistrate's prejudice was not fully apparent until the reasons for decision had been stated.
***Vakuata v Kelly* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, referred to.**

MANDIE J: [1] This is an appeal from a decision of the Magistrates' Court at Melbourne made on 4 February 1994 in proceedings involving claim and counterclaim for motor vehicle property damage arising out of an accident on the South Eastern Arterial Road on 17 July 1993. The witnesses who gave evidence in the proceedings were the plaintiff driver ("the respondent") and his passenger and the defendant driver ("the appellant") and his passenger, one Ms Fedden. The issue of negligence turned on evidence by the witnesses as to the precise movements of the two vehicles immediately before the accident and, needless to say, there was a direct conflict between the parties as to what had occurred including the alleged divergence of the respondent's vehicle from the left-hand lane in which it was travelling into the right-hand lane in which the appellant's vehicle was travelling as against the alleged inattentiveness and excessive speed of the appellant.

The course of the proceedings was that the respondent's witnesses were examined and cross-examined and the respondent's case was closed by his counsel. Then the solicitor for the appellant called and examined the appellant. At the conclusion of the examination in chief, the learned Magistrate said to counsel for the respondent that "he need not bother cross-examining" the appellant. The solicitor for the appellant then called and examined Ms Fedden. Ms Fedden gave evidence that **[2]** the respondent's vehicle had diverged into the right-hand lane without warning and that the respondent had admitted fault after the accident. At the conclusion of the examination in chief, the Magistrate said to counsel for the respondent that "he would not bother cross-examining" Ms Fedden. The solicitor for the appellant then closed his case.

The learned Magistrate then gave his decision. He said that he had to decide whose account of evidence to accept. He said that if he was to accept the appellant's version of the accident he

would have to accept that the respondent was negligent. He said that if he was to accept the version of the respondent and his passenger it would be sufficient to establish negligence on behalf of the appellant in that the collision was caused by the inattentive driving of the appellant, driving too fast and a misconception that a possibility of something untoward was to occur. He said that he had to consider whose evidence he was able to accept. He said that he had noticed both parties in court, both prior to and whilst giving evidence. He said that he was impressed by the respondent and his friend in the unflamboyant way in which they gave evidence and that they presented as young men telling the truth. He said that the appellant displayed himself with casual indifference almost bordering on offensive and that the appellant took the oath as if buying a ticket to a Saturday afternoon matinee, inviting the bench to give him no credit and disregard his evidence. The Magistrate **[3]** then said, "I do give him no credit and disregard his evidence". He said that he found that the respondent had established his claim and the counterclaim would be dismissed. At no stage, in giving his reasons, did the Magistrate refer to the evidence of Ms Fedden or give any reason for his implicit rejection of her relevant evidence.

The foregoing account is derived from an affidavit filed in support of the appeal the contents of which were not contradicted. By the Master's Order dated 7 March 1994 the questions of law shown to be raised by the appeal were stated and included the following:

"(a) The Magistrate erred in law in failing to consider the evidence of the Appellant.

(b) The Magistrate erred in law in failing to consider the evidence of the witness, Ms Fedden.

(c) The Magistrate erred in law in failing to advert to the evidence of the witness, Ms Fedden, in his reasons for decision.

(d) The Magistrate erred in law in disregarding the evidence of the Appellant.

(e) The Magistrate erred in law by telling Counsel for the Respondent not to cross examine the Appellant and Ms Fedden.

(g) The Magistrate prejudiced the Appellant's and the Appellant's witness Ms Fedden evidence on the basis of the manner in which the Appellant took the oath and displayed himself and therefore erred in law.

(i) The Magistrate erred in law by disregarding the evidence of the **[4]** Appellant and Ms Fedden on the basis of the demeanour of the Appellant.

(j) The Magistrate erred in law by not raising with the Appellant or his Counsel his displeasure with the Appellant's demeanour and his intention to disregard the Appellant's and Ms Fedden evidence."

It was submitted before me by Mr Cazalet on behalf of the appellant, that for a number of reasons justice had not been seen to be done in the Magistrates' Court hearing. The appellant contended that the Magistrate had failed to state adequate reasons for his decision or to consider all of the evidence before coming to a conclusion and had ignored or rejected the evidence of Ms Fedden without stating any reason for doing so. It was further argued that the Magistrate's indication to counsel for the respondent that it was unnecessary to cross-examine the appellant demonstrated a prejudgment of the issues at that time and that he had made up his mind before he had heard all of the evidence.

Counsel for the respondent, Mr Randall, submitted in answer that the Magistrate was entitled to proceed as he did and had decided the case on the evidence and on the demeanour of the witnesses. It was a simple case and his reasons were sufficient – he was entitled in a case of this kind to reject Ms Fedden's evidence without expressing reasons. Counsel conceded in his written outline of argument that the Magistrate perhaps took an unusual course but said that there was a decision of fact that should not be interfered with.

Alternatively Mr Randall argued that if the Magistrate **[5]** had demonstrated a lack of impartiality or prejudice, the appellant had failed to object or to ask him to stand down and could not now raise such an objection. On this latter point, the appellant argued in reply that the Magistrate's prejudice was not apparent or not fully apparent until he had stated his reasons for decision.

In an oft-quoted passage in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256 at 259; [1923] All ER 233; 93 LJKB 129, Lord Hewart CJ said that:

> "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done ... nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

In *R v Watson; Ex Parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, CLR 262-3 Barwick CJ, Gibbs, Stephen and Mason JJ said:

> "The view that a judge should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial, and that if a judge does sit in those circumstances prohibition will lie, is not only supported by the balance of authority as it now stands but is correct in principle. It would be wrong to regard the observations of Lord Hewart CJ in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB, at p259 as meaning that the appearance of justice is of more importance than the attainment of justice itself: cf. *Reg v Camborne Justices; Ex Parte Pearce* [1955] 1 QB, at p52. However, his statement of principle, which was recently reaffirmed in this Court in *Stollery v Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509, at pp518-519; [1972-73] ALR 645; 46 ALJR 602 does go to the heart of the matter. It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that **[6]** the tribunal has prejudged the case, they cannot have confidence in the decision. To repeat the words of Lord Denning, MR which have already been cited, "Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased' ..."
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> The fact that prerogative writs did not lie to a superior court did not mean that the rule that a judge who might reasonably be suspected of bias should not hear the cause was not applicable to superior courts; it meant only that a particular remedy was not available to redress a departure from the rules of natural justice if it occurred in a superior court. It would be absurd to suggest that the administration of justice should be less pure in a superior than in an inferior court, or that the confidence upon which justice rests is less necessary in the case of the former than in the latter. The rule that a judge may not sit in a cause in which he has an interest has been applied to the most eminent of judicial officers: *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HLC 759 [10 ER 301]. In the same way, the rule that a judge may not sit to hear a case if it might reasonably be considered that he could not bring a fair and unprejudiced mind to the decision applies to every court in Australia, subject only to the exceptions (statutory authority, necessity and waiver), mentioned by Isaacs J in *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243, at pp259-260; 16 ALR 149 none of which has any application to the present case."

The appellant relied upon the foregoing principles and referred to their reiteration by Kaye J in *Humphrey v Wills* [1989] VicRp 42; [1989] VR 439, 446-7. By saying to counsel for the respondent that he need not bother cross-examining the appellant, the Magistrate was no doubt disclosing that he did not accept the evidence of the appellant but he was also thereby creating at least some ground for suspicion that he would not be accepting the evidence of the appellant's passenger either and would not be finding in favour of **[7]** the appellant at all. Nevertheless, there remained the theoretical possibility that, if he was subsequently impressed with Ms Fedden's evidence, he might have had the appellant recalled and invited counsel for the respondent to cross-examine him.

In my view, however, once the Magistrate had gone on to reject the need to cross-examine Ms Fedden, had failed to express reasons for rejecting her evidence and had also emphasised in his reasons his reaction to the manner in which the appellant displayed himself and took the oath, fair-minded people would have reasonably apprehended or suspected on a consideration of all of those matters that the Magistrate had indeed made up his mind in favour of the respondent's case by the time that the appellant had taken the oath and before he gave evidence or, certainly, before Ms Fedden had given evidence. The case is therefore one it seems to me of ostensible, if not actual, bias in the sense of pre-judgment and a denial of natural justice or procedural fairness.

The appellant further submitted that the Magistrate had failed to state adequate reasons for his decision and relied upon what was said by the Full Court of this Court in *Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8, 18 (per Gray J):

> "The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be adequate if: **[8]**
> (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
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> (b) justice is not seen to have been done.
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> The two above stated criteria of inadequacy will frequently overlap. If the primary Judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the losing party is denied knowledge of why his or her case was rejected."

It was argued that Ms Fedden was a critical witness as to the movement of the respondent's vehicle and that to put her evidence on one side without reason or apparent explanation led independently to a reasonable apprehension or suspicion of prejudice which amounted to a denial of natural justice and, in addition, that the reasoning upon which the decision was based could not be ascertained. For the respondent it was submitted that the simplicity of the case was such that a mere statement of the conclusion was sufficient to indicate the basis of the decision (cf. *Sun Alliance & Massoud* at p19) and that the Magistrate would have been entitled to take the view that Ms Fedden was "tarred by the same brush".

In my opinion, the rejection by the Magistrate of Ms Fedden's apparently cogent and relevant evidence, without having the benefit of cross-examination of either of the appellant's witnesses, called for some specific explanation, however brief. I am satisfied that the Magistrate's reasons were inadequate based on each of the criteria stated in *Sun Alliance Insurance v Massoud*. As a result the appeal court was denied the opportunity to **[9]** detect error and the appellant was denied knowledge of why his case was rejected in this respect.

I turn to the submission on behalf of the respondent that the appellant had failed to object to the course being taken by the Magistrate or to ask his Worship to stand down and was therefore debarred from raising the matters relied upon before this Court.

In *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, the High Court had before it a case in which the trial judge had made critical remarks about medical witnesses, both in the course of the trial and in his judgment, which in the circumstances the High Court considered amounted to ostensible bias. Brennan, Deane and Gaudron JJ said at CLR pp572-3:

> "Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgement on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to **[10]** stand only if it proved to be unfavourable to him or her ...
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> If the above comments made by the learned trial judge in the course of the trial had stood alone, we would have been of the view that the appellant, having taken no clearly stated objection to them at the time and having stood by until the contents of his Honour's judgment were known, could not now found upon them in order to have that judgment set aside on the grounds of a reasonable apprehension of bias. The statements which the learned trial judge had made about his preconceived views of Dr. Lawson were, however, effectively revived by what his Honour said in his reserved judgment. The appellant's failure to object to the comments made in the course of the trial cannot, in our view, properly be seen as a waiver of any right to complain if comments made about Dr. Lawson in the judgment itself would, in the context of those earlier comments, have the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer."

In the same case Toohey J said at CLR pp587-588:

> "There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case. That is not to say that the litigant in such a position must expressly call upon the judge to withdraw from the case. It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way in which the remarks will be viewed. It will then be for the judge to determine what course to adopt, in particular whether to stand down from the case. For counsel to invite the judge to withdraw from the case may be quite premature, particularly if the judge acknowledges the apparent bias in what has been said and thereafter takes steps to dispel that apprehension. But, as Dawson J notes in *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at p372; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, suspicion of bias based on preconceptions existing independently of the case 'may well be ineradicable'. In that situation there will be no option but to ask the judge to disqualify himself. In any event objection **[11]** must be taken: see *Re McCrory; Ex parte Rivett* [1895] VicLawRp 2; (1895) 21 VLR 3, at p6. It was not taken in the present case.
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> In the result, when a party is in a position to object but takes no steps to do so, that party cannot be heard to complain later that the judge was biased ...
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> Once it is accepted that there was bias, at any rate ostensible bias, in the judgment itself, no question of waiver or estoppel can then arise. What was delivered was a reserved judgment, without any opportunity for counsel to question what it contained."

Counsel for the respondent also relied upon *In the Marriage of Bennett* [1990] FLC 92-113; 98 FLR 453; 13 Fam LR 626 in which the Full Court of the Family Court applied the principle in *Vakauta's* Case.

In this case the reasonable apprehension of bias or pre-judgment ultimately stems not simply from the conduct of the learned Magistrate during the hearing but upon a consideration of his conduct during the hearing as illuminated by his stated reasons for decision. I do not consider that the solicitor for the appellant was sufficiently or so clearly apprised of the relevant circumstances as to have been able to formulate an appropriate objection prior to the Magistrate stating his reasons for decision.

To put it another way, I do not think that the appellant can be taken to have waived the right to complain of the apparent pre-judgment because his solicitor had insufficient knowledge of the matters relevant thereto until the reasons had been stated and final orders made. Although the decision was not reserved, there was no realistic opportunity to question its contents. **[12]** If I am wrong about this aspect, the appellant is entitled in any event to rely upon the Magistrate's failure to state adequate reasons for his decision as an independent ground of appeal which I consider has been made out.

Furthermore, I think that it was in all the particular circumstances of this case a denial of natural justice or procedural fairness (as was submitted on behalf of the appellant) for the Magistrate to rely upon the manner in which the appellant had taken the oath and displayed himself as a critical basis for the rejection of his evidence without giving the appellant an opportunity to explain that behaviour. It may have been attributable to many causes including nervousness (as was submitted before me) ...

The appeal will be allowed with costs including reserved costs, the Orders made by the Magistrate set aside and the proceedings remitted for rehearing *de novo* before a Magistrate other than the Magistrate who made the Orders. If application is made in that behalf, I would be disposed to grant to the respondent an indemnity certificate under s13(1)(a) of the *Appeal Costs Act* 1964.

APPEARANCES: For the appellant Croft: Mr G Cazalet, counsel. Henty Jepson & Kelly, solicitors. For the respondent Peterson: Mr M Randall, counsel. Battley & Co, solicitors.
