39/10; [2010] VSCA 190

SUPREME COURT OF VICTORIA — COURT OF APPEAL

AYDIN v THE QUEEN

Buchanan, Redlich and Harper JJA

13, 29 July 2010

CRIMINAL LAW – INTERLOCUTORY APPEAL – APPLICATION FOR GRANT OF A PERMANENT STAY REFUSED BY TRIAL JUDGE – WHETHER AN EXCEPTIONAL CASE – COLD CASE – ALMOST 28 YEARS BETWEEN DATE OF OFFENCE AND TRIAL – ALLEGED FINGERPRINT EVIDENCE LINKING APPLICANT TO OFFENCE – DESTRUCTION OF POLICE FILE – NO BAD FAITH OR ABUSE OF PROCESS OR ATTEMPT TO OBSTRUCT THE COURSE OF JUSTICE – WHETHER TRIAL JUDGE IN EXERCISING HER DISCRETION GAVE SUFFICIENT WEIGHT TO ANY FORENSIC DISADVANTAGE TO THE APPLICANT – WHETHER TRIAL JUDGE IN ERROR IN REJECTING APPLICATION FOR A PERMANENT STAY: *CRIMINAL PROCEDURE ACT* 2009, S295.

In 1982, a female alleged that she had been assaulted by a male who, armed with a knife, gained access to her vehicle. The female reported the assault and made a statement to police who, upon investigation, found fingerprints of the top of the driver's side window of the female's motor car. A police file was opened but the file except the photographs of the fingerprints was destroyed in about 2002. In 2006 the fingerprints were tentatively matched with those of A. and he was subsequently charged with the offence. At his trial, A. applied for a permanent stay of the trial which was refused by the trial judge. Upon appeal—

HELD: Leave to appeal granted. Appeal dismissed.

1. The power of a court to grant a permanent stay of a criminal prosecution is to be exercised only in an exceptional case.

***Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, applied.**

2. Delay of itself is not enough. The delay of almost 28 years between September 1982 and July 2010 was itself not such as to warrant the success of the application. Just as the community has an interest in ensuring the fairness of criminal trials, so it also has an interest in ensuring that those who are guilty of crimes are brought to justice.

3. Much reliance was placed upon the proposition that the destruction of the file was part of a deliberate policy. This, of itself, was not significant. The trial judge did not fall into error in not giving that circumstance sufficient weight. There was no suggestion of bad faith, or of any intention to abuse the process of the courts or otherwise obstruct the course of justice. Rather, it might be supposed (and there was evidence before her Honour to support this) that the policy was the product of a desire to enhance administrative efficiency; and it is no business of the courts to instruct Victoria Police in how best to conduct its administration.

4. What was important in a case such as the present, therefore, was not the document management policy as such, but the effect that the unavailability of the police file had on the fairness of the trial.

5. It is not sufficient that the loss of relevant material could or might result in injustice or unacceptable lack of fairness; it must be shown that that would be the result. A permanent stay must not be granted unless the court before which the application is made is satisfied that the continuation of the proceedings constitute an abuse in an exceptional or extreme case.

6. It may be that during the course of the trial material does come to light which alters the perspective which at present seems to be compelling. In the meantime, one can conclude that this case does not fall into that exceptional class in respect of which an application for a permanent stay will succeed. Accordingly, the appeal against the judge's refusal to stay the prosecution was dismissed.

BUCHANAN JA:

1. I agree with Harper JA that the applicant should be granted leave to appeal but the appeal should be dismissed.

2. It is, I think, unfortunate that the police file was destroyed in a case in which a photograph

of a fingerprint was retained, presumably in the hope or expectation that it could be matched at some future date. When material,[1] which can lead to the identification of an offender if further material comes to light, is retained, it might be thought that other evidence and material in the possession of the prosecuting authorities, which would then become relevant, should also be retained.

REDLICH JA:

3. I agree with Harper JA that the applicant has not demonstrated that the destruction of the police file constituted an abuse of process that rendered the trial unfair. A permanent stay would only be warranted if it were shown that a conviction of the applicant would be attended by a real risk of miscarriage.

4. The destruction of the police file was not undertaken in bad faith or in wilful disregard of the right of an accused person to full disclosure of all material evidence. That said, I endorse the view expressed by Buchanan JA that it is unsatisfactory that forensic evidence such as finger prints or DNA is retained so that where the offender is later identified, a prosecution may commence, yet the balance of the file is destroyed. The policies implemented by Victoria Police should be designed to achieve the same ends.

5. As Harper JA shows, the applicant was unable to identify any specific prejudice flowing from the implementation of the police policy which required the investigative file to be destroyed after twenty years. It was accepted during the course of argument that it was highly unlikely that the complainant would have provided a detailed description of her assailant or his car, such as would enable him or his car to be identified. The investigators would have had little reason to trace the previous ownership of the complainant's motor car given her account of the event and the finger prints found on the window.

6. In an attempt to establish unfairness, the applicant ultimately fell back upon presumptive prejudice. But the possible denial of his procedural right to disclosure of all material evidence, would not in the present circumstances provide a sufficient basis to permanently stay his trial. [2] Of course the application for such a stay could be renewed during the trial if circumstances were to emerge which demonstrated that as a consequence of the destruction of the police file the applicant could not receive a fair trial.

HARPER JA:

7. In the very early hours of 26 September 1982, the complainant (Melanie Krepcik) stopped her 1973 Ford Escort sedan, which she had purchased only a month before, in order to assist another driver. She thought he might be lost. She partially opened the window nearest her, but kept her doors locked. The other driver, who was unknown to her, approached; but, according to her, he did not ask for directions. Instead, he ordered her out of her car. When she refused, he grasped the top of the window and pushed down the glass to a point from which he could release the lock. He then opened the door and (so she told the police) pushed himself into the driver's seat, and her into the passenger seat. He was holding a small knife as he did so. He told her to take off her jeans. She refused. He attempted to remove them himself. In the resulting struggle, she managed to unlock the passenger side door and, calling for help, escaped. Her assailant then drove away in his own car.

8. Later that day, the complainant reported the assault to the police. The response was prompt. Within hours of the report, fingerprints were found on the top of the driver's window of the complainant's car. They were consistent with their having been placed on the window by a hand which was pushing it down. They were photographed, and the image retained.

9. A police file was opened. The complainant made a statement, which was doubtless placed in the file along with other documents relating to the investigation. It was not until 2007, however, that a suspect was found. By this time, the file had been destroyed. Its destruction, which took place in about 2002, was in accordance with police policy, which is to destroy old files after 20 years unless there is some reason, accepted by standard police practice, for their retention. The destruction policy does not, however, apply to evidence such as photographs of fingerprints. That taken on 26 September 1982 and of significance here therefore remains in existence.

10. The prosecution case is that, in September 2006, the photographed fingerprints were tentatively matched with those of the applicant. Following further police investigations, he was interviewed on 14 July 2007, when a fresh set of fingerprints were taken from him. On 2 August 2007, these were compared to those in the photograph taken on 26 September 1982. The prosecution contends that they match. This, according to the prosecution, was confirmed in July 2008, when a second comparison was performed under the supervision of a different police investigator.

11. The prosecution claims that there is an explanation for the delay between the taking of the fingerprint photographs in September 1982 and the first match being made in September 2006. For some 10 or 11 years, there was nothing with which to make a comparison. Then, in 1992 or 1993, as the result of an incident involving the applicant, his fingerprints were obtained. But at that time, fingerprint images were manually stored and manually matched; and so matching was only attempted in the most serious of cold cases. By contrast, when electronic matching became operative in about 2005, stored prints could be loaded onto the electronic system and a much larger range of comparisons was possible in a much shorter time.

12. The applicant concedes that the power of a court to grant a permanent stay of a criminal prosecution is to be exercised only in an exceptional case.[3] But when the applicant's trial commenced in the County Court on 7 July 2010, his counsel submitted that his prosecution fell into that category. The learned trial judge disagreed. Having heard both parties, she ruled that the application for a permanent stay should be refused. She did, however, grant the applicant a certificate under s295(3)(b) of the *Criminal Procedure Act* 2009. And so the matter comes before this Court.

13. The submission that this was a relevantly exceptional case had several bases. The first, put perhaps tentatively to her Honour but not pursued before us, was that the delay of almost 28 years between September 1982 and July 2010 is itself such as to warrant the success of the application. But it is clear that this is not so. Delay of itself is not enough. Just as the community has an interest in ensuring the fairness of criminal trials, so it also has an interest in ensuring that those who are guilty of crimes are brought to justice. As was said by the Chief Justice, Sir Anthony Mason, in *Jago*:[4]

> In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed.

14. The principal basis upon which the applicant relies is that, by her ruling, the trial judge failed to exercise in accordance with law the discretion open to her. It is submitted that her Honour gave insufficient weight to the fact that the applicant would in any trial be placed at a significant, and unfair, forensic disadvantage. The complainant's original statement has been destroyed, along with the balance of the police file, leaving only the (separately stored) film of the fingerprints found on the window of the Ford Escort, and some notes made by the relevant fingerprint expert.

15. Much reliance is placed upon the proposition that the destruction of the file was part of a deliberate policy. I do not agree that, of itself, this is significant. I therefore do not accept the applicant's submission that her Honour fell into error in not giving that circumstance sufficient weight. There is no suggestion of bad faith, or of any intention to abuse the process of the courts or otherwise obstruct the course of justice. Rather, it might be supposed (and there was evidence before her Honour to support this) that the policy was the product of a desire to enhance administrative efficiency; and it is no business of the courts to instruct Victoria Police in how best to conduct its administration.

16. It is, however, the duty of the courts to ensure that trials are fair – to both prosecution and defence. If police policy concerning the destruction of police material has as an occasional result the loss of evidence without which a trial cannot be conducted with justice to an accused, then a stay will be ordered; and those who determine that policy will doubtless bear that in mind when deciding how best to balance the problems of document retention with other police responsibilities.

17. What is important in a case such as the present, therefore, is not the document management policy as such, but the effect that the unavailability of the police file has on the fairness of the trial. And here, as was said by the High Court in *R v Edwards*,[5] quoting from the judgment of the same Court in *Walton v Gardiner*,[6] the test is:

> ... 'whether, in all the circumstances, the continuation of the proceedings *would* involve unacceptable injustice or unfairness', or whether the 'continuation of the proceedings *would* be "so unfairly and unjustifiably oppressive" as to constitute an abuse of process'.[7]

In *Edwards* the Court thus stressed that it is not sufficient that the loss of relevant material could or might result in injustice or unacceptable lack of fairness; it must be shown that that would be the result. And the Court further stated that a permanent stay must not be granted unless the court before which the application is made is 'satisfied that the continuation of the proceedings constituted an abuse in an exceptional or extreme case.'[8]

18. The applicant sought to meet this test by submitting that he has lost the opportunity, which may otherwise have been open to him, to obtain alibi evidence, or other evidence which might sustain an hypothesis sufficient – at the least – to prevent the prosecution proving its case to the requisite standard. Time will have worked its power to subtract, to add and to distort – in short, to diminish the ability of a jury to reach a true verdict. Likewise (the applicant's submission continued) he has been deprived of the opportunity to expose gaps or other difficulties in the prosecution case which might be discerned on a proper analysis of the materials in the now unavailable police file, or which might have become apparent on questioning the original police investigators. Both of these officers have since retired, and have no notes and no independent memory of their investigation. In addition, the police have lost another photograph of another fingerprint found on the inside of the same car window on 26 September 1982. At the committal hearing, Sergeant Brian Ritchie, the fingerprint expert who took the original photographs, told the Court that this second photograph 'was possibly someone else'; but, if it was, that other person has never been identified.

19. At the committal, Mr Ritchie also referred to another 'probable' suspect – a man named Jose Manuel Alonso. On a *voir dire* before her Honour, however, the informant (Detective Senior Constable Costakis Costa) said that he had made further inquiries about this person, without result; and Mr Costa added that he did not know whether Mr Alonso 'was ever considered a person of interest.'

20. Both before her Honour, and on this application, it was submitted on behalf of the applicant that in her original statement, now lost, the complainant probably gave more details about her assailant than appear in the statement made after the applicant became a suspect. If those additional details were now available, the applicant might be able to point to discrepancies between them and his own appearance. It is already apparent that photographs said to have been taken of the applicant at about the time of the offence show a man without a paunch; whereas the complainant now says that her attacker had a pot belly.

21. It was submitted on this application, but not in the court below, that a like argument could be made about the vehicle in which the complainant's assailant was travelling. She may have given a description of it in her first statement; and even if that description were not sufficient to enable the police to identify that vehicle as being associated with the applicant, it may have been detailed enough to enable the applicant to deny any connection with it.

22. It is appropriate, it seems to me, to test the applicant's submissions by asking what the realities are likely to be should the trial proceed. As was said by the authors of *Abuse of Process in Criminal Proceedings*:[9]

> Unsurprisingly, ... courts ... have been concerned to ensure that unscrupulous and opportunistic defendants are prevented from either successfully making false claims concerning the purported prejudice suffered because of the loss by the prosecution or constructing false defences ex post facto based on knowledge of the unfortunate loss. This attitude of scepticism towards defence complaints of prejudice in these circumstances is consistent with that concerning defence complaints arising out of prosecutorial delay. In ... *R v Cardiff Magistrates' Court, ex p Hole*[10] ... Bingham CJ insisted that the defence, in arguing abuse, would have to establish precisely how in relation to the defence(s) to

> be advanced at trial prejudice was suffered, '... it is necessary to look at the charges and see exactly what defence it is that they are impeded from advancing'.

23. If the prosecution fails in this case to satisfy the jury beyond reasonable doubt that the applicant's fingerprints were found on the window of the Ford Escort on the day of the assault, then the jury will of course return a verdict of not guilty. We are therefore concerned with the position which would (not could) arise were the prosecution to discharge the onus upon it to prove to the requisite degree that the fingerprints found on the Ford Escort did match those of the applicant.

24. Had the match been made within a short period after the offence, the applicant would even then have escaped a verdict of guilty only by advancing, probably with the assistance of supporting evidence, an exculpatory hypothesis – an hypothesis which had his fingerprints being placed on the window on an occasion other than the early morning of 26 September 1982. The demonstration of a discrepancy between the complainant's description of her attacker and the applicant might, but probably would not, advance that purpose: the incident occurred well before dawn, the complainant's evidence is that she was taken completely by surprise, and it was probably all over quickly. In those circumstances, a mistake in her description of him would probably be an acceptable, but not exculpatory, explanation: of itself, it probably would not create a reasonable doubt about the circumstances in which the applicant's fingerprints came to be on the window.

25. The same is true about a discrepancy between the complainant's description of her assailant's car (if she gave one) and any vehicle associated with the applicant. She may have been mistaken. Or she may have accurately described a car actually used by the applicant that night, but not otherwise associated with him. Or she may have accurately described the assailant's vehicle, but that person was not the applicant.

26. The conclusion that the applicant's fingerprints came onto the window on a date other than 26 September 1982 is only likely to be sufficiently persuasive to raise a reasonable doubt about the guilt of the applicant if other or additional material is put before the jury. It is difficult to see how the applicant's ability to do this has been adversely affected by the loss of the police file. The missing photograph of another fingerprint might, if found, raise the possibility that another person was the wrongdoer. Or it might depict fingerprints which match those of the applicant. Or it might be that of a person upon whom no suspicion could be placed. It is impossible, it seems to me, to conclude that, in the absence of some material from the applicant, the production of the missing file would assist the applicant in raising the necessary doubt.

27. It would be wrong for me to speculate about what defence material might fill what at present seems to me to be a gap in the applicant's case (assuming the photographed fingerprints are his). The Ford had only been in the complainant's ownership for a month before 26 September 1982. If the applicant was then or at some reasonably proximate time a car detailer, for example, then the otherwise extraordinary co-incidence that he happened to have touched that window in innocent circumstances would be less extraordinary.

28. It may be that during the course of the trial material does come to light which alters the perspective which at present seems to me to be compelling. In the meantime I must, I think, conclude that this case does not fall into that exceptional class in respect of which an application for a permanent stay will succeed. But, as was said by Ashley JA in *Wells v R*:[11]

> ... it might appear, as the trial proceeds, that the circumstances are otherwise than I presently apprehend them. If that turned out to be the case, the applicant would not be precluded from making a further application for a stay.

29. On this appeal, the applicant relied heavily on a point not raised before the trial judge: the possibility that, in her original statement, the complainant described her assailant's vehicle in terms incompatible with the true description of any vehicle the applicant might have been driving on the night in question. To so rely when seeking to demonstrate that a judge erred in the exercise of his or her discretion is in my opinion to put the court hearing the appeal in a very difficult, if not impossible, position. Were it relevant, it would have been necessary to give serious consideration to whether or not the applicant ought be permitted to now rely on that submission. But even if it is taken into account, this application must in my opinion fail.

30. For these reasons, I would grant leave to appeal against the judge's refusal to stay this prosecution but dismiss the appeal.

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[1] For example, DNA material.
[2] *R v Roberts* [1999] NSWCCA 95; (1999) 106 A Crim R 67, [38], [39] (Smart AJ).
[3] *Jago v District Court* (NSW) [1989] HCA 46; (1989) 168 CLR 23, 31; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Mason CJ).
[4] Ibid, 30.
[5] [2009] HCA 20; (2009) 255 ALR 399; (2009) 83 ALJR 717, [23] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[6] [1993] HCA 77; (1993) 177 CLR 378, 392 (Mason CJ and Deane and Dawson JJ); (1993) 112 ALR 289; (1993) 67 ALJR 485.
[7] Emphasis supplied.
[8] *R v Edwards* [2009] HCA 20; (2009) 255 ALR 399; (2009) 83 ALJR 717, [23].
[9] David Corker and David Young, *Abuse of Process in Criminal Proceedings* (2nd ed, 2003), [3.10]
[10] [1997] COD 84, 92.
[11] [2010] VSCA 100, [26]. See also *Abuse of Process in Criminal Proceedings*, above n 8, [3.36].

APPEARANCES: For the applicant Aydin: Mr RF Edney, counsel. Robert Stary Lawyers. For the Crown: Mr JD McArdle QC, counsel. Mr C Hyland, Solicitor for Public Prosecutions.
