

31/93

SUPREME COURT OF VICTORIA

NGUYEN v MAGISTRATES' COURT of VICTORIA (No.2)

Beach J

13 December 1993

PROCEDURE – TAPE-RECORDING OF PROCEEDINGS – PLEA ON MATTERS BEING DEALT WITH SUMMARILY – REQUEST TO RECORD REFUSED – WHETHER PARTY HAS A RIGHT TO RECORD PROCEEDINGS – WHETHER DISCRETION PROPERLY EXERCISED – BAIL – FAILURE TO APPEAR ON PREVIOUS OCCASIONS – COMMISSION OF OFFENCES WHILST ON BAIL – BAIL REFUSED – UNACCEPTABLE RISK – WHETHER ANY FURTHER REASONS NECESSARY: *MAGISTRATES' COURT ACT 1989*, S136.

1. Where an accused person had failed to answer bail on four previous occasions and committed an indictable offence whilst on bail, a magistrate was not in error in

(a) refusing bail; and

(b) giving the reason that the defendant was an unacceptable risk.

2. A party to a proceeding does not have a right to make a tape-recording of the proceeding. It is a matter to be determined by the Court. A Court may refuse an application to record where the proceeding is not complex or involved or there is a possibility that the recording may be tampered with or improperly used.

BEACH J: [1] On 9 February 1993 the plaintiff, Trung Dong Nguyen, was arrested by members of the Police Force and charged with 5 counts of theft from cars, 3 counts of attempted theft from a car and 8 counts of tampering with cars. All the offences are alleged to have been committed that same day. On 9 August 1993 the plaintiff was released on bail. However, on 8 October 1993 he was re-arrested and charged with theft, which was alleged to have occurred whilst he was on bail awaiting trial in respect of the February offences.

On 29 November 1993 the matter came before the Magistrates' Court at Broadmeadows. When the case was called on, counsel for the plaintiff informed the Magistrate that he wished to make a tape-recording of the proceeding and indicated during the course of that application that the case would proceed as a plea of guilty. The Magistrate asked counsel if an undertaking would be given to provide the Prosecution with a copy of the transcript, to which counsel said no. The Magistrate then asked counsel the basis upon which the application for the tape-recording was made. Counsel informed the magistrate that the basis for making the tape-recording was to enable an accurate record of what was said in court to be obtained to enable the plaintiff to be properly advised at the end of the case as to what further steps, if any, he could take in the matter.

The Magistrate was referred to the unreported decision of Coldrey J in which the present plaintiff was plaintiff and the Magistrates' Court of Victoria at Broadmeadows and Steve Wood were defendants. In that **[2]** decision Coldrey J canvassed a number of authorities dealing with the question as to whether or not a court should allow a tape-recording of its proceedings to be made by a party to the proceeding and held that insofar as the Magistrates' Court is concerned, a discretion exists as to whether or not a Magistrate will allow such a recording to be made.

In that regard, Coldrey J placed reliance upon the provisions of s136 of the *Magistrates' Court Act 1989* which read:

"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."

Having been handed a copy of Coldrey J's decision, the Magistrate adjourned the application over the luncheon break to enable him to consider the matter. When the court resumed that

afternoon the Magistrate delivered his ruling, saying:

"The defendant (the plaintiff in the present proceeding) is to plead guilty to various charges. It is put by counsel for the defendant he should be permitted to make a tape-recording of the hearing, as it is in the interests of his client to provide advice and consider further steps after the hearing. This case is proceeding as a plea of guilty. I cannot understand why in these circumstances counsel cannot advise the defendant on his rights. The defendant can appeal to the County Court, which will hold a hearing *de novo*. I have a discretion whether or not to allow a tape-recording to be made. I am not persuaded in this case. Leave is not granted."

The hearing then proceeded. The plaintiff entered a plea of guilty to seven of the charges that had been laid on 9 February and guilty to the charge of theft which had been laid on 8 October. The Prosecutor then asked that the remaining charges be struck out, and I assume that in [3] due course they were. The Prosecutor then read out a summary of the 7 charges which had been laid on 9 February and a summary of the charge of theft laid on 8 October. The charges were formally found proved by the Magistrate and a number of prior convictions were then put to the plaintiff. Those convictions were admitted by the plaintiff, including one in 1992 when the plaintiff was sentenced to a total of 12 months' imprisonment but where the sentence was suspended for a period of 24 months.

A plea was then made on behalf of the plaintiff. During the course of the plea it was pointed out to the Magistrate that the plaintiff had committed all previous offences whilst he was under the influence of drugs. Counsel informed the Magistrate that both he and his instructing solicitor were of the view that the plaintiff was suffering from a psychological or psychiatric condition and that it would be of assistance to the court if a pre-sentence report could be obtained. The Magistrate acceded to that suggestion and indicated that the matter would stand over until 14 January 1994 pending an assessment of the plaintiff and the preparation of a pre-sentence report. An application was then made that the plaintiff be released on bail pending the further hearing of the matter. The basis upon which that application was made was that the plaintiff had been in custody for a total of some 8 months and 3 weeks between the time of his arrest in February and the time of his release on bail in August and then the time of his re-arrest in October and that day.

That application for bail was opposed by the informant on the ground, firstly, that the plaintiff had [4] failed to answer bail on four previous occasions, namely, 14 December 1988, 23 January 1990, 10 April 1990 and 3 December 1990; secondly, that the defendant had pleaded guilty to the offences; thirdly, that the ability of the plaintiff to be available for counselling and assessment would be greatly enhanced if he were to remain in custody and, finally given the plaintiff's itinerant lifestyle, that it would be highly unlikely that he would attend counselling and assessment sessions if he was not detained in custody. In the final analysis, the Magistrate refused bail saying:

"Bail is refused on the ground that the defendant is an unacceptable risk."

On 7 December last the plaintiff filed an originating motion in this court naming as defendants the Magistrates' Court of Victoria at Broadmeadows and Steve Wood. Steve Wood is Constable Stephen Victor Wood, who is the informant in certain of the proceedings against the plaintiff. By the originating motion the plaintiff seeks the following relief or remedy:

1. An order quashing the decisions and/or orders of Mr Wynn-MacKenzie, Magistrate, made before the Magistrates' Court of Victoria at Broadmeadows on 29 November 1993.
2. A declaration that a person facing criminal charges has a right to make a tape-recording of the hearing of the charges even if it proceeds by way of a plea of guilty.
3. A declaration that the plaintiff has the right to make a tape-recording of the proceedings before the Magistrates' Court of Victoria at Broadmeadows in which he is charged by the second-named defendant with numerous criminal offences.
4. A mandatory injunction requiring the Magistrates' Court of Victoria to permit the plaintiff to make a tape-recording of the proceeding on 14 January 1994 or during any adjourned hearing thereof. [5]
5. An order that the plaintiff be remanded on bail to appear before the Magistrates' Court of Victoria

at Broadmeadows on 14 January 1994.

6. An order that the defendant pay the plaintiffs costs of this appeal, as well as all ancillary costs.

7. Such further interlocutory injunctive or other orders as may be just.

Counsel who appeared before me on behalf of the second-named defendant contended that the procedure adopted by the plaintiff in this proceeding, that is, to issue an originating motion, is not the procedure which should have been adopted with a view to challenging the orders of the Magistrates' Court at Broadmeadows; that in the circumstances of this case the appropriate procedure to adopt was to come to this court by way of appeal. There may well be merit in that submission but, having regard to the views I have formed in the matter, it is unnecessary for me to determine the point.

I deal firstly with the application for bail. In my opinion, the circumstances are such in this case that it would have been quite wrong for the Magistrate to release the plaintiff on bail. I say that for the reason that on four previous occasions the plaintiff had failed to answer his bail and that he had committed the offence of theft in October 1993 whilst he was on bail in respect of the charges laid against him in February 1993. In that connection I think that there was an unacceptable risk that, had the plaintiff been released on bail, he would either have committed further offences or not appeared on 14 January in answer to his bail.

Further, as the matter was before the Magistrates' Court for plea and sentence, and as the Magistrate had [6] referred the plaintiff for counselling and to enable a pre-sentence report to be prepared, I think it would have been quite inappropriate to release the plaintiff on bail at that time. It would have been far more satisfactory, having regard to the plaintiff's history and background, that he remain in custody whilst that counselling was undertaken and whilst a pre-sentence report was prepared. Had the plaintiff come before this court in the ordinary way, that is, by means of a bail application as such, pursuant to the provisions of the *Bail Act*, it would have been necessary for him to demonstrate that there were exceptional circumstances which justified his release on bail. I say that, of course, for the reason that the October offence was committed whilst he was presently on bail and for the reason that he had failed to answer his bail on some four prior occasions. In my view, there were no special circumstances and any such application for bail would have been refused. Accordingly, it is my opinion that the Magistrate's refusal to grant him bail was perfectly proper in the circumstances.

It is said, however – and this seems to me really to be the gravamen of the plaintiff's complaint – that when refusing bail the Magistrate did not give appropriate reasons for that refusal. In my view, that argument cannot be sustained. The Magistrate stated that, "Bail is refused on the ground that the defendant is an unacceptable risk." In my opinion, in the circumstances of this case, that was all the Magistrate was required to say in the matter. The plaintiff is an unacceptable risk either because there is a likelihood he will commit further offences if he is released on bail or because, if [7] he is released on bail, there is an unacceptable risk that he may not appear at court to answer his bail. The matter having been debated before the Magistrate in the way it was, I think that all that was necessary was for the Magistrate to say, "Your application for bail is refused because you are an unacceptable risk." Any interested bystander sitting in the court and hearing that would know that what the Magistrate was saying was, "You are an unacceptable risk for the reasons stated by the informant."

I return then to the application in respect of the Magistrate's order refusing a tape-recording. The originating motion seeks a declaration that a person facing criminal charges has a right to make a tape-recording of the hearing of the charges even if it proceeds by way of a plea of guilty. In my opinion, a party to a proceeding in a Magistrates' Court, or in any court, does not have a right to make a tape-recording. It is for the court to determine the manner in which proceedings before it will be conducted. The court, including the Magistrates' Court, has a discretion as to whether or not it will permit a tape-recording of the proceeding to be made by a party to the proceeding – and I stress "a party to the proceeding". One is not dealing with licensed shorthand writers or court reporters who are authorised to make tape-recordings of court proceedings; one is dealing with a party to the proceeding.

There are a number of reasons why a court may not permit a recording to be made in a

particular case. It may be that the court takes the view that it is totally [8] unnecessary, that is, that there is nothing complex or involved about the particular piece of litigation and that in that situation it is totally unnecessary to have a tape-recording of it made. One could envisage, for argument's sake, the hearing of an originating motion where everything is done on affidavit. In such a situation it would be quite unnecessary to tape-record the proceeding. One can envisage pleas in the Magistrates' Court in traffic matters. It would be quite unnecessary in such cases to make a tape-recording of the proceeding.

Another reason, and one which does not seem to have been adverted to in the authorities referred to in Coldrey J's judgment, is that a court may be reluctant to have a non-licensed person make a tape-recording of proceedings before it for fear that some improper use may later be made of that tape-recording. It is to be remembered that such a person would go away from the court with a recording of the presiding judge stating amongst other things, his reasons and rehearsing, amongst other things, submissions made to him by counsel appearing in the matter. I do not suggest that anything like that would happen in the present case, but there could be cases where someone may tamper with such a recording and produce from it another recording which totally misconstrues what was in fact said during the course of the trial. In this day of electronic wizardry, that is quite a simple thing to achieve. And so I say there is no right in a party to have a tape-recording. A court, and in this case a magistrate, has a discretion in the matter.

In the present case what the Magistrate was hearing was a plea where, if the plaintiff was dissatisfied with [9] the result, he had the right to appeal to the County Court for a hearing *de novo*. Further, and somewhat surprisingly, counsel for the plaintiff informed the Magistrate that he, or his instructor, would not make a copy of any such tape available to the informant.

In the final analysis, the Magistrate took the view that it was unnecessary that the proceeding before him be taperecorded, and I am unable to say in that situation that he erred in the exercise of his discretion.

Accordingly, in my view, the plaintiff is not entitled to any of the relief sought in the originating motion. Both the summons and originating motion will be dismissed with costs to be taxed and paid by the plaintiff.

APPEARANCES: For the plaintiff/applicant Nguyen: Mr D Perkins, counsel. G Kuek & Associates, solicitors. For the defendant/respondent Magistrates' Court of Victoria (Broadmeadows): Mr J Rapke, counsel. Victorian Government Solicitor.
