

05/86

SUPREME COURT OF VICTORIA

***R v GOLDEN and "D"; ex parte ATTORNEY-GENERAL for VICTORIA:
Re BRUCE***

Nicholson J

12 March 1986

EVIDENCE – UNCONTRADICTED EVIDENCE – DUTY TO ACCEPT SUCH EVIDENCE – DUTY ON COURT TO GIVE REASONS WHERE SUCH EVIDENCE IS REJECTED – POLICE WITNESS QUESTIONED BY COURT ABOUT IRRELEVANT MATTER – WHETHER OBJECTIVE BIAS SHOWN.

Whilst hearing a summary matter *ex parte*, G., a magistrate, put questions to B. the police informant concerning matters irrelevant to the proceedings before him. Upon close of the prosecution case, G. said that there could have been a problem with the police informant's eyesight and dismissed the information without giving any other reasons for its dismissal. Upon order nisi for *certiorari*—

HELD: Order absolute. Dismissal of information quashed. Remitted to be dealt with according to law. (1) In the absence of reasons for rejection, the uncontradicted prosecution evidence being inherently probable, in circumstances where the defendant had not chosen to appear, should have been accepted by the Court.

Read v Nerey Nominees Pty Ltd [1979] VicRp 6; [1979] VR 47;

Hardy v Gillette [1976] VicRp 36; [1976] VR 392; and

Richards v Jager [1909] VicLawRp 26; [1909] VLR 140; 15 ALR 119; 30 ALT 163, applied.

(2) From the point of view of a bystander, there was objective bias present on the part of the Magistrate.

NICHOLSON J: [1] This is the return of an order nisi for *certiorari* granted by Mr Justice Nathan on the 25th October 1985 whereupon he ordered that the two respondents to the application, Graeme Angus Golden and "D" show cause why the record of dismissal in the Magistrates' Court at Prahran by Graeme Angus Golden on the 27th September 1985 of an information by Jillian Heather Bruce against "D" laid on the 15 August 1985 should not be brought up to this court and quashed. The grounds as originally contained in His Honour's order were:

The Stipendiary Magistrate acted in excess of his jurisdiction in that –

(a) He dismissed the information by reference to irrelevant acts of the informant in driving and parking a motor car vehicle on [2] the 27th day of September 1985 and not by reference to the subject matter of the charge or the evidence given in relation thereto;

(b) he dismissed the information by reference to extraneous and improper considerations relating to the informant's eyesight and the informant's acts in the driving and parking of a motor vehicle on the 27th day of September 1985 which ought not to have affected his decision;

(c) he exercised his jurisdiction in bad faith and for purposes other than that for which it was conferred upon him in that he dismissed the information by reason of the acts of the informant in driving and parking a motor vehicle on the 27th day of September 1985 and refused to give reasons for his decision until the informant was charged with an offence;

(d) he reached a decision which, on the evidence before him, was perverse to such an extent that it must have been influenced by extraneous and improper considerations."

Those orders were varied by consent of the parties pursuant to an order made by Mr Justice Murphy on the 9th December 1985 where His Honour deleted grounds (c) and (d) to which I have just referred and added a ground (e) as follows:

"He reached a decision which would have raised an apprehension of bias in the mind of an ordinary bystander."

At the same time His Honour ordered that until further order the publication of the name "D" or any reference to him in any publication or broadcast within the State of Victoria relating to the hearing of this application be prohibited.

The circumstances which gave rise to the present matter occurred at the Magistrates' Court on the 27th September 1985 when the information laid by Jillian Heather Bruce came before Mr Golden. The information alleged that "D" at St. Kilda on the 31st July 1985, "in a public place, [3] to wit Grey Street, did solicit a female to prostitute herself for pecuniary reward with himself", which was an information laid pursuant to the relevant provisions of the *Summary Offences Act* 1966.

There seems to be no dispute that at the hearing the policewoman, Jillian Heather Bruce, gave evidence to the effect that on the 31st July 1985 at 11 pm. in Grey Street, St. Kilda, a Toyota sedan pulled up in front of her. The driver indicated that she should go over to the car and she did so and she thereupon received a proposition to engage in sexual activity for money. At this stage she informed the driver, "D", that she was a member of the police force and produced her identification. The witness also gave evidence that she was then joined by another police officer and that "D" then admitted to that other police officer in her presence the substance of the allegation against him and gave his name and address. No other evidence was called on behalf of the prosecution than that of the policewoman in question.

It seems that thereafter the learned Magistrate put questions to the policewoman directed as to whether or not she wore glasses, as to whether she had an eyesight problem and then asked her why she had driven into the court carpark that morning against a "Do Not Enter" sign and had driven forward into a 'Reverse Only' carpark and entered a car space for which she had no permit. It appears the policewoman explained that she had been running late for court and could not find a carpark and had never been to the Prahran court before and did not see the signs. The learned Magistrate then asked the Prosecutor whether he agreed that a police officer would not deliberately do such a thing to which the Prosecutor agreed, [3A] and then, the Magistrate said that there would have been a problem with sight on this occasion and dismissed the information without giving any other reasons for its dismissal.

[4] In an affidavit filed in these proceedings, "D", the defendant, did not in substance dispute the case against him, but simply made a request to the court that it make an order in the form that Murphy J eventually did prohibiting reference to him in any publication of the proceedings. Although I have grave reservations about the desirability of making orders of the type sought, and I note that Murphy J's order was made by consent, it seems to me in the peculiar circumstances of this case that it would be doing an injustice to "D" to have his part in the proceedings publicised, and I propose therefore to continue His Honour's order so far as he is concerned.

Mr Weinberg appeared before me to move the order absolute on behalf of the Attorney-General, and Mr Hanlon QC with Mr Gibson appeared for Mr Golden. Mr Hanlon made it clear that his only purpose in appearing before the Court was to defend any attack which might be made upon the personal integrity of the learned Magistrate, but that it was no part of his intention to address argument to the Court on the substantial issues, and in this regard it would seem that he has acted in accordance with the principles laid down by the High Court in *R v Australian Broadcasting Tribunal & Ors; Ex parte Hardiman & Ors* [1980] HCA 13; (1980) 144 CLR 13, particularly at pp35-6; [1980] 54 ALJR 314; 29 ALR 289.

Mr Weinberg put on behalf of the Attorney-General that the order nisi should be made absolute upon all of the three grounds referred to, and in this submission I think that he was clearly right. I should add that he stated that no allegation was made against the learned Magistrate [5] of a personal nature, and I approach the matter upon this basis also.

It seems to me to be clear that the learned Magistrate's decision cannot stand. He was faced with uncontradicted evidence as to the commission of the offence in the circumstances where the defendant had not chosen to appear, and in circumstances where there was nothing inherently improbable about the evidence that was given to him.

There is a long line of cases which state that the Court is bound to give effect to such

evidence. I need refer only for these purposes to *Read v Nerey Nominees Pty Ltd* [1979] VicRp 6; [1979] VR at p47; *Hardy v Gillette* [1976] VicRp 36; [1976] VR at p392; and *Richards v Jager* [1909] VicLawRp 26; [1909] VLR at p140, particularly at p147; [1909] ALR 119 at 122; 30 ALT 163.

It is also apparent from all of those decisions that if a Court decides to refuse to accept such uncontradicted evidence, then the Court is bound to give the reasons why it has done so. It is also apparent that the questions asked by the learned Magistrate as to the informant not complying with the various driving directions applicable in the region of the Court were entirely irrelevant to the matter before him, and indeed his own observations as to these matters were similarly entirely irrelevant and he should not have introduced them into the proceedings at all. I can, of course, appreciate that a Magistrate who is faced, as most Magistrates are, with a particularly heavy workload might perhaps impetuously deal with a matter in a way in which given the opportunity for more mature reflection he would not have otherwise done. I have no doubt that this is what occurred on this occasion.

[6] I also agree with the submission put by Mr Weinberg that from the point of view of a bystander there was in this case objective bias even though there may not have been actual bias on the part of the learned Magistrate. Mr Weinberg referred to several cases, including *R v Watson*; *Ex parte Armstrong*, [1976] HCA 39; (1976) 136 CLR 248 at pp258 *et seq*; [1976] 50 ALJR 778; [1976] 9 ALR 551; and *Livesey v The New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; [1983] 57 ALJR 420; 47 ALR 45, in support of this proposition, and in my view it is amply demonstrated that such objective bias was present in this case.

Accordingly, I propose to make the order absolute and remit the information to the Magistrates' Court at Prahran to be dealt with according to law.
