3/97

SUPREME COURT OF VICTORIA

ROSS v TRAN and ANOR

Nathan J

16 September 1996 — (87 A Crim R 144)

PROCEDURE – ABUSE OF PROCESS – DELAY IN LAYING CHARGE – ACCUSED INVOLVED IN ACCIDENT BEFORE CHARGE LAID – PARTIALLY INCAPACITATED – UNABLE TO REMEMBER OR RAISE MATTERS IN OWN DEFENCE – APPLICATION FOR PERMANENT STAY GRANTED – WHETHER PROPER EXERCISE OF DISCRETION.

T. was charged in 1995 with offences of burglary and theft allegedly committed in 1988. During that 7-year period, the informant had the capacity to have identified T.'s fingerprints left at the scene and initiated proceedings. In 1994, T. suffered head injuries in a motor car accident which affected his memory as to what he was doing at the time of the alleged offences. Further, T. was said to have lost the opportunity to call witnesses in his defence either by way of alibi or otherwise. When the matter came on for hearing, T. applied for a permanent stay of proceedings on the ground that the delay had caused prejudice to him and would amount to an abuse of process if the proceedings were to continue. The magistrate upheld the submission and granted the stay. Upon appeal —

HELD: Appeal dismissed.
1. Delay of itself will seldom, if ever, constitute a ground for granting a permanent stay of proceedings.

2. In the present case, having regard to the difficulties confronting T. who, as a result of the intervening accident lacked the capacity to remember or to raise matters in his own defence, the circumstances were rare, exceptional and prejudicial so as to sustain the proper exercise of discretion to grant a permanent stay.

NATHAN J: [1] In February 1995 Mr Tran was charged with burglary and theft. The proceedings came on before the magistrate at Dandenong on 4 July 1995. An application was made on Mr Tran's behalf that the proceedings be permanently stayed. The application was based on the ground that the delay in instituting the proceedings had caused prejudice to Mr Tran and would amount to an abuse of the court's process if they were to continue. The offences for which Mr Tran were charged had occurred in 1988 and it appears that he had left fingerprints on the windowsill of the house, which it was said was burgled, and from which various chattels were taken.

The magistrate granted the application for a permanent stay. That exercise of her discretion and the orders she pronounced are now the subject of an originating motion which has been returned before me. The ground upon which the plaintiff proceeds is as follows:- That the magistrate erred in finding that the delay between the alleged commission of the offences and the prosecution of them by the first defendant, the police informant, did in the circumstance provide jurisdiction to grant a permanent stay of the proceedings or to dismiss the charges.

This matter is properly before me and the procedure adopted by the police informant in this case is the appropriate one. The matter of jurisdiction is now well settled following the decision of the Court of Criminal Appeal in *R v Ferguson* [1994] VicRp 71; (1994) 2 VR 503 which itself was a decision affirming and following the procedures set out in *Boehm v DPP* [1990] VicRp 43; (1990) VR 494. A **[2]** decision which itself was affirmed by the High Court in *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592; 106 ALR 177; 60 A Crim R 18; 66 ALJR 344. Therefore I need not concern myself further with procedural matters.

I return to the merits of the case. Submissions were made on Mr Tran's behalf before the magistrate in support of the application. I shall characterise them *seriatim*: Firstly, since 1986, the Fingerprint Bureau of the police force had the technology available to match the fingerprints found at the scene with those of Mr Tran. Since the commission of the offence in 1988 and the commencement of the prosecution in 1995, a period of 7 years, the police had the capacity to have identified the fingerprints and institute proceedings against Mr Tran. For reasons not adequately

explained the matching was never undertaken, and accordingly, there was a delay in the institution of the proceedings which of itself was said to be prejudicial to Mr Tran. I shall refer to this as the time delay factor. The second ground raised was that in 1994 Mr Tran was involved in a serious motor vehicle accident and suffered a head injury which has compounded his difficulty of recall and that he cannot now remember what he was doing at the time the alleged offences occurred. I shall refer to this as the brain damage factor. The third ground raised was that Mr Tran is said to have lost the opportunity to call witnesses in his defence, either by way of alibi or otherwise. I shall refer to this as the alibi and witness factor.

In coming to her conclusion to grant the stay, the magistrate is said, by way of affidavit, to have done the **[3]** following:

> The magistrate stated that she must balance the right of Mr Tran to a fair trial against the interests of the community, plainly a reference to *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, a case which was cited before the magistrate and rests in part on the prior Victorian authority of *R v Clarkson* [1987] VicRp 80; [1987] VR 962; (1987) 25 A Crim R 277. She indicated that she did not blame the informant, who appears to have acted promptly once Mr Tran became a suspect, that is, at the time when his fingerprints were matched. That is a reference to the time delay factor. She continued that the court could not do anything to redress the prejudice to Mr Tran if she allowed the matter to proceed. The magistrate then said that due to the effluxion of time Mr Tran had been denied the opportunity to call witnesses to assist his case, including any witnesses which might bolster an alibi defence. This is a reference to the alibi and witness factor. She then stated that the fingerprints evidence may be highly probative and it would be difficult to overcome if admitted into evidence, but that did not reduce the unfairness of the delay caused by the 7 year lapse. The magistrate concluded that on that basis the delay had caused unfairness to Mr Tran which could not be overcome and, accordingly, a stay was pronounced.

On these facts the Crown contend before me that delay of itself is insufficient to warrant the granting of a permanent stay, a proposition with which I concur. The Crown extended its argument to assert that the magistrate had not put her mind to the appropriate factors, a **[4]** reference to the brain damage factor, and even if she had insufficient grounds would exist for the proper exercise of a discretion to grant a stay. The defendant, on the other hand, contended that although the magistrate made no direct reference to the brain damage factor, the same must be imputed into her findings because she referred to the fair balance of factors, which in turn must have related to the submissions made to her, which in turn included reliance upon the brain damage factor.

I turn to the appropriate law. There is no question that *Jago's* case is the prime authority and has been entrenched in Australian law by frequent references to it throughout the Commonwealth. It was delivered on the same day as *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183 reported in the same volume of the Commonwealth Law Reports. Together the cases establish that there is no general principle that unreasonable delay in bringing a matter to trial, of itself means that there can be no trial, or that delay of itself necessarily vitiates conviction on a trial that has followed such a delay. Were this case to rest solely on the time lapse between the commission of the offence and the matching of the fingerprints the magistrate would have significantly misdirected herself and I would have set aside the exercise of her discretion. But I am satisfied that the references by her, albeit oblique, to the brain damage factor, significantly alter the tenor of this case. In *Edebone v Allen* [1991] VicRp 100; [1991] 2 VR 659 I considered *Jago's* case and the various balancing factors which must be taken into account when assessing whether a permanent **[5]** stay should be granted. The head note adequately translates the judgment and in part it says this:

> "The power to grant a permanent stay undoubtedly exists as an instrument which the court exercises to prevent injustice or the abuse of its processes. Such applications should, however, be treated cautiously and will necessarily involve exceptional or unusual circumstances."

I there examined American authorities which are to the same effect as the Australian authorities. It was correct in that case and in this too, to take into account the reasons for the delay as well as the nature of the offence. In this case the failure of the police to match the prints earlier, the time delay factor, would not, of itself, justify the granting of a stay, but one intervening event entirely changes the situation before me and that is the brain damage factor.

Although the evidence is scant, the magistrate was entitled to accept the assertion from the Bar table that Mr Tran was brain damaged in 1994 and as a result could not now recall the alleged events and was, hence, prejudiced significantly. Although the argument was not extended, it is apparent to me that so far as the law is concerned, a person whose capacity to mount and to provide instructions for a defence, is disabled from properly presenting a defence, justice would be distorted if the matter were to remain in such a state.

Although there is much power in the argument advanced by Mr Just for the Crown, that it remains the obligation of the Crown to displace any reasonable explanation of innocence on the given facts, and that it **[6]** is always the Crown's obligation to prove every ingredient of its case beyond reasonable doubt, there remains the high probability in this case that the defendant would not be able to raise in his own defence, significant factors by way of explanation, at least putting the Crown upon some notice or information as to what it in turn might have to disprove. In this case there could be an explanation for the existence of the fingerprints on the subject premises and the raising of an alibi defence, and similarly there could be many innocent explanations of the existence of the fingerprints themselves. For example, Mr Tran may have attended at the premises by consent or as a trades person or as a result of some social visit. Nothing in the material characterises the premises or Mr Tran at the time. What is apparent, however, is that he has maintained his innocence from the time the matter was mentioned in the Magistrates' Court.

It might be said that the Crown's case is, therefore, more difficult in that it would have to operate in the dark, as it were, seeking to exclude any explanation consistent with innocence. That might involve an extensive case. There is some substance in that, but it does not outweigh the difficulties confronting a defendant who, as a result of an intervening accident, now lacks the capacity to remember or to raise matters in his own defence. These circumstances are singular and will seldom be repeated. They fall within the category of being **[7]** exceptional and rare as I defined in *Edebone's* case. No general principle can be distilled from what I say in this case. I am confronted by the magistrate's remarks which fail to refer specifically to the brain damage factor but do refer to two factors; namely time delay and witnesses, neither of which would be persuasive in themselves. But the time delay and alibi witness factor, when combined with the brain damage factor, having been put to the magistrate, indicate to me that she did take those matters into account. She did so properly and her discretion did not miscarry and this notice of motion will be dismissed.

By way of entrenching a proposition I have already recited, let me say again, delay of itself will seldom, if ever, constitute a ground for granting a permanent stay. Difficulties with obtaining witnesses may well fall within a separate category and I say nothing about that. But in this case so far as the defendant is concerned, an intervening, partially incapacitating event, prejudicing the presentation of a defence, does fall within the class of factors of being rare, exceptional and mightily prejudicial to the defendant as will sustain the proper exercise of discretion to grant a permanent stay. I will order that the first defendant's costs be paid by the plaintiff.

APPEARANCES: For the Plaintiff (Ross). Mr D Just, counsel. Solicitors: DPP. For the First Defendant (Tran) Mr J Lavery, counsel. Solicitors: Kuek & Associates.
